

# COMMENTS

BROOKLYNN ARMESTO-LARSON\*

## Nonconsensual Pornography: Criminal Law Solutions to a Worldwide Problem

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\* J.D. Candidate 2020 and Senior Frohnmayer Leadership Fellow, University of Oregon School of Law; Bachelor of Arts in History, Walla Walla University, 2016.

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He told me I would die. He was completely out of control at that point, and I was a wreck.”<sup>1</sup> These are the words of a woman whose nude photos were sent to her boss, her friends, and her community in a small town in Alabama.<sup>2</sup> The woman, whose name and identifying information were withheld from news stories for privacy reasons, went to her local police for help.<sup>3</sup> Neither the local police nor the Federal Bureau of Investigation could help track him down because the man who distributed her nude photographs was unfortunately in another country.<sup>4</sup> Although the distributor has been quiet for a while, he could strike again at any time.<sup>5</sup> The woman is now working with international law professor Paul Kuruk, the U.S. Department of State, and the U.S. embassy in the perpetrator’s country to try and track him down.<sup>6</sup> According to Kuruk, using the law in the perpetrator’s country is the best way to track him down because no global standard or international law protects victims of nonconsensual pornography.<sup>7</sup>

Nonconsensual pornography is the distribution of private, explicit images of individuals without their consent.<sup>8</sup> In recent years, high-profile nonconsensual pornography cases involving a variety of

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<sup>1</sup> Brian Pia, *Alabama Woman a Victim of International Revenge Porn*, ABC 33/40 (Nov. 3, 2017), <https://abc3340.com/news/abc-3340-news-iteam/alabama-woman-victim-of-international-revenge-porn>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

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

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Definitions*, CYBER CIV. RTS. INITIATIVE, <https://www.cybercivilrights.org/definitions/> (last visited Apr. 5, 2019) [hereinafter *Definitions*].

victims, including teenagers in small towns,<sup>9</sup> well-known celebrities,<sup>10</sup> and active-duty marines,<sup>11</sup> have brought the issue to the public's attention in the United States. Unfortunately, the problem of nonconsensual pornography is not just domestic—it is global.<sup>12</sup> Courts in countries all over the world, including Germany,<sup>13</sup> Japan,<sup>14</sup> and Canada,<sup>15</sup> are currently grappling with how to address cases of nonconsensual pornography. Several countries<sup>16</sup> and a majority of states in the United States<sup>17</sup> have criminalized nonconsensual pornography. Despite these efforts to protect victims, one group remains without recourse: victims whose perpetrators are in other countries.<sup>18</sup>

This Article discusses the current barriers faced by victims of nonconsensual pornography when their perpetrators are in other countries. In this Article, I argue that the current systems of criminal law in the United States and abroad fail victims of international nonconsensual pornography. I also argue that the U.S. Congress should pass the ENOUGH Act to protect victims of international nonconsensual pornography. Then, I argue that, although

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<sup>9</sup> See Richard A. Oppel Jr., *Ohio Teenagers Guilty in Rape That Social Media Brought to Light*, N.Y. TIMES (Mar. 17, 2013), <https://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html>.

<sup>10</sup> See Paul Farrell, *Nude Photos of Jennifer Lawrence and Others Posted Online by Alleged Hacker*, THE GUARDIAN (Aug. 31, 2014), <https://www.theguardian.com/world/2014/sep/01/nude-photos-of-jennifer-lawrence-and-others-posted-online-by-alleged-hacker>.

<sup>11</sup> Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues>.

<sup>12</sup> See *infra* notes 13–16.

<sup>13</sup> See Philip Oltermann, *'Revenge Porn' Victims Receive Boost from German Court Ruling*, THE GUARDIAN (May 22, 2014), <https://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling>.

<sup>14</sup> See *Reports of Stalking and Revenge Porn Continued to Rise in 2017 After Expansion of Law: Police*, THE JAPAN TIMES (Mar. 15, 2018), <https://www.japantimes.co.jp/news/2018/03/15/national/crime-legal/reports-stalking-revenge-porn-continued-rise-2017-expansion-law-police/#.XKbl2etKigQ>.

<sup>15</sup> Tamara Khandaker, *Canada's First Revenge Porn Convict Gets 90 Days in Jail*, VICE NEWS (Mar. 24, 2016), [https://news.vice.com/en\\_us/article/zm7g5a/canadas-first-revenge-porn-convict-gets-90-days-in-jail](https://news.vice.com/en_us/article/zm7g5a/canadas-first-revenge-porn-convict-gets-90-days-in-jail).

<sup>16</sup> For a discussion of the United Kingdom's and South Korea's laws regarding nonconsensual pornography, see *infra* Part II.

<sup>17</sup> *46 States + DC Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Nov. 9, 2019).

<sup>18</sup> For a discussion of how the existing legal framework leaves victims of international nonconsensual pornography unprotected, see *infra* Part III.

the ENOUGH Act is a good place to start, the ENOUGH Act cannot fully protect victims of international nonconsensual pornography. Last, I argue that, while international and domestic criminalization are good tools for combating nonconsensual pornography, some of the best tools are available to every citizen: raising awareness, advocating for legislation, and educating the public.

Part I of this Article discusses what nonconsensual pornography is, whom it affects—victims and society—and what its effects are. Part II addresses nonconsensual pornography as a global problem and examines how the United Kingdom and South Korea have criminalized nonconsensual pornography. Part III addresses extradition and the challenges it presents for victims of international nonconsensual pornography. Finally, Part IV examines the inadequacy of current domestic and international criminal law, the pros and cons of the ENOUGH Act as a possible solution for victims, and ultimately argues that everyone should engage in raising awareness, advocating for legislation, and educating the public about nonconsensual pornography.

## I

### UNDERSTANDING NONCONSENSUAL PORNOGRAPHY

Because nonconsensual pornography is a relatively new crime,<sup>19</sup> it may be an unfamiliar topic for many people.<sup>20</sup> Legislators sometimes struggled to pass statutes criminalizing nonconsensual pornography simply because they were unfamiliar with it.<sup>21</sup> In the words of one Washington State legislator, there was a “lack of understanding of what revenge porn was; [it had not] sunk in what we were really talking about here.”<sup>22</sup> Understanding nonconsensual pornography is important,

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<sup>19</sup> New Jersey was the first state to criminalize nonconsensual pornography with N.J. REV. STAT. § 2C:14-9 (2016), which became effective in 2004 and has since been updated.

<sup>20</sup> I attended a 2017 presentation by Carrie Goldberg, a New York attorney who specializes in civil litigation relating to privacy and nonconsensual pornography, in which even the local prosecutor opined that he had no idea that his own state had a “revenge porn” law. Washington passed its nonconsensual pornography statute in 2015. WASH. REV. CODE § 9A.86.010 (2015).

<sup>21</sup> Josh Feit, *Image Wars: A Victim Steps Forward in the Legal Fight Against Revenge Porn*, SEATTLE MET (Apr. 24, 2015), <https://www.seattlemet.com/articles/2015/4/24/revenge-porn-law-passes-washington-state-may-2015>.

<sup>22</sup> *Id.*

though, because it is increasingly common<sup>23</sup> and affects a wide variety of people.<sup>24</sup>

First, I discuss what nonconsensual pornography is, the forms it takes, and how it is distributed. Then I discuss who nonconsensual pornography affects. Finally, I discuss the effects of nonconsensual pornography on an individual and societal level.

### *A. What Is Nonconsensual Pornography?*

Nonconsensual pornography is the distribution of private, explicit images of individuals without their consent.<sup>25</sup> This definition includes “images originally obtained without consent (e.g., by using hidden cameras, hacking phones, or recording sexual assaults) as well as images consensually obtained<sup>26</sup> within the context of an intimate relationship.”<sup>27</sup> This definition excludes content distributed for a legitimate purpose,<sup>28</sup> such as photos distributed to a jury in a court room or to medical professionals for treatment purposes. When uploaded to the internet, nonconsensual pornography can be copied to other websites,<sup>29</sup> downloaded by anyone with an internet connection, sent via messaging apps,<sup>30</sup> and used to create new social media profiles mimicking and impersonating the victim.<sup>31</sup>

Nonconsensual pornography is also widely known as “revenge porn.”<sup>32</sup> Contrary to the term’s implicit suggestion, not all perpetrators

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<sup>23</sup> See generally Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of “Revenge Porn,”* DATA & SOC’Y RES. INST. (2016), [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf).

<sup>24</sup> For a discussion of who nonconsensual pornography affects, see *infra* Sections IB and IC.

<sup>25</sup> *Definitions*, *supra* note 8.

<sup>26</sup> Note that an image created within the context of a consensual relationship is considered “a private image” and not pornography, but an image is transformed into pornography once it is shared publicly. Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 68 FLA L. REV. 1251, 1258 (2017).

<sup>27</sup> *Frequently Asked Questions*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/faqs/> (last visited Feb. 11, 2020).

<sup>28</sup> Franks, *supra* note 26.

<sup>29</sup> *Id.* at 1259.

<sup>30</sup> See generally Jorge Barrera, *Revenge Porn Victim Feels Delayed Police Response Allowed Spread of Intimate Photos to Continue*, CANADIAN BROADCASTING CORP.: NEWS (Oct. 12, 2018), <https://www.cbc.ca/news/indigenous/revenge-porn-police-complaint-1.4858147>.

<sup>31</sup> See generally *id.*

<sup>32</sup> *Definitions*, *supra* note 8.

of nonconsensual pornography desire to exact revenge.<sup>33</sup> In fact, a recent study found that 79% of nonconsensual pornography perpetrators said they did not mean to hurt the victims when they spread the explicit content without the victims' consent.<sup>34</sup> Nonconsensual pornography perpetrators share the content for a variety of reasons, including for profit, notoriety, entertainment, and no reason at all.<sup>35</sup>

Regardless of why people distribute the content, studies suggest that more people than expected, particularly young people, distribute nonconsensual pornography.<sup>36</sup> A 2017 study by the Cyber Civil Rights Initiative found that 5.2% of respondents in the United States "reported having perpetrated [nonconsensual pornography] at some point in their lives."<sup>37</sup> That same study found that respondents between the ages of eighteen and twenty-five were the most likely to have shared nonconsensual pornography, with 8.2% of respondents in that age group admitting to distributing the content.<sup>38</sup> This study also found that men are more likely than women to perpetrate nonconsensual pornography.<sup>39</sup> One study in Australia found that nonconsensual pornography perpetrators were most likely to be males known to the victim.<sup>40</sup>

Nonconsensual pornography can take many different forms, but it is very commonly shared by using either mobile technology or the internet.<sup>41</sup> When shared via the internet, nonconsensual

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<sup>33</sup> *Id.*; see Se Eu Gong & Michael Sullivan, *South Korean Women Fight Back Against Spy Cams in Public Bathrooms*, NAT'L PUB. RADIO (Oct. 19, 2018, 4:49 PM ET), <https://www.npr.org/2018/10/19/648720360/south-korean-women-fight-back-against-spy-cams-in-public-bathrooms> (in which the creators and distributors create the nonconsensual pornography without knowing or having any particularized motive toward the women victimized).

<sup>34</sup> *Nonconsensual Porn: A Common Offense*, CYBER C.R. INITIATIVE (June 12, 2017), <https://www.cybercivilrights.org/2017-natl-ncp-research-results/>.

