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### Revenge Porn: The Result of a Lack of Privacy in an Internet-Based Society

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# **REVENGE PORN: THE RESULT OF A LACK OF PRIVACY IN AN INTERNET-BASED SOCIETY**

Shelbie Marie Mora

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# REVENGE PORN: THE RESULT OF A LACK OF PRIVACY IN AN INTERNET-BASED SOCIETY

Shelbie Marie Mora\*

## ABSTRACT

This paper is about revenge porn statutes within and outside of the United States and their privacy consequences to victims. This paper focuses heavily on two state laws and reviews a case in each state and then explains the implications the ruling has on victims. With other countries' statutes, the paper primarily focuses on penalties for violations. To finish, there is a review of a failed proposed US statute and then I propose my own law and penalties.

## INTRODUCTION

Nonconsensual pornography, also referred to as revenge porn, is “the distribution of sexual or pornographic images of individuals without their consent.”<sup>1</sup> Forty-six U.S. states, the District of Columbia, and the U.S. territory of Puerto Rico have adopted revenge porn laws. However, there is no federal law in place that prohibits revenge porn. Several countries around the world have chosen to adopt revenge porn statutes to protect individuals’ privacy rights and prevent emotional and financial harm. Revenge porn is primarily a large issue for women given that they are overwhelmingly the target of it.<sup>2</sup> Major ramifications can amount to victims who have had their intimate images posted online without their consent.

In this paper, I will discuss the rise of revenge porn websites, examine Texas and Vermont’s revenge porn statutes, review case law for each state, and analyze the detriments that the holdings pose to victims of revenge porn. I will next examine Australia, Puerto Rico, and Canada’s revenge porn laws and the penalties imposed for offenders. Lastly, I will assess a failed proposed federal revenge porn law in the United States, discuss where the U.S. falls short on federal legislation, and propose remedies to help protect the privacy of individuals. The United States falls short in revenge porn legislation and must pass a federal law to promote and protect the privacy of Americans and deter this crime.

### I. Revenge Porn Websites

Revenge porn can be put on the internet in many different ways. Victims could have their photos uploaded to common social media websites such as Facebook or Instagram, social media apps including Snapchat, or even put on websites that exist

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<sup>1</sup> *Nonconsensual pornography (revenge porn) laws in the United States*, Ballotpedia, [https://ballotpedia.org/Nonconsensual\\_pornography\\_\(revenge\\_porn\)\\_laws\\_in\\_the\\_United\\_States](https://ballotpedia.org/Nonconsensual_pornography_(revenge_porn)_laws_in_the_United_States).

<sup>2</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L.R. 345, 353-4 (2014).

for the sole purpose of revenge porn. One website was called myex.com, and although it is no longer in operation, many similar websites still exist. This website allowed individuals to post pictures and videos along with the personal information of the victim. This personal information included “full name, age, address, employer, phone number, social media account information, and email address.”<sup>3</sup> This site subsequently required victims to pay hundreds of dollars to have pictures, videos, and personal information removed from the website.<sup>4</sup> The inclusion of such personal information allows for the images to pop up when you google a person’s name, which is clearly detrimental to the victim in a variety of ways.

Sadly, although not surprisingly, myex.com is not the only revenge porn website. Websites such as Anon-IB and AnonMe are similar revenge porn websites. Like myex.com these websites allow users to upload pornographic images and include personal information such as the name, age, and location of the victim. Users are able to anonymously post comments on images uploaded. Commenters are typically men who use the image-sharing platform to degrade women.<sup>5</sup> Even celebrities are not immune from the dangers of revenge porn, Anon-IB has leaked many nude celebrity photos. However, Anon-IB was shut down in 2018 after a year-long Dutch police investigation.<sup>6</sup> This police investigation began after a woman discovered her intimate images were stolen and posted on the website.<sup>7</sup> She filed a complaint to the police which led them to find a man behind the operation of the site who also gave the police additional information about several other men involved. The four men alone had images of a “‘few hundred’ women that they targeted.”<sup>8</sup> Images were taken from e-mail, social media, and cloud storage accounts that had been hacked.<sup>9</sup> This can be incredibly terrifying to anyone who takes intimate photos or videos of themselves. Regardless of whether they are shared with another person, there is the potential that this delicate material can be distributed on the internet. After Anon-IB was shut down the owners said that “they likely won’t relaunch the site.”<sup>10</sup> While this is a victory to many people it, unfortunately, is viewed as a loss for those who profit from this type of platform. New, unprecedented revenge porn platforms such as Discord are still functional and gaining popularity.<sup>11</sup>

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<sup>3</sup> Fed. Trade Comm’n, *Complaint for Permanent Injunction and Other Equitable Relief* (Jan. 9, 2018) [https://www.ftc.gov/system/files/documents/cases/1623052\\_myex\\_complaint\\_1-9-18.pdf](https://www.ftc.gov/system/files/documents/cases/1623052_myex_complaint_1-9-18.pdf).

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

<sup>5</sup> Alma Fabiani, *Everything you need to know about revenge porn site AnonMe*, Screenshot (Oct. 24, 2020), <https://screenshot-media.com/visual-cultures/toxic-masculinity/anonme-revenge-porn-site/>.

<sup>6</sup> Andrew Liptak, *Dutch police have shut down Anon-IB in the course of a revenge porn investigation*, *The Verge* (Aug. 29, 2018, 3:33 PM), <https://www.theverge.com/2018/4/29/17299020/anon-ib-the-netherlands-dutch-police-revenge-porn-shut-down>.

