

THE ROLE OF TORTS IN THE FIGHT AGAINST NONCONSENSUAL PORNOGRAPHY

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I. INTRODUCTION

During her junior year at the University of West Florida, twenty-year-old Madison Conradis decided to model professionally to pay for her tuition.¹ Conradis was introduced to a photographer with whom she signed a contract stating that none of the images taken of her were to be “posted or published publicly” or “used for pornographic or other illicit purposes” absent Conradis’[s] consent.”² The photographer took over 100 photos of Conradis, a small portion of which captured her wearing lingerie or appearing naked, and stored the photos on a website called Zenfolio.³ Unbeknownst to both parties, Zenfolio’s security features were deficient and allowed the contents of private folders to be indexed by search engines.⁴ Thus, routine Google searches for “Madison Conradis” revealed the semi-nude images stored on a Zenfolio page that the photographer had titled with her name.⁵ Conradis never consented to the photographs’ public posting, nor did she publicly release the images.⁶

Three years after the photos were taken, and two years after Conradis had graduated, she started receiving messages from strangers on social media, commenting on the semi-nude images she had taken as a college student.⁷ It appeared that an anonymous internet user had exploited the vulnerabilities in Zenfolio’s security settings and located the photos of Conradis.⁸ Several of the more risqué photos had been published on online forums such as 4chan.org and thebarchive.com, image boards that contain thousands of posts and threads with pornographic content.⁹ These photos included her face as well as a distinctive tattoo, rendering her readily identifiable to those who knew her.¹⁰ With persistent searching, one 4chan user discovered Conradis’s email address, phone number, social media profiles, and place of work.¹¹ The anonymous person routinely contacted Conradis, threatening to send the images to Conradis’s family and friends if

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¹ Plaintiffs’ Amended Complaint at ¶ 20, *Conradis v. Geiger*, 6:18-cv-1486-Orl-TBS, 2018 WL 9458029 (M.D.Fla. Feb. 5, 2019).

² *Id.* at ¶ 22.

³ *Id.* at ¶ 21.

⁴ *Id.* at ¶ 23.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at ¶ 25.

⁸ *Id.* at ¶ 24.

⁹ *Id.* at ¶ 25.

¹⁰ *Id.* at ¶ 26.

¹¹ *Id.* at ¶ 30.

she did not send him more intimate photos and encouraging other 4chan.org users to torment her incessantly.¹² Conradis refused to comply with any of these demands, and the anonymous user began reposting photos from the original photo shoot on various online forums.¹³ On several occasions, the man sent a photo in which Conradis appeared to be naked to a professional contact of hers.¹⁴

Between 2017 and 2018, seven years after the original photos were taken, the man continued to post the photographs.¹⁵ Under Florida's Sexual Cyberharassment Law, however, Conradis's tormentor was in the clear. The law prohibits "sexual cyberharassment," which is defined as the publication of "a sexually explicit image of a person . . . to an internet website without the depicted person's consent . . . with the intent of causing substantial emotional distress."¹⁶ The anonymous man who targeted Conradis online alleged to be motivated by entertainment and sexual arousal. He was not a bitter ex-boyfriend; he was not even an acquaintance of Conradis. For the anonymous man, the identity of the woman he was harassing was unimportant, so long as he could amuse himself by soliciting her for more sexually suggestive images. For the purposes of the statute, nothing about their relationship or their interactions suggested that he *intended* to cause her "substantial emotional distress."¹⁷ Of course, the man's lack of specific intent was irrelevant to the real harm that Conradis experienced as a result of his actions. Still, the years of humiliation, shame, and fear that Conradis endured were left without remedy.

Conradis's case serves as a powerful example of the fact that, contrary to the phenomenon's misleading name, the vast majority of so-called revenge porn cases are motivated by desires much more banal than revenge.¹⁸ Nonconsensual pornography is, therefore, a more apt term to describe the phenomenon of distributing intimate images without the depicted person's consent. Most perpetrators of nonconsensual porn view the images as entertainment, a means of sexual gratification, or as a way to

¹² *Id.* at ¶ 24-30.

¹³ *Id.* at ¶ 42-43.

¹⁴ *Id.* at ¶ 32.

¹⁵ *Id.* at ¶ 42.

¹⁶ FLA. STAT. ANN § 784.049(2)(c) (West, 2019).

¹⁷ Plaintiffs' Amended Complaint at ¶ 89, *Conradis v. Geiger*.

¹⁸ See CCRI, *Nonconsensual Porn: A Common Offense*, CYBER CIVIL RIGHTS INITIATIVE (Jun. 12, 2017), <https://www.cybercivilrights.org/2017-natl-ncp-research-results/> (Finding 79 percent of perpetrators "claimed that they didn't intend to hurt the person when they shared a sexually explicit image or video of them without their consent").

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make a profit.¹⁹ In fact, over the past several years, sites dedicated to nonconsensual pornography have multiplied dramatically, giving internet users a place to shame, threaten, criticize, and derive sexual pleasure from photos and videos posted without their subjects' consent.²⁰ At the same time, social media sites like Tumblr, Wordpress, and Facebook have all been found to host threads and image boards dedicated to nonconsensual pornography.²¹ Though the community guidelines on these sites categorically ban nonconsensual pornography, their content monitors have been slow to identify and remove offensive content, and the sites retain near complete immunity from legal sanction for their content.²² In light of this lackadaisical approach to self-regulation, it is unsurprising that the number of women victimized by nonconsensual pornography continues to grow each year.²³ Given the high stakes, it is crucial for the law to properly grasp the nuances of nonconsensual pornography. Those who are victimized by such online sexual harassment should be able to bring causes of action against those who non-consensually disseminate their photos, and against the sites that encourage and profit from such distribution.

This article argues that the criminal law, in its present form, is woefully inadequate as a means of addressing the harms caused to victims of revenge porn. Instead, such harms are best addressed within the framework of tort law, which can more effectively target the organizations that perpetrate nonconsensual porn and expose patterns of systemic wrongdoing. In Part II, nonconsensual pornography is defined and assessed at the micro, meso, and macro levels. In Part III, the shortcomings of the relevant criminal statutes designed to mitigate nonconsensual pornography are explained. In Part IV, an argument is made that the torts system can be

¹⁹ Asia Eaton, Holly Jacobs, & Yanet Ruvalcaba, *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration*, CYBER CIVIL RIGHTS INITIATIVE 19, 20 (June 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

²⁰ Renee Viellaris & Lauren Martyn-Jones, *Revenge Porn: Thousands of Sites Dedicated to Ruining Lives*, THE COURIER-MAIL (Nov. 24, 2016, 12:00 AM), <https://www.couriermail.com.au/news/queensland/revenge-porn-thousands-of-sites-dedicated-to-ruining-lives/news-story/6b1c06d2dfb3fd82c46f46fa5cc9b622>.

²¹ Alex Hern, *How Revenge Porn Sites Rely on Legal Loopholes and Anonymity*, GUARDIAN (May 9, 2016), <https://www.theguardian.com/technology/2016/may/09/revenge-porn-websites-legal-loopholes-anonymity>; Sarah Ashley O'Brien, *Facebook's Controversial 'Revenge Porn' Pilot Program is Coming to the U.S., U.K.*, CNN (May 23, 2018), <https://money.cnn.com/2018/05/23/technology/facebook-revenge-porn/index.html>.

²² See Hern, *supra* note 21; Tarleton Gillespie, *How Social Networks Set the Limits of What We Can Say Online*, WIRED (June 26, 2018), <https://www.wired.com/story/how-social-networks-set-the-limits-of-what-we-can-say-online/>.

²³ Kimberly Lawson, *One in 25 Americans Say They've Been a Victim of Revenge Porn*, VICE (Dec. 14, 2016, 3:16 PM), https://www.vice.com/en_us/article/zmbva9/one-in-25-americans-say-theyve-been-a-victim-of-revenge-porn.

leveraged to achieve better outcomes for victims and undermine the economic engines that encourage the spread of nonconsensual pornography.

II. DEFINING NONCONSENSUAL PORN

Nonconsensual pornography is best conceptualized as a technique of sexual harassment that involves the distribution of sexually graphic images and videos of identifiable individuals without their consent.²⁴ Sometimes, these intimate images are taken without the subject's knowledge, sometimes they are taken with the subject's consent by a trusted partner, and sometimes they are taken by the subject herself.²⁵ The provenance of the photos is to some extent irrelevant, because the key element of nonconsensual pornography is distribution without the permission of the depicted individual. Such nonconsensual distribution can occur across all channels of digital communications. However, nonconsensual pornography is given its widest reach, and is at its most destructive, on the internet—where sexually graphic images and videos can be shared, virtually instantaneously, by anonymous perpetrators to an enormous audience. These unique features of cyberspace make the spread of nonconsensual pornography virtually impossible to track and even harder to contain, shrouding the forums and image boards through which nonconsensual pornography proliferates from the scrutiny of law enforcement.

Whether as a means of revenge, entertainment, sexual gratification, or profit, the thrill of nonconsensual porn for those who perpetrate it is that the subject has not consented to it.²⁶ Pornography is available all over the internet within just a few clicks, but the consumer of nonconsensual porn is interested in something more than graphic sexual depictions. He seeks the spectacle of nonconsensual porn, namely the idea that the woman he is looking at does not know he is looking at her and does not consent to his gaze.²⁷ It feels transgressive and powerful to know the subject in a way that she does not want to be known.²⁸ As Professor Mary Anne Franks has

²⁴ CCRI, *Definitions: Nonconsensual Porn*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/definitions/> (last accessed Jan. 11, 2021).

²⁵ Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

²⁶ See MaryAnne Franks, "Revenge Porn" Reform 69 FL. L. REV. 1251, 1254 (2017) ("The 'revenge porn' consumer is not aroused by graphic sexual depictions as such, but by the fact that the people in them – usually women – did not consent to being looked at"); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 64-65 (2014) (explaining that the host of an online nonconsensual porn forum attributed his behavior to the support from other men who enjoyed criticizing the women depicted).

²⁷ MATTHEW HALL & JEFF HEARN, REVENGE PORNOGRAPHY: GENDER, SEXUALITY, AND MOTIVATIONS 53-54 (2017).