<sup>35</sup> Franks, *supra* note 26, at 1257–58.

<sup>36</sup> See *infra* notes 37–38.

<sup>37</sup> Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration*, CYBER C.R. INITIATIVE 1, 15 (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [hereinafter CCRI STUDY].

<sup>38</sup> *Id.* at 16.

<sup>39</sup> *Id.* at 15.

<sup>40</sup> NICOLA HENRY ET AL., NOT JUST 'REVENGE PORNOGRAPHY': AUSTRALIANS' EXPERIENCES OF IMAGE-BASED ABUSE 5 (RMIT University, 2017) [hereinafter HENRY ET AL.].

<sup>41</sup> See Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, CYBER C.R. INITIATIVE 1, 2 (2016), <https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf>.

pornography is hosted on a variety of platforms.<sup>42</sup> Some websites host nonconsensual pornography exclusively, including websites such as IsAnyoneUp.com<sup>43</sup> and UGotPosted.com.<sup>44</sup>

Hunter Moore created IsAnyoneUp.com to host both nonconsensual pornography and the victims' personal information.<sup>45</sup> The website posted user-submitted content as well as content obtained through hacking.<sup>46</sup> According to his 2013 indictment, Moore, and his associate Charles Evens, hacked into email accounts to obtain pornographic photographs and other personal information so that they could post the photographs and information on their website.<sup>47</sup> According to *The Atlantic*, the website earned thousands of dollars in advertising revenue and was viewed millions of times.<sup>48</sup>

UGotPosted.com is another example of a nonconsensual pornography website, which Kevin Bollaert created as part of an extortion scheme.<sup>49</sup> Bollaert's scheme involved two websites: UGotPosted.com and ChangeMyReputation.com.<sup>50</sup> UGotPosted.com allowed users to post nonconsensual pornography along with victims' identifying information.<sup>51</sup> Bollaert then emailed the victims and sent them to ChangeMyReputation.com, where they had to pay up to \$350 to remove the content from UGotPosted.com.<sup>52</sup> When the site was

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<sup>42</sup> See *infra* notes 43–44, 49–62.

<sup>43</sup> Kashmir Hill, *IsAnyoneUp Is Now Permanently Down*, FORBES (Apr. 19, 2012), <https://www.forbes.com/sites/kashmirhill/2012/04/19/isanyoneup-is-now-permanently-down/#48f604fa450a>.

<sup>44</sup> Jessica Contrera, 'Revenge Porn' Distributors Are Finally Seeing Legal Ramifications. This Website Owner Will Go to Prison for 18 Years, THE WASH. POST (Apr. 5, 2015), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/04/05/revenge-porn-distributors-are-finally-seeing-legal-ramifications-this-web-site-owner-will-go-to-prison-for-18-years/?utm\\_term=.cd24e3a6ac0b](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/04/05/revenge-porn-distributors-are-finally-seeing-legal-ramifications-this-web-site-owner-will-go-to-prison-for-18-years/?utm_term=.cd24e3a6ac0b).

<sup>45</sup> Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, THE ATLANTIC (Feb. 4, 2014), <https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>.

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

<sup>47</sup> Indictment at 3, *United States v. Hunter Moore and Charles Evens*, CR13-0917 (C.D. Cal. 2013), <https://www.scribd.com/document/201777072/Hunter-Moore-Charles-Evens-Revenge-Porn-Indictment>.

<sup>48</sup> Levendowski, *supra* note 45.

<sup>49</sup> Lindsay Winkley & Dana Littlefield, *Sentence Revised for Revenge Porn Site Operator*, THE SAN DIEGO UNION-TRIBUNE (Sept. 21, 2015), <https://www.sandiegouniontribune.com/sdut-kevin-bollaert-revenge-porn-case-resentencing-2015sep21-story.html>.

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

<sup>51</sup> Contrera, *supra* note 44.

<sup>52</sup> *Id.*

finally taken down, UGotPosted hosted 10,170 images of nonconsensual pornography, some of which were child pornography.<sup>53</sup> Bollaert was eventually convicted on twenty-seven felony counts, including identity theft and extortion.<sup>54</sup>

Nonconsensual pornography, however, is not limited to revenge porn websites. It can be found on mainstream internet pornography space as well. Pornhub.com, a Canadian website launched in 2007,<sup>55</sup> is the self-described top free pornography site on the internet.<sup>56</sup> In 2018, Pornhub averaged ninety-two million visitors to the site each day with an average of 962 searches per second.<sup>57</sup> Because Pornhub operates partially on user-uploaded content,<sup>58</sup> and anyone who is a member can upload content,<sup>59</sup> it is a convenient place for perpetrators to post nonconsensual pornography. This became so common that Pornhub specifically created a page in 2015 for nonconsensual pornography victims to submit “Content Removal Requests.”<sup>60</sup>

Unfortunately, nonconsensual pornography is present on common networking sites such as Facebook,<sup>61</sup> Twitter,<sup>62</sup> Reddit,<sup>63</sup> and public domain blogs.<sup>64</sup> One major case of nonconsensual pornography on Facebook involved hundreds of naked photographs of female service

<sup>53</sup> *Id.*

<sup>54</sup> Winkley & Littlefield, *supra* note 49.

<sup>55</sup> Benjamin Wallace, *The Geek-Kings of Smut*, N.Y. MAG. (Jan. 30, 2011), <http://nymag.com/news/features/70985/index1.html>.

<sup>56</sup> *Frequently Asked Questions*, PORNHUB, <https://www.pornhub.com/information#faq> (last visited Apr. 5, 2019) (click on What is Pornhub?) [hereinafter *FAQ*].

<sup>57</sup> *2018 Year in Review*, PORNHUB INSIGHTS (Dec. 11, 2018), <https://www.pornhub.com/insights/2018-year-in-review>.

<sup>58</sup> Aisha Hassan, *Porn Sites Collect More User Data Than Netflix or Hulu. This Is What They Do with It.*, QUARTZ (Dec. 13, 2018), <https://qz.com/1407235/porn-sites-collect-more-user-data-than-netflix-or-hulu-this-is-what-they-do-with-it/>.

<sup>59</sup> *FAQ*, *supra* note 56, (click on How Much Does It Cost to Become a Member?).

<sup>60</sup> Amar Toor, *Pornhub Makes It Easier to Report Revenge Porn*, THE VERGE (Oct. 13, 2015), <https://www.theverge.com/2015/10/13/9518029/pornhub-revenge-porn-reporting-page>; see *Content Removal Request?*, PORNHUB, <https://www.pornhub.com/content-removal> (last visited Apr. 5, 2019).

<sup>61</sup> See Brennan, *supra* note 11.

<sup>62</sup> Jonathan Vanian, *Twitter Wants to Crack Down on Revenge Porn*, FORTUNE (Oct. 27, 2017), <http://fortune.com/2017/10/27/nudity-revenge-porn-twitter/>; see Alex Heath, *Twitter Let a Celebrity with Millions of Followers Post Revenge Porn for 30 Minutes Before It Was Taken Down*, BUS. INSIDER (July 5, 2017), <https://www.businessinsider.com/rob-kardashian-twitter-account-posts-blac-chyna-revenge-porn-isnt-suspended-2017-7>.

<sup>63</sup> Franks, *supra* note 26, at 1270–72.

<sup>64</sup> Dan Taube et al., *Preliminary Report: Without My Consent Survey of Online Stalking, Harassment and Violations of Privacy*, WITHOUT MY CONSENT 1, 7 [https://withoutmyconsent.org/sites/default/files/wmc\\_prelim\\_survey\\_report.pdf](https://withoutmyconsent.org/sites/default/files/wmc_prelim_survey_report.pdf) (last visited Nov. 9, 2019).



members and veterans of the U.S. Marine Corps.<sup>65</sup> In 2017, the U.S. Department of Defense discovered a Facebook group dedicated to sharing nonconsensual pornography of female marines.<sup>66</sup> The page had more than thirty-thousand followers and featured thousands of comments on the explicit content.<sup>67</sup> Some comments were crude, such as suggesting that the service member who took the photo should take the subject of the photo “out back and pound her out.”<sup>68</sup> Other comments were outright violent, like a comment where the person suggested that the service member should have sex with the subject of the photo in “the buttohole...[a]nd throat...[a]nd ears...[b]oth of them.”<sup>69</sup> This comment suggested that the service member create more nonconsensual pornography.<sup>70</sup> “Video it though,” the comment continued, “for science.”<sup>71</sup>

The pervasiveness of nonconsensual pornography causes real, widespread harm to its victims. Furthermore, because of its pervasiveness, it affects more people than we realize. Part B discusses who is affected by nonconsensual pornography.

### ***B. Risk Factors for Nonconsensual Pornography Victimization***

Nonconsensual pornography can affect anyone at any time. A variety of factors increases the likelihood that someone will become a victim of nonconsensual pornography. This Section addresses the following factors: gender; other identity statuses such as race, sexuality, and disability status; victims of other crimes including intimate partner violence, sex trafficking, and rape; and people who create intimate content of themselves.

#### *1. Gender*

Whether nonconsensual pornography affects women more than men is an open discussion.<sup>72</sup> Because many of the high-profile “revenge

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<sup>65</sup> Brennan, *supra* note 11.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

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

<sup>69</sup> *Id.*

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

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

<sup>72</sup> See *infra* notes 73–75.

porn” cases involve female victims,<sup>73</sup> some may assume that nonconsensual pornography affects women more than men. Studies disagree, however, about which gender is more affected by nonconsensual pornography.<sup>74</sup> For instance, in 2017, two separate studies came to opposite conclusions. A study by the Cyber Civil Rights Initiative (CCRI) found that women are 1.5 times more likely to be victims of nonconsensual pornography than men,<sup>75</sup> while an Australian study from the Royal Melbourne Institute of Technology (RMIT) found that men were just as likely to be victims as women.<sup>76</sup> Yet certain kinds of nonconsensual pornography can affect women at a higher rate. For instance, 80% of victims of South Korean spy cam pornography are women.<sup>77</sup>

While the data may remain unclear whether nonconsensual pornography affects women more than men, the conversation surrounding nonconsensual pornography often operates as if women are disproportionately the victims.<sup>78</sup> In the media, news articles about nonconsensual pornography often feature women’s stories<sup>79</sup> or headlines specific to women.<sup>80</sup> Television shows such as *13 Reasons Why*<sup>81</sup> and Lifetime’s made-for-TV movie *Revenge Porn*<sup>82</sup> depict women as victims of nonconsensual pornography.

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<sup>73</sup> For example, a hacker posted explicit photos of celebrities on 4chan.org, which then quickly spread throughout the internet in August 2014. The hacker released photos of Jennifer Lawrence, Kirsten Dunst, and Mary Elizabeth Winstead, among others. Farrell, *supra* note 10.

<sup>74</sup> See *infra* notes 75–76.

<sup>75</sup> CCRI STUDY, *supra* note 37, at 12.

<sup>76</sup> HENRY ET AL., *supra* note 40.

<sup>77</sup> Laura Bicker, *South Korea’s Spy Cam Epidemic*, BBC NEWS: ASIA (Aug. 3, 2018), <https://www.bbc.com/news/world-asia-45040968>.

<sup>78</sup> See *id.*; *infra* notes 79–84.