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Discord is a website that was not traditionally used for revenge porn but rather started as a chat platform for gamers.<sup>12</sup> Anon-IB users have migrated to Discord, and it is now heavily used for revenge porn. There are “[chat] rooms dedicated to specific women to sections that only allow ‘real rape, real daterape [sic], real drugged chicks for rape, videos of real rape, real forced girlfriend, abused girlfriends.’”<sup>13</sup> These chatrooms are particularly alarming given the illegality of rape and the disproportionate abuse against women. It would be all too simple for a vengeful ex to post intimate videos and photos of their significant others to these chatrooms. However, because Discord is not a website designed exclusively for revenge porn, like myex.com, it disavows such content in its guidelines.<sup>14</sup> A Discord spokesperson stated that the platform’s community guidelines “specifically prohibit non-consensual pornography, harassment, or any illegal activity.”<sup>15</sup> Once Discord becomes aware of this inappropriate content through user reports, it removes the content and deletes the user’s account,<sup>16</sup> but this doesn’t stop that user from simply making a new account and continuing to upload this heinous content.

Websites such as Discord show that without proper policing on a platform, otherwise benign social media sites could be used as a revenge porn platform. For example, Facebook is a platform that has been used to post non-consensual nude photos. However, one area where Facebook succeeds and Discord falls short is how they respond to revenge porn on their site and the measures they take to prevent it as well. While it is against Discord’s community guidelines to post non-consensual images, the site moderators did not do anything to prevent it from happening. Their policy is only reactive rather than proactive. Facebook on the other hand works to be both reactive and proactive on the matter. Facebook’s Global Head of Safety posted to its website stating its policy on detecting non-consensual images in March 2019. Antigone Davis stated that,

[t]o protect victims, it’s long been our policy to remove non-consensual intimate images (sometimes referred to as revenge porn) when they’re reported to us – in recent years we’ve used photo-matching technology to keep them from being re-shared. To find this content more quickly and better support victims, we’re announcing new detection technology and an online resource hub to help people respond when this abuse occurs.<sup>17</sup>

This detection technology uses machine learning and artificial intelligence to detect not only nude images but also, “near nude [sic] images.”<sup>18</sup> This allows

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<sup>12</sup> Megan Farokhmanesh, *Discord has a new problem: revenge porn*, The Verge (Jan. 17, 2018, 1:11 PM), <https://www.theverge.com/2018/1/17/16901218/discord-revenge-porn-social-media>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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

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

<sup>17</sup> Antigone Davis, *Detecting Non-Consensual Intimate Images and Supporting Victims*, About Facebook (Mar. 15, 2019), <https://about.fb.com/news/2019/03/detecting-non-consensual-intimate-images/#:~:text=To%20protect%20victims%2C%20it's%20long,them%20from%20being%20re%2Dshared.>

<sup>18</sup> *Id.*

Facebook to find revenge porn before it is reported which is especially helpful when victims are unaware that their images or videos have been shared.

Although this policy is far more proactive than the removal-after-reporting method, it still has a downfall. The images must actually be uploaded first. Facebook's moderation method does not prevent the uploading of images entirely, rather it detects nudity once it has already been uploaded to Facebook. Facebook may be able to detect nudity or near-nudity very quickly but that does not mean that irreparable damage has not occurred in the short period of time the image was up. It is common knowledge that records on the internet endure forever.<sup>19</sup> All it takes is one person to save those images to their desktop or screenshot the post. Once the content is deleted from the original account, who knows who else has the images saved on their computers? Recreations of these images can then be shared wherever and with whomever and the victim may never know. So, although Facebook is more proactive than other websites it still is not enough. In an ideal situation, the platform would have a filtering technology with the capacity to detect nudity or near-nudity before the images are uploaded to prevent the images from being distributed. This would greatly cut down on the harm caused to victims.

Revenge porn websites and other social media websites that allow for non-consensual intimate images to be displayed on their websites can cause serious harm, and several states have attempted to legally mitigate this harm. This next section will examine different state laws and cases in those states where defendants have sued those who have posted their nude photos and or videos to revenge porn websites or other social media platforms.

## **II. Revenge Porn Litigation**

### **A. Texas**

Texas's revenge porn statute was adopted in 2017 and prohibits the "unlawful disclosure or promotion of intimate visual material."<sup>20</sup> A person violates this statute if:

- (1) Without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
- (2) The visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;

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<sup>19</sup> David Moore, *Once on the Internet, Always on the Internet*, THE NORMAN TRANSCRIPT (Mar. 18, 2021), [https://www.normantranscript.com/news/once-on-the-internet-always-on-the-internet/article\\_4bb953b0-8804-11eb-9bad-c7b05bdeb4cc.html#:~:text=%E2%80%9CWhat%20goes%20on%20the%20Internet,%2C%20alw](https://www.normantranscript.com/news/once-on-the-internet-always-on-the-internet/article_4bb953b0-8804-11eb-9bad-c7b05bdeb4cc.html#:~:text=%E2%80%9CWhat%20goes%20on%20the%20Internet,%2C%20alw)ays.

<sup>20</sup> Tex. Penal Code § 21.16 (2019).

- (3) The disclosure of the visual material causes harm to the depicted person;  
and
- (4) The disclosure of the visual material reveals the identity of the depicted person in any manner.<sup>21</sup>

“‘Intimate parts’ means ‘the naked genitals, pubic area, anus, buttocks, or female nipple of a person.’”<sup>22</sup>

In the case of *Ex parte Jones*, “Jones was charged by information with unlawful disclosure of intimate visual material,” under Tex. Penal Code §21.16. <sup>23</sup> In September of 2017, Jones filed a Writ of *Habeas Corpus* where he argued the Texas statute was unconstitutional on its face in violation of the First Amendment. The trial court denied his motion which brought about this appeal.