²⁸ Rebecca Whisnant, *From Jekyll to Hyde: The Grooming of Male Pornography Consumers*, in EVERYDAY PORNOGRAPHY 122-123 (Boyle ed., 2010) (explaining that the anonymity of the online

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written, “We are a society of Peeping Toms, no longer fearing judgment for our voyeurism, but administering judgment on the objects of our gaze.”²⁹ Rather than turn away from the spectacle of a woman exposed against her will, consumers of nonconsensual pornography ogle her, criticize her with misogynistic refrains, and issue rape threats against her, all while being aroused by the fact that she did not give permission to be made vulnerable in this way.³⁰ Far more than her naked or semi-naked figure, he is interested in the fact that the explicit images and recordings were created within the context of a private, sexual relationship, and that they were not meant for him.³¹

For the victim, the unique harm of revenge porn is the distribution of intimate images *without her consent*. Consent is foundational to personal integrity and self-ownership. It is the fundamental boundary that protects against unwanted violations of one’s bodily autonomy and sexual privacy, inhabiting what Ronald Dworkin has termed, “a prophylactic line that comes close to making the body inviolate.”³² The crux of this personal integrity-based understanding of consent is that the individual sense of personhood is predicated on her ability to decide who may enter her private sphere. While many revenge porn cases start with the dissemination of an explicit image to a trusted other, such voluntarily disclosure does not amount to consent outside of the boundaries of the intimate relationship. A woman who shares a sexual photo of herself to her boyfriend does so because she assumes that the photos will remain confidential and will not be seen by others. The distribution of such images to others outside of that relationship, without the depicted individual’s permission, is nonconsensual. While a person can be invited into another’s private sphere by receiving an intimate image of her, from her, he cannot become the final arbiter of access to her private sphere. To do so renders her an unwilling participant in the sexual pleasure of complete strangers.

environment makes online porn consumers feel like they can get away with anything and “act in evil ways”); See Noam Lapidot-Lefler & Azy Barak, *Effects of Anonymity, Invisibility, and Lack of Eye Contact on Toxic Online Disinhibition* 28 *COMPUTERS IN HUMAN BEHAVIOR* 434, 440 (2012) (finding that the perpetration of toxic online behavior is exacerbated by feelings of anonymity among the perpetrators); AMY ADELE HASINOFF, *SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT* 132-136 (2015).

²⁹ Franks, *supra* note 26, at 1254.

³⁰ *Id.* (arguing “lack of consent has increasingly become the entire point of the spectacle”).

³¹ *Id.* (explaining “The ‘revenge porn’ consumer is not aroused by graphic sexual depictions as such, but by the fact that the people in them – usually women did not consent to being looked at”).

³² Ronald Dworkin, *Comment on Narveson: In Defense of Equality*, 1 *SOC. PHIL. & POL.* 24, 39 (1983).

According to a 2016 study, 4 percent of Americans have been threatened with, or been a victim of, nonconsensual pornography.³³ While anyone can be victimized by the dissemination of their intimate images, some groups are preyed on far more than others. Ninety-three percent of the victims of nonconsensual porn are female, and images of women make up the vast majority of content posted on websites dedicated to nonconsensual pornography.³⁴ Men are twice as likely to have shared nonconsensual porn than women, and women are 2.5 times as likely to have been threatened with nonconsensual porn.³⁵ People between the ages of 18 and 25 are far more likely to have perpetrated revenge porn than people in other age groups, while people between the ages of 34 and 41 have reported the highest levels of lifetime victimization by nonconsensual porn.³⁶ Finally, nonconsensual porn is perpetrated against sexual minorities at rates slightly higher than against individuals who identify as heterosexual.³⁷ All of these statistics speak to the dominant social force driving the nonconsensual dissemination of intimate images—the exercise of mastery, coercion, and control by advantaged groups over the less powerful.

A. Micro Level Analysis—Experiences of Victims and Perpetrators

A number of forces operate against victims of revenge porn, which normalize their suffering and inhibit their ability to seek justice. On the micro level, victims face feelings of emotional anguish and humiliation that arise from the discovery that their naked or nearly-naked self has spread around the internet, entertaining or sexually gratifying an unknown number of strangers. In a 2014 study of nonconsensual porn victims, 92 percent of respondents said the harassment they experienced had a strong negative emotional impact on them.³⁸ Among the most commonly reported emotional responses documented by the victims were feelings of anger, anxiety, depression, sadness, isolation, shame, fear of going on the internet, and fear of answering the phone.³⁹ Others said they received trauma

³³ Amanda Lenhart, Michelle Ybarra, & Myeshia Price Feeney, *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of Revenge Porn*, DATA & SOC'Y RESEARCH INST. (Dec. 23, 2016), https://datasociety.net/wp-content/uploads/2016/12/Nonconsensual_Image_Sharing_2016.pdf.

³⁴ Carolyn A. Uhl et al., *An Examination of Nonconsensual Pornography Websites*, 28 FEMINISM & PSYCHOL. 50, 53 (2018).

³⁵ Eaton et. al, *supra* note 19, at 14–15.

³⁶ *Id.* at 16–17.

³⁷ Jimmie Manning & Danielle Stern, *Heteronormative Bodies, Queer Futures: Toward a Theory of Interpersonal Panopticism*, 21 INFO., COMM. & SOC'Y, 208, 218 (2018).

³⁸ Don Taube, Keely Kolmes, & Colette Vogeles, *Preliminary Report: Without My Consent Survey of Online Stalking, Harassment, & Violations of Privacy*, CYBER CIVIL RIGHTS INITIATIVE 12 (Sept. 2014), <https://withoutmyconsent.org/perch/resources/wmcprelimsurveyreport.pdf>.

³⁹ *Id.* at 13.

diagnoses, experienced nightmares and flashbacks, lost friends and family, lost self-esteem and confidence, became paranoid and reclusive, and even considered suicide.⁴⁰ As one participant stated, “I veer between extreme motivation to learn and problem-solve, because I recognize now that this is a cutting edge topic. . . and the other side of the coin where every day I wish I could just stop living at all, and escape what is seemingly unescapable, unending torture.”⁴¹ Many of the participants blamed themselves for their victimization, felt helpless, and believed that they could do nothing to stop their tormentors.⁴²

Undergirding the emotional distress experienced by victims of nonconsensual pornography is an acute sense of powerlessness. Unlike actors in traditional pornography who consent to their sexualized image being widely shared, victims of revenge porn have no say in the matter. They are instead reduced to sexual objects for the consumption of others, regardless of whether or not they desire to be tools for others’ sexual purposes. In this way, the trauma and shame experienced by the victims of nonconsensual pornography becomes a cultural product from which men can derive entertainment or sexual pleasure. Such treatment fails to recognize women as free and equal beings, while dehumanizing them and encouraging their victimization. As Andrea Dworkin has written, “Objectification is an injury right at the heart of discrimination: those who can be used as if they are not fully human are no longer fully human in social terms; their humanity is hurt by being diminished.”⁴³ Such powerlessness is only amplified by the fact that it is the victim’s own body—perhaps depicted in her own photos—that now serves as the instrument of her harassment. Given that the digital representation of the victim’s most intimate and exposed selfhood provides the forum for her degradation, she turns her pain at the emotional penetration of her boundaries inward, blaming herself for her victimization.⁴⁴

At the expense of their victim’s autonomy, men who perpetuate nonconsensual pornography accumulate power within their social relations and manifest sexual competency. A man who sends his friends photos of a woman he once had sexual relations with does not send such pictures so that his friends can be aroused by the woman’s exposed figure; rather, he sends the photos so that his friends view him as potent, heterosexual, and in

⁴⁰ *Id.* at 14.

⁴¹ *Id.*

⁴² *Id.* at 16.

⁴³ Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, in *FEMINISM AND PORNOGRAPHY* 31 (Drucilla Cornell ed., 2000).

⁴⁴ Tegan Starr & Tiffany Lavis, *Perceptions of Revenge Pornography and Victim Blame*, 12 *INT’L J. OF CYBER CRIMINOLOGY* 427, 428-429 (2018).

control.⁴⁵ Transmission of such images allows him to marshal widespread taboos about the deviance of female sexuality, to confer on the subject what Martha Nussbaum described as “a spoiled, or stigmatized, identity, a compromised status.”⁴⁶ The woman depicted is diminished in stature—socially, professionally, and personally—through the broadcasting of her most intimate moments. In tandem with her demise comes her harasser’s accumulation of power and masculinity. By showing other men that he has the ability to make what was private public, and that he controls who has access to these intimate, private moments, the harasser exudes dominance and mastery.⁴⁷

Consider, for example, a study of users of the revenge porn site MyEx.com.⁴⁸ MyEx.com is a site that allows anonymous persons to post explicit images and videos of people they have allegedly been in relationships with.⁴⁹ Almost all of the posts on MyEx.com are from men, but little other demographic data can be gleaned from the materials because of the site’s privacy protections for posters.⁵⁰ The authors of the study observed that the men crafted a wide array of explanations for their decisions to expose their exes and acquaintances, but the underlying theme across all of the posts was that publishing these sexually explicit images made the men feel as though they were dominant, virile, and manly.⁵¹ A post titled “My Ex” from a user whose ex-girlfriend had recently broken up with him demonstrates this phenomenon succinctly: “Recently broke up because I was too controlling apparently, well I wouldn’t check her phone or tell her to close her [Facebook] if she didn’t flirt with every guy!!! As she is now done with me, no point keeping these [photos] to myself,” the user wrote above a series of explicit images that he had taken of his former girlfriend.⁵² Conceding that he had been dumped, and implicitly that he was not an omnipotent Adonis, the man posted the photos to show the other

⁴⁵ Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* 82-83 (Saul Levmore & Martha Nussbaum eds., 2010).

⁴⁶ *Id.* at 68.

⁴⁷ *Id.* at 84.

⁴⁸ See Matthew Hall & Jeff Hearn, *Revenge Pornography and Manhood Acts: A Discourse Analysis of Perpetrators’ Accounts*, 28 *J. OF GENDER STUDIES* 158 (2019) (Analyzing “men’s electronic texts accompanying their posing of explicit images on arguably the most popular revenge porn specific website MyEx.com”).

⁴⁹ See, e.g., *Suit: Former NFL Player Published Explicit Images of Ex-Wife Without Permission* CBS (Mar. 4, 2014), <https://chicago.cbslocal.com/2014/03/04/suit-former-nfl-player-published-explicit-images-of-ex-wife-without-permission/> (explaining that a person was sued after creating “a post on the ‘revenge porn site’ MyEx.com that identified his ex-wife by name and contained about 50 sexually explicit photos of her”).

⁵⁰ Hall & Hearn, *supra* note 48, at 161.

⁵¹ *Id.* at 162.

⁵² *Id.*

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anonymous users of the platform—a proxy for the larger social category of masculine men—that he was still in control and that he was still one of them.⁵³ He may have felt emasculated or powerless when his girlfriend broke up with him, but he could overcome such feelings by showing other men that while he might be vulnerable, at least he was not a woman.⁵⁴ In that sense, posting nonconsensual, intimate photos is a means for men to regain or increase their stature among other men, where the invasion of a woman’s privacy is construed as form of “homosocial exchange.”⁵⁵

B. Meso Level Analysis—Cultures of Shame

On the meso level, revenge porn is facilitated and emboldened by pervading cultures of shame regarding female sexuality and women’s sex organs. In the United States, widespread puritanical attitudes towards sex view women’s reproductive health, bodies, and sexual needs or pleasure as deviant, grotesque, or immoral.⁵⁶ Female sexuality is shamed along the lines of physical differences such as female reproductive organs, race, ethnicity, height or weight, or possession of desired sexual characteristics—as well as intangible social factors such as sexual orientation, sexual preferences, employment, or class.⁵⁷ In the case of nonconsensual porn, the locus of shame is the sexualized female body, exposed against its owner’s will.⁵⁸ As Martha Nussbaum has written, shame is so often connected to a desire to cover one’s sexual organs from view because they are “symbols of our animality and mortality, states that we are striving to transcend, always vainly.”⁵⁹ To have these most intimate, primordial parts of oneself revealed without inviting or consenting to such exposure thus feels like an

⁵³ *Id.* at 164 (explaining that a perpetrator’s “deployment of ‘jokey’ humour also works to present him as one of the lads”); *see also*, Whisnant, *supra* note 28, at 127 (explaining that “much pornography (and its promotional material) caters to anxious masculinity. . . Sometimes it is suggested that enjoying or at least tolerating extreme aggression against women is an indicator of masculinity”).

