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## Confronting Nonconsensual Pornography with Federal Criminalization and a “Notice-and-Takedown” Provision

Dalisi Otero

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## NOTES

### **Confronting Nonconsensual Pornography with Federal Criminalization and a “Notice-and-Takedown” Provision**

DALISI OTERO\*

*The issue of nonconsensual pornography has recently been brought into the limelight because of events like the online postings of celebrities' intimate photos. Non-celebrities, however, have been victimized in this way since long before the recent hackings, and their lives are also changed in the worst possible way. The harms that result from the unconsented-to distribution of an individual's intimate photos and videos are severe and oftentimes long-lasting. This Comment suggests that an alternative proposal to help non-consensual pornography victims regain their reputations, their privacy, and their lives, is to federally criminalize the nonconsensual distribution of a person's intimate images or videos, and include in the law a safe-harbor provision with a "notice-and-takedown" procedure similar to the provision in Section 512 of the Digital Millennium Copyright Act. Such a framework would bind the hands of Internet service providers to remove nonconsensual pornography or links to such content from their websites in order to avoid criminal*

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\* J.D. Candidate, University of Miami School of Law, 2016; B.A. Political Science, magna cum laude, Florida International University, 2013. The author thanks Professor Mary Anne Franks for her vast amount of knowledge, her guidance during the writing process, and her inspiring dedication to fighting nonconsensual pornography. Additionally, the author thanks her loving and supportive parents, who taught her about the importance of hard work and an education; her fiancé for his unending love and encouragement; and her family and friends for their constant support.

*liability. It is the author's hope that this alternative proposal will provide victims with an additional tool to regain their privacy and dignity by having nonconsensual pornography removed from the Internet.*

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## INTRODUCTION

Alecia, a Missouri mother who worked as an independent insurance agent, checked her email early one Friday morning and opened a message referring to the online posting of nude photos.<sup>1</sup> She clicked a link in the suspicious e-mail, which led her to a website.<sup>2</sup> What happened next could be the subject of a nightmare or a movie thriller; to her horror, Alecia saw a photo of herself walking out of a shower nude, and the photo had been made public for the world to see.<sup>3</sup> This was no nightmare, however. This was reality for Alecia, and it is the reality for thousands of individuals, mostly women,<sup>4</sup> who become victims of the nonconsensual dissemination of their intimate media.<sup>5</sup>

Alecia's ex-husband took the photo of her walking out of the shower seven years earlier in their jointly owned home.<sup>6</sup> She likely did not think at that moment that they would eventually divorce and that he would use that same photo to humiliate her and destroy her personal and professional reputation.<sup>7</sup>

The availability of nonconsensual pornography, sometimes called "revenge porn," has unfortunately increased significantly over the past decade because of the prevalence of smartphones and

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<sup>1</sup> Lara Moritz, *Woman Fights for Revenge Porn Laws After Ex Posted Nude Photo Online*, KMBC (Apr. 24, 2014, 11:20 PM), <http://www.kmbc.com/news/woman-fights-for-revenge-porn-laws-after-ex-posted-nude-photo-online/25649360>.

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

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

<sup>4</sup> See Vanessa Lawrence, *The Sex Crime We Need to Talk About*, ELLE AUSTRALIA (Dec. 27, 2014), <http://www.elle.com.au/news/zeitgeist/2014/12/the-sex-crime-we-need-to-talk-about/> (noting that the gender disparity in nonconsensual pornography victims is a "depressing reflection of the [I]nternet's hostility towards women").

<sup>5</sup> See Moritz, *supra* note 1; see also Lorelei Laird, *Victims Are Taking On 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, ABA JOURNAL (Nov. 1, 2013, 9:30 AM), [http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c).

<sup>6</sup> Moritz, *supra* note 1.