The First Amendment states that “Congress shall make no law. . .abridging the freedom of speech.”<sup>24</sup> “The free speech protections of the First Amendment are implicated when the government seeks to regulate protected speech or expressive conduct.”<sup>25</sup> The Texas Court of Criminal Appeals has ruled that photographs are inherently expressive.<sup>26</sup> The court ruled that there is no distinction between “whether government regulation applies to ‘creating, distributing, or consuming’ speech.”<sup>27</sup> “Because the photographs and visual recordings are inherently expressive and the First Amendment applies to the distribution of such expressive media in the same way it applies to their creation. . .the right to freedom of speech is implicated in this case.”<sup>28</sup>

The standard of review on the constitutionality of a criminal statute is *de novo*.<sup>29</sup> Ordinarily, the burden of proof in these types of cases falls on the person who challenges the statute to show its unconstitutionality.<sup>30</sup> However, when there is a restriction on speech that is content-based then the burden switches to the government.<sup>31</sup> “Content-based regulations are presumptively invalid, and the government bears the burden to rebut that presumption.”<sup>32</sup>

If one must look at the content of the speech to determine if a law has been violated, then it is content-based.<sup>33</sup> Content-based laws are reviewed under the strict scrutiny standard.<sup>34</sup> Here, the Texas statute does not prohibit all images of others

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<sup>21</sup> See *Id.* § (b)(1-4).

<sup>22</sup> See *Id.* § (a)(1).

<sup>23</sup> *Ex parte Jones*, 2018 Tex. App. LEXIS 2718.

<sup>24</sup> U.S. Const. amend. I.

<sup>25</sup> *Ex parte Jones*, at 4 (citing *Scott v. State*, 322 S.W.3d 662, 668-69 (2010)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3.

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

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Ex parte Jones* (citing *Ex parte Thompson*, 442 S.W.3d at 345 (2014)).

<sup>34</sup> *Ex parte Jones* (citing *Turner Broad. Sys., Inc.*, 512 U.S. at 642, 114 S.Ct. at 2459 (1994)).

but rather “a subset of disclosed images,” namely ones with intimate body parts exposed.<sup>35</sup> Thus, this statute is content-based. To prevail under the strict scrutiny standard of review a law must be “narrowly drawn to serve a compelling government interest.”<sup>36</sup> “A case is ‘narrowly drawn’ if it uses the least restrictive means of achieving the government interest.”<sup>37</sup>

There are categories of speech that are unprotected, one being obscenity.<sup>38</sup> Content-based restrictions may be permitted if they aim to prevent areas of unprotected speech. In this case, the state argues that the compelling government interest is “protecting an individual from a substantial invasion of his/her privacy.”<sup>39</sup> Privacy surely is a compelling government interest but only when the interest is substantial and an invasion is done in an intolerable manner.<sup>40</sup> An example of a substantial and intolerable invasion would be when a person is photographed without their consent in a private place or an area of the person was photographed that is not exposed to the general public such as up the skirt.<sup>41</sup> The court explained that the state may have written the statute with the intent to protect substantial privacy interests by protecting intimate parts, however, that does not mean it passes strict scrutiny.<sup>42</sup> The Court then reasoned that the statute “could be narrowed by requiring that the disclosing person have knowledge of the circumstances giving rise to the depicted person’s privacy expectation.”<sup>43</sup> Yet, the statute does not use this narrowing language. Thus, the statute fails strict scrutiny for not using the least restrictive method possible. Additionally, the court holds that the statute is overbroad because “the criminal prohibition [it] creates is of ‘alarming breadth’ that is ‘real’ and ‘substantial.’”<sup>44</sup> Given that the statute failed to satisfy strict scrutiny, it was deemed to be unconstitutional.

### **i. Implications of the Texas Court of Appeals Ruling**

In finding that the revenge porn statute in Texas is unconstitutional, the Court of Appeals made it very difficult for victims to seek the proper redress needed for their harm. While it is important that individuals have the right to freedom of speech, that right is not and cannot be absolute. Allowing someone to get away with disclosing intimate images of another because they claim it’s in their right of the First Amendment is utterly absurd. States must be able to restrict the content of people’s speech when it can have truly detrimental ramifications for victims. The Texas court did acknowledge that revenge porn is “obscene” speech. However, the

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<sup>35</sup> *Ex parte Jones* at 6.

<sup>36</sup> *Id.* (citing *Ex parte Thompson*, 442 S.W.3d at 344 (2014)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 468-69 (2010)).

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Ex parte Jones*, at 9.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 12.

<sup>44</sup> *Id.* at 14.

State could not have used less restrictive methods to achieve the goal of preventing the harm that flows from revenge porn. The law must encompass enough speech to deter people from engaging in revenge porn and also to allow victims to seek retribution from those who have committed this crime against them. The court had felt that people who were simply resharing intimate photos but were unaware of the context should not be held liable under the statute (though they could be) and therefore the statute did not operate in the “least restrictive” way possible.

The idea that a person resharing nudes should not be punished defeats one of the purposes of the statute. The court proposes that the statute should only apply to people who are aware of the circumstances. However, that does not help prevent the problem of sharing nude photos of other people without their consent. Just because one person isn’t personally aware of who is in the image does not reduce the privacy harm to the subject of the photo. Anyone should be held liable for distributing nude photos and the Texas statute allowed for that. The court of appeals decision was incorrect and poses serious privacy harm to individuals.

## **ii. Resolution**

This decision was appealed and later reversed in May of 2021 in an unpublished *per curiam* opinion.<sup>45</sup> Though the majority opinion was not published, the concurrence was. The concurrence agreed with the majority that the Texas revenge porn statute did not violate the First Amendment.<sup>46</sup> This is a huge win for victims in the state of Texas who may be able to seek a private right of action against offenders. Additionally, it is a huge step in promoting and ensuring individuals’ privacy rights are met.

## **B. Vermont**

Vermont’s revenge porn statute was adopted in 2015 and prohibits the “disclosure of sexually explicit images without consent.”<sup>47</sup>

A person violates this section if he or she knowingly discloses a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm.<sup>48</sup>

This law also provides a private right of action “against a defendant who knowingly discloses, without the plaintiff’s consent, an identifiable image of the plaintiff while he or she is nude or engaged in sexual conduct and the disclosure causes the plaintiff harm.”<sup>49</sup>

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<sup>45</sup> *Ex parte Jones*, 625 S.W.3rd 118 (2021).