<sup>79</sup> See Alice McCool, *When Her Naked Selfies Were Posted Online, She Thought Life Couldn’t Get Worse. Then She Was Arrested.*, CNN, <https://www.cnn.com/2018/11/10/africa/uganda-pornography-revenge-porn-asequals-africa-intl/index.html> (last visited Apr. 5, 2019) (for an example of reporting on nonconsensual pornography as a form of gender inequity).

<sup>80</sup> See Nova A. Levant, *Revenge Porn: How Tech Lawyers Are Helping Women*, AM. BAR ASS’N (May 2, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/revenge-porn-how-tech-lawyers-are-helping-women/>; Jade Jackman, *Love, Lies, & Nudes: How Revenge Porn Destroyed These Women’s Lives*, REFINERY 29 (June 3, 2018), <https://www.refinery29.com/en-gb/2018/06/200691/revenge-porn-documentary> (for examples of nonconsensual pornography headlines specific to women).

<sup>81</sup> *13 Reasons Why* (July Moon Productions, Kicked to the Curb Productions, Anonymous Content, and Paramount Television 2017).

<sup>82</sup> REVENGE PORN (Poke Prod broadcast June 18, 2016).

Additionally, the academic discussion regarding nonconsensual pornography often refers to it as a crime against women. Take, for instance, a groundbreaking law review article entitled “Criminalizing Revenge Pornography” by law professors Mary Anne Franks and Danielle Keats Citron.<sup>83</sup> In this article, Professors Franks and Citron argue that nonconsensual pornography should be criminalized, but they do so by comparing nonconsensual pornography to other crimes commonly understood to affect women more than men.<sup>84</sup> Franks and Citron argue that nonconsensual pornography is akin to crimes such as rape, sexual assault, and domestic violence.<sup>85</sup> Like those crimes, they argue, nonconsensual pornography “belongs to the category of violence that violates legal and social commitments to [gender] equality.”<sup>86</sup> According to Franks and Citron, nonconsensual pornography violates legal and social commitments to gender equality by “den[ying] women and girls control over their own bodies and lives.”<sup>87</sup> Although studies disagree on the subject, the media, popular culture, and legal academia often operate on the assumption that nonconsensual pornography affects women more often than men.

## 2. Other Identity Statuses

The data on other identity groups affected by nonconsensual pornography is sparse, but the 2017 RMIT study does provide some insight. According to this study, people are more likely to be victims of nonconsensual pornography if they are indigenous, alternatively abled, or LGBTQ+.<sup>88</sup> The study found that one in two indigenous people reported being victims of nonconsensual pornography.<sup>89</sup> Similarly, one-in-two people with disabilities reported that they were victims of nonconsensual pornography.<sup>90</sup> The study also found that lesbian, gay, and bisexual individuals were 15% more likely than their heterosexual counterparts to be victims of nonconsensual pornography.<sup>91</sup>

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<sup>83</sup> See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

<sup>84</sup> *Id.* at 353.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

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

<sup>88</sup> HENRY ET AL., *supra* note 40, at 7.

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

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

The Data & Society Research Institute also found that 15% of lesbian, gay, and bisexual people have had someone threaten to share an explicit image of them without their consent.<sup>92</sup> According to this study, they experience such threats at a much higher rate than do heterosexual people, as only 2% of heterosexual people have been threatened with nonconsensual pornography.<sup>93</sup>

### 3. *Crime Victimization*

Victims of other crimes can also become victims of nonconsensual pornography. Common examples are victims of domestic violence, human trafficking, sexual assault, and rape. Intimate images that may have been originally created with consent are turned into weapons of abuse when the abuser threatens to distribute his<sup>94</sup> partner's photos.<sup>95</sup> An abuser can also coerce his partner into creating nonconsensual pornography or create the content without the partner's knowledge and consent so that he can threaten his partner with online distribution of the content.<sup>96</sup> Regardless of how the content is created, nonconsensual pornography can be a tool of "coercive control" that is fundamental to domestic and intimate partner violence.<sup>97</sup>

The use of nonconsensual pornography to maintain control over a partner is becoming increasingly common.<sup>98</sup> According to Adam Dodge, the legal director for a domestic violence agency in California, nonconsensual pornography has become a recurring theme in domestic violence cases.<sup>99</sup> "We expect it to be part of the narrative," he said.<sup>100</sup> "He beats me, he isolated me from my family and my friends, he won't let me leave the house, he tells me I'm stupid, and he tells me if I ever leave him he'll send my pictures to my family."<sup>101</sup>

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<sup>92</sup> Lenhart et al., *supra* note 23, at 16.

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

<sup>94</sup> For ease of use, I have used male pronouns to refer to abusers throughout this Article.

<sup>95</sup> *Behind the Screens: Revenge Porn*, NAT'L DOMESTIC VIOLENCE HOTLINE (Jan. 14, 2016), <https://www.thehotline.org/2016/01/14/revenge-porn/>.

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

<sup>97</sup> Jack Simpson, *Revenge Porn: What Is It and How Widespread Is the Problem?*, THE INDEP. (July 2, 2014), <https://www.independent.co.uk/news/uk/home-news/what-is-revenge-porn-9580251.html>.

<sup>98</sup> Haley Goldberg, *Revenge Porn: When Domestic Violence Goes Viral*, SELF MAG. (Mar. 21, 2017), <https://www.self.com/story/revenge-porn-domestic-violence>.

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

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

This is exactly what happened to Beth in Maine.<sup>102</sup> Beth met Neal in 2008, and they began dating. Initially, the relationship went well, but slowly Neal began to change.<sup>103</sup> Neal became abusive and controlling.<sup>104</sup> He was obsessed with the idea that she was cheating on him and would “severely punish” her for interacting with other men.<sup>105</sup> Eventually, Beth left Neal after packing all her belongings while he was at work and moved to Maine.<sup>106</sup> Months later, Beth was looking for a job and Googled herself in the process.<sup>107</sup> Even though Beth did not have a Facebook account, the first result of the Google search was a Facebook page with her full name, address, and the name of her business.<sup>108</sup> The profile cover photograph was a photograph of Beth entirely naked.<sup>109</sup> The profile contained other explicit photographs of Beth, some with captions like “I want to be a porn star!”<sup>110</sup> Also, the profile contained a link to an explicit website that hosted more photographs of Beth—some real, some doctored.<sup>111</sup> The website also contained her old home address, her phone number, her email address, and captions like “call me for dirty sex.”<sup>112</sup> Soon, Beth started receiving emails from strangers propositioning her and sharing pictures of their genitalia.<sup>113</sup> Beth contacted Neal and asked him to take down the website, but he responded by asking her for her location.<sup>114</sup> Beth thought she could give Neal a fake address by creating a fake social media account with a different address.<sup>115</sup> When she did this, all her personal information on the pornography website changed to her new, fake personal information, and her email was again flooded with vulgar

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<sup>102</sup> Regina Rooney, *The Abuse Follows Her Everywhere and It's Legal: One Woman's Story of Revenge Porn*, BANGOR DAILY NEWS: ME. FOCUS (Apr. 20, 2015), <http://mainefocus.bangordailynews.com/2015/04/20/mainefocus/domestic-and-sexual-violence/the-abuse-followed-her-everywhere-one-womans-story-of-revenge-porn/>.

<sup>103</sup> *Id.*

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

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

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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

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

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

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

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

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

messages from strangers.<sup>116</sup> This change confirmed to Beth that Neal was watching her every move online.<sup>117</sup> Beth described the fear she felt about Neal possibly finding her real location, saying, “He could hurt me, or kill me . . . Nine or 10 months of revenge porn is what he did because I left. I don’t know what he’d do if he found me.”<sup>118</sup>

Nonconsensual pornography can also be used as a tool to coercively control trafficking victims, another group at an elevated risk of further victimization. One trafficker, Alex Campbell, forced his victims to perform sexual acts while he recorded them.<sup>119</sup> He used the recordings as leverage to keep his victims under his control by threatening to send the video to the victim’s family if the victim refused to “come back into his grasp.”<sup>120</sup> By threatening his victims with nonconsensual pornography, Campbell ensured that the women remained under his control and continued to perform sex work in his trafficking ring.

Other factors that put people at high risk for nonconsensual pornography victimization are rape and sexual assault.<sup>121</sup> Sexual assault victims can become victims of nonconsensual pornography if their assailant or an accomplice photographs, records, or livestreams the assault or its immediate aftermath. One tragic example of nonconsensual pornography depicting sexual assault is the Rehtaeh Parsons case from Nova Scotia, Canada.<sup>122</sup> Rehtaeh Parsons was fifteen years old in 2011 when she was assaulted at a gathering with friends.<sup>123</sup> At some point during the evening, a photo was taken in which her assailant gave the “thumbs up” sign while raping her.<sup>124</sup> The photograph was then distributed throughout her school, which resulted in bullying that reportedly led Rehtaeh to take her own life in 2013.<sup>125</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Marion Brooks, *The World of Human Trafficking: One Woman’s Story*, NBC 5 CHI. (Feb. 22, 2013, 11:43 AM), <https://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html>.

<sup>120</sup> *Id.*

<sup>121</sup> See *infra* notes 122–28.

<sup>122</sup> John Barber, *Second Man Walks Free After Humiliation of Canadian Teen Rehtaeh Parsons*, THE GUARDIAN (Jan. 15, 2015), <https://www.theguardian.com/world/2015/jan/15/rehtaeh-parsons-second-man-walks-free-humiliation-canadian-teen-killed-herself>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

Unfortunately, Rehtaeh's story is not unique. Other notable cases include the 2012 suicide of Audrie Pott,<sup>126</sup> the 2012 Steubenville rape case,<sup>127</sup> and the 2016 case of Marina Lonina, who filmed and livestreamed via Periscope her friend being raped.<sup>128</sup> With this type of nonconsensual pornography, victims are more likely to receive media attention because their story involved an already well-recognized crime, but they have not, necessarily, had more success in convicting the perpetrators.<sup>129</sup> For instance, the Royal Canadian Mounted Police initially refused to press charges against the perpetrators in Rehtaeh's case,<sup>130</sup> but later reopened it after she died and new information came to light.<sup>131</sup> Eventually, both perpetrators pleaded guilty to creation and distribution of child pornography,<sup>132</sup> but no sexual assault charges were brought in that case.<sup>133</sup>

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<sup>126</sup> Audrie died by suicide after her assailants assaulted her at a party, drew all over her body with Sharpies, and took photos of her unconscious body. Nina Burleigh, *Sexting, Shame, and Suicide: A Shocking Tale of Sexual Assault in the Digital Age*, ROLLING STONE (Sept. 17, 2013), <https://www.rollingstone.com/culture/culture-news/sexting-shame-and-suicide-72148/>.

<sup>127</sup> The Steubenville rape case received considerable media attention in 2012 and 2013 after two high school seniors were accused and then convicted of rape. The boys raped the victim and then shared images and videos of the assault via text message and on social media. Oppel, *supra* note 9.

<sup>128</sup> Lonina later pleaded guilty to obstruction of justice. John Futtly, *Woman Who Live-Streamed Girl's Rape Sentenced to Nine Months*, COLUMBUS DISPATCH (Feb. 13, 2017), <https://www.dispatch.com/news/20170213/woman-who-live-streamed-girls-rape-sentenced-to-nine-months>; Mike McPhate, *Teenager Is Accused of Live-Streaming a Friend's Rape on Periscope*, N.Y. TIMES (Apr. 18, 2016), <https://www.nytimes.com/2016/04/19/us/periscope-rape-case-columbus-ohio-video-livestreaming.html>.