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

the increased connectivity of the Internet.<sup>8</sup> The infamous “nude celebrity hacking scandal,” as it was perhaps too casually named,<sup>9</sup> made headlines all over the world in August of 2014.<sup>10</sup> Hundreds of intimate photos of celebrities, mostly women, were stolen from an online database called the iCloud and disseminated through the Internet.<sup>11</sup> Jennifer Lawrence, one actress whose photos were stolen and published online as part of the alarming privacy intrusion, said in an interview with the magazine *Vanity Fair*, “It is not a scandal. It is a sex crime. It is a sexual violation. It’s disgusting. The law needs to be changed, and we need to change.”<sup>12</sup>

Although the issue of nonconsensual pornography has recently been put into the limelight because of events like the online postings of celebrities’ intimate photos, non-celebrities like Alecia have been the victims of nonconsensual pornography for years, and their lives are also changed in the worst possible way.<sup>13</sup> Distributing an individual’s intimate media without consent can cause severe and long-lasting harms, largely because of the increasing technological capability to spread information on the web like a forest fire.<sup>14</sup>

Legal scholars have proposed a variety of strategies for combating nonconsensual pornography and giving victims recourse once the initial damage has been inflicted. Amanda Levendowski, a New

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<sup>8</sup> See Taylor Linkous, *It’s Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 RICH. J.L. & TECH. 14, 1, 5 (2014).

<sup>9</sup> See *Let’s Call the Celebrity Nude Photo Hack What It Is: Nonconsensual Pornography*, END REVENGE PORN (Sept. 4, 2014), <http://www.endrevengeporn.org/lets-call-nonconsensual-pornography/>.

<sup>10</sup> Lawrence, *supra* note 4 (discussing the celebrity personal photograph hacking scandal).

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

<sup>12</sup> Sam Kashner, *Both Huntress and Prey*, VANITY FAIR (Oct. 17, 2014, 10:35 AM), <http://www.vanityfair.com/vf-hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy>.

<sup>13</sup> Tara Culp-Ressler, *This Idea Could Stop People from Posting Women’s Naked Photos Without Permission*, THINK PROGRESS (Sept. 2, 2014, 11:43 AM), <http://thinkprogress.org/health/2014/09/02/3477844/revenge-porn-policy/>.

<sup>14</sup> See Lawrence, *supra* note 4.

York University Law graduate, suggests using copyright law to protect victims.<sup>15</sup> Samantha Kopf, a Pace University Law graduate, argues that nonconsensual pornography victims have the best chance for redress when nonconsensual pornography is criminalized at the state level.<sup>16</sup> Ariel Ronneburger, a New York lawyer, proposes that the Communications Decency Act ("CDA")<sup>17</sup> be amended to require Internet service providers to "act upon knowledge" of revenge porn that is communicated through their networks or face civil and criminal liability.<sup>18</sup> Law professor Danielle Citron recommends that the CDA be amended to remove websites used mainly for the dissemination of nonconsensual pornography from its safe harbor provision.<sup>19</sup> Further, Citron and Mary Anne Franks, law professor at the University of Miami School of Law, argue that current civil law remedies are ineffective deterrents to those who disseminate revenge pornography, and they propose direct criminalization, including a federal criminal prohibition, of nonconsensual pornography disclosure.<sup>20</sup>

An alternative proposal to help nonconsensual pornography victims regain their reputation, their privacy, and their lives, is to federally criminalize the nonconsensual distribution of a person's intimate images or videos and include in the law a safe harbor provision incorporating a "notice-and-takedown" procedure similar to that of § 512 of the Digital Millennium Copyright Act ("DMCA").<sup>21</sup> The

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<sup>15</sup> Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 426 (2014).

<sup>16</sup> Samantha Kopf, *Avenging Revenge Porn*, 9 AM. U. MODERN AM. 22, 23 (2014).

<sup>17</sup> Communications Decency Act of 1996, 47 U.S.C. § 230 (2012).

<sup>18</sup> Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 22–23 (2009).

<sup>19</sup> Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPS. (Jan. 25, 2013), <http://concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html>.

<sup>20</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 349, 389 (2014).

<sup>21</sup> See 17 U.S.C. § 512 (2012).

modified safe harbor provision would require Internet service providers,<sup>22</sup> but not information content providers, to follow certain procedures (e.g., establish policies that prohibit the uploading of nonconsensual pornography and require a consent form to be uploaded along with intimate media). These procedures and the safe harbor provision would essentially force Internet service providers to remove nonconsensual pornography or links to nonconsensual pornography from their websites in order to avoid criminal liability.