<sup>46</sup> *Id.* at 118.

<sup>47</sup> Vt. Stat. Ann. tit. 13, § 2606 (2015).

<sup>48</sup> *See Id.* § (b)(1).

<sup>49</sup> *See Id.* § (e)(1).

In *State v. VanBuren* the Vermont Supreme Court interpreted the statute in a case involving the complainant who sent naked pictures of herself to a man named Anthony Coon via Facebook Messenger.<sup>50</sup> Complainant and Coon were not in a relationship with each other at the time, although they had previously dated.<sup>51</sup> The day after the naked photos had been sent to Coon, the photos were posted to his Facebook page and the complainant was tagged in them.<sup>52</sup> Coon was not the person responsible for the photos being posted. The defendant held herself out to be Coon's girlfriend.<sup>53</sup> However, Coon informed the complainant that she was just "obsessed with him and that he had never slept with her."<sup>54</sup> Once the complainant became aware of the photos, she called Coon and left a voicemail asking for the photos to be removed, but the defendant was the one who returned her call on Coon's phone.<sup>55</sup> The defendant called the complainant a "'moraless [sic] pig' and told her that she was going to contact complainant's employer, a child-care facility. When complainant asked defendant to remove the pictures, defendant responded that she was going to ruin complainant and get revenge."<sup>56</sup> The defendant gained access to Coon's Facebook through her own phone where his password was stored.<sup>57</sup>

The complainant filed suit against the defendant in December 2015 for violating 13 V.S.A. §2606.<sup>58</sup> In February 2016 the defendant filed a motion to dismiss claiming the Vermont statute violated the First Amendment and that the complainant had no reasonable expectation of privacy in the shared photos.<sup>59</sup> The most concerning aspect of this case is the reasonable expectation of privacy argument. The Supreme Court of Vermont ruled that the Vermont statute does not violate the First Amendment because it satisfies strict scrutiny. Unfortunately, the Court also held that the complainant did *not* have a reasonable expectation of privacy in her nude photos.

The defendant argued that the "complainant had no reasonable expectation of privacy because she took the pictures herself and messaged them to Mr. Coon without any promise on his part to keep the pictures private."<sup>60</sup> In support of their claim, the defendant cited subsection (d)(1) of 13 V.S.A. § 2606 which states an "exception from liability for individuals who disclose 'images involving voluntary nudity or sexual conduct in public or commercial settings or in a place where a person does not have a reasonable expectation of privacy.'"<sup>61</sup> The state opposed the motion to dismiss on the grounds that the complainant did in fact have a reasonable expectation of privacy given that she sent the photos on Facebook Messenger,

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<sup>50</sup> *State v. VanBuren*, 2019 Vt. LEXIS 80.

<sup>51</sup> *Id.* ¶ 14.

<sup>52</sup> *See Id.* ¶ 10.

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

<sup>54</sup> *See Id.* ¶ 11.

<sup>55</sup> *See Van Buren*, ¶ 87.

<sup>56</sup> *Id.*

<sup>57</sup> *See Id.* ¶ 14.

<sup>58</sup> *See Id.* ¶ 11.

<sup>59</sup> *See Id.* ¶ 12.

<sup>60</sup> *VanBuren*, ¶ 12.

<sup>61</sup> *Id.*

which allows users to privately send messages to other users, and thus reasonably believed Mr. Coon would be the only person with access to the pictures.<sup>62</sup> The state further argued that the images only became public once the defendant gained unauthorized access to Coon’s Facebook account and posted the photos.<sup>63</sup> Additionally, the state claimed that the “statute [is] concerned about the ‘place’ where the pictures were taken, not the method by which the pictures were initially shared.”<sup>64</sup>

The Superior Court of Vermont did not review this aspect of the case because it determined that the statute was facially unconstitutional.<sup>65</sup> The Supreme Court of Vermont also initially did not rule on this part of the argument after it determined that the statute *was* constitutional, it allowed for additional briefing on the matter before returning to the argument.<sup>66</sup> In June 2019 the Supreme Court of Vermont ruled that the complainant did not have a reasonable expectation of privacy.<sup>67</sup> The Court reasoned that the complainant and Coon were not in a relationship when the photos were sent.<sup>68</sup> The court does not give a definition as to what a reasonable expectation of privacy is in this sense but rather says that “[p]rivacy here clearly does not mean the exclusion of all others, but it does mean the exclusion of everyone but a trusted few.”<sup>69</sup> In the Court’s eyes, if you’re sending naked photos to someone they must not be in the “trusted few” or else you compromise your expectation of privacy in them entirely.

### **i. Implications of the Supreme Court of Vermont’s Ruling**

This ruling is very problematic and sets a dangerous precedent for victims. A study done by MatchGroup LLC in 2019 shows that nearly 40% of people ages eighteen to twenty-two have sent nude photos, and thirty-seven percent of adults ages twenty-three to thirty-eight have sent nudes.<sup>70</sup> Additionally, in 2018 the Journal of the American Medical Association conducted an analysis of thirty-nine studies which reported that nearly fifteen percent of people have sent a “sext.”<sup>71</sup> Nude photos are becoming increasingly prevalent in today’s society. It seems

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<sup>62</sup> See *Id.* ¶ 13.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *Van Buren*, ¶ 15.

<sup>66</sup> *Id.* ¶ 70.

<sup>67</sup> *State v. VanBuren*, Harvard Law Review (May 10, 2020), <https://harvardlawreview.org/2020/05/state-v-vanburen/>.

<sup>68</sup> *VanBuren*, ¶ 106.