<sup>129</sup> See *infra* notes 130–33.

<sup>130</sup> Andres Jauregui, *Rehtaeh Parsons, Canadian Girl, Dies After Suicide Attempt; Parents Allege She Was Raped by 4 Boys*, HUFFINGTON POST (Apr. 9, 2013), [https://www.huffingtonpost.com/2013/04/09/rehtaeh-parsons-girl-dies-suicide-rape-canada\\_n\\_3045033.html](https://www.huffingtonpost.com/2013/04/09/rehtaeh-parsons-girl-dies-suicide-rape-canada_n_3045033.html).

<sup>131</sup> *Rehtaeh Parsons Case to Be Reopened by Police*, CBC (Apr. 12, 2013), <https://www.cbc.ca/news/canada/nova-scotia/rehtaeh-parsons-case-to-be-reopened-by-police-1.1309465>.

<sup>132</sup> *Rehtaeh Parsons Case: No Jail Over Photo of 'Assault'*, BBC (Nov. 14, 2014), <https://www.bbc.com/news/world-us-canada-30058254>; *Second Man in Rehtaeh Parsons Case Sentenced to Probation, Counselling*, THE STAR (Jan. 15, 2015), <https://www.thestar.com/news/canada/2015/01/15/second-man-to-be-sentenced-in-rehtaeh-parsons-child-porn-case.html>.

<sup>133</sup> The Canadian Press, *Review: Crown Decision in Rehtaeh Parsons' Case Was Reasonable*, MACLEAN'S: CAN. (Oct. 8, 2015), <https://www.macleans.ca/news/canada/review-crown-decision-in-rehtaeh-parsons-case-was-reasonable/>.

#### 4. Self-Creation of Content

One of the most common risk factors for becoming a victim of nonconsensual pornography is whether someone has created and/or shared intimate content of himself or herself.<sup>134</sup> The practice of creating intimate images and sending them to another person, usually a romantic partner, is often called “sexting.”<sup>135</sup> This practice is incredibly common.<sup>136</sup> According to a 2014 study by the cyber security company McAfee, 50% of people said they have used their mobile device to share or receive intimate content.<sup>137</sup> Of the more than 9,300 people surveyed from fifteen countries,<sup>138</sup> 14% of those surveyed said that they had used their mobile devices to film sexual content.<sup>139</sup> As stated above, many people go on to share this content via their mobile device. Even if they do not choose to share the content, the content can still become public. The study found that 28% of people had taken their significant others’ phones in order to access content like photos and messages.<sup>140</sup> Although much of this content is created within the context of an intimate relationship, a bad breakup or hack of a partner’s phone can easily lead to the distribution of the intimate content beyond the bounds of the partner’s consent.<sup>141</sup> As long as these individuals are not in

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<sup>134</sup> See *infra* notes 137–40.

<sup>135</sup> This term specifically refers to the practice of using a mobile phone to create and send images, although images can be created and sent with any number of devices connected to the internet, including tablets, laptops, and MP3 players. *All About Sexting*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/bullying-safety-privacy/all-about-sexting> (last visited Apr. 5, 2019).

<sup>136</sup> See *supra* notes 128–30.

<sup>137</sup> *Love, Relationships, & Technology*, MCAFEE (2013), <https://promos.mcafee.com/offer.aspx?id=605436&culture=en-us&affid=0&cid=140624&pir=1> [hereinafter MCAFEE, *Love*].

<sup>138</sup> *Stop! Do You Really Want to Send That Photo?*, MCAFEE (Feb. 4, 2014), <https://securingtomorrow.mcafee.com/consumer/identity-protection/love-and-tech/?culture=en-us&affid=0&cid=140623> [hereinafter MCAFEE, *Stop!*].

<sup>139</sup> MCAFEE, *Love*, *supra* note 137.

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

<sup>141</sup> The fact that so much of nonconsensual pornography is originally created consensually has resulted in a lot of advice about how to protect against becoming a victim. Articles often share practical advice such as “use secure apps” and “make sure your face is not in the photo.” The piece of advice given most frequently, however, is that people refrain from creating and/or sending the content in the first place. This advice, although practical, is problematic because it is unhelpful to people who have already created and/or shared intimate content. It borders on blaming the victim of the crime for putting himself or herself at risk, and it does not entirely prevent nonconsensual pornography from being created in the first place. For examples of advice columns about preventing nonconsensual pornography, see MCAFEE, *Stop!*, *supra* note 138; Sarah Young, *How to Protect Yourself Against Revenge Porn*, THE INDEP. (Aug. 24, 2017), <https://www.independent>.



complete control of their intimate content, they are at risk of victimization.

### ***C. Anyone Can Become a Victim of Nonconsensual Pornography***

Although these factors do place certain people at a higher risk of becoming victims of nonconsensual pornography, the reality is that any person can become a victim of nonconsensual pornography at any time. Two glaring examples of this are “spy cam porn” and “deep fake technology.”

“Spy cam porn”<sup>142</sup> is a phenomenon in South Korea in which people have installed microcameras and peepholes in public spaces such as bathrooms,<sup>143</sup> motels,<sup>144</sup> underneath tables in restaurants, on bikes, in dressing rooms, and locker rooms in gyms and swimming pools<sup>145</sup> to surreptitiously film other people. The number of cameras filming in public places has grown to the point where people regularly need to examine their surroundings for microcameras and peepholes before they engage in everyday activities such as riding bikes or sitting in restaurants.<sup>146</sup> The images captured with these cameras are then posted online and labeled as “spy cam videos” or “spy cam porn.”<sup>147</sup> Surreptitious filming of this kind, also called “Molka”<sup>148</sup> in reference to a popular television show that involved hidden camera pranks, is a

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co.uk/life-style/venge-porn-how-to-protect-ex-partners-nude-photos-share-public-social-media-a7909736.html; Jason Behrmann, *Protect Yourself from Revenge Porn and Online Sexual Harassment*, MEDIUM (Sep. 14, 2017), <https://medium.com/@JBehrmannPhD/protect-yourself-from-revenge-porn-and-online-sexual-harassment-d2c4838b939c>. For a discussion on how advising people to refrain from creating intimate content borders on the practice of “slut shaming,” see Rachel Budde Patton, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 419–21 (2015).

<sup>142</sup> Bicker, *supra* note 77.

<sup>143</sup> Gong & Sullivan, *supra* note 33.

<sup>144</sup> Tiffany May & Su-Hyun Lee, *1,600 Motel Guests Were Secretly Streamed Live in South Korea, Police Say*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/world/asia/korea-spycam-hotel-livestream.html>.

<sup>145</sup> Bicker, *supra* note 77.

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

<sup>147</sup> *Id.*

<sup>148</sup> Adam Taylor, *At South Korean Beaches and Swimming Pools, A War Against Tiny Spy Cameras*, THE WASH. POST (July 30, 2018), [https://www.washingtonpost.com/world/asia\\_pacific/at-south-korean-beaches-and-swimming-pools-a-war-against-tiny-spy-cameras/2018/07/30/8804c3b4-9071-11e8-9b0d-749fb254bc3d\\_story.html?utm\\_term=.aef4610091bb](https://www.washingtonpost.com/world/asia_pacific/at-south-korean-beaches-and-swimming-pools-a-war-against-tiny-spy-cameras/2018/07/30/8804c3b4-9071-11e8-9b0d-749fb254bc3d_story.html?utm_term=.aef4610091bb).

growing issue in South Korea.<sup>149</sup> According to National Public Radio, “Police data show that the number of ‘illegal filming’ crimes sharply increased from 1,353 in 2011 to 6,470 in 2017.”<sup>150</sup> According to the Supreme Prosecutor’s Office, the South Korean police took reports of 6,800 cases in 2018 alone.<sup>151</sup> Between 2012 and 2016, police have identified over 26,000 victims of spy cam filming, many of whom had no idea that they were filmed.<sup>152</sup> In the summer of 2018, outrage over the Molka spy cam epidemic led to protests in which women took to the streets and declared, “My life is not your porn.”<sup>153</sup> Despite the outrage, and the South Korean police’s crackdown,<sup>154</sup> the fact remains that microcameras and peepholes can be used to create nonconsensual pornography in any public space in any country.

The second way that nonconsensual pornography can victimize an individual is with the use of “deep fake technology.” Deep fake technology uses artificial intelligence to “recognize patterns in actual audio or visual recordings of a particular person” through a process called “deep learning.”<sup>155</sup> This process allows for videos to be spliced together to create a new video with a lifelike recreation of a person’s face or voice.<sup>156</sup> Deep fake technology was recently used to create a video that depicted President Barack Obama warning viewers about deep fake technology and how it can be used to “make it look like anyone is saying anything at any point in time, even if they would never say those things.”<sup>157</sup> The depiction of President Obama then goes on to say outrageous things, such as “President Trump is a total and complete dipshit.”<sup>158</sup> Of course, President Obama did not actually say this.<sup>159</sup> Rather, a computer watched fifty-six hours of sample recordings<sup>160</sup> and

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<sup>149</sup> See *supra* notes 144–45.

<sup>150</sup> Gong & Sullivan, *supra* note 33.

<sup>151</sup> May & Lee, *supra* note 144.

<sup>152</sup> Taylor, *supra* note 148.

<sup>153</sup> Bicker, *supra* note 77.

<sup>154</sup> For examples of the searches and education South Korean police have undertaken to combat the spy cam problem, see Taylor, *supra* note 148.

<sup>155</sup> Bloomberg, *How Faking Videos Became So Easy—And Why That’s So Scary*, FORTUNE (Sept. 11, 2018), <http://fortune.com/2018/09/11/deep-fakes-obama-video/>.

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

<sup>157</sup> BuzzFeedVideo, *You Won’t Believe What Obama Says in This Video!*, YOUTUBE (Apr. 17, 2018), [https://www.youtube.com/watch?time\\_continue=25&v=cQ54GDm1eL0](https://www.youtube.com/watch?time_continue=25&v=cQ54GDm1eL0); Bloomberg, *supra* note 155.

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

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

<sup>160</sup> Bloomberg, *supra* note 155.

manipulated an old video to look like a new, profane message from the former President of the United States.

After the release on Reddit of the open-source code for this process, the technology immediately took off as a way to create pornography.<sup>161</sup> People used deep fake technology to map the faces of female celebrities onto the bodies of porn stars to “depict sex acts that never took place.”<sup>162</sup> This technology is worrisome for celebrities and noncelebrities alike. Anyone can create deep fake videos with a reasonably powerful computer, an internet connection, and access to FakeApp, an application for creating deep fake videos.<sup>163</sup> This means that anyone, with enough pictures or videos of another person, can map his or her face onto a porn star’s body to create nonconsensual pornography. In fact, thousands of Reddit users did just that.<sup>164</sup> On a now-closed Reddit thread, thousands of Redditors used deep fake technology to create and share pornography featuring both celebrities and people the Redditors knew.<sup>165</sup> One user described how he created a “pretty good” video of an old high school classmate using photographs taken from her Instagram.<sup>166</sup> Another user asked for tips by saying, “I want to make a porn video with my ex-girlfirend (sic). But I don’t have any high-quality video with her, but I have a lot of good photos.”<sup>167</sup>

The potential harm for deep fake nonconsensual pornography is enormous. Anyone with enough source material can create realistic videos depicting violent or humiliating sex acts.<sup>168</sup> Nonconsensual pornography perpetrators can use these lifelike videos to ruin someone’s employment prospects,<sup>169</sup> turn rape threats into a “terrifying

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> For an explanation of how one reporter created deep fake videos of his face mapped onto celebrities’ bodies, see Kevin Roose, *Here Come the Fake Videos, Too*, N.Y. TIMES (Mar. 4, 2018), <https://www.nytimes.com/2018/03/04/technology/fake-videos-deepfakes.html>.