A major component of the proposed safe harbor provision would be the requirement that Internet service providers implement certain deterrent provisions in their online content policies. These provisions should include the required suspension or deletion of user accounts that upload nonconsensual pornography (similar to what many websites already do in response to the posting of child pornography).<sup>23</sup> They should also include a requirement of an affirmative showing of consent<sup>24</sup> by the individuals depicted in the intimate media—either up-front at the time of initial uploading or by counter-notice after the media is taken down in order for the media to be re-uploaded. Information content providers that are not also service providers (meaning those that do not allow users to provide content,

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<sup>22</sup> An Internet-service provider is a website that allows users to provide the content, while the website itself simply provides a means of posting the content. Ronneburger, *supra* note 18, at 12 n.50 (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991)). An information-content provider is a website whose owners provide the content on the site. *Id.* (citing *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1164 (9th Cir. 2007)).

<sup>23</sup> See *Child Endangerment*, YOUTUBE, <https://support.google.com/youtube/answer/2801999> (last visited Feb. 18, 2016); *The Twitter Rules*, TWITTER, <https://support.twitter.com/articles/18311-the-twitter-rules> (last visited Feb. 18, 2016); *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Feb. 18, 2016). Facebook does not explicitly state in its policy that users who post child pornography will face account suspension or deletion. *Id.* However, its policy states that if the user violates the “letter or spirit” of the policy, Facebook can stop providing all or part of its site to the user. *Id.* Reddit is paving the way for other websites; it updated its policies to prohibit users from posting nonconsensual pornography. *Reddit Content Policy*, REDDIT, <https://www.reddit.com/help/contentpolicy> (last visited Feb. 18, 2016).

<sup>24</sup> An affirmative showing of consent could take many possible forms: perhaps a video recording of the depicted individuals giving consent, a written statement of consent, or a signed consent form.

but rather provide the content themselves) would not have immunity under the safe harbor provision because the content providers would have directly posted the illegal content.<sup>25</sup>

Part I explains what nonconsensual pornography is, its harms to victims, and the lack of legal protections afforded to victims. Part II sheds light on some of the previously proposed solutions to nonconsensual pornography and discusses why each prior proposal, although minimally useful to help victims, alone is insufficient and would be buttressed by federal criminalization of nonconsensual pornography with a modified notice-and-takedown provision. Part III maps out an alternative solution to the problem of nonconsensual pornography: federal criminalization with a notice-and-takedown provision similar to § 512 of the DMCA.<sup>26</sup> Finally, this Comment concludes that the proposed solution provides another weapon in the arsenal of legal strategies that victims may use to combat the individuals who seek to cause so much harm.

## I. WHAT IS NONCONSENSUAL PORNOGRAPHY?

### A. *The Rise of Nonconsensual Pornography and Its Harms*

Nonconsensual pornography, also known as “revenge porn,” “cyber rape,” or “involuntary porn,”<sup>27</sup> involves the dissemination of edited or unedited sexually graphic images or videos of individuals without their consent.<sup>28</sup> Images and videos originally obtained both with and without consent are included in the definition.<sup>29</sup> Individuals post nonconsensual pornography for many reasons, ranging from a desire for sexual entertainment, no matter the cost to the person depicted in the media, to a twisted longing to take revenge upon an

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<sup>25</sup> See *supra* note 22 (explaining the difference between a service provider and a content provider).

<sup>26</sup> See 17 U.S.C. § 512.

<sup>27</sup> Citron & Franks, *supra* note 20, at 346 n.10.

<sup>28</sup> *Id.* at 346; Kopf, *supra* note 16, at 22.

<sup>29</sup> *Frequently Asked Questions*, END REVENGE PORN, <http://www.endrevengeporn.org/faqs/> (last visited Jan. 17, 2015, 11:00 PM).



ex-partner.<sup>30</sup> Regardless of the motive, the harm to the victim is severe.<sup>31</sup>

Nonconsensual pornography may be uploaded to the Internet for the world to view and share endlessly.<sup>32</sup> Once the media is posted online, it becomes extremely difficult to have it removed,<sup>33</sup> and the images or photos may be the first results listed when the victim's name is searched online.<sup>34</sup> Revenge porn victims face grave harms, including "stalking, loss of professional and educational opportunities, and psychological damage."<sup>35</sup> Frequently, the offender who posts the nonconsensual explicit images or videos includes the victim's name, state, city, place of employment, and even contact information.<sup>36</sup> To make matters worse, victims who speak out may even face the risk of increased harm by drawing attention to the media.<sup>37</sup>

The term "Porn 2.0" is used to refer to websites that allow users to post pornography that the users themselves created.<sup>38</sup> With the rise of Porn 2.0, it is easier for individuals to post intimate media of others who did not consent to its dissemination.<sup>39</sup> With the increased

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<sup>30</sup> See Amanda L. Cecil, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2515 (2014); see also Culp-Ressler, *supra* note 13.