<sup>69</sup> See *Id.* ¶ 105.

<sup>70</sup> Nicole Vega, *Nearly 40 percent of Generation Z are Sexting: study*, NY Post (Jul. 30, 2019, 10:15 AM), <https://nypost.com/2019/07/30/nearly-40-percent-of-generation-z-are-sexting-study/>.

<sup>71</sup> Ly, Madigan, and Rash, *Prevalence of Multiple Forms of Sexting Behavior Among Youth*, JAMA Network (April 2018), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2673719>. Sext means “to send someone a sexually explicit message or image by cell phone” according to Merriam Webster Dictionary.

unlikely that every person sending a nude is in a committed relationship with the receiver. However, in the eyes of the Supreme Court of Vermont, that means that many people would not have a reasonable expectation of privacy when sending nude photos. The choice to send a nude photo of yourself to another person is typically made with some forethought. However, just because a person may not be in a defined relationship with another person does not mean that they sent the image haphazardly. A study done by Morgan Johnstonbaugh at the University of Arizona found that the main reason people send nude or semi-nude images is “to turn the receiver on.”<sup>72</sup> Most people do not go from a purely platonic relationship to a committed relationship without having any romantic intimacy involved. Although to members of the Court in Vermont, sending nudes may not seem like a steppingstone to having an actual sexual relationship, it certainly is viewed that way by many young Americans.<sup>73</sup>

This also does not account for people who do not wish to have a relationship with a person but still expect trust. Increasingly, young adults are not seeking long-term relationships. Rather, half of single people are not looking for a relationship and a quarter of single people only want a casual relationship.<sup>74</sup> In fact, “talking”<sup>75</sup> has become increasingly popular among young adults over relationships.<sup>76</sup> People in these types of situations would still have large amounts of trust in the other person, but because they are not in a legitimate committed relationship that means they have no reasonable expectation of privacy? This holding from the Supreme Court of Vermont has serious negative implications for potential victims given the rise of nudes in modern society. The next section will examine international revenge porn laws and their penalties.

### **III. International Revenge Porn Statutes**

#### **A. Australia**

Australia’s revenge porn statute is the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act of 2018. This act amends the

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<sup>72</sup> Brittany Wong, *Why Do Women Send Nudes? Why Do Men? It’s Complicated, A New Study Finds.*, HuffPost (Aug 21, 2019, 3:10 PM), [https://www.huffpost.com/entry/sexting-women-and-men-study\\_1\\_5d5c504ee4b0f667ed69c8d6](https://www.huffpost.com/entry/sexting-women-and-men-study_1_5d5c504ee4b0f667ed69c8d6).

<sup>73</sup> *Teen hormones and cellphones: Sexting leads to increased sexual behavior, study shows*, Science Daily (Oct. 6, 2014), <https://www.sciencedaily.com/releases/2014/10/141006085345.htm>.

<sup>74</sup> Anna Brown, *A profile of single Americans*, Pew Research Center (Aug. 20, 2020), <https://www.pewresearch.org/social-trends/2020/08/20/a-profile-of-single-americans/>.

<sup>75</sup> Talking is a phrase used “when two people like each other a lot and have established that they like each other but they aren’t technically ‘boyfriend’ and ‘girlfriend’ yet, but they don’t talk to other people.” According to urbandictionary.com.

<sup>76</sup> Georgia Leipold-Vitiello, *The talking phase killed dating culture*, The Breeze (Sep. 12, 2019), [https://www.breezejmu.org/opinion/opinion-the-talking-phase-killed-dating-culture/article\\_89b795be-d4e1-11e9-8185-9348cebfea0c.html#:~:text=%E2%80%9CTalking%E2%80%9D%20has%20become%20the%20main,eventually%20enter%20a%20concrete%20relationship.](https://www.breezejmu.org/opinion/opinion-the-talking-phase-killed-dating-culture/article_89b795be-d4e1-11e9-8185-9348cebfea0c.html#:~:text=%E2%80%9CTalking%E2%80%9D%20has%20become%20the%20main,eventually%20enter%20a%20concrete%20relationship.)

Enhancing Online Safety Act 2015, the amendment includes civil penalties and made it a criminal offense to engage in revenge porn.<sup>77</sup> This statute prohibits the publication, or threat of publication, of “private sexual material” of others, without their consent, where a person has a reasonable expectation of privacy in that material.<sup>78</sup>

The civil penalties imposed affect both the defendant and online service providers. The eSafety Commissioner can require the “rapid removal” of material. The commissioner can issue “removal notices” to individual perpetrators, websites, content hosts, and social media providers, directing them to remove offending content within [forty-eight] hours.”<sup>79</sup>

The criminal penalties added to the amendment include two types of offenses. The first is the standard aggravated offense. A person commits a standard aggravated offence if they “(a) commit[] an offence (the underlying offence). . . ; and (b) the commission of the underlying offence involves the transmission, making available, publication, distribution, advertisement or promotion of material; and (c) the material is private sexual material.”<sup>80</sup> The penalty for committing the standard aggravated offence is five years imprisonment.<sup>81</sup> The second is a special aggravated offence. A person commits a special aggravated offence if they

- (a) commit[] an offence (the underlying offence). . . ; and
- (b) the commission of the underlying offence involves the transmission, making available, publication, distribution, advertisement or promotion of material; and
- (c) the material is private sexual material; and
- (d) before the commission of the underlying offence, 3 [sic] or more civil penalty orders were made against the person under the Regulatory Powers (Standard Provisions) Act 2014 in relation to contraventions of . . .the Enhancing Online Safety Act 2015.<sup>82</sup>

The penalty for committing a special aggravated offence is seven years imprisonment.<sup>83</sup> The most notable portion of this statute is the civil penalties. Not

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<sup>77</sup> *Australia: Legislation Imposing Penalties for Publishing Intimate Images Without Consent Comes into Force*, Library of Congress (Sept. 21, 2018), <https://www.loc.gov/item/global-legal-monitor/2018-09-21/australia-legislation-imposing-penalties-for-publishing-intimate-images-without-consent-comes-into-force/#:~:text=The%20Act%20amends%20the%20Enhancing,others%20online%20without%20the%20consent.>

<sup>78</sup> *Id.*; see also *Amendment of Criminal Code Act*, Commonwealth Numbered Acts, [http://classic.austlii.edu.au/au/legis/cth/num\\_act/eossoiia2018592/sch2.html](http://classic.austlii.edu.au/au/legis/cth/num_act/eossoiia2018592/sch2.html).