⁵⁴ Whisnant, *supra* note 28, at 127 (“Pornography includes a quieter backstory. . . not about women, but about the consumer’s own identity; and its central message is that the consumer is, or at least can be, a real man.”); *see also*, ROBERT JENSEN, GETTING OFF: PORNOGRAPHY AND THE END OF MASCULINITY 33 (2007) (“What brings us back, over and over, is the voice in our ears, the soft voice that says, ‘It’s okay, you really are a man, you really can be a man.’”).

⁵⁵ Hall & Hearn, *supra* note 48, at 162.

⁵⁶ Jackie Calms, *Poll Finds Most Americans Retain Puritanical Attitudes Toward Sex*, WALL ST. J. (Mar. 5, 1998, 12:33 AM), <https://www.wsj.com/articles/SB889045414360972500>.

⁵⁷ *See generally*, Erving Goffman, *Embarrassment and Social Organization*, 62 AM. J. OF SOC., 268, 268 (Nov. 1956).

⁵⁸ SARAH BANET-WEISER, EMPOWERED: POPULAR FEMINISM AND POPULAR MISOGYNY 67-71 (2018).

⁵⁹ MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 186 (2004).

unacceptable form of degradation⁶⁰ or searing affront to one's dignity or a regulation of one's gendered body.⁶¹

An acceptable female self in the context of sexual relations is a fundamentally private self.⁶² Any deviation from sexual privacy creates opportunities for shame, rendering women's publicly sexualized bodies the archetypal sites of subversiveness. For a woman to allow public intrusion into her intimate affairs has long been viewed as condemnable, dirty behavior.⁶³ The widespread vilification of sex workers, strippers, and porn stars conveys the message that to publicly sexualize oneself for the consumption of others is an unacceptable manifestation of indecency.⁶⁴ In this view, to relinquish control over her sexual privacy is to diminish one's claims to respect and sexual autonomy. It makes an individual's intimate choices appear as though they are not uniquely her own. Of course, the difference between sex workers, strippers, and porn stars, on the one hand, and victims of revenge porn on the other, is that while the former consents to an audience of strangers, the latter does not.

Shame about sex and nudity occurs where there is an audience that is not consented to.⁶⁵ A woman who sends a naked selfie to her boyfriend likely does not feel shame when her boyfriend sees the picture—after all, she intended to receive his gaze—but she might feel shame when her

⁶⁰ DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 7-8 (2011).

⁶¹ BANET-WEISER, *supra* note 58, at 71.

⁶² See Danielle Keats Citron, *Sexual Privacy*, 128 YALE L. J. 1870, 1898 (2019) (arguing that intimate activity and nudity can be viewed as “discrediting and shameful” when they are exposed to the public gaze); See also, BANET-WEISER, *supra* note 58, at 71 (explaining “The dominant public response to women who have been publicly shamed through revenge porn and online harassment has been the familiar tactic of blaming the victim: don’t take nude photos of yourself; don’t act in ‘slutty’ ways”).

⁶³ See Kate Lister, *Today's Sex Workers, Like Their Victorian Sisters, Don't Want Saving*, GUARDIAN (Sept. 20, 2019), <https://www.theguardian.com/commentisfree/2019/sep/20/sex-workers-sheffield-spear-mint-rhino> (explaining that the perception of sex workers as an immoral band of “abandoned sisters” has existed since Victorian times); see also, Ronald Weitzer, *The Campaign Against Sex Work in the United States: A Successful Moral Crusade*, 17 SEXUALITY RESEARCH & SOCIAL POLICY 399 (explaining that the past 70 years has seen “the growing stigmatization and criminalization of the individuals involved in sex work” and “over the past two decades, an influential moral crusade has vigorously targeted prostitution, pornography, commercial stripping” and more).

⁶⁴ Paul Berthe, *The Stigmatization Behind Sex Work*, SAMUEL CTR. FOR SOC. CONNECTEDNESS (May 4, 2018), <https://www.socialconnectedness.org/the-stigmatization-behind-sex-work/>; Jessica Blankenship, *The Social and Legal Arguments for Allowing Women to Go Topless in Public*, ATLANTIC (Sept. 18, 2013), <https://www.theatlantic.com/national/archive/2013/09/the-social-and-legal-arguments-for-allowing-women-to-go-topless-in-public/279755/> (explaining “The disparity in treatment of the genders appears to offer legal validation that a man’s view of a woman’s body is the only one that matters. The underlying message to the public is that women’s bodies are inherently sexual and thus inappropriate to be seen in public”).

⁶⁵ KRISTA THOMASON, NAKED: THE DARK SIDE OF SHAME AND MORAL LIFE 114 (2018) (“An unexpected audience ends the identification of our self-conceptions with our bodies, and we become in a somewhat literal sense self-conscious.”).

boyfriend's friends see it.⁶⁶ The source of such shame is mere unwanted exposure.⁶⁷ Much of this experience of shame is uniquely gendered. Sex and sexuality have traditionally been seen as activities for men and controlled by men.⁶⁸ As critical theorist Andrea Long Chu has written, femaleness is the “psychic operation in which the self is sacrificed to make room for the desires of another . . . to be female is to let someone else do your desiring for you.”⁶⁹ Thus, when women are documented experiencing real sexual pleasure, it can seem deviant, transgressive, and most of all, shameful.

The reality underlying the fantasy of the pornography industry—that the subjects depicted are acting, that their sexual gratification is pure performance—is not at play in cases of nonconsensual intimate images. Such images catch the subject lost in themselves, unconcerned with how others might see them, and this startling exposure erodes any sense of safety and security they might have formerly had. As Krista Thomason writes, “I might fear that what they have seen is somehow the ‘real’ me. Because they see me in an uninhibited moment, the way that I appear to them under normal social circumstances might now feel like a sham or fraud.”⁷⁰ Where one has an expectation of privacy because of certain contextual clues—having sex, changing clothes, texting one’s romantic partner—an intrusion can be particularly jarring and create immense shame. Those who perpetrate nonconsensual sharing of intimate images subvert their victim’s ability to choose who may see their naked or sexualized self and diminish their victim’s control over her sexual identity. Thus, more than harassment, threats, or coercion, nonconsensual pornography is at its core an invasion of sexual privacy, marshalling shame as a cultural weapon to do its bidding.

C. Macro Level Analysis—The Digital Landscape

On the macro level, the plight of victims of non-consensual porn is in direct tension with the rights of website operators who profit off of their pain. These sites enjoy immunity from liability for the abusive behavior of their users under Section 230 of the Communications Decency Act, which states that providers of interactive computer services cannot be treated as

⁶⁶ *Id.* (“When others catch us having sex. . . we are wrenched away from identifying with our bodies by the sudden presence of this uninvited person.”).

⁶⁷ *Id.* at 111 (“In many of these cases, exposure all by itself seems to be the source of shame.”).

⁶⁸ See CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 98 (1987) (arguing that women’s sexuality is defined by “the uses to which men put us”); see also, Judith Hill, *Pornography and Degradation*, 2 *Hypatia* 45 (1987) (arguing that women are viewed as “instruments” for male sexual pleasure).

⁶⁹ ANDREA LONG CHU, *FEMALES* 11(2019).

⁷⁰ Thomason, *supra* note 65, at 115.

publishers or speakers of user-generated content.⁷¹ Section 230 has been read quite broadly by courts who view its immunizing provisions as nearly absolute, protecting platforms even when they knew about users' illegal activities and provided means for those users to protect themselves from identification by law enforcement.⁷² Such sweeping protections for internet publishers ignore the legislative history of Section 230, which was created primarily to protect "Good Samaritan blocking and screening of offensive material" in instances where site operators exercised editorial authority to cull obscene content from their sites.⁷³ Despite being drafted as a means of protecting those trying to make the internet more "decent," Section 230 today serves to grant near-absolute immunity to website operators who perpetuate the abuse, exploitation, and shaming of vulnerable persons.

Since the dawn of the internet, countless sites have been created with the specific purpose of shaming and sexualizing women without their consent.⁷⁴ Under Section 230, these sites have enjoyed immunity against civil claims from victims. So long as they do not have a hand in generating the content on their sites, they cannot be held liable for their users' posts, regardless of how much they might incentivize and profit from their users' content.⁷⁵ Dirty.com, for example, is a social networking site effectively dedicated to spreading gossip.⁷⁶ Its founder, Nik Richie, encourages the site's users to email him "dirt" on people they know, and Richie posts his favorite submissions on the site.⁷⁷ The posts contain photos of naked or nearly naked young women who are unconscious, who are having sex, or who are otherwise vulnerable, and they are filed under headings like, "scantily clad," "inebriated," and "unfaithful."⁷⁸ In interviews, Richie has explained that he "ruin[s] people sometimes out of fun."⁷⁹

⁷¹ 47 U.S.C. § 230(c)(1) (1996).

⁷² Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 406–10 (2017).

⁷³ *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016).

⁷⁴ See generally Elisa Tate, *Challenging Women's Digital Agency: The Frequency of Slut Shaming in Social Media* *THE IJOURNAL* 37 (Spring 2016).

⁷⁵ See 42 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

⁷⁶ Kashmir Hill, *The Dirty Business: How Gossipmonger Nik Richie of TheDirty.com Stays Afloat*, *FORBES* (Nov. 11, 2010), <https://www.forbes.com/sites/kashmirhill/2010/11/11/the-dirty-business-how-gossipmonger-nik-richie-of-the-dirty-com-stays-afloat/#358263c662f9>.

⁷⁷ *Id.*

⁷⁸ Danielle Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity* 2 *GEO. L. TECH. REV.* 453, 454 (2018).

⁷⁹ Kate Knibbs, *Cleaning Up the Dirty*, *RINGER* (Apr. 19, 2017), <https://theringer.com/the-dirty-nik-richie-gossip-site-relaunch-4a086aa24536>.

Richie, however, cannot be sued for his role in any of the abuse that takes place on his site because he is protected by Section 230's provider immunity provision. Though his posts have shamed women and caused significant psychological harm for those depicted, courts have dismissed efforts to hold Richie responsible for the posts on Dirty.com.⁸⁰ Still, Richie's site, and similarly constructed revenge porn sites, boast significant ad revenue as a result of the thousands of unique users that troll the sites for lewd content each day.⁸¹ Owners of these sites also profit by making their most shaming and harmful content available only to paying subscribers, incentivizing users to pay a monthly fee in order to see photos of women passed out at fraternity parties, women posing suggestively in photos meant only for their boyfriends, and women in locker rooms or in bathrooms, and otherwise unaware that they might be photographed or recorded.⁸² In many ways, it is a lucrative and protected business to facilitate the invasion of women's sexual privacy.