<sup>164</sup> Adam Dodge et al., *Using Deep Fake Technology to Perpetrate Intimate Partner Abuse*, CAL. PARTNERSHIP TO END DOMESTIC VIOLENCE 1, 6 (2018), [https://www.cpedv.org/sites/main/files/webform/deepfake\\_domestic\\_violence\\_advisory.pdf](https://www.cpedv.org/sites/main/files/webform/deepfake_domestic_violence_advisory.pdf).

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

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

<sup>167</sup> *Id.*

<sup>168</sup> Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753, 1773 (2019).

<sup>169</sup> *See id.*

virtual reality,” and reduce someone’s likeness to a sex object.<sup>170</sup> What makes this harm so terrifying, however, is the fact that the technology is relatively accessible to anyone with a computer and enough source material.

The fact is, far more people are at risk for nonconsensual pornography victimization than we might realize. Because sexting is so common,<sup>171</sup> intimate images can be shared without consent on any device with an internet connection and transformed into nonconsensual pornography. Victims of sexual assault, domestic abuse, intimate partner violence, and human trafficking are at risk of their abusers creating nonconsensual pornography and using it to taunt or control them. Furthermore, nonconsensual pornography can affect almost anyone at any time through the use of spy cams and deep fake technology.

#### ***D. What Are the Effects of Nonconsensual Pornography?***

Nonconsensual pornography’s effects are measured on two scales: individual and societal. On an individual level, nonconsensual pornography has immediate and devastating mental and emotional effects.<sup>172</sup> In the 2017 RMIT survey, 80% of nonconsensual pornography victims reported experiencing “high levels of psychological distress.”<sup>173</sup> Victims also expressed emotions including “anger, guilt, paranoia, depression” and suicidal thoughts and feelings.<sup>174</sup> A 2013 study published in the *Journal of Feminist Criminology* found that victims were diagnosed with depression, anxiety, and post-traumatic stress disorder.<sup>175</sup> Many of the long-term psychological effects of nonconsensual pornography are parallel to those of child pornography. In both cases, victims report feelings of powerlessness, humiliation, depression, withdrawal, and worthlessness.<sup>176</sup> Nonconsensual pornography, the subsequent

<sup>170</sup> *See id.*

<sup>171</sup> *See* MCAFEE, *Love*, *supra* note 137.

<sup>172</sup> *Infra* note 175; *see generally infra* note 174.

<sup>173</sup> HENRY ET AL., *supra* note 40, at 5.

<sup>174</sup> Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359, 362 (2016).

<sup>175</sup> Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 21 FEMINIST CRIMINOLOGY 1, 10–12 (2016), <https://www.biscmi.org/wp-content/uploads/2016/08/Revenge-Porn-and-Mental-Health-A-Qualitative-Analysis-of-the-Mental-Health-Effects-of-Revenge-Porn-on-Female-Survivors.pdf>.

<sup>176</sup> Kamal & Newman, *supra* note 174.

harassment, and the psychological effects have led some victims to attempt or complete suicide.<sup>177</sup>

However, nonconsensual pornography's negative effects go beyond mental and emotional distress. When nonconsensual pornography is sent to, or discovered by, current and future employers, a victim's employability suffers.<sup>178</sup> Because of nonconsensual pornography, some victims report quitting or losing their jobs, as well as significant difficulty obtaining employment.<sup>179</sup> Fake social media accounts featuring nonconsensual pornography that impersonates the victims<sup>180</sup> are particularly effective at ruining a victim's employability.<sup>181</sup>

Nonconsensual pornography can affect a victim's physical safety as well. Perpetrators can publish explicit content along with the victim's name, contact information, home and/or work address, and other identifying information. As a result, victims may receive threats and harassment, both in person and online.<sup>182</sup> Understandably, this leads some victims to fear for their physical safety.<sup>183</sup>

Nonconsensual pornography does more than harm individuals; it also harms society as a whole. In her article for the American Bar Association, law professor Mary Anne Franks argues that nonconsensual pornography "imposes expressive harms<sup>184</sup> that impact society as a whole."<sup>185</sup> According to Franks, nonconsensual pornography normalizes sexual exploitation as an acceptable form of entertainment and punishment.<sup>186</sup> Franks also argues that nonconsensual pornography is used as a misogynistic tool to "put

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<sup>177</sup> See Annemarie Chiarini, *I Was the Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, THE GUARDIAN (Nov. 19, 2013), <https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>; Burleigh, *supra* note 126.

<sup>178</sup> See Chesney & Citron, *supra* note 168.

<sup>179</sup> Kamal & Newman, *supra* note 174, at 363.

<sup>180</sup> See Matthew Weaver & Sandra Laville, *CPS to Go After Online Trolls Who Use Fake Profiles to Post Revenge Porn*, THE GUARDIAN (Mar. 3, 2016), <https://www.theguardian.com/uk-news/2016/mar/03/online-trolls-revenge-porn-new-prosecutors-guidelines>.

<sup>181</sup> Kamal & Newman, *supra* note 174, at 363.

<sup>182</sup> See Rooney, *supra* note 102.

<sup>183</sup> Kamal & Newman, *supra* note 174.

<sup>184</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000) ("A person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her.").

<sup>185</sup> Franks, *supra* note 26, at 1259.

<sup>186</sup> *Id.*

powerful women in their place” based on the belief that nonconsensual pornography is a gendered phenomenon in which men often victimize women.<sup>187</sup> Franks argues that nonconsensual pornography, along with rape, sexual harassment, and voyeurism, “reinforce[s] the pernicious belief that men have the right to use women and girls sexually without their consent.”<sup>188</sup> These functions of nonconsensual pornography harm society by normalizing inequality and denying victims safety and autonomy.

The harmful effects of nonconsensual pornography are devastating. From mental and emotional distress to lost economic opportunity, nonconsensual pornography can wreak havoc on an individual’s life. In the bigger picture, nonconsensual pornography harms society as a whole by normalizing the exploitation of women as entertainment and robbing victims of their autonomy and safety.

## II

### A SURVEY OF NONCONSENSUAL PORNOGRAPHY LAWS

As previously discussed, nonconsensual pornography is a global problem. Anywhere people take and/or share intimate photographs or videos without the subjects’ consent, nonconsensual pornography is present. In response to this developing problem, some countries have criminalized nonconsensual pornography.<sup>189</sup> This Part surveys the laws that criminalize nonconsensual pornography in three countries: the United States, the United Kingdom, and South Korea. In the United States, individual states criminalize nonconsensual pornography with laws that operate in a variety of ways.<sup>190</sup> Additionally, nonconsensual pornography can be prosecuted on the federal level using other criminal statutes that are not specific to nonconsensual pornography.<sup>191</sup> The United Kingdom—England, Wales, Scotland, and Northern Ireland—has criminalized nonconsensual pornography with laws that ban the

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Other countries that have banned nonconsensual pornography include the Philippines (Anti-Photo and Video Voyeurism Act of 2009, Rep. Act No. 9995 (2009) (Phil.)); Israel (Yifa Yaakov, *Israeli Law Makes Revenge Porn a Sex Crime*, TIMES OF ISRAEL (Jan. 6, 2014), <https://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime>); and New Zealand (Office of the Privacy Commissioner, *Act Closes ‘Revenge Porn’ Loophole*, SCOOP (July 6, 2015), <http://www.scoop.co.nz/stories/PO1507/S00047/act-closes-revenge-porn-loophole.htm>).

<sup>190</sup> See *infra* Section II.A.

<sup>191</sup> See *infra* Section II.A.2.

distribution of intimate, sexual images without consent.<sup>192</sup> In South Korea, both consensual and nonconsensual pornography are illegal under the same law.<sup>193</sup>

### ***A. Prosecution of Nonconsensual Pornography in the United States***

In the United States, nonconsensual pornography can be prosecuted in many different ways depending on the jurisdiction and the particular facts of the case. Because no federal law bans nonconsensual pornography,<sup>194</sup> prosecution happens mainly in two ways: under state laws that ban nonconsensual pornography and under other federal laws that are not specific to nonconsensual pornography.

#### *1. State Laws*

As of February 2020, forty-six states and the District of Columbia have passed laws criminalizing nonconsensual pornography.<sup>195</sup> New Jersey was the first state to criminalize nonconsensual pornography in 2003.<sup>196</sup> As of April 2019, New York is the most recent state to address nonconsensual pornography with a “long awaited”<sup>197</sup> bill that criminalizes the “unlawful dissemination or publication of an intimate image.”<sup>198</sup> Statutes in the United States vary in two key respects: the severity of the offense and the characterization of the harm.

##### *a. Severity of the Offense*

In the United States, nonconsensual pornography statutes treat violations with varying degrees of severity. Under some state statutes, such as in Michigan,<sup>199</sup> dissemination of nonconsensual pornography

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<sup>192</sup> See *infra* Section II.B.

<sup>193</sup> See *infra* Section II.C.

<sup>194</sup> *State Revenge Porn Policy*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/state-policy/revenge-porn/> (last visited Nov. 8, 2019).

<sup>195</sup> *States with Revenge Porn Laws*, C.A. GOLDBERG LAW, <https://www.cagoldberglaw.com/states-with-revenge-porn-laws/#1558637039315-341edc87-9984> (last visited Feb. 11, 2020).

<sup>196</sup> N.J. REV. STAT. § 2C:14-9 (2016) (see discussion *supra* note 19).

<sup>197</sup> Vivian Wang, ‘Revenge Porn’ Law Finally Passes in New York, N.Y. TIMES (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/nyregion/revenge-porn-law.html>.

<sup>198</sup> Assemb. B. A5981, 2019-2020 Senate Assemb., Reg. Sess. (N.Y. 2019).