<sup>31</sup> Mary Anne Franks, *We Need New Laws to Put a Stop to Revenge Porn*, INDEPENDENT (Feb. 23, 2014), <http://www.independent.co.uk/voices/Note/we-need-new-laws-to-put-a-stop-to-revenge-porn-9147620.html>.

<sup>32</sup> *Frequently Asked Questions*, *supra* note 29 (explaining nonconsensual pornography).

<sup>33</sup> Cecil, *supra* note 30, at 2516.

<sup>34</sup> Franks, *supra* note 31.

<sup>35</sup> Citron & Franks, *supra* note 20, at 347.

<sup>36</sup> See, e.g., Nina Bahadur, *Victims of 'Revenge Porn' Open up on Reddit about How It Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014, 8:50 AM), [http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact\\_n\\_4568623.html](http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html); Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013), <http://www.theguardian.com/Noteisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

<sup>37</sup> Bahadur, *supra* note 36; see also Chiarini, *supra* note 36.

<sup>38</sup> Ronneburger defines "Porn 2.0" as "websites that allow users to post pornography that they themselves have created." Ronneburger, *supra* note 18, at 2.

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

use of technologies like smart phones and tablets and the more widespread connectivity of the Internet, nonconsensual pornography is now easier to disseminate than ever before.<sup>40</sup> The destruction of an individual's personal dignity and professional reputation, as well as their mental and emotional health, is only a click away.<sup>41</sup>

*B. Nonconsensual Pornography Victims Often Have No Recourse*

The dissemination of nonconsensual pornography differs from other forms of harm because victims often have little to no recourse once the image has been posted and their private, intimate media has been distributed.<sup>42</sup> *People v. Barber*, for example, exemplifies how nonconsensual pornography has not been considered to be within the scope of criminal law. There, a New York County Court held that a man who, without his ex-girlfriend's consent, posted nude photos of her to his Twitter account and sent the photos to her employer and sister did not violate any of the criminal statutes under which he was charged.<sup>43</sup> The man had been charged with Aggravated Harassment in the Second Degree, Dissemination of an Unlawful Surveillance Image in the Second Degree, and Public Display of Offensive Sexual Material.<sup>44</sup> Even worse than those cases in which the offenders are not punished are the cases in which law enforcement officers engage in "victim blaming," which entails shaming victims for having taken or allowed the taking of the intimate photos in the first place.<sup>45</sup> In such cases, the harms caused by the

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<sup>40</sup> Linkous, *supra* note 8, at 5, 9–11.

<sup>41</sup> See Kopf, *supra* note 16, at 22.

<sup>42</sup> Cecil, *supra* note 30, at 2532–34.

<sup>43</sup> *People v. Barber*, No. 50193(U), slip op. at 1 (N.Y. Sup. Ct. Feb. 18, 2014).

<sup>44</sup> *Id.* at 1–2. In a different case, the "most hated person on the Internet," Hunter Moore, owner of the now-obsolete revenge pornography website *Is Anyone Up*, was arrested by FBI officials in January 2015. Jessica Roy, *Revenge Porn King Hunter Moore Was Arrested, But Not for Hosting Revenge Porn*, TIME (Jan. 27, 2014), <http://newsfeed.time.com/2014/01/27/revenge-porn-king-hunter-moore-was-arrested-but-not-for-hosting-revenge-porn/>. Although he ultimately pled guilty and will face time in prison, he was indicted, not for disseminating nonconsensual pornography, but for breaking hacking laws by paying others to obtain the intimate media. *Id.*

<sup>45</sup> See Chiarini, *supra* note 36 (describing a victim's first experience with "overt victim blaming").

initial act of disseminating the intimate media, including depression and anxiety, can be amplified.<sup>46</sup>

## II. PAST PROPOSALS FOR HELPING VICTIMS AND HOLDING OFFENDERS ACCOUNTABLE

Legal scholars have proposed several solutions for nonconsensual pornography victims to obtain redress against offenders. Proposals have included the use of copyright law, private lawsuits, and amendments to the CDA.