Also on the macro level, victims of nonconsensual pornography are harmed by the challenges of anonymity. Should they desire to hold their abusers accountable, they must first identify them—a challenging task given that most nonconsensual pornography sites allow users to post under a pseudonym.⁸³ Users can also use anonymizing technologies that prevent host sites from tracking their IP addresses, and nonconsensual porn sites that consciously engage in harmful, invasive activities can simply disable their ability to track visitors' IP addresses.⁸⁴ Consider the case of AutoAdmit, a now-defunct internet discussion board where participants could post comments about colleges and universities under anonymous user names. In the early aughts, AutoAdmit became an extremely popular

⁸⁰ See, e.g., *Dyer v. Dirtyworld*, No. CV-11-0074-PHX-SMM, 2011 WL 2173900, at *3-4 (D. Ariz. June 2, 2011).

⁸¹ Hill, *supra* note 76.

⁸² Lorelei Laird, *Victims Are Taking On "Revenge Porn" Websites for Posting Photos They Didn't Consent To*, ABA JOURNAL (Nov. 1, 2013), https://www.abajournal.com/magazine/article/victims_websites_photos_consent.

⁸³ Amir Efrati, *Subpoenas Allowed in AutoAdmit Suit*, WALL ST. J. (Jan. 30, 2008, 9:08 AM), <https://www.wsj.com/articles/BL-LB-5226>; Russell Spears et al., *De-individuation and Group Polarization in Computer-Mediated Communication*, 29 BRIT. J. SOC. PSYCHOL. 121, 122-24 (1990) (explaining that group discussions can veer towards extreme positions as a result of pseudonym use and visual anonymity).

⁸⁴ See Nate Anderson, *Yale students unable to identify anonymous forum bashers*, ARS TECHNICA (Jan. 27, 2008, 11:39 PM), <https://arstechnica.com/tech-policy/2008/01/yale-students-unable-to-identify-anonymous-forum-bashers/> (explaining that AutoAdmit does not log users' IP addresses, "so finding out who was behind the messages has been difficult"); see also, CITRON, *supra* note 26, at 142-143 (explaining that the law has difficulty redressing injuries if defendants have used anonymizing technologies); see also, Danielle Citron, *Cyber Civil Rights* 89 B.U. L. REV. 61, 117 (2009) (explaining that claims cannot be pressed against cyber offenders if the websites hosting their abusive activities fail to track their IP addresses).

means of objectifying and humiliating female law school students.⁸⁵ Two students at Yale Law School were frequent topics on the site's message boards and were discussed by the site's users in vulgar and threatening terms.⁸⁶ Users alleged that the women had sexually transmitted diseases, commented incessantly on the women's bodies, made lewd remarks about their breasts, and threatened them with physical harm.⁸⁷ For example, in a thread titled "Which female YLS students would you sodomize?" users wrote of one student: "I'll force myself on her, most definitely," and "I think I will sodomize her. Repeatedly," and "Clearly she deserves to be raped so that her little fantasy world can be shattered by real life."⁸⁸

To accompany these message threads, AutoAdmit also encouraged nonconsensual photography and video recording of the women discussed on the forum.⁸⁹ In one instance, an anonymous user encouraged others to follow one of the women to Yale's gym and take her picture with the express purpose of posting it on an AutoAdmit forum. The user wrote: "I can assure you she doesn't dress conservatively. Anyone who goes to the gym in the afternoon has seen her traipsing around in spandex booty shorts and a strappy tank top."⁹⁰ A few days later, another user responded, "Take your goddamned cell phone next time and snap a pic, for Chrissakes. Then post of course."⁹¹ Once the woman discovered the posts about her, she feared for her safety walking around campus.⁹² She dressed more conservatively, she was wary of all interactions with classmates, she struggled to focus on schoolwork, and she was dissuaded from pursuing sexual relationships.⁹³ The violation of the woman's selfhood in cyberspace became a violation against the woman's selfhood in real life.

On a different occasion, a user posted photos of another Yale student that he retrieved from her private Facebook account. The user added the photos to an AutoAdmit forum, encouraging others to "rate" the woman.⁹⁴

⁸⁵ Ellen Nakashima, *Harsh Words Die Hard on the Web*, WASH. POST (Mar. 7, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030602705_pf.html; Brian Leiter, *Penn Law Student, Anthony Ciolli, Admits to Running Prelaw Discussion Board Awash in Racist, Anti-Semitic, Sexist Abuse*, LEITER REPORTS (Mar. 11, 2005), https://leiterreports.typepad.com/blog/2005/03/penn_law_studen.html.

⁸⁶ Complaint, Doe I v. Ciolli, 611 F.Supp.2d 216 (D. Conn. 2009) (No. 3:07-cv-909).

⁸⁷ *Id.*

⁸⁸ *Id.* at ¶27, ¶38.

⁸⁹ Plaintiffs' Memorandum of Law in Support of Opposition to John Doe 21's Motion to Quash Plaintiff's Subpoena at 4, Doe I v. Individuals, 561 F. Supp. 2d 249 (D. Conn. 2008) (No. 3:07-cv-909).

⁹⁰ *Id.* at 6.

⁹¹ Complaint at ¶43, Doe I v. Ciolli.

⁹² *Id.*

⁹³ Ryan Singel, *Yale Students' Lawsuit Unmasks Anonymous Trolls, Opens Pandora's Box*, WIRED (Jul. 30, 2008), <https://www.wired.com/2008/07/autoadmit/>.

⁹⁴ Complaint at ¶41, Doe I v. Ciolli.

While the woman had never intended for her photos to be seen by anyone beyond her list of Facebook friends, they were quickly and easily broadcast to all AutoAdmit users to invite mockery.⁹⁵ Over time, because of the enormous amount of traction generated by content about the women on AutoAdmit, Google searches for the victims' names revealed links to AutoAdmit message threads about them in the first page of results.⁹⁶ At the time of the plaintiffs' complaint, the top four searches for one of the victim's names on Google were AutoAdmit postings with obscene titles about the woman's breasts.⁹⁷ Still, victims could not press charges against many of the individual men who targeted them because their identities were hidden. Though victims posted several messages on AutoAdmit "requesting that defendants come forward for the purpose of being served with the complaint," unsurprisingly, none responded.⁹⁸

Ultimately, the unique regulatory and technological features of the digital ecosystem in which online harassment takes place facilitate the perpetuation of harmful conduct. Where site operators simply solicit harmful content—indeed, even when they pay for such harmful content by offering rewards for user-generated images and videos—they are immune to sanction. Their users, meanwhile, who stalk women, harass them online, and post photos of them when drunk, unclothed, or otherwise vulnerable, can also evade the scrutiny of law enforcement so long as they are careful not to leave a digital footprint. Cyberspace is therefore ideally suited to perpetuate harms against vulnerable women insofar as it provides countless forums for lewd and offensive imagery, a near infinite audience of internet users eager to leer and to shame, and relatively little oversight from website operators, internet service providers, or government authorities.

III. EFFORTS TO CRIMINALIZE REVENGE PORN

Over the past decade, the number of state "revenge porn" laws has increased fifteenfold—a testament to the degree to which the issue has spread to the public consciousness.⁹⁹ Today, forty-six states have

⁹⁵ See generally *id.*

⁹⁶ First Amended Complaint at ¶ 9, 16–17, *Doe I & Doe II v. Individuals*, 611 F.Supp.2d 216 (D. Conn. 2009) (No. 3:07–cv–909).

⁹⁷ *Id.* at ¶ 18.

⁹⁸ Plaintiff's Memorandum of Law in Support of Motion for Expedited Discovery at 12 n.80, *Doe I v. Ciolli*, 611 F.Supp.2d 216 (D. Conn. 2008) (No. 3:07–cv–909).

⁹⁹ See Jessica Goldstein, *Revenge Porn Was Already Commonplace. The Pandemic Has Made Things Even Worse* WASH. POST (Oct. 29, 2020), https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html (explaining that "As recently as six years ago, only three states had revenge porn laws. Since then, they have been enacted in 46 states and the District of Columbia"); CYBER CIVIL RIGHTS INITIATIVE, *46 States + DC + One Territory Now*

nonconsensual pornography statutes, but among them there exists significant variation in statutory formulations of intent. Ten states have statutes that require no specific intent and instead focus on the act of dissemination and the harm caused; twenty-one states require intent to harass; seven states require intent to harm; four states require intent to cause serious emotional distress; three states require intent to threaten or intimidate; and three states require intent to profit from the dissemination of the photos.¹⁰⁰

The diversity among the statutes reflects an enormous variance in opinion regarding the condemnable intent involved in nonconsensual pornography. While some states' statutes focus on intent to harass, extort, threaten, or coerce, other states focus on intent to cause emotional distress, financial harm, or reputational damage. These variations of revenge porn statutes are inadequate because they require opaque and difficult-to-prove constructions of the perpetrator's motivations. In all cases of nonconsensual pornography, the only intent that should matter is intentional dissemination, regardless of whether the perpetrator did so knowingly, recklessly, or intentionally, and regardless of whether he intended any sort of specific outcome. Ultimately, the crux of the injury caused by nonconsensual porn is an invasion of sexual privacy, leading to serious emotional distress. Until nonconsensual pornography statutes recognize this, the criminal law is an inadequate tool to slow the spread of nonconsensual pornography.

While revenge porn as a term implies a relationship between the perpetrator and the victim, and an intention on behalf of the perpetrator to harm his victim, neither of these features are prerequisites to carrying out an unauthorized disclosure of another person's intimate images and videos. According to a 2017 report by the Cyber Civil Rights Initiative, only 12 percent of perpetrators who shared such pornographic images were upset with the victim and wanted to hurt her.¹⁰¹ Seventy-nine percent simply wanted to share the image with friends, finding humor or entertainment in them.¹⁰² A law designed to punish only those who intend to harass or harm the victim depicted in the photo would not apply to four-fifths of nonconsensual pornography cases. Consider, for example, a person who receives a text from his friend with a naked picture of his friend's girlfriend. The person finds the photo amusing, so he posts it on Facebook, presuming his friends will find it equally fun to gawk at his friend's girlfriend. The

Have Revenge Porn Laws, <https://www.cybercivilrights.org/revenge-porn-laws/> (last updated Oct. 12, 2019).

¹⁰⁰ CYBER CIVIL RIGHTS INITIATIVE, *supra* note 99.

¹⁰¹ Eaton et al., *supra* note 19, at 19.

¹⁰² CCRI, *supra* note 18.

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woman finds out that the pictures she sent to her boyfriend in the context of their trusting relationship have wound up widely spread online, but she has no recourse against the person who posted them online under thirty-six of the forty-six state statutes. Her boyfriend's friend did not intend to harass her, harm her, cause her emotional distress, or even profit from the photos. Nevertheless, the potential social harm of his conduct is extraordinary in its capacity for psychological harm. If the law recognized that the harm of nonconsensual pornography is a loss of sexual privacy, however, then mere intentional disclosure, without further specific intent, would suffice to charge the perpetrator in a case such as this one.