<sup>199</sup> Under Michigan’s law, the first offense amounts to a misdemeanor punishable by up to ninety-three days in jail, a fine, and each subsequent offense is also a misdemeanor punishable by no more than a year in jail. MICH. COMP. LAWS § 750.145f (2017).

can never amount to a felony.<sup>200</sup> Other statutes, like the one in Oregon,<sup>201</sup> make the first offense a misdemeanor and subsequent offenses felonies.<sup>202</sup> Some states, like Arizona,<sup>203</sup> treat violations of the law differently if the perpetrator only threatens to distribute the intimate material but does not actually do so.<sup>204</sup> Other statutes escalate the severity of the offense when aggravating circumstances are present; for example, when the perpetrator uses the nonconsensual pornography for monetary gain,<sup>205</sup> distributes the content along with the victim's identifying information,<sup>206</sup> distributes the content with an intent to harass the victim,<sup>207</sup> or maintains a website or app for the purpose of distributing the nonconsensual pornography.<sup>208</sup> At least one state, North Carolina, reduces the severity of the crime if the perpetrator is younger than eighteen years old.<sup>209</sup> Finally, some statutes dispense with this analysis altogether and label all violations felonies.<sup>210</sup>

This wide range of approaches means that, depending on the state in which he is prosecuted, a convicted perpetrator can receive vastly different punishments for a similar crime. As discussed above, all violations of Michigan's nonconsensual pornography statute are misdemeanors.<sup>211</sup> The first offense is punishable with up to ninety-three days in jail and/or a fine of \$500.<sup>212</sup> Subsequent offenses are punishable

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<sup>200</sup> For other laws that treat violations of nonconsensual pornography statutes as misdemeanors, *see* Pennsylvania's statute (18 PA. CONS. STAT. § 3131 (2014)) and Oklahoma's statute (OKLA. STAT. tit. 21, § 1040.13b (2017)).

<sup>201</sup> OR. REV. STAT. § 163.472 (2017).

<sup>202</sup> For other examples of statutes that escalate the severity of the offenses with subsequent violations, *see* Utah's statute (UTAH CODE ANN. § 76-5b-203 (LexisNexis 2014)), West Virginia's statute (W. VA. CODE R. § 61-8-28a (2017)), and New Mexico's statute (N.M. STAT. ANN. § 30-37(A)-1 (2015)).

<sup>203</sup> ARIZ. REV. STAT. ANN. § 13-1425 (2016).

<sup>204</sup> For another example of a statute that treats threats of disclosure differently than actual disclosure, *see generally* Missouri's statute. MO. REV. STAT. § 565.252 (2017).

<sup>205</sup> KY. REV. STAT. ANN. § 531.120(4) (West 2018).

<sup>206</sup> DEL. CODE ANN. tit. 11, § 1335(A)(9)(c)(5) (2019).

<sup>207</sup> MINN. STAT. § 617.261 (2019).

<sup>208</sup> *Id.*

<sup>209</sup> For perpetrators over the age of eighteen, violation of North Carolina's statute results in a Class H felony. For perpetrators under the age of eighteen, a violation results in a Class 1 misdemeanor. N.C. GEN. STAT. § 14-190.5A (2015).

<sup>210</sup> For examples of jurisdictions that label all violations of the nonconsensual pornography statutes as felonies, *see* New Hampshire (N.H. REV. STAT. ANN. § 644:9-a (2016)) and Nevada (NEV. REV. STAT. § 200.780-85 (2015)).

<sup>211</sup> MICH. COMP. LAWS § 750.145e (2016).

<sup>212</sup> *Id.*



by up to a year in jail and/or a fine of \$1,000.<sup>213</sup> In Alabama, however, subsequent violations of the nonconsensual pornography statute can result in a Class C felony conviction<sup>214</sup> and a sentence of up to ten years in prison.<sup>215</sup>

*b. Characterization of the Offense*

Nonconsensual pornography statutes also vary in how they characterize the harm resulting from the offense. States characterize the harm in three major ways: as a violation of privacy, as a variation of harassment, or as a stand-alone violation against a person.

First, some states characterize nonconsensual pornography's harm as a violation of a person's reasonable expectation of privacy. Kansas's statute, for instance, defines its nonconsensual pornography offense as a single type of crime, namely "breach of privacy."<sup>216</sup> Other breach of privacy offenses in this statute include intercepting a telephone call without consent,<sup>217</sup> installing listening or recording devices in private places without consent,<sup>218</sup> and "entering with intent to listen surreptitiously to private conversations in a private place."<sup>219</sup> Other states that characterize nonconsensual pornography's harm as a violation of privacy are New Jersey,<sup>220</sup> South Dakota,<sup>221</sup> and Connecticut.<sup>222</sup>

Second, some states characterize nonconsensual pornography's harm as a type of harassment or assault. For example, Alaska's harassment statute categorizes nonconsensual pornography as a method by which a person can harass another. Other possible harassment methods listed in the statute include: insults and taunts,<sup>223</sup> "repeated telephone calls at extremely inconvenient hours,"<sup>224</sup> and anonymous or obscene electronic communications that threaten

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<sup>213</sup> *Id.*

<sup>214</sup> ALA. CODE § 13A-6-240 (2017).

<sup>215</sup> *Form CR-52: Explanation of Rights and Plea of Guilty*, ST. OF ALA. UNIFIED JUD. SYS. (2007), [http://judicial.alabama.gov/docs/library/rules/crcr52\\_aft.pdf](http://judicial.alabama.gov/docs/library/rules/crcr52_aft.pdf).

<sup>216</sup> KAN. STAT. ANN. § 21-6101(a)(8) (2019).

<sup>217</sup> *Id.* at (a)(1).

<sup>218</sup> *Id.* at (a)(4).

<sup>219</sup> *Id.* at (a)(3).

<sup>220</sup> N.J. REV. STAT. § 2C:14-9 (2016).

<sup>221</sup> S.D. CODIFIED LAWS § 22-21-4 (2016).

<sup>222</sup> CONN. GEN. STAT. § 53a-189c (2018).

<sup>223</sup> ALASKA STAT. § 11.61.120(a)(1) (2018).

<sup>224</sup> *Id.* § (a)(3).

physical injury or sexual contact.<sup>225</sup> Florida<sup>226</sup> and Iowa<sup>227</sup> are two other states that characterize nonconsensual pornography's harm as a form of harassment.

And third, some states characterize the harm of nonconsensual pornography as a stand-alone offense. Washington's statute lists the knowing disclosure of an intimate image as its own offense, unconnected to other offenses such as invasion of privacy, harassment, or extortion.<sup>228</sup> Other states with statutes that list nonconsensual pornography offenses as stand-alone offenses include Kentucky,<sup>229</sup> Oregon,<sup>230</sup> and Minnesota.<sup>231</sup>

## 2. Federal Laws

Because federal law does not specifically outlaw nonconsensual pornography,<sup>232</sup> perpetrators can be prosecuted for other crimes related to creating and distributing nonconsensual pornography. Hunter Moore, the founder of IsAnyoneUp.com, was federally prosecuted using this strategy. Moore was indicted on federal charges of conspiracy, unauthorized access to a protected computer to obtain information, and aggravated identity theft.<sup>233</sup> He eventually pleaded guilty to "unauthorized access of victims' computers for private financial gain" and aggravated identity theft.<sup>234</sup>

Moore's case is one example of how prosecutors can use other federal laws to prosecute nonconsensual pornography perpetrators. For this to work, however, the perpetrator has to break at least one federal law in the creation or dissemination of nonconsensual pornography.

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<sup>225</sup> *Id.* § (a)(4).

<sup>226</sup> FLA. STAT. § 784.049 (2019).

<sup>227</sup> Note that Iowa's statute names the offense "Harassment or Invasion of Privacy," but that the ban on nonconsensual pornography is listed as one method by which someone can harass another person. IOWA CODE § 708.7 (2017).

<sup>228</sup> WASH. REV. CODE § 9A.86.010 (2015).

<sup>229</sup> Note that Kentucky lists nonconsensual pornography as a stand-alone offense but places it among "pornography" offenses. KY. REV. STAT. ANN. § 531.120 (LexisNexis, 2018).

<sup>230</sup> Note that Oregon created a stand-alone offense for nonconsensual pornography but lists it as a sexual offense. OR. REV. STAT. § 163.472 (2017).

<sup>231</sup> MINN. STAT. § 617.261 (2018).

<sup>232</sup> See Emma Gray Ellis, *New York's Revenge Porn Law Is a Flawed Step Forward*, WIRED (July 24, 2019), <https://www.wired.com/story/new-york-revenge-porn-law/>.

<sup>233</sup> Indictment, *supra* note 47.

<sup>234</sup> Danielle Citron, *Ding Dong, Revenge Porn King Hunter Moore Is Going to Prison*, FORBES (Feb. 18, 2015), <https://www.forbes.com/sites/daniellectron/2015/02/18/ding-dong-revenge-porn-king-hunter-moore-is-going-to-jail/#4ec5f6c32494>.

Moore, for example, allegedly broke federal conspiracy law<sup>235</sup> when he conspired with his accomplice to access a private computer for “private financial gain.”<sup>236</sup> Although it appears that there are limited cases where perpetrators break federal law when disseminating nonconsensual pornography, prosecuting these perpetrators in federal court under hacking, extortion, or conspiracy laws remains a valid avenue available in some cases.

### ***B. Prosecution of Nonconsensual Pornography in the United Kingdom***

In the United Kingdom, a few different statutes criminalize nonconsensual pornography. In England and Wales, the Criminal Justice and Courts Act of 2015 makes it illegal to “disclose a private sexual photograph if the disclosure is made without the consent of the [subject] and with the intention of causing [the subject] distress.”<sup>237</sup> The offense can be charged either as a summary offense, a less serious offense that may be tried before a magistrate,<sup>238</sup> or an indictable offense,<sup>239</sup> which is a more serious offense that may be tried in the Crown Court upon indictment.<sup>240</sup> If convicted of a summary offense, a person can be fined and sentenced to serve up to twelve months in prison.<sup>241</sup> If convicted of an indictable offense, a person can be fined and jailed for up to two years.<sup>242</sup>

The first person in England to be prosecuted under this law was Jason Asagba.<sup>243</sup> Just three days after the law came into force in 2015, Asagba threatened to post sexual photographs of a twenty-year-old

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<sup>235</sup> Specifically, the government alleged he broke United States Code § 371, which is the statute that forbids two or more people from conspiring “either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose” and taking any act to affect the conspiracy. 18 U.S.C.S. § 371 (LexisNexis 2019).

<sup>236</sup> Indictment, *supra* note 47.

<sup>237</sup> Criminal Justice and Courts Act 2015, c. 2, § 33(1), (Eng.).

<sup>238</sup> JONATHAN LAW & ELIZABETH A. MARTIN, A DICTIONARY OF LAW (Oxford University Press, 7th ed. 2009). (If available, search the online version of this dictionary for “summary offence”).

<sup>239</sup> *Id.* (If available, search the online version of this dictionary for “indictable offence”).

<sup>240</sup> Criminal Justice and Courts Act 2015, c. 2, § 33(9), (Eng.).

<sup>241</sup> *Id.* § 9(b).

<sup>242</sup> *Id.* § 9(a).