<sup>79</sup> *Australia: Legislation Imposing Penalties for Publishing Intimate Images Without Consent Comes into Force*, Library of Congress (Sept. 21, 2018), <https://www.loc.gov/item/global-legal-monitor/2018-09-21/australia-legislation-imposing-penalties-for-publishing-intimate-images-without-consent-comes-into-force/#:~:text=The%20Act%20amends%20the%20Enhancing,others%20online%20without%20the%20consent.>

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* .

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

only can the eSafety commissioner require the perpetrator to take the images down within forty-eight hours but they can also require content hosts, websites, etc., to do the same. Additionally, if they do not comply in the short time frame, they can receive fines.<sup>84</sup> The civil penalties can reach six figures for individuals and more than half a million for corporations.<sup>85</sup> This type of enforcement ensures that revenge porn is handled swiftly as it is a serious offense. Furthermore, criminal penalties must act as a deterrent. Simply violating the statute is an aggravated offence with a penalty of five years in prison. Five years seems a little hefty for one offense, but this is beneficial to Australia, it allows the country to crack down on a major problem.

Australia's revenge porn statute ensures that non-consensual images are removed from the internet swiftly to mitigate any harm. Victims of revenge porn can feel vindicated for their harm and the huge invasion of privacy they experienced. The harsh civil and criminal penalties should deter any would-be perpetrators from committing this horrible crime against individuals.

## **B. Puerto Rico**

Puerto Rico's revenge porn statute was enacted in August 2021, the statute is titled 2021 P.R. H.B. 547. This statute prohibits "any unauthorized distribution or publication of explicit material of an intimate nature."<sup>86</sup> Explicit material is defined as:

any material of an intimate or sexual nature that includes any image of the human body or any part thereof; or that is sexually explicit and includes any type of sexual activity; whether intimate or of a couple, regardless of whether it is visual, illustrative, or graphic, or a video or audio recording.<sup>87</sup>

The penalties for violating this statute are severe. Any person who purposely or knowingly violates the statutes "shall be guilty of a felony and punished by a fixed term of imprisonment of three years. The term of imprisonment may be increased to five years if there are any aggravating factors. The term of imprisonment may be decreased to one year if there are any mitigating factors."<sup>88</sup> Additionally, any person that violates this statute with the intent to "threaten, extort, or obtain any personal gain shall be guilty of a felony and punished by a fixed term of imprisonment of eight years."<sup>89</sup> The statute goes one step further for a more severe punishment, "[r]epeat offenders shall be required to register in the Registry

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

<sup>85</sup> *Criminalizing the Non-Consensual Online Sharing of Intimate Images*, Time Base (Sept. 13, 2018, 11:28 AM) <https://www.timebase.com.au/news/2018/AT04790-article.html>.

<sup>86</sup> 2021 P.R. H.B. 547.

<sup>87</sup> *See Id.* § 3(b).

<sup>88</sup> *See Id.* § 4.

<sup>89</sup> 2021 P.R. H.B. 547, § 4.

of Persons Convicted of Sex Offenses and Child Abuse as a Tier I Sex Offender by order of the court.”<sup>90</sup>

The severe penalties in Puerto Rico’s revenge porn statute will most likely over time promote deterrence but the statute is too new to tell. With revenge porn being a felony with a fixed term of imprisonment it is likely to deter vindictive people from committing this crime. Especially given a fixed eight years for any threats, extortion, or personal gain. This automatically raises the bar for a lot of revenge porn cases. One area of the statute that may be intense would be the requirement of registering as a sex offender for repeat offenders. Although this has serious deterrence value, as it is a very harsh punishment. In the United States, the sex offender registry is typically saved for people committing physical sexual acts against another, besides the possession of child pornography.<sup>91</sup> While it may be harsh, it shows that Puerto Rico views revenge porn to be a serious sex crime, whereas the continental U.S. does not.

The U.S. would benefit from adopting a revenge porn statute similar to that of Puerto Rico that vehemently seeks deterrence. Threats, extortion, and personal gain seem to be a common thread in many revenge porn cases across the country. Revenge porn is a serious problem, especially with revenge porn websites, that needs to be resolved. The deterrence approach certainly could work with the felony status of any person violating the statute. It is hard to say for certain the effect of this law given that the Puerto Rico statute is so new there is no case law on the matter yet.

### **C. Canada**

Canada’s revenge porn statute is found in section 162.1 of their criminal code. The law prohibits anyone to,

knowingly publish[], distribute[], transmit[], sell[], make[] available or advertise[] an image of a person knowing that the person depicted in the image did not give consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct.”<sup>92</sup>

There are civil penalties for violating Canada’s revenge porn statute. In Canada, a victim has a private right of action to sue their perpetrator under a new cause of action in the country called “public disclosure of private facts.”<sup>93</sup> “This tort occurs when an individual shares private information about another person

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

<sup>91</sup> *Sex Offender*, Cornell Law School, [https://www.law.cornell.edu/wex/sex\\_offender](https://www.law.cornell.edu/wex/sex_offender).

<sup>92</sup> *Publication, etc., of an intimate image without consent*, Justice Laws Website, <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-162.1.html>.