### A. *Copyright Law*

Amanda Levendowski proposes using copyright law to provide redress for nonconsensual pornography victims.<sup>47</sup> She acknowledges the weaknesses of using tort law to combat nonconsensual pornography, especially because of the legal protection afforded to websites under § 230 of the CDA.<sup>48</sup> Levendowski argues that copyright law “establishes a uniform method for revenge porn victims to remove their images, target websites that refuse to comply with takedown notices and, in some cases, receive monetary damages.”<sup>49</sup>

However, as Levendowski acknowledges, not all nonconsensual pornography cases fall within the scope of copyright law.<sup>50</sup> For an individual to have rights over their media, the individual must be the author of that media.<sup>51</sup> Similar to the example highlighted in the introduction of this Comment, there are nonconsensual pornography cases in which the victim did not photograph herself or even know that she was being photographed.<sup>52</sup> Although Levendowski asserts

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<sup>46</sup> Cecil, *supra* note 30, at 2524; Citron & Franks, *supra* note 20, at 351.

<sup>47</sup> See generally Levendowski, *supra* note 15, at 446 (arguing that “for the vast majority of revenge porn victims, copyright presents an efficient means of self-help”).

<sup>48</sup> *Id.* at 425.

<sup>49</sup> *Id.* at 426.

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

<sup>51</sup> See 17 U.S.C. § 201 (2012); Levendowski, *supra* note 15, at 440.

<sup>52</sup> See *supra* Introduction (discussing the circumstances of Alecia, the Missouri insurance agent whose ex-husband posted her nude photo online without her consent).

that "eighty percent of revenge porn images are 'selfies,'" <sup>53</sup> which would be protected by copyright law, <sup>54</sup> for the remaining portion of victims whose intimate media is not comprised of "selfies," copyright law would not be useful or even applicable. <sup>55</sup> While copyright law may be helpful to some victims who authored their own photos, more must be done to provide adequate deterrence, protection, and remedies. <sup>56</sup>

### B. Civil Liability

Tort law is useful for providing money damages to a victim, but often a victim's main priorities are having their images removed as quickly as possible. <sup>57</sup> Thus, tort law, in general, is of little aid to nonconsensual pornography victims because these victims are often looking for more than "injunctive relief, civil penalties, or monetary damages." <sup>58</sup> The threat of civil liability is not a strong enough deterrent because individuals who disseminate intimate images without consent know they will likely not be sued due to the economic and emotional costs to the victim. <sup>59</sup> Furthermore, even if a victim is successful in a civil suit, an already-disclosed image likely will continue to spread. <sup>60</sup> Thus, a victim is faced with a Hobson's choice: do nothing and have no redress, or spend thousands of dollars in a civil suit and have some or no redress. If the victim loses the case, the money and time spent will have essentially been for nothing. If the victim wins damages and perhaps injunctive relief, the victim may still continue to be harmed by the ongoing cycle of the public's non-consensual sharing and viewing of the victim's intimate media. <sup>61</sup> In either case, the image remains online.

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<sup>53</sup> Levendowski, *supra* note 15, at 426.

<sup>54</sup> *See id.* "Selfie" is the common term for a photo that an individual takes of himself or herself.

<sup>55</sup> Ronneburger, *supra* note 18, at 19.

<sup>56</sup> *See id.*

<sup>57</sup> Citron & Franks, *supra* note 20, at 349; Levendowski, *supra* note 15, at 425.

<sup>58</sup> Levendowski, *supra* note 15, at 425.

<sup>59</sup> Citron & Franks, *supra* note 20, at 349.

<sup>60</sup> *Id.*

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

In the context of nonconsensual pornography, the imposition of civil liability is most useful only as a threat to websites for not complying with orders to remove intimate media, rather than as actual recourse for victims.<sup>62</sup> Unfortunately, however, there is no legal framework for civil liability to be useful even in this context. Civil suits against websites are unlikely to be successful, as was the case in *Barnes v. Yahoo!, Inc.*,<sup>63</sup> because Internet service providers that do not directly upload the content on their sites are immune under the CDA.<sup>64</sup> Additionally, imposing civil liability on Internet service providers—although a better form of deterrence than taking no action at all—is simply insufficient as a remedy for victims.<sup>65</sup> Instituting a civil suit necessitates ample resources in order to hire an attorney and pay the costs associated with litigation.<sup>66</sup> Moreover, as discussed above, civil liability lacks the damage-control that victims need.<sup>67</sup> Lastly, victims who step forward and speak out about what has happened to them face the prospect of being subjected to more humiliation and harassment because litigation is a public affair.<sup>68</sup>

### C. *The Communications Decency Act and Proposals to Amend It*

Congress passed the Communications Decency Act in 1996 in response to a growing concern that minors could access pornography on the then-newly developed and increasingly used World Wide Web.<sup>69</sup> Free speech advocates were highly concerned about the law, claiming that the CDA's application was too broad and its terms too vague, thus criminalizing innocent behavior.<sup>70</sup> Basing its opinion on free speech concerns, the United States Supreme Court, in *Reno v.*

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<sup>62</sup> Levendowski, *supra* note 15, at 425.