Further, in terms of volume of images spread, the vast majority of nonconsensual pornography cases arise under circumstances in which the perpetrator does not know the victim at all, rendering statutes requiring specific intent and personal animus largely impotent.¹⁰³ Many revenge porn cases involve websites dedicated to the proliferation of intimate images of complete strangers. The site Anonymous Image Board, for example, which appears at first glance to be a conventional pornography website, features a host of categories dedicated specifically to nonconsensual pornography such as "drunk/passed out," "peeping toms," and "upskirt."¹⁰⁴ The content posted under these headings often features photos taken in dressing rooms, bathroom stalls, locker rooms, frat house bedrooms, and through bedroom windows.¹⁰⁵ Often, these photos feature identifying information coded in a way meant to evade the scrutiny of law enforcement such as "last name rhymes with []".¹⁰⁶ Users gain access to more photos by posting photos they have taken themselves, so they are incentivized to perpetuate further instances of revenge porn.¹⁰⁷ The site gets nearly 50,000 unique visitors and over 170,000 page views daily.¹⁰⁸ The proprietors of such sites can plausibly claim to intend no personal harm to the women depicted in the

¹⁰³ Eaton et al., *supra* note 19, at 20.

¹⁰⁴ Comments of the Electronic Privacy Information Center to the Federal Trade Commission, *In the Matter of Craig Brittain*, FTC FILE 1323120, 3, fn. 12 (Mar. 2, 2015), https://www.ftc.gov/system/files/documents/public_comments/2015/03/00048-93433.pdf; Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That's Ruining Women's Lives*, N.Y. POST (Sep. 22, 2017), <https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims/>.

¹⁰⁵ Fonrouge, *supra* note 104.

¹⁰⁶ As to not guide the reader to a pornography/Not Safe for Work (NSFW) website, the Cardozo Journal of Equal Rights and Social Justice and the Author have decided not to include the URL to this site. This quote was found on Anonymous Image Board's (AnonIB) website.

¹⁰⁷ Grace Lisa Scott, *What Is Anon-IB, The Revenge Porn Site At The Center of a Government Scandal*, INVERSE (Jan. 11, 2018) <https://www.inverse.com/article/40135-anon-ib-revenge-porn-site-scandal-senate>; Allee Manning, *Fighting Against the Website That Could've Ruined My Life*, MEDIUM (Feb. 23, 2018), <https://medium.com/s/darkish-web/fighting-against-the-website-that-couldve-ruined-my-life-fbb936a9a270>.

¹⁰⁸ Fonrouge, *supra* note 104.

photos in large part because they do not know the women personally. As one revenge porn site operator explained, “I call it entertainment We don’t want anyone shamed or hurt; we just want the pictures out there for entertainment purposes and business.”¹⁰⁹ Nevertheless, the invasion of privacy is undeniable.

Finally, another sizable category of nonconsensual porn cases involves the posting of photos on hidden social media groups and forums, designed so that victims never see the photos posted. Here, where significant effort has been dedicated to obscure the content from the public’s view, it is hard to make the argument that the perpetrators behind these informal organizations have intended anything towards their victims. Consider, for example, the high-profile case of a private United States Marines’ Facebook page on which hundreds of Marines shared naked photos and videos of female Marines without their consent.¹¹⁰ The content posted included images of fellow Marines’ genitalia and breasts as well as sexually graphic videos, capturing women in various states of undress.¹¹¹ Many of the women were identified by their full name, their rank, and the base where they were stationed.¹¹² The Marines case pointedly demonstrates the fallacy of the intent requirement. The Facebook group was by no means designed to harass the women depicted, as the Marines who used the group never contacted the women or their friends and family.¹¹³ In fact, the women did not know they were being shamed until a member of the group leaked its existence to the press.¹¹⁴ Through the efforts of this whistleblower, the privacy invasions perpetuated by the group were revealed, and the extent of the abuse was made clear to the women depicted.¹¹⁵ With this

¹⁰⁹ *Revenge Porn Website Has Colorado Women Outraged*, CBS DENVER (Feb. 3, 2014), <https://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/>.

¹¹⁰ Katie Van Syckle, *How Two Marines Helped Bring Down Revenge Porn on Facebook*, ROLLING STONE (May 5, 2017), <https://www.rollingstone.com/culture/culture-features/how-two-marines-helped-bring-down-revenge-porn-on-facebook-114663/>.

¹¹¹ Shawn Snow, *Seven Marines Court-Martialed in Wake of Marines United Scandal*, MARINE CORPS TIMES (Mar. 1, 2018), <https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/>.

¹¹² Chris Perez, *Marines Shared Photos of Naked Female Recruits on Secret Facebook Page*, N.Y. POST (Mar. 5, 2017), <https://nypost.com/2017/03/05/marines-shared-photos-of-naked-female-recruits-on-secret-facebook-page-report/>.

¹¹³ Citron & Franks, *supra* note 25, at 366 (explaining that cyber harassment requires a course of conduct as well as “persistent abuse communicated directly to victims”).

¹¹⁴ Claudia Koerner, *Revenge Porn Took Over a Marines Facebook Group, And There’s Nothing to Keep It From Happening Again*, BUZZFEED NEWS (Mar. 15, 2017), <https://www.buzzfeednews.com/article/claudiakoerner/revenge-porn-took-over-a-marines-facebook-group-and-theres>.

¹¹⁵ Jeff Schogol, *“I don’t want to leave my house”: Victims Haunted by Marines’ Nude Photo Scandal*, MARINE CORPS TIMES (Mar. 6, 2017), <https://www.marinecorpstimes.com/news/pentagon-congress/2017/03/06/i-don-t-want-to-leave-my-house-victims-haunted-by-marines-nude-photo-scandal/>.

acknowledgement came all of the emotional distress and shame attendant to more classic cases of revenge porn involving jilted lovers or jealous friends.

By conceptualizing harassment or disorderly conduct as the wrong at issue, specific intent revenge porn statutes do not capture perpetrators in any of the three molds mentioned above. Instead, they capture just one-fifth of all revenge porn perpetrators.¹¹⁶ For a crime that already dissuades victims from coming forward given the shame associated with exposure, it seems ineffectual to draft statutes which express to the vast majority of revenge porn victims that the harms they have experienced are not cognizable.¹¹⁷ Ultimately, mischaracterization of the nature of the harm caused leads to the drafting of inadequate legislation that neither deters future perpetrators nor sufficiently recompenses victims for the harms done to them.

IV. TORTS AS THE SOLUTION TO NONCONSENSUAL PORN

Until criminal law statutes include more capacious definitions of nonconsensual porn, tort law offers a better path forward to deter revenge porn. By looking to the harm done rather than the specific intent of the perpetrators, the tort system can more effectively target the organizations that perpetrate nonconsensual pornography, pursue punitive damages, and expose and publicize patterns of systemic wrongdoings. As professors Thomas Koenig and Michael Rustad have written, over the past four decades, “Tort law has expanded to encompass a public social justice role in addressing pervasive social problems without requiring an inflexible government bureaucracy.”¹¹⁸ Tort law can allow victims to be recompensed for the emotional harms caused by nonconsensual porn and can send the perpetrators of nonconsensual porn into financial ruin. Meanwhile, civil condemnation via punitive damages can put the websites that encourage nonconsensual pornography out of business, while communicating a powerful deterrence message to others that there will be no tolerance for their harmful conduct.

Depending on the unique features of the case, plaintiffs can bring any number of tort claims against the perpetrators of nonconsensual

¹¹⁶ CCRI, *supra* note 18.

¹¹⁷ Danielle Citron & Mary Anne Franks, *Evaluating New York’s ‘Revenge Porn’ Law: A Missed Opportunity to Protect Sexual Privacy*, HARV. L. REV. BLOG (Mar. 19, 2019), <https://blog.harvardlawreview.org/evaluating-new-yorks-revenge-porn-law-a-missed-opportunity-to-protect-sexual-privacy/> (arguing that the revenge porn is not a form of harassment, as some state statutes suggest, but rather involves an invasion of sexual privacy).

¹¹⁸ Thomas Koenig & Michael Rustad, *Hate Torts to Fight Hate Crimes*, 51 AM. BEHAVIORAL SCI. 2, 302 (2007).

pornography. Three claims, however, are likely to garner the most significant impact against defendants in cases of nonconsensual pornography—intentional infliction of emotional distress, public disclosure of private facts, and vicarious liability for site operators. The first two torts address the intent-related shortcomings of state revenge porn statutes by capturing instances in which the perpetrator either intentionally or recklessly caused some sort of psychic harm or privacy intrusion.¹¹⁹ Neither intentional infliction of emotional distress nor public disclosure of private facts require that the perpetrator desired to cause those specific outcomes with his behavior; all that matters is that the perpetrator acted in a certain condemnable way causing his victim legally cognizable hardship.¹²⁰ This, of course, is a stark contrast from the criminal statutes discussed *supra* Part III, in which the defendant must have specifically intended to harass, coerce, or cause emotional distress to his victim.

The third tort, vicarious liability of site operators, addresses the shortcomings of state revenge porn statutes in regard to sanctioning the websites that promote and enable nonconsensual pornography. As Koenig and Rustig write, the organizations responsible for inciting attacks are unlikely to be prosecuted because of “the elevated burden of proof required for criminal convictions, the limited resources of government prosecutors, and the inflexibility of criminal law statutes.”¹²¹ With limited time and resources, it is often the case that prosecutors are simply unable to target the organizations who fund and encourage the perpetration of harmful conduct, particularly where criminal investigations would warrant significant forensic analysis to uncover anonymous actors or where there is no evidence of direct violence.¹²² However, where prosecutors are unwilling or unable to file criminal actions, victims can pursue civil lawsuits, expose organizational wrongdoing, and punish the operators of offensive websites with punitive damages. Unlike prosecutors who must wait for a significant criminal act to press charges, civil litigants can pursue damages for less noticeable, but equally damaging, patterns of misconduct and negligence. Through such actions, victims can also raise awareness about types of condemnable behavior that law enforcement officials might otherwise deride as less important than

¹¹⁹ Caroline Drinnon, *When Fame Takes Away the Right to Privacy in One's Body: Revenge Porn & Tort Remedies for Public Figures*, 24 WILLIAM & MARY J. OF WOMEN & L. 209, 221-23 (2017).

¹²⁰ *Id.*

¹²¹ Koenig & Rustad, *supra* note 118, at 306.

¹²² *Id.*

other categories of crime. Each of these three tort claims is described in more detail below.

A. Intentional Infliction of Emotional Distress

Given the high rates of psychological disorders and mental and emotional illness caused by nonconsensual pornography, intentional infliction of emotional distress (“IIED”) is likely the foremost claim for which victims might pursue damages. A plaintiff making an IIED claim must show (1) that the defendant acted with “extreme and outrageous conduct, intentionally or recklessly caus[ing] . . . emotional distress;” (2) that the plaintiff suffered severe emotional distress; (3) that “no reasonable person could be expected to endure it;” and (4) that the defendant’s actions were the actual or proximate cause of the plaintiff’s emotional distress.¹²³

While the second and fourth criteria in this framework seem clearly applicable to the experiences of nonconsensual pornography victims, the first and third criteria are a bit more opaque. In a culture in which shaming female sexuality is normalized, would posting a woman’s nude photos, that she took herself, constitute extreme and outrageous conduct? How about posting her address or detailing her sexual proclivities? The commentary to the Second Restatement has expanded upon the criteria of “extreme or outrageous conduct,” to explain that the conduct must “go beyond all possible bounds of decency” and be “utterly intolerable in a civilized community.”¹²⁴ Courts have interpreted such behavior to include sending Christmas cards containing sexually explicit photos of an ex-girlfriend to her family and friends and sending three different ex-girlfriends videotapes of sexual encounters with each of the women, which none of the women knew had been filmed.¹²⁵ From these examples, it seems fair to assume that cases of nonconsensual pornography online could merit an IIED claim.