<sup>93</sup> *Revenge Porn Lawyer in Toronto*, Donich Law, <https://mydefence.ca/toronto-publication-of-an-intimate-image-lawyer/#:~:text=As%20outlined%20above%2C%20sharing%20intimate,protect%20privacy%20in%20terests%20in%20Canada>.

without that person’s consent.”<sup>94</sup> In order to be held liable under this tort, two elements must be met. First, “the publication would be highly offensive to a reasonable person”<sup>95</sup> and second “the publication is not of legitimate public concern.”<sup>96</sup> Canada has awarded large damage amounts for this tort, up to \$100,000 for committing the tort of public disclosure of private facts.<sup>97</sup>

The criminal penalties for violating this statute are different from typical American jurisprudence. Any person who violates the statute will be guilty of a “hybrid offence.”<sup>98</sup> “This allows the Crown to proceed either summarily or by indictment.”<sup>99</sup> When there is an indictment there is no statute of limitations, therefore, charges can come about any time after the crime has been committed.<sup>100</sup> However, if the Crown proceeds summarily there is a one-year statute of limitations.<sup>101</sup> After a year has passed then the Crown must go the indictment route unless the accused chooses to waive the limitation period.<sup>102</sup> There is a possibility of imprisonment with a “maximum of between five years and two years less of a day.”<sup>103</sup> Additionally, the court may order the perpetrator to be barred from using the internet for a period of time, excluding for work purposes.<sup>104</sup>

Canada’s penalties are reasonable enough to deter the crime. The private right of action is a good remedy for victims and the high damages award could act as a deterrent. The prison time is relatively low, especially compared to Puerto Rico, however, no statute of limitations can certainly be a deterrence. It is clear Canada wishes to cut down on revenge porn without being too harsh.

#### **IV. Proposed United States Federal Law**

In 2019 a bill was brought to the House of Representatives called the Stopping Harmful Image Exploitation and Limiting Distribution Act of 2019 (SHIELD). This act would have prohibited a person to:

knowingly use any means or facility of interstate or foreign commerce to distribute an intimate visual depiction of an individual – (1) with knowledge of or reckless disregard for – (A) the lack of consent of the individual to the distribution; and (B) the reasonable expectation of the individual that the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

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

<sup>97</sup> *Revenge Porn Lawyer in Toronto*, Donich Law, <https://mydefence.ca/toronto-publication-of-an-intimate-image-lawyer/#:~:text=As%20outlined%20above%2C%20sharing%20intimate,protect%20privacy%20in%20terests%20in%20Canada.>

<sup>98</sup> *Id.*

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

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

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

<sup>102</sup> *Id.*

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

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

depiction would remain private; and (2) without an objectively reasonable belief that such distribution touches upon a matter of public concern.<sup>105</sup>

The penalty for violation would have been a fine, imprisonment up to five years, or both.<sup>106</sup> This bill was very similar to many state revenge porn statutes by giving a possibility of imprisonment, but the maximum amount of time is not large. This bill died in Congress, and it did not receive a vote.<sup>107</sup> Fortunately, this failure did not stop the push to pass federal revenge porn legislation.

In March 2021, the SHIELD Act of 2021 was added as an amendment to the Violence Against Women Act Reauthorization Act of 2021.<sup>108</sup> There are a few changes between the 2019 act and the 2021 act, the main one being the penalty. Under the 2021 act, the penalty for violating the statute was minimized to no more than two years imprisonment for each victim depicted.<sup>109</sup> This has not yet passed. It is currently in the first chamber of the House of Representatives with a low chance of passage.<sup>110</sup> However, this is the best thing the United States has right now to get a federal revenge porn statute, there is nothing new on the horizon while the SHIELD Act works its way through the legislative process.

## V. What the United States Should do on a Federal Level

The SHIELD Act is certainly taking a step in the right direction, but there could be harsher punishments and civil penalties added. The breadth of prohibited content in the proposed SHIELD Act is a great start. An area that should be removed should be “without an objectively reasonable belief that such distribution touches upon a matter of public concern.”<sup>111</sup> There should not be a reason why someone’s private intimate photos or videos are ever a matter of public concern. Canada has a similar provision, however, there is no need for it in either Canada or the United States statutes, moreover, any country’s revenge porn laws. One’s privacy is something that should be of the utmost value. Simply because someone may be a public figure should not mean that private images of them are of public concern and therefore should not be an exclusion in revenge porn statutes. Looking at Puerto Rico and

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<sup>105</sup> *H.R. 2896*, Congress (May 22, 2019), [https://www.congress.gov/bill/116th-congress/house-bill/2896/text#:~:text=Introduced%20in%20House%20\(05%2F22%2F2019\)&text=To%20amend%20title%2018%2C%20United.distribution%2C%20and%20for%20other%20purposes](https://www.congress.gov/bill/116th-congress/house-bill/2896/text#:~:text=Introduced%20in%20House%20(05%2F22%2F2019)&text=To%20amend%20title%2018%2C%20United.distribution%2C%20and%20for%20other%20purposes).

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

<sup>107</sup> *H.R. 2896 (116<sup>th</sup>): SHIELD Act of 2019*, GovTrack, <https://www.govtrack.us/congress/bills/116/hr2896>.

<sup>108</sup> *Press Release*, Congress Woman Jackie Speier (Mar. 17, 2021), <https://speier.house.gov/2021/3/speier-and-katko-amendment-to-address-online-exploitation-of-private-images-included-in-violence-against-women-reauthorization-act>.

<sup>109</sup> *Amendment to Rules Committee Print 117-3*, Congress Woman Jackie Speier, [https://speier.house.gov/\\_cache/files/3/0/30d55e9e-b75d-42fa-8787-22f7a7a98e23/3BF785007E4368CDA50DB1C8C78729A6.speier-034-xml.pdf](https://speier.house.gov/_cache/files/3/0/30d55e9e-b75d-42fa-8787-22f7a7a98e23/3BF785007E4368CDA50DB1C8C78729A6.speier-034-xml.pdf).