<sup>63</sup> *Barnes v. Yahoo!, Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, at \*11 (D. Or. Nov. 8, 2005), *rev'd*, 570 F.3d 1096 (9th Cir. 2009).

<sup>64</sup> See 47 U.S.C. § 230 (2012). Under the CDA's safe harbor provision, Internet service providers are not liable under local law for content uploaded by content providers on the service providers' sites. See *id.*

<sup>65</sup> Kopf, *supra* note 16, at 24.

<sup>66</sup> Salina Tariq, Comment, *Revenge: Free of "Charge?"*, 17 S.M.U. SCI. & TECH. L. REV. 227, 240 (2014).

<sup>67</sup> Levendowski, *supra* note 15, at 425.

<sup>68</sup> Tariq, *supra* note 66, at 240.

<sup>69</sup> See 47 U.S.C. § 223 (2012).

<sup>70</sup> *Supreme Court Rules CDA Unconstitutional*, CNN (June 26, 1997, 10:00 AM), [http://www.cnn.com/US/9706/26/cda.overturned.hfr/index.html?eref=site\\_search](http://www.cnn.com/US/9706/26/cda.overturned.hfr/index.html?eref=site_search).

ACLU, invalidated two of the CDA's statutory provisions in 1997, shortly after it was enacted.<sup>71</sup> One provision prohibited the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age."<sup>72</sup> The second provision prohibited the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."<sup>73</sup> The Court held that the two challenged CDA provisions abridged First Amendment freedom of speech.<sup>74</sup>

Despite the invalidation of these provisions, nonconsensual pornography victims and scholars have focused their attention on § 230 of the CDA, which is still in effect.<sup>75</sup> With limited exceptions, § 230 provides immunity for Internet service providers.<sup>76</sup> It states, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>77</sup> Courts have interpreted this language to mean that the CDA bars claims against service providers

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<sup>71</sup> 521 U.S. 844, 885 (1997).

<sup>72</sup> *Id.* at 859.

<sup>73</sup> *Id.* at 859–60.

<sup>74</sup> See U.S. CONST. amend. I; *Reno*, 521 U.S. at 885.

<sup>75</sup> See 47 U.S.C. § 230 (2012); Samuel J. Morley, *How Broad Is Web Publisher Immunity Under § 230 of the Communications Decency Act of 1996?*, 84 FLA. B.J. 8 (Feb. 10, 2012), [http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/94fda41e804565ac852576b9006af919!OpenDocument&Highlight=0,\\*](http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/94fda41e804565ac852576b9006af919!OpenDocument&Highlight=0,*).

<sup>76</sup> For example, § 230(e)(2) of § 230 is titled "No effect on intellectual property law," and states, "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." 47 U.S.C. § 230.

<sup>77</sup> § 230(c)(1). Section 230 of the Act was passed for the following policy reasons:

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development

for the information that a third-party user has distributed on or through the provider's service.<sup>78</sup> Generally, courts interpret § 230 immunity broadly, especially when a plaintiff sues a service provider for content that a third party posted.<sup>79</sup>

Even in cases of nonconsensual pornography in which service providers have notice of the content that has been posted, service providers are still granted immunity under the CDA.<sup>80</sup> In *Barnes v. Yahoo!, Inc.*, the District Court of Oregon, applying § 230 of the CDA, dismissed a woman's suit against Yahoo!, Inc. ("Yahoo") for ignoring her letters regarding her ex-boyfriend's nonconsensual posting of her nude photos online.<sup>81</sup> On appeal, the U.S. Court of Appeals for the Ninth Circuit held that Ms. Barnes's case against Yahoo was not barred by § 230 because it was based on the theory of promissory estoppel.<sup>82</sup> Because a Yahoo employee told Ms. Barnes that it would remove the photos, Ms. Barnes had the right to enforce the promise.<sup>83</sup> Although this ruling worked in Ms. Barnes's favor, it was a setback for nonconsensual pornography victims, as now service providers may simply avoid liability by not promising victims to remove content.<sup>84</sup>