The third requirement—that the average, reasonable person would not be able to withstand the distress—is more challenging to grasp in light of the somewhat vague term, “reasonable person.” In a legal system designed by and for men, the term reasonable person often fails to grasp the complexities of harms perpetrated predominantly against women, particularly when those harms are psychological.¹²⁶ Would an

¹²³ RESTATEMENT (SECOND) OF TORTS § 46, at 71 (AM. LAW INST. 1965).

¹²⁴ *Id.* at 73.

¹²⁵ *Del Mastro v. Grimado* No. Civ. A. BER-C-388-03E, 2005 WL 2002355, at *1, 8 (N.J. Super. Ct. Ch. Div. 2005); *Lewis v. LeGrow*, 670 N.W.2d 675 (Mich. Ct. App. 2003).

¹²⁶ See, e.g., Elizabeth Shoenfelt, Allison Maue, & JoAnn Nelson, *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 J. OF GENDER, SOC. POL. & L. 633, 646–47 (comparing and

image of a man having sex at a fraternity party cause as much intrigue and vilification as a woman? While women are often shamed for their sexuality, men are lauded for manifesting anything close to a sexual prowess.¹²⁷ Perhaps courts using the reasonable person standard would apply the IIED analysis with a reasonable man in mind as opposed to a reasonable woman and therefore disregard the unique, gendered harms that women face when confronting the sex-shame dialectic. However, in many nonconsensual porn cases where a female victim has raised an IIED claim, the court has recognized that the harm suffered by the woman could not be endured by any reasonable person.

Consider, for example, a case in California where a man posted sexual photographs and videos of his ex-girlfriend on pornography websites under a profile using her real name.¹²⁸ He also used the photographs to impersonate her on dating websites, posting her address and phone number to an OkCupid profile and encouraging users of the site to visit his ex-girlfriend for sex.¹²⁹ He also sent photos to the woman's acquaintances and professional contacts, saying that he wanted to make her life "so miserable she would want to kill herself."¹³⁰ For years, she received "countless messages and requests from strange men through her Facebook, LinkedIn, OkCupid, and Instagram accounts."¹³¹ As a result of all of this targeted harassment across multiple platforms, the woman was unable to sleep, feared for her physical safety, was unable to dedicate herself fully to her work, and had to work hard to repair her professional reputation.¹³² The woman ultimately sued her ex and, after a bench trial in front of a conservative, male judge, was awarded \$3 million in compensatory damages for IIED and \$3 million in punitive damages.¹³³

contrasting the standards of reasonable person and reasonable woman in determining hostile work environment sexual harassment).

¹²⁷ Derek A. Kreager & Jeremy Staff, *The Sexual Double Standard And Adolescent Peer Acceptance*, 72 SOC. PSYCH. Q. 2, 147–150 (2009).

¹²⁸ First Amended Complaint at ¶10, *Doe v. Elam II*, No. 14-9788, 2015 WL 10001703 (C.D. Cal., Feb. 12, 2015), ECF No. 11.

¹²⁹ *Id.* at ¶¶10-11.

¹³⁰ Christine Hauser, *\$6.4 Million Judgment in Revenge Porn Case Is Among Largest Ever*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html>.

¹³¹ First Amended Complaint at ¶24, *Doe v. Elam II*.

¹³² *Id.* at ¶26.

¹³³ Proposed Default Judgment, *Doe v. Elam II*, CV 14-9788-PSG-SS (C.D. Cal. Apr. 4, 2018), ECF No. 149.

B. Public Disclosure of Private Facts

Victims of revenge porn can also bring public disclosure of private facts claims against those who post intimate images of them online. A plaintiff in such a case must establish four elements to hold an individual liable for publication: (1) the disclosure of facts must be public; (2) the fact disclosed must be private, and not generally known; (3) the publication of the private facts must be offensive to a reasonable person of ordinary sensibilities; and (4) the facts disclosed must not be a matter of legitimate public concern.¹³⁴

In the context of nonconsensual pornography, this first factor of public disclosure would amount to any publication to a website that can be accessed by the public.¹³⁵ Even publication to forums hidden behind paywalls or image boards' subscription fees would be considered public insofar as a sizable portion of members of the public are capable of gaining access.¹³⁶ While some instances of nonconsensual porn would not meet this level of publicity—consider, for example, those cases in which photos are disseminated exclusively in private text messages—nearly all cases in which an individual is profiting from the nonconsensual dissemination will involve some element of publication in order to maximize subscriptions and ad revenue.¹³⁷ To some extent, the harm caused by revenge porn is amplified proportionally by the number of people that the images are made accessible to. When images of an individual's most vulnerable moments are available within a few keystrokes for the world to see, the privacy invasion is so severe, so difficult to mitigate, that it warrants a remedy of its own.

As to the second factor, courts have recognized public disclosure claims even where the plaintiff had shared private information with one other, trusted person or where the information was first disclosed in the context of a closed community with a strong expectation of privacy.¹³⁸

¹³⁴ RESTATEMENT (SECOND) OF TORTS § 652(d), at 383 (AM. LAW INST. 1976).

¹³⁵ DANIEL SOLOVE & PAUL SCHWARTZ, INFORMATION PRIVACY LAW 117–120 (4th ed. 2011).

¹³⁶ See Tara M. Breslawski, *Privacy in Social Media; To Tweet or not to Tweet?* 29 TOURO L. REV. 1283, 1291 (2013) (explaining that information might be considered public even when it is accessible only to a selected group of recipients).

¹³⁷ Christopher Mims, *How the Internet Porn Business Works*, MIT TECH. REV. (May 18, 2010), <https://www.technologyreview.com/2010/05/18/203327/how-the-internet-porn-business-works/>; Thao-Mi Bui, *The Economics of Pornography Stripped Down*, ESSA (Sept. 15, 2017), <http://economicstudents.com/2017/09/economics-pornography-stripped/>.

¹³⁸ SOLOVE & SCHWARTZ, *supra* note 135, at 126; See e.g., *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931) (holding that referencing a former prostitute's maiden name in a movie could incite a public disclosure claim); *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964) (sustaining a public disclosure claim where a newspaper published a photograph of a woman whose dress was blown up); *Barber v. Time, Inc.* 159 S.W.2d 291 (Mo. 1942) (sustaining a public disclosure claim arising out of the publication of an article describing a person's illness); *Brents v. Morgan*, 299 S.W. 967 (Ky. Ct. App.

In all cases of revenge porn, the private facts at issue are the data revealed by the photo or video of the exposed person as well as any captions or commentary associated with the content. These facts can be anatomical (this woman has large breasts), anecdotal (this woman had sex with this person here), statistical (her address is this), or socially constructed (this woman is promiscuous, unclean, compromised). In that sense, the facts revealed by intimate images are influenced in part by the various biases of the audience consuming those images and deriving conclusions about the individual depicted.

For the third criteria of offensiveness, it is not difficult to imagine that where the person depicted is naked, scantily clad, or engaging in some sex act, the reasonable person would find the image or recording offensive to their sensibilities.¹³⁹ Further, courts have on several occasions deemed the mere involuntariness of the exposure to be offensive in its own right. In *Daily Times Democrat v. Graham*, for example, a newspaper published a picture of a woman whose lower body was exposed after her dress was blown up by air jets.¹⁴⁰ The court held in favor of the woman, explaining that not only was the photograph embarrassing, but it was offensive to modesty given the involuntary nature of the exposure.¹⁴¹

Finally, to the question of public interest, courts typically look to the “customs and conventions of the community.”¹⁴² The Restatement makes a point of drawing a line between the “giving of information to which the public is entitled” and “morbid and sensational prying into private lives for its own sake.”¹⁴³ Given that courts have repeatedly conceded that mere public curiosity is not enough to demonstrate public interest, it seems fairly straightforward that publishing a private person’s intimate images online would not constitute a matter that legitimately concerns the public.¹⁴⁴ Such photos are released into the world with no

1927) (sustaining a public disclosure claim where defendant posted a large sign in his window stating that the plaintiff owed a debt).

¹³⁹ Mudasir Kamel & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359, 363 (2016).

¹⁴⁰ *Daily Times Democrat*, 162 So. 2d at 477–78.

¹⁴¹ *Id.*

¹⁴² *Virgil v. Time*, 527 F.2d 1122, 1129 (9th Cir. 1975).

¹⁴³ RESTATEMENT (SECOND) OF TORTS § 652(d), cmt. H (AM. LAW INST. 1976).

¹⁴⁴ David A. Elder, *Privacy Torts*, § 3:17, at 3-154–3-156 (2016); *See* U.S. Dept. of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989) (holding that disclosure of an FBI rap sheet to a third party could constitute an unwarranted invasion of personal privacy); *World Pub. Co. v. U.S. Dept. of Justice*, 672 F.3d 825 (10th Cir. 2012) (holding that plaintiff’s personal privacy interest in mug shots outweighed the public curiosity in the photos); *Karantalis v. U.S. Dept. of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (holding that an individual’s privacy interest in his booking photos outweighed the value of “satisfying voyeuristic curiosities”); *National Archives and Records Admin. v.*

legitimate purpose, harming otherwise private individuals and exposing the most intimate, deeply felt parts of their lives for the rest of the world to see.

C. Vicarious Liability

The most significant way in which the tort system can prevent the harms caused by nonconsensual pornography is by holding site operators vicariously liable for the injuries caused by their users. An employer is vicariously liable for his employee's intentional tort where the tort was committed in the scope of employment, in furtherance of the employer's business, and was foreseeable.¹⁴⁵ In cases of harmful or hateful businesses or organizations, vicarious liability is a clever means of holding such groups liable for encouraging their members or employees to commit intentional torts. The key question in such cases boils down to whether the agent's actions were in the scope of his duties to the principal. In several cases, for example, racist organizations have been held vicariously liable for the hateful acts of their members and have incurred punitive damages to the tune of several million dollars.¹⁴⁶ Civil actions against these organizations enforce societal mores, deter similarly inclined organizations, and siphon from the group's coffers. Finally, unlike criminal sanctions, which may lead to the imprisonment of one or two members of the group, vicarious liability constitutes an existential threat to the organization by endangering its financial sustainability.

For all of these reasons, vicarious liability may be a powerful tactic to take down websites peddling nonconsensual pornography. As discussed *supra* Part III, the operators of such sites are not motivated by any sort of ideology or by a desire to provide sexual gratification. Instead, they are interested in making money. Through the

Favish, 541 U.S. 157 (2004) (holding that a family's privacy interest in "death-scene" photos of their deceased relative outweighed the curiosities of the public); *Broward Bulldog, Inc. v. U.S. Dept. of Justice*, 939 F.3d 1164, 1187 (11th Cir. 2019) (holding that "there is a difference between public curiosity and the type of public interest that can outweigh a personal privacy interest"); *Fund for Const. Gov. v. Nat'l Archives and Records Service*, 656 F.2d 856, 866 (D.C. Cir. 1981) (explaining that individuals' privacy rights "cannot be overridden by a general public curiosity").