<sup>243</sup> ‘Revenge Porn’ Man Jason Asagba Sentenced, BBC NEWS (Sept. 1, 2015), <https://www.bbc.com/news/uk-england-berkshire-33819264>.

woman online.<sup>244</sup> He subsequently posted the photographs to Facebook, reportedly causing the victim “extreme distress.”<sup>245</sup> Asagba eventually pleaded guilty to disclosing the photographs without consent and with the intent to cause distress. He was sentenced to six months in jail.<sup>246</sup>

In Scotland, nonconsensual pornography is covered by the Abusive Behavior and Sexual Harm Act of 2016.<sup>247</sup> The Act makes it a crime to disclose or threaten to disclose a photograph or film that “shows, or appears to show, another person in an intimate situation” if that person intends to cause or is “reckless as to whether” the disclosure will cause “fear, alarm, or distress.”<sup>248</sup> The law also includes an exception for content that has “previously been disclosed to the public . . . or [disclosed] by [the victim] or with [the victim’s] consent.”<sup>249</sup>

In Northern Ireland, the Justice Act of 2016 criminalized nonconsensual pornography.<sup>250</sup> Section 51(1) of the Act makes it illegal to “disclose a private sexual photograph or film . . . without the consent of an individual who appears in the photograph or film, and with the intention of causing that individual distress.”<sup>251</sup> This law covers disclosures of intimate images to third parties but not disclosures to the people or persons depicted in the image.<sup>252</sup>

Just because nonconsensual pornography is illegal in the United Kingdom does not mean perpetrators are being prosecuted. Recently, Scotland police have come under pressure for low rates of case referral to prosecutors.<sup>253</sup> According to the BBC, “[b]etween July and December [of 2017], 225 complaints were reported to Scotland Police with just 89, or 39%, being referred to prosecutors.”<sup>254</sup> According to BBC Scotland, the most common reasons police cited for not referring cases to prosecutors were either a lack of evidence or the victim “withdrawing support.”<sup>255</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Abusive Behavior and Sexual Harm (Scotland) Act 2016, (ASP 22 Part 1) § 2(1)(a).

<sup>248</sup> *Id.* § 2(1)(b).

<sup>249</sup> *Id.* § 2(1)(c).

<sup>250</sup> Justice Act (Northern Ireland) 2016, c. 21 Part 3, § 51–53.

<sup>251</sup> *Id.* § 51(1)(a-b).

<sup>252</sup> *Id.* § 51(2).

<sup>253</sup> Marc Ellison, *Less Than Half of Revenge Porn Cases Passed on to Prosecutors*, BBC: NEWS SCOT. (Mar. 6, 2018), <https://www.bbc.com/news/uk-scotland-42689607>.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

### ***C. Prosecution of Nonconsensual Pornography in South Korea***

In South Korea, both consensual and nonconsensual pornography are illegal.<sup>256</sup> The Children and Juvenile Sex Protection Law makes it illegal for anyone to distribute or otherwise make available media that could be harmful to minors, including “voluptuous or obscene materials which may stimulate sexual desire of juveniles.”<sup>257</sup> This means that distributors and creators of both consensual pornography and nonconsensual pornography can be prosecuted under already-existing law. In fact, the owner of a nonconsensual pornography website was recently arrested for violating this law.<sup>258</sup> The suspect, identified only by her surname Song, is accused of running SoraNet, a website notorious for featuring “revenge porn and spy cam porn,” among other types of nonconsensual pornography.<sup>259</sup>

Despite the blanket ban on pornography, prosecuting nonconsensual pornography in South Korea has its own obstacles. Women in South Korea have reported experiencing a lack of interest and understanding on the part of police, who are in charge of referring cases for prosecution.<sup>260</sup> CNN reported that a study by the Korean Women Lawyers Association found that only about 5% of spy-cam crimes that are prosecuted result in any jail time, even though perpetrators can be sentenced to up to five years in prison.<sup>261</sup>

In all three of these countries, nonconsensual pornography can be prosecuted using existing criminal law. In the United States, nonconsensual pornography is illegal under some state laws.<sup>262</sup> And perpetrators may be prosecuted under federal law, if the facts allow.<sup>263</sup> In the United Kingdom, nonconsensual pornography is illegal throughout the country, but questions remain about why so many cases

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<sup>256</sup> *South Korea Cracks Down on Online Porn*, NBC NEWS (Apr. 4, 2005), [http://www.nbcnews.com/id/7505092/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/south-korea-cracks-down-online-porn/#.XB0xh89Khp8](http://www.nbcnews.com/id/7505092/ns/technology_and_science-tech_and_gadgets/t/south-korea-cracks-down-online-porn/#.XB0xh89Khp8).

<sup>257</sup> [Juvenile Protection Act], Act No. 5297, Mar. 7, 1997, *amended by* Act. No. 9932, Jan. 18, 2010, art. 10 (S. Kor.).

<sup>258</sup> Claire Lee, *Owner of Notorious Korean Revenge Porn Site Arrested: Police*, THE KOREA HERALD (Jun. 26, 2018), <http://www.koreaherald.com/view.php?ud=20180626000681>.

<sup>259</sup> *Id.*

<sup>260</sup> Jake Kwon, Sophie Jeong, & Paula Hancocks, *Seoul to Inspect Thousands of Toilets for Spy Cams, but Women Say Not Enough Being Done*, CNN: WORLD ASIA (Sept. 7, 2018), <https://www.cnn.com/2018/09/06/asia/south-korea-spy-cams-toilet-intl/index.html>.

<sup>261</sup> *Id.*

<sup>262</sup> *See supra* Section II.A.1.

<sup>263</sup> *See supra* Section II.A.2.

go unprosecuted.<sup>264</sup> In South Korea, all pornography, consensual and nonconsensual alike, is illegal and is prosecuted using the same law.<sup>265</sup> Like the United Kingdom, however, victims and lawyers remain concerned about why the police refer only a few cases for prosecution.<sup>266</sup>

### III LIMITATIONS AND SOLUTIONS FOR THE CRIMINALIZATION OF INTERNATIONAL NONCONSENSUAL PORNOGRAPHY

#### *A. The Limitations of Criminal Law*

Although criminal law offers recourse and solutions for many victims of nonconsensual pornography, the fact remains that victims of international nonconsensual pornography are currently left largely unprotected. Consider the following hypothetical example.<sup>267</sup> Alex and Jordan are in a long-distance relationship and send nude photos to one another. Jordan is living in the United States, and Alex is living in another country. When the relationship ends, Alex posts Jordan's nude photos on a "revenge porn" website. What can Jordan do?

The answer all depends on where Jordan and Alex are located. If Alex remains in a country in which nonconsensual pornography is legal, the only thing Jordan can do is try to get the images off the internet.<sup>268</sup> State prosecutors cannot reach beyond their state's borders to arrest and prosecute someone in another country because that person is beyond their jurisdiction.<sup>269</sup> Furthermore, because extradition is governed by treaty and conducted between the U.S. Federal Government and the foreign government, state governments cannot

<sup>264</sup> See *supra* Section II.B.

<sup>265</sup> See *supra* Section II.C.

<sup>266</sup> See *supra* notes 252–54, 259–60.

<sup>267</sup> In this hypothetical example, I have given two partners names that are gender neutral. The important part of this example is where each partner is located, not the gender or genders of the partners.

<sup>268</sup> This can be done in several ways, including copyrighting the image through the Digital Millennium Copyright Act, "de-indexing from Google" and other search engines, and requesting that the photos be taken down from websites with policies against nonconsensual pornography. *Revenge Porn and Internet Privacy*, C.A. GOLDBERG, <https://www.cagoldberglaw.com/revenge-porn-and-internet-privacy/> (last visited Apr. 5, 2019); *Online Removal Guide*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/online-removal/> (last visited Apr. 5, 2019).

<sup>269</sup> A state court can hear many different types of cases, but it can neither prosecute someone who is not in its jurisdiction nor force another jurisdiction to prosecute someone on its behalf. *State Jurisdiction Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/s/state-jurisdiction/> (last visited Nov. 9, 2019).

request extradition.<sup>270</sup> Alternatively, if nonconsensual pornography is illegal in Jordan's jurisdiction, Jordan can try to get police to investigate and arrest Alex if Alex returns to Jordan's jurisdiction. If Alex is in a country in which nonconsensual pornography is illegal, Jordan can try to contact Alex's local law enforcement authorities and hope that they choose to investigate and prosecute.<sup>271</sup>

Alternatively, if Alex's country has an extradition agreement with the United States, Jordan can work with the United States Department of State to have Alex extradited and prosecuted in the United States.<sup>272</sup> Extradition is the process of bringing a person accused of a crime from another jurisdiction into the jurisdiction in which they will be tried.<sup>273</sup>

Extradition, however, is not as simple as asking another country to surrender an accused criminal. A country's right to demand extradition is created by a treaty between countries.<sup>274</sup> Some countries grant extradition without a treaty, but most of these countries require an offer of reciprocity.<sup>275</sup> Furthermore, the doctrine of "dual criminality" limits the crimes available for extradition to crimes that are illegal in both countries.<sup>276</sup> Dual criminality is established by comparing the "essential character" of both crimes and examining whether the laws are "substantially analogous."<sup>277</sup> This means that a perpetrator of international nonconsensual pornography residing in a country that does not criminalize nonconsensual pornography is likely out of reach for extradition.<sup>278</sup> Even if the United States has a treaty with the perpetrator's country, extradition is not guaranteed.<sup>279</sup> Just because a country demands the extradition of an accused criminal does not mean another country must grant that extradition.<sup>280</sup> A country asked to

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270 U.S. DEP'T OF JUST., JUSTICE MANUAL Title 9-15.100 (2018), <https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters#9-15.100> [hereinafter JUSTICE MANUAL].

271 See *supra* notes 1–7 and accompanying text for an example.

272 JUSTICE MANUAL, *supra* note 270.

273 TIMOTHY A. SCOTT & LARRY A. BURNS, NINTH CIR. CRIM. HANDBOOK § 3.01 (Matthew Bender ed., 2018).

274 *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986).

275 JUSTICE MANUAL, *supra* note 270.

276 *United States v. Saccoccia*, 18 F.3d 795, 800 (9th Cir. 1994); *Quinn*, 783 F.2d at 783.

277 *Manta v. Chertoff*, 518 F.3d 1134, 1141 (9th Cir. 2008).

278 See JUSTICE MANUAL, *supra* note 270, at 9-15.210.

279 See *id.* at 9-15.300.

280 *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986).

surrender the accused for extradition retains discretion about whether to comply with the request.<sup>281</sup>

Simply put, extradition is an option for Jordan only if (a) Alex is in a country where nonconsensual pornography is illegal, (b) the laws are substantially analogous, and (c) the United States has a treaty with that country that creates the right to extradition. In either situation, current criminal law in the United States fails victims by making it very difficult for victims of international nonconsensual pornography to seek justice through the criminal justice system.

Because American criminal law leaves victims unprotected, the focus shifts to instruments of international law. Can international law make it easier to prosecute and punish international nonconsensual pornography perpetrators? In a hypothetical scenario, one might imagine a multilateral international treaty that defines nonconsensual pornography; builds protocols for investigation, prosecution, and extradition; and creates rights and protections for victims in each signatory country. Ideally, such a treaty would create a framework in which law enforcement agencies could cooperate and ultimately convict and punish perpetrators.

Unfortunately, implementation of such an international instrument is more complicated than it may seem. Coordination and cooperation between countries can be deceptively inefficient. For example, consider the United Nations Convention Against Transnational Organized Crime (the Convention) that was finalized in 2000.<sup>282</sup> The Convention's stated purpose was to "promote cooperation to prevent and combat transnational organized crime more effectively."<sup>283</sup> Although not a treaty, the Convention addressed organized crime that was "transnational"<sup>284</sup> and serious in nature.<sup>285</sup> The Convention addressed serious offenses in organized crime, such as money laundering<sup>286</sup> and obstruction of justice.<sup>287</sup> The Convention also

<sup>281</sup> *Id.*

<sup>282</sup> See generally *United States Convention Against Transnational Organized Crime and the Protocols Thereto*, U.N. OFF. ON DRUGS & CRIME (2004), [https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANIZED\\_CRIME\\_AND\\_THE\\_PROTOCOLS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf) [hereinafter *Convention*].