#### 1. PROPOSAL TO AMEND THE CDA BY IMPOSING A DUTY TO ACT UPON NOTICE

Some legal scholars have proposed amending the CDA to provide nonconsensual pornography victims with a better opportunity

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and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

*Id.*

<sup>78</sup> Ronneburger, *supra* note 18, at 13 (citing *Barnes v. Yahoo! Inc.*, 2005 U.S. Dist. LEXIS 28061, at \*2 (2005), *rev'd*, 570 F.3d 1096 (9th Cir. 2009)).

<sup>79</sup> *Id.*

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

<sup>81</sup> *Barnes v. Yahoo! Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, at \*1-4 (D. Or. Nov. 8, 2005), *rev'd*, 570 F.3d 1096 (9th Cir. 2009).

<sup>82</sup> *Barnes*, 570 F.3d at 1107-09.

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

<sup>84</sup> Ronneburger, *supra* note 18, at 14.

for redress.<sup>85</sup> Ariel Ronneburger argues that the best way to regulate "Porn 2.0" is to amend the CDA to "require service providers to investigate claims of hosting non-consented pornography and subsequently remove such images or videos, in order to obtain immunity in suits over third-party content."<sup>86</sup> Her proposed amendment would "require service providers to act upon knowledge that [they are] hosting unauthorized pornography,"<sup>87</sup> similar to the notice-and-takedown provision of the Online Copyright Infringement Liability Limitation Act ("OCILLA"),<sup>88</sup> which is the safe harbor provision of the Digital Millennium Copyright Act ("DMCA").<sup>89</sup>

Amending the CDA to include action-upon-notice requirements for service providers to obtain immunity would be helpful for non-consensual pornography victims who want to obtain either the removal of their photos from one website or sue for monetary damages. However, this proposal would not help the majority of victims stop the cycle of damage resulting from others posting and sharing their photos.<sup>90</sup> Moreover, the threat of civil liability to Internet service providers who do not take down unauthorized media would not be as strong a deterrent as the threat of criminal prosecution. As discussed in Section II.D, victims want more than monetary damages.<sup>91</sup> Additionally, the majority of victims do not have sufficient resources to file suit against Internet service providers.<sup>92</sup> Most importantly, many victims do not want more attention directed toward their intimate media.<sup>93</sup>

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<sup>85</sup> See *id.* at 23 (proposing an amendment to the CDA conditioning Internet-service providers' immunity from civil liability and local criminal liability on "[action] upon knowledge" that the service provider is hosting nonconsensual pornography); Citron, *supra* note 19.

<sup>86</sup> Ronneburger, *supra* note 18, at 2, 5.

<sup>87</sup> *Id.* at 23.

<sup>88</sup> Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2012).

<sup>89</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

<sup>90</sup> See Levendowski, *supra* note 15, at 425.

<sup>91</sup> *Id.*; see also *infra* Section II.D (noting that state criminalization offers more than civil actions can provide).

<sup>92</sup> See Tariq, *supra* note 66, at 240.

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



## 2. PROPOSAL TO AMEND THE CDA BY DENYING SAFE HARBOR IMMUNITY UNDER § 230 TO NONCONSENSUAL PORNOGRAPHY WEBSITES

Section 230 of the CDA immunizes Internet-service providers from civil liability and state criminal liability.<sup>94</sup> Danielle Citron proposes amending the CDA to exclude revenge porn website operators from its immunity provision.<sup>95</sup> She argues that the broad immunity Congress provided to Internet service providers, including revenge porn operators, is “incompatible” with the stated purposes of the CDA.<sup>96</sup> Under the current legal framework, website operators “have no obligation to patrol their sites or respond to cyber harassment victims’ complaints, even though they would have to be responsive to complaints concerning copyright violations.”<sup>97</sup>

Amending § 230 to exclude nonconsensual pornography websites from the benefit of immunity would allow nonconsensual pornography victims to have some sort of leverage to pressure revenge porn website operators to remove damaging material or save Internet protocol addresses of users who post the material in the first place.<sup>98</sup> However, more must be done to hold nonconsensual pornography website owners and other website owners accountable for the injurious content that is uploaded onto their websites.