¹⁴⁵ EDWARD J. KIONKA, *TORTS BLACK LETTER OUTLINES* 294 (5TH ED. 2013).

¹⁴⁶ *Koenig & Rustad*, *supra* note 118, at 303; *See Berhanu v. Metzger*, 119 Or. App. 175 (Or. Ct. App. 1993) (assessing White Aryan Resistance over \$12 million in damages after some of their members beat an Ethiopian man to death); *Fisher v. Carousel Motor Hotel*, 424 S.W.2d 627 (Tex. 1967) (upholding damages assessed to a hotel after a white employee harassed and assaulted a black patron); *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173 (Wash. 1977) (assessing damages to a company after the boss of that company launched a slew of racial slurs at an employee); *In re: South African Apartheid Litigation*, 617 F.Supp.2d 228 (S.D.N.Y. 2009) (upholding damages assessed against defendant multinational corporations for aiding and abetting apartheid).

advertisements that appear on the sidebars of their pages of explicit images, and the subscription fees that their most loyal consumers pay to access their content, nonconsensual pornography sites are highly profitable.¹⁴⁷ Operating such sites is not an expensive proposition, and the business is highly scalable and able to be morphed into myriad spinoffs to satisfy different audiences' sexual interests as well as different countries' internet regulations.¹⁴⁸ Consider the case of Craig Brittain, who founded the revenge porn site *isanybodydown.com* and, according to Federal Trade Commission investigators, earned at least \$12,000 in fees from users of his site.¹⁴⁹ Brittain had no personal animus against the women victimized by his site, nor was he compelled to harass them by some sexual desire. He was interested solely in turning a profit off of the lurid content that he compiled on his site.¹⁵⁰ It was only after reaching a settlement with the FTC, which required Brittain to remove all of the photos on *isanybodydown.com* that he stopped operating the site.¹⁵¹ Importantly, Brittain did not incur any fines or face any criminal sanctions for operating the site because he was a first-time offender.¹⁵² Rather, it seems that it was mere unprofitability of the site—caused by its FTC-mandated lack of content—that rendered it undesirable for Brittain to continue.¹⁵³ Thus, with threat of financial

¹⁴⁷ Gordon Fletcher, *Revenge Porn Has Become Too Profitable to Go Away*, THE CONVERSATION (Apr. 24, 2014), <https://theconversation.com/revenge-porn-has-become-too-profitable-to-go-away-25837>; Dan Tynan, *Revenge Porn: The Industry Profiting from Online Abuse*, GUARDIAN (Apr. 26, 2016), <https://www.theguardian.com/technology/2016/apr/26/revenge-porn-nude-photos-online-abuse>.

¹⁴⁸ Walt Hickey, *Entrepreneur Explains How to Make Hundreds of Thousands of Dollars Per Year Owning a Porn Site*, BUSINESS INSIDER (Aug. 19, 2013), [file://localhost/https://www.businessinsider.com/how-to-make-hundreds-of-thousands-per-year-owning-a-porn-site-2013-8](https://www.businessinsider.com/how-to-make-hundreds-of-thousands-per-year-owning-a-porn-site-2013-8).

¹⁴⁹ FTC Complaint In the Matter of Craig Brittain, Docket No. 132 3120 (2015), <https://www.ftc.gov/system/files/documents/cases/150129craigbrittaincmpt.pdf>.

¹⁵⁰ CBS Denver, *supra* note 109.

¹⁵¹ Joshua Barrie, *A Man Who Ran An Alleged "Revenge Porn" Website Says He's Now "A Different Person"*, YAHOO! FINANCE (Jan. 30, 2015), <https://in.finance.yahoo.com/news/man-ran-alleged-revenge-porn-193300696.html>.

¹⁵² Jeff Roberts, *FTC Shuts Down "Revenge Porn" Operation, But Imposes No Fine*, GIGAOM (Jan. 29, 2015), <https://gigaom.com/2015/01/29/ftc-shuts-down-revenge-porn-operation-but-imposes-no-fine/>.

¹⁵³ See Thomas Brewster, *Craig Brittain: Confessions of an "Accidental" Revenge Porn Pusher*, FORBES (Feb. 6, 2015) <https://www.forbes.com/sites/thomasbrewster/2015/02/06/revenge-porn-apology-craig-brittain/?sh=77bf70572ad9> (explaining that "Brittain is still trying to profit from *IsAnybodyDown.com*, with apparent plans to sell it with an asking price of \$10,000"); See also Jessica Roy, *Even As He Promises to Close "Is Anybody Down," Craig Brittain Covertly Plans a New Revenge Porn Site*, OBSERVER (Apr. 5, 2013), <https://observer.com/2013/04/craig-brittain-revenge-porn-is-anybody-down-obama-nudes/> (explaining that on the same day that Brittain announced he was shutting down *isanybodydown.com*, he "registered for the domain names *ObamaNudes.com* and *ObamaNudes.net* and transferred all of IAD's content over to them").

ruin, site operators such as Brittain would have no incentive to continue facilitating the harassment of vulnerable women.

i. Employer-Employee Relationship

Of course, there are some hurdles that vicarious liability claims against nonconsensual porn sites face. The first is the problem of the employer-employee relationship, and the second is the problem of the provider immunity under Section 230 of the Communications Decency Act. As to the employer-employee relationship, it seems difficult to argue that users of nonconsensual porn sites have enough connection to the site operators for the site operators to be held liable for their behaviors. Outside of the context of the internet, however, non-employment-based relationships between organizations and their agents or representatives have resulted in successful claims of vicarious liability. Various hate groups, for example, have been held liable for the activities carried out by their members in a civil litigation strategy first popularized by the Southern Poverty Law Center in the 1980s.¹⁵⁴ In 1984, the SPLC filed suit against the white supremacist group, United Klans of America, and its national leader, on behalf of the wife of a Black man who was murdered by two low-ranking members of the group.¹⁵⁵ The SPLC argued that the men were acting as conspiratorial agents to further the klan's agenda of racially motivated violence, and as a result, the UKA should be held vicariously liable for their members' conduct.¹⁵⁶ The jury agreed and awarded the victim's wife \$7 million in damages.¹⁵⁷ In 1989, the SPLC pursued the same tactic once again, filing a wrongful death lawsuit against the White Aryan Resistance and its leaders on behalf of an Ethiopian man who was murdered by members of the organization.¹⁵⁸ The suit claimed that WAR was

¹⁵⁴ Salmon Shomade, *Southern Poverty Law Center*, CIVIL LIBERTIES IN THE U.S. (Jul. 9, 2012), <https://uscivil liberties.org/organizations/4509-southern-poverty-law-center.html>.

¹⁵⁵ *Id.*; Composite Complaint, *Donald v. United Klans of America, Inc.*, No. 84-0725 (S.D. Ala. Aug. 19, 1985), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/beulahvunklan_compcomplaint.pdf.

¹⁵⁶ Shomade *supra* note 154.

¹⁵⁷ Final Judgment, *Donald v. United Klans of America, Inc.*, No. 84-0725 (S.D. Ala. Feb. 12, 1987), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/beulahvunklan_judgment.pdf.

¹⁵⁸ *Berhanu v. Metzger*, 15 Cal. Rptr.2d 191 (Cal. Dist. Ct. App. 1992); *Tom Metzger*, SPLC <https://www.splcenter.org/fighting-hate/extremist-files/individual/tom-metzger> (last accessed Feb. 1, 2021); Elden Rosenthal, *White Supremacy and Hatred in the Streets of Portland* 120 OR. HISTORICAL QUART. 588, 590-603 (2019); Douglas Perry, *White Supremacists on Trial for Inciting Murder Required Extraordinary Security in Portland; Case Reverberates 30 Years Later* THE OREGONIAN (Jan. 8, 2020),

vicariously liable for the activities of its members because the men were encouraged to confront minority groups by senior members of organization.¹⁵⁹ The jury agreed, awarding the Ethiopian man's family \$12.5 million in damages.¹⁶⁰

In both cases, the organizations' vicarious liability arose from theories of aiding and abetting and civil conspiracy – both of which might apply to nonconsensual porn site operators and their agents. As to aiding and abetting, lawyers for the SPLC explained that the doctrine of vicarious liability need not rely solely on the traditional employer-employee relationship.¹⁶¹ Instead, they explained, the Second Restatement describes a broader notion of the doctrine, encompassing instances involving independent actors, on ostensibly equal footing, who encourage each other to act in a particular way in pursuit of a shared goal.¹⁶² To illustrate this point, the authors of the Restatement point to an example of a policeman who advises another policemen to use illegal methods of coercion upon a suspect and is subsequently liable to the suspect “for batteries committed in accordance with the advice.”¹⁶³ Thus, where a defendant (1) provides an actor with assistance and encouragement with the intention that the actor commit the offense, (2) this encouragement is a substantial factor in causing the conduct, and (3) the conduct is a foreseeable result of the assistance provided by the defendant, the defendant can be held vicariously liable.¹⁶⁴ In that sense, by encouraging their fellow members to perpetrate hate crimes against minorities, the leaders of UKA and WAR opened themselves up to liability for the harmful actions of their members.

A similar argument was made by the SPLC regarding their second theory of vicarious liability: civil conspiracy. To be held vicariously liable under a theory of civil conspiracy, the defendants must have agreed on a course of action; the primary purpose of that agreement must have been to promote the particular offense; the offense must have

<https://www.oregonlive.com/history/2020/01/white-supremacists-on-trial-for-inciting-murder-required-extraordinary-security-in-portland-case-reverberates-30-years-later.html>.

¹⁵⁹ Kristina Davis, *A Dark Chapter of Hate Closes: Notorious Racist Leader Tom Metzger Dead at 82* SAN DIEGO TRIB. (Nov. 10, 2020), <https://www.sandiegouniontribune.com/news/story/2020-11-10/racist-leader-tom-metzger-dies>.

¹⁶⁰ Robb London, *Sending a \$12.5 Million Message to a Hate Group*, N.Y. TIMES (Oct. 26, 1990), <https://www.nytimes.com/1990/10/26/news/sending-a-12.5-million-message-to-a-hate-group.html>.

¹⁶¹ Morris Dees & Ellen Bowden, *Courtroom Victories: Taking Hate Groups to Court*, TRIAL 1, 4 (1995) http://hornacek.coa.edu/dave/Teaching/Core_Course.03/courtroom_victories.pdf.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 5 (describing the elements of proof required to establish aiding and abetting).