<sup>283</sup> *Id.* at 5.

<sup>284</sup> *Id.*

<sup>285</sup> The *Convention* defined serious crime as "an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty." *Id.* at 5–6.

<sup>286</sup> *Id.* at 8–9.

<sup>287</sup> *Id.* at 25.



broadly described how law enforcement in signatory countries should cooperate with one another,<sup>288</sup> collect and exchange information and knowledge,<sup>289</sup> and attempt to prevent international crime.<sup>290</sup> On paper, the Convention appears to have laid out a framework that enables countries to fight transnational organized crime. The problem with this Convention, however, remains in its implementation. Ten years after the Convention was finalized, the Conference of States Parties of the United Nations Convention Against Transnational Organized Crime agreed to “set up a working group to lay the ground for the possible adoption of a review mechanism in two years’ time.”<sup>291</sup> If implemented, the review mechanism would monitor countries’ implementation of the Convention.<sup>292</sup> In other words, the group estimated that it would take up to two years to create a mechanism simply to review how countries were implementing the Convention,<sup>293</sup> not to mention assisting those countries with implementation or revising the Convention itself. The Convention, while great on paper, presented a massive logistical challenge for member countries and for the United Nations.

The political will necessary to fight and monitor international crime on an international scale is enormous.<sup>294</sup> Now consider the prospect of creating an international legal instrument that combats a form of crime that mostly affects individuals on a case-by-case basis and presents no immediate financial or national security consequences. Unfortunately, the likelihood that a nation would undergo the process of agreeing to such an instrument, and then using that instrument, is slim to none. Extradition and international cooperation remain a victim’s best hope for prosecuting nonconsensual pornography.

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<sup>288</sup> *See id.* at 29–30.

<sup>289</sup> *Id.* at 30.

<sup>290</sup> *Id.* at 33–34.

<sup>291</sup> Press Release, U.N. Off. on Drugs & Crime, UN Member States Take Positive Step on the Road to the Effective Implementation of Transnational Organized Crime Convention (Oct. 22, 2010), <https://www.unodc.org/unodc/en/press/releases/2010/October/un-member-states-take-positive-step-on-the-road-to-the-effective-implementation-of-transnational-organised-crime-convention.html>.

<sup>292</sup> *Id.*

<sup>293</sup> *See id.*

<sup>294</sup> *See generally* Meetings Coverage, U.N. General Assembly Third Committee 5th & 6th Meetings, Struggle Against Organized Crime, Corruption, Drug Trafficking Connected; Too Big for Countries to Confront on Their Own, Third Committee Told (Oct. 6, 2010), (<https://www.un.org/press/en/2010/gashc3975.doc.htm>).

### ***B. The ENOUGH Act: A Limited Solution***

One possible solution to make criminal justice more accessible to nonconsensual pornography victims in the United States is the ENOUGH Act, which was introduced to the U.S. Senate in 2017.<sup>295</sup> The ENOUGH Act, or the Ending Nonconsensual Online User Graphic Harassment Act of 2017, makes it a crime to “knowingly use any means of . . . interstate or foreign commerce to distribute an intimate visual depiction of an individual” with knowing or reckless disregard for his or her lack of consent.<sup>296</sup> Should this bill become law in its current form, violators would face up to five years in prison and/or a fine.<sup>297</sup> Senator Kamala Harris, one of the bill’s sponsors, stated that the ENOUGH Act is meant to hold accountable “perpetrators of exploitation who seek to humiliate and shame their victims.”<sup>298</sup> Harris, along with the bill’s other sponsors, introduced the ENOUGH Act in November 2017.<sup>299</sup>

Because the ENOUGH Act criminalizes both the use of interstate and foreign commerce to distribute nonconsensual pornography,<sup>300</sup> it can be used to prosecute such crimes committed even in states that do not have their own nonconsensual pornography laws, similar to how mail fraud statutes are currently prosecuted.<sup>301</sup> Furthermore, passing this uniform federal law would open the door for the United States to create cooperative relationships with other countries to prosecute nonconsensual pornography crimes committed in other countries against U.S. citizens.<sup>302</sup>

The ENOUGH Act, however, is a limited solution. The “Venue and Extraterritoriality” section of the bill states that “there is extraterritorial Federal jurisdiction over an offense under this section if the defendant, or the depicted individual, is a citizen or permanent resident of the

<sup>295</sup> ENOUGH Act, S. 2612, 115th Cong. § 1802(b) (2017).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> Jessica Lahitou, *What Is the ENOUGH Act? Lawmakers Are Pushing to Criminalize Revenge Porn with a New Bill*, BUSTLE (Nov. 28, 2017), <https://www.bustle.com/p/what-is-the-enough-act-lawmakers-are-pushing-to-criminalize-revenge-porn-with-a-new-bill-6337236>.

<sup>299</sup> ENOUGH Act § 1802(b).

<sup>300</sup> *Id.*

<sup>301</sup> See Janet Portman, *Federal Mail Fraud Laws*, CRIM. DEF. L., <https://www.criminaldefenselawyer.com/crime-penalties/federal/Federal-mail-fraud.htm> (last visited Nov. 9, 2019).

<sup>302</sup> Jason Haynes, *Legislative Approaches to Combating 'Revenge Porn': A Multijurisdictional Perspective*, 39 STATUTE L. REV. 319, 325 (2018).

United States.”<sup>303</sup> This means that the law can be used only to prosecute citizens or permanent residents of the United States. So, in the earlier hypothetical, federal prosecutors could prosecute Alex only if Alex is a U.S. citizen or permanent resident. Furthermore, if Alex is a citizen or permanent resident of another country, Jordan cannot count on the ENOUGH Act for protection and will have to try another avenue to pursue criminal justice.

The reality for victims of international nonconsensual pornography is bleak. Current criminal law fails these victims in the United States because there is no federal law specifically outlawing this practice.<sup>304</sup> The U.S. Congress should pass the ENOUGH Act to afford U.S. citizens some recourse should they become victims of nonconsensual pornography. The ENOUGH Act, however, is limited because it reaches only U.S. citizens and permanent residents.<sup>305</sup> Furthermore, because extradition is a complicated process that requires the surrendering country to also criminalize nonconsensual pornography, extradition for trial in the United States is unavailable to victims whose perpetrators reside in countries in which nonconsensual pornography is legal.<sup>306</sup>

### *C. Awareness and Activism*

Because both international and domestic criminal law fails to protect victims of international nonconsensual pornography, the question now becomes: how do victims, lawyers, and law enforcement prevent and fight the spread of nonconsensual pornography?

One answer is to continue raising awareness about nonconsensual pornography, its forms, its effects on victims, and its potential for harm. Some groups are already working to raise awareness about nonconsensual pornography, such as the Cyber Civil Rights Initiative.<sup>307</sup> Founded in 2013, the Cyber Civil Rights Initiative is a nonprofit organization dedicated to “serving thousands of victims around the world and advocating for technological, social, and legal

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<sup>303</sup> ENOUGH Act § 1802(b).

<sup>304</sup> *State Revenge Porn Policy*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/state-policy/revenge-porn/> (last visited Nov. 9, 2019).

<sup>305</sup> *See supra* Section III.A.

<sup>306</sup> *Id.*

<sup>307</sup> *What We Do*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/our-services/> (last visited Nov. 9, 2019).

innovation to fight online abuse.”<sup>308</sup> Also, people can raise awareness by sharing their own stories, like attorney Carrie Goldberg in her book *Nobody’s Victim*<sup>309</sup> and Leah Juliett in her YouTube video *A Victim of Revenge Porn Tells Their Story*.<sup>310</sup>

Another answer is to demand and promote legislative action. Citizens of states that do not criminalize nonconsensual pornography can advocate for legislation that criminalizes that conduct. Such advocacy would require citizens to educate legislators and law enforcement about what nonconsensual pornography is, how it works, who it affects, and what other states have done to criminalize it. Personal stories of victims and perpetrators, model statutes, and advice from legal experts would all be useful in this process.<sup>311</sup>

The last answer for how people might fight nonconsensual pornography is simple: education. Educating people about new laws regarding nonconsensual pornography may incentivize law enforcement to investigate and prosecute cases at higher rates. Education may also help individuals make informed choices about whether they create intimate content of themselves and how they choose to share it. Last, education could inspire empathy for victims and prevent individuals from creating or sharing nonconsensual pornography in the first place.

Although criminal law offers limited solutions both domestically and internationally, advocates, legal professionals, and law enforcement seeking to combat nonconsensual pornography are not without avenues for change. Awareness-raising, advocacy, and education remain important tools in the fight against nonconsensual

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<sup>308</sup> *About Us*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/welcome/> (last visited Nov. 9, 2019).

<sup>309</sup> See CARRIE GOLDBERG, *NOBODY’S VICTIM* (2019).

<sup>310</sup> *As/Is, A Victim of Revenge Porn Tells Their Story*, YOUTUBE (May 10, 2018), <https://www.youtube.com/watch?v=Gw2-K97EweI>.

<sup>311</sup> However, awareness and advocacy are limited by large societal and governmental forces. For citizens of countries in which the dominant culture refuses to recognize expressions of sexuality outside marriage, or even punishes them, the process of raising awareness and advocating for legislation is far more complicated than for someone in a society that acknowledges sexuality openly. In a society where sexuality is only acknowledged inside marriage, for instance, it may be dangerous for individuals to tell the story of when their partner shared a consensually taken video after the relationship ended. Furthermore, advocating for legislation can be a difficult, time-consuming, and expensive process, even in a country with a governmental structure that is responsive to its citizens. For citizens of countries with broken, inefficient, or unresponsive governmental regimes, it can be extremely difficult or impossible to effect change on a legislative level.

pornography. Use of these tools, however, is not limited to those with a law degree or an elected office. Anyone can use these tools.

### CONCLUSION

Nonconsensual pornography affects people all over the world because it can be created in many different ways and distributed on and off the internet. It has devastating effects on its victims and negatively affects society as a whole. Although nonconsensual pornography is illegal in some states in the United States<sup>312</sup> and some countries,<sup>313</sup> it is not illegal everywhere. Because of this, victims of international nonconsensual pornography face significant barriers if they choose to pursue solutions via criminal law.

One possible solution for victims of international nonconsensual pornography in the United States is the ENOUGH Act introduced in the U.S. Congress in 2017. Unfortunately, the ENOUGH Act has not been signed into law as of April 5, 2020,<sup>314</sup> and it is only a limited solution that will necessarily leave some victims without recourse. Nevertheless, passing the ENOUGH Act would be a step toward protecting victims of international nonconsensual pornography. Not only would the bill provide recourse for victims, but passage of the ENOUGH Act would signal to people in the United States and around the world that the United States government takes seriously the harm of nonconsensual pornography and the protection of its victims.

There are other avenues beyond criminal law through which everyday people can combat nonconsensual pornography. By raising awareness, advocating for anti-nonconsensual pornography legislation, and educating people on the subject, we all can fight, prevent, and, hopefully, eradicate nonconsensual pornography.

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<sup>312</sup> See *supra* Section II.A.

<sup>313</sup> See *supra* Section II.B-C; *supra* note 185.

<sup>314</sup> ENOUGH Act § 1802(b).