<sup>110</sup> *117 Legislative Outlook H.R. 1620*, LEXIS (accessed April 2022).

<sup>111</sup> *H.R. 2896*, Congress (May 22, 2019), [https://www.congress.gov/bill/116th-congress/house-bill/2896/text#:~:text=Introduced%20in%20House%20\(05%2F22%2F2019\)&text=To%20amend%20title%2018%2C%20United.distribution%2C%20and%20for%20other%20purposes](https://www.congress.gov/bill/116th-congress/house-bill/2896/text#:~:text=Introduced%20in%20House%20(05%2F22%2F2019)&text=To%20amend%20title%2018%2C%20United.distribution%2C%20and%20for%20other%20purposes).

Australia's statutes, neither list a matter of public concern as a reason for sharing intimate photos. Other countries do not include this exclusion perhaps because they feel that there will never be such a thing as public concern for sharing intimate photos. Even if the Prime Minister of Australia had nude photos, they cannot be shared under Australia's statute, as it should be. Revenge porn is a serious invasion of privacy that everyone deserves the right to, including public figures.

There should be civil penalties imposed on perpetrators of revenge porn. Victims must be able to seek a private right of action against anyone who shares their intimate photos without permission. While criminal penalties may help a victim feel slightly better about the incident, they need to be able to receive damages for the harm caused to them. Revenge porn can be extremely detrimental both emotionally and financially. Women are disproportionately affected by revenge porn and women typically already face ridicule in their daily lives. Many women don't find out about their nudes being on the internet themselves, it typically comes from people reaching out to let them know what they have seen, or they find out much later.<sup>112</sup> Finding out that nude photos of yourself are on the internet, can cause serious mental anguish for a victim. It can quickly feel like your world is ending. For some victims, they may actually lose their job. Victims' employers may see the photos and determine their actions are not in line with the companies' policies and terminate them. Victims certainly should be able to recover lost wages and damages for emotional distress. Additionally, there should be punitive damages that victims can receive. People must know they will be punished for invading someone else's privacy like this. Similarly to Canada, the United States should either make a new tort for this invasion of privacy or allow this to fall under public disclosure of private facts, an already established tort in American Jurisprudence. Furthermore, the U.S. should follow suit of Australia and require websites, social media sites, etc., to remove any revenge porn within forty-eight hours of notification or else face penalties. This holds more people accountable and helps to mitigate the spread and harm felt by victims.

The criminal penalties must be harsher than what the SHIELD Act of 2021 proposes. A maximum of two years imprisonment per victim is nowhere close to a deterrent. Revenge porn is a heinous act that the United States should actively be trying to get rid of, harsh measures are required. Comparably to Canada, the U.S. should not have a statute of limitations for this crime. Some victims are unaware they are victims for years given that their images are posted on revenge porn websites, a place many victims don't frequent. If the country cannot eliminate a statute of limitations provision, then it must be a long statute of limitations, such as ten to fifteen years, so victims will be able to feel vindicated. Additionally, the U.S. should follow in the footsteps of Puerto Rico's harsh deterrence measures, although it may not be necessary to be as harsh as Puerto Rico. The first offense should be a misdemeanor. With the first offense, if there are no aggravating factors, the offender shall pay fines not exceeding \$10,000 and face imprisonment of no less than one year and no more than four. This should have a decent amount of

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<sup>112</sup> See generally VanBuren (nudes discovered on Facebook due to friends and family).

deterrence for basic revenge porn offenders. However, if there are aggravating factors, such as threats, extortion, or personal gain then the offender must pay fines not exceeding \$20,000 and face imprisonment of no less than three years and no more than six. With any repeat offenses, the crime shall be a felony. Offenders must pay fines no less than \$25,000 but not exceeding \$100,000 depending on aggravating factors. The offender must be imprisoned for a minimum of five years but not exceeding twenty years, depending on the number of offenses, victims, and aggravating factors. Each victim shall be viewed as a single offense. Imprisonment terms may not be served concurrently.

While these proposed penalties may be harsh, they are crucial to cutting down the prevalence of this horrid crime. The key must be deterrence. There is no reason, ever, for anyone to knowingly distribute intimate photos of another person without their consent. The harms are insurmountable, and everyone has a right to privacy.

The piecemeal approach that the U.S. has now will not work forever. The country is only four states away from having every state have some kind of revenge porn statute. Surely there will come a time when every single state has its own statute. This can be problematic because each statute will be slightly different from the other. There will not be one comprehensive statute that is equal for every victim. Victims in some states could seek a private right of action whereas some in other states cannot. Moreover, some states have a different view of when someone has a reasonable expectation of privacy over other states. Nothing is universal when it comes to the piecemeal approach the U.S. has right now. That is why there must be one federal revenge porn statute to combat the problem and help victims obtain the proper redress they need. Perpetrators must face the consequences of invading someone's privacy when they trusted them with private photos, especially if they were not trusted and the photos were stolen or taken of someone without the person's knowledge.

## **VI. Conclusion**

In this paper, I have reviewed the operation of several revenge porn websites. I examined how they came about and the disproportionate impact they have on women. Then, I reviewed Texas and Vermont's revenge porn statutes and one case violation of each statute. Each case has a negative implication for victims that can serve as a dangerous precedent in each state, especially in Vermont. Next, I reviewed Puerto Rico, Australia, and Canada's revenge porn statutes and their harsh penalties. After, I looked at the failed SHIELD Act and the status of the new act. Finally, I proposed my own prohibition and penalties that the U.S. should impose to protect and deter revenge porn. The United States clearly falls short on revenge porn legislation and must adopt a federal law to protect the privacy rights of its citizens.