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occurred; and the offense must be illegal or independently tortious.¹⁶⁵ Conspiracy law is incredibly broad such that the conspirators need not know each other's identities, or even each other's existence, and defendants can be held liable even if they did not know about the specific injurious action in question.¹⁶⁶ All that is required of civil conspiracy is some sort of agreement between two or more persons in furtherance of a particular offense.¹⁶⁷ Thus, even though WAR's leaders had never heard of the members who carried out the racist murder, and certainly never spoke to them personally, their mutual participation in the organization implied their endorsement of their fellow members' activities.¹⁶⁸

The connections established between the hate groups and their members in the context of the commission of particular hate crimes seems to mirror the connections between nonconsensual porn site operators and their dedicated users. First, many of the posts made by users on the sites are done at the direction of the site's operators. On many of the nonconsensual porn sites, operators ask users to post particular social categories of exposed women such as "college bitches" and "accidental nude."¹⁶⁹ On the Marines' Facebook page, for example, posters were encouraged to sell troves of the sexually explicit photos and videos to a marketplace on the dark web.¹⁷⁰ On isanybodydown.com, members were asked to find and post photos of specific people, including information about those individuals' jobs, addresses, and more.¹⁷¹ These highly specific directions weigh in favor

¹⁶⁵ *Id.* (describing the elements of proof required to establish civil conspiracy).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Rosenthal, *supra* note 158 at 598 (explaining that the WAR leaders testified that "they had been a thousand miles away from Portland when the murder occurred, that they had nothing to do with what happened").

¹⁶⁹ As to not guide the reader to a pornography/Not Safe for Work (NSFW) website, the Cardozo Journal of Equal Rights and Social Justice and the Author have decided not to include the URL to this site. These quotes were found on The Porn Dude's website, which reviews pornography sites.

¹⁷⁰ James LaPorta & Rory Laverty, *Military Women Plead With Facebook to Address the Continued Spread of Revenge Porn*, MIC (Apr. 13, 2017), <https://www.mic.com/articles/174122/marines-united-facebook-revenge-porn-problem-dark-web-military-women-open-letter>. Philip Athey, *Marine Says Her Sexual Photos and Videos From a Paid Site are Being Spread Around Camp Wilson Without Her Permission*, MARINE CORPS TIMES (Nov. 12, 2019), <https://www.marinecorpstimes.com/news/your-marine-corps/2019/11/12/sexual-photos-and-videos-from-a-marines-paid-site-allegedly-spread-around-camp-wilson/>.

¹⁷¹ Ken White, *The Feds Reach A Settlement With Craig Brittain, Revenge Pornster and Extortionist Behind "Is Anybody Down"*, POPEHAT (Jan. 29, 2015), <https://www.popehat.com/2015/01/29/the-feds-reach-a-settlement-with-craig-brittain-revenge-pornster-and-extortionist-behind-is-anyone-down/>; FTC, *Website Operator Banned from the 'Revenge Porn' Business After FTC Charges He Unfairly Posted Nude Photos* (Jan. 29, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn->

of a finding the nonconsensual porn sites and their operators to be aiding and abetting the offenses commissioned by users, opening them up to vicarious liability claims.

Furthermore, there is also a conspiratorial element to the relationship between nonconsensual porn sites and their users. Such porn sites could not exist without a dedicated legion of users constantly posting new content. In that sense, the financial viability of these sites is directly contingent on cultivating a sustained, close relationship with users such that the users continue to return to that particular site, and not one of its competitors, and continue to upload new content. At the same time, one of the hallmarks of the user experience on nonconsensual porn sites seems to be the sense of community and camaraderie among other users who can rate and respond to content.¹⁷² For example, a user of the site Anon-IB, explained that what he enjoyed about the site was that it allowed users to “check out what other users have posted.”¹⁷³ The users seem to find enjoyment in the shared experience of disseminating such photos, often knowing that doing so might constitute a crime. Consider a review of the site Anon-IB, which explains, “The legality of this site is a bit murky, but there is zero chance of getting caught if you feel like posting nude pictures which should only add to the thrill.”¹⁷⁴ The close degree of cooperation among users and between the sites’ organizers and members in pursuit of the commission of what all parties know to be a not-entirely-licit activity seems reminiscent of the collaboration among the hate groups and their members. Ultimately, this close, and often conspiratorial relationship might serve to open nonconsensual porn sites up to liability for the harmful actions of their users.

ii. Section 230

The second complication with vicarious liability is the issue of provider immunity under Section 230 of the Communications Decency

business-after-ftc-charges; FTC Complaint In the Matter of Craig Brittain Docket No. C-4564 ¶ 7 (Dec. 28, 2015).

¹⁷² As to not guide the reader to a pornography/Not Safe for Work (NSFW) website, the Cardozo Journal of Equal Rights and Social Justice and the Author have decided not to include the URL to this site. This statement is supported by information found on The Porn Dude’s website, which reviews pornography sites.

¹⁷³ As to not guide the reader to a pornography/Not Safe for Work (NSFW) website, the Cardozo Journal of Equal Rights and Social Justice and the Author have decided not to include the URL to this site. This statement is supported by information found on The Porn Dude’s website, which reviews pornography sites.

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Act. As discussed above, Section 230 provides near-blanket immunity to website operators, stating, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁷⁵ Some have argued that the operators of revenge porn sites are completely protected under Section 230 because they are providers of a forum, rather than creators of content, but the line between provider and creator is not so clear cut.¹⁷⁶ Courts have long been perplexed by the phenomenon of “mixed content”—content that is created jointly by the site’s operator and the site’s users.¹⁷⁷ For example, where a site operator makes significant edits to content submitted by a user, or where a site operator encourages users to create or submit content, the extent to which the operator is protected by Section 230 is contested.¹⁷⁸ In most cases, protection in cases of mixed content hinges on whether the site appears to solely provide a service, or if it also provides content as well. Where the site is deemed to have provided content, it cannot claim Section 230 immunity.¹⁷⁹

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, where a housing website required users to state their sex and sexual orientation and invited public comments on posts, the Ninth Circuit held that Roommates.com was a content provider of both its questionnaire and filtered search results, but was a service provider for the purposes of the additional comments section.¹⁸⁰ The court’s ruling turned on the idea that a website operator can be both a service provider and a content provider. “If [the site] passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content,” the court noted. “But as to content that it creates itself, or is ‘responsible, in whole or in part’ for

¹⁷⁵ 47 U.S.C. § 230 (2018).

¹⁷⁶ Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change>; Cathy Gellis, *Section 230 Basics: There Is No Such Thing As a Publisher or Platform Distinction*, TECHDIRT (Oct 20, 2020), <https://www.techdirt.com/articles/20201017/13051145526/section-230-basics-there-is-no-such-thing-as-publisher-or-platform-distinction.shtml>.

¹⁷⁷ Kelli Sager et al., *9th Circuit Affirms Immunity for Pure Third-Party Web Content: En Banc Decision Defines Scope of Immunity for Mixed-Content Websites*, DAVIS WRIGHT TREMAINE (2006), <https://www.dwt.com/insights/2008/04/9th-circuit-affirms-immunity-for-pure-thirdparty-w>.

¹⁷⁸ *Immunity for Online Publishers Under the Communications Decency Act*, DIGITAL MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act> (last accessed Jan. 13, 2021).

¹⁷⁹ *Id.*

¹⁸⁰ *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2017).

creating or developing, the website is also a content provider.”¹⁸¹ Thus, a site is a content provider, and can be held liable, where it has “materially contributed” to the disputed content on its site.¹⁸² The Ninth Circuit made it clear that immunity will be lost when a site poses questions or requests that will result in inevitably illegal responses, or alters content to contribute to its illegality.¹⁸³ Insofar as the site provides a neutral, unsuggestive forum for responses, though, the site will not be held liable.

In the case of revenge porn websites, the argument could be made that many of the site operators are content providers and service providers, as was Roommates.com, thereby undermining their Section 230 protections for content in which they had a hand in creating. As discussed *supra* Section IIC, nonconsensual porn site operators often make specific requests for content whose publication amounts to a gross invasion of privacy. If Roommates.com can be held liable for the responses given to their routine queries about applicants’ sex and gender, then surely, nonconsensual porn site operators can be held liable for the naked images of nonconsenting women that their users post in response to offers for cash rewards for specific categories of content such as “The Most Appealing Women at Top Law Schools.”¹⁸⁴ Further, nonconsensual porn sites may be held liable where their administrators play a hand in editing content to make it more entertaining or sexually provocative. Many site operators write what they perceive to be witty or humorous captions on the content that they post, sometimes pointing out identifiable features in the photos that make it easier to identify the woman pictured.¹⁸⁵ Surely, these additions, which facilitate the harassment of the victimized individual, constitute a contribution to the content’s illegality. Ultimately, through provocative requests for content and a heavy hand in editing and preparing posts, many nonconsensual porn site operators risk losing Section 230 protections and open themselves up to vicarious liability for their users’ activities on their sites.

Of course, not all victims have the financial resources to bring civil suits against their tormentors. Many victims of nonconsensual porn lose

¹⁸¹ *Id.* at 1162.

¹⁸² *Id.* at 1171.

¹⁸³ *See id.* at 1174-1175 (explaining that “where it is very clear that the website directly participates in developing the alleged illegality – as it is clear here with respect to Roommate’s questions, answers and the resulting profile pages – immunity will be lost”).

¹⁸⁴ Jill Filipovic, *Blogging While Female: How Internet Misogyny Parallels ‘Real-World’ Harassment*, 19 *YALE J. OF L. & FEMINISM* 295, 296 (2007).

¹⁸⁵ *Id.* at 295-99.

their jobs due to the online posts and struggle to make basic payments, such that affording legal fees becomes a near impossibility. Furthermore, the perpetrators of nonconsensual porn might be in such a financially precarious position themselves that collecting on whatever judgment is levied against them may take years. These are serious concerns, especially since the perpetrators of nonconsensual pornography are less likely to cease their harmful activities where they do not believe that there will be any course of action against them.

Still, the cost of civil litigation is not a reason to completely discount the power of the tort system to raise awareness about the harms caused by nonconsensual pornography or to financially ruin the sites responsible. First, more and more law firms and civil society organizations are taking up nonconsensual porn cases on a pro bono basis. The Cyber Civil Rights Initiative has compiled a list of dozens of attorneys across the United States who have volunteered on a pro bono basis to assist victims of nonconsensual pornography in their various legal matters.¹⁸⁶ Second, provided that the plaintiffs have successful claims, and their attorneys work on a contingent fee basis, plaintiffs can use the damages awarded in their case to afford legal representation, or the defendant may be required to pay their attorney's fees. Finally, vicarious liability suits against nonconsensual porn site operators represent an extraordinary opportunity for impact litigation from civil society groups. This is not a fight that victims need to wage on their own, either financially or emotionally. Thus, while it may at times be an expensive undertaking, the opportunity provided by tort law to take down harmful, nonconsensual porn sites should not be written off for financial worries alone.

V. CONCLUSION

There is no perfect solution for ending the practice of nonconsensual pornography, but tort law provides a powerful means of mitigating the root causes of the harm. Unlike criminal statutes aimed at targeting nonconsensual pornography—which are unnecessarily narrow, and only cover a fraction of relevant cases—the tort system allows victims to collect on the emotional harm and privacy invasions they have suffered, as well as hold the site operators accountable for the actions of their users.

¹⁸⁶ Attorneys, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/professionals-helping-victims/> (last visited Nov. 11, 2020).