### D. *State Criminalization*

Many legal scholars, including Mary Anne Franks and Danielle Citron, advocate for state criminalization of the nonconsensual disclosure of intimate media in order to institute “more effective disincentives for nonconsensual pornography”<sup>99</sup> than civil actions currently provide. Franks and Citron argue that civil law offers only “modest deterrence and remedy, but practical concerns often render

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<sup>94</sup> Communications Decency Act of 1996, 47 U.S.C. § 230 (2012); Citron & Franks, *supra* note 20, at 359.

<sup>95</sup> See generally Citron, *supra* note 19 (discussing a proposal to amend the CDA).

<sup>96</sup> Danielle Citron, *Revenge Porn and the Uphill Battle to Sue Site Operators*, CONCURRING OPS. (Jan. 25, 2013), <http://concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-sue-site-operators.html>.

<sup>97</sup> *Id.*

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

<sup>99</sup> Citron & Franks, *supra* note 20, at 357.

them more theoretical than real.”<sup>100</sup> One of the main reasons for this view is that most victims cannot afford to file suit against their perpetrators.<sup>101</sup> This is often the case because nonconsensual pornography severely damages victims’ personal and professional reputations.<sup>102</sup> Many victims lose their jobs and find it difficult to obtain new employment because the injurious materials appear among the top search results when potential employers search victims’ names online.<sup>103</sup> The employment difficulties cause victims to lose the capability to pay basic living expenses like rent, thus making attorney’s fees nearly impossible to pay.<sup>104</sup>

As of February 2016, twenty-six states have enacted laws criminalizing nonconsensual pornography, although many of these laws are either too narrow or constitutionally infirm.<sup>105</sup> The difficulties in

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

<sup>101</sup> *Id.* at 358.

<sup>102</sup> Cecil, *supra* note 30, at 2522–23.

<sup>103</sup> Citron & Franks, *supra* note 20, at 358; Cecil, *supra* note 30, at 2522–23.

<sup>104</sup> Citron & Franks, *supra* note 20, at 358.

<sup>105</sup> See *States with Revenge Porn Laws*, END REVENGE PORN, <http://www.endrevengeporn.org/revenge-porn-laws/> (last visited Feb. 18, 2016) (listing and summarizing revenge pornography laws by state); *Frequently Asked Questions*, *supra* note 29; see also ALASKA STAT. § 11.61.120 (2014) (violation constitutes a class B misdemeanor); ARIZ. REV. STAT. ANN. § 13-1425 (2014) (violation constitutes a class-5 felony or a class-4 felony if the depicted person is recognizable); CAL. PENAL CODE § 647(j)(4) (West 2014) (violation constitutes disorderly conduct, a misdemeanor); COLO. REV. STAT. §§ 18-7-107 to -108 (2014) (violation constitutes a class-1 misdemeanor); DEL. CODE ANN. tit. 11, § 1335 (2015) (violation constitutes a class-B misdemeanor and class-G felony if aggravating factors are present); D.C. CODE §§ 22-3053 to -3054 (2015) (violation constitutes a misdemeanor or felony); FLA. STAT. § 784.049 (2015) (violation constitutes a first degree misdemeanor and third degree felony for second or subsequent violations); GA. CODE ANN. § 16-11-90 (2014) (violation constitutes a misdemeanor, or, if recidivist, a felony); HAW. REV. STAT. § 711-1110.9 (2014) (violation constitutes a class-C felony); IDAHO CODE ANN. § 18-6609 (2014) (violation constitutes a felony); 720 ILL. COMP. STAT. 5/11-23.5 (2014) (violation constitutes a class-4 felony); LA. REV. STAT. § 14:283.2 (2015) (violation is grounds for a fine not more than ten thousand dollars, imprisonment with or without hard labor for not more than two years, or both); ME. REV. STAT. ANN. tit. 17-A, § 511-A (2015) (violation constitutes a class-D crime); NEV. REV. STAT. ANN. A.B. 49, § 5 (2015) (violation constitutes a Category-D felony); MD. CODE ANN., criminal law § 3-809 (LexisNexis 2014) (violation constitutes a misdemeanor); N.J. STAT. ANN. § 2C:14-9 (West 2015) (violation constitutes a crime of the third

advancing nonconsensual pornography legislation are numerous.<sup>106</sup> Critics of state nonconsensual pornography laws argue that these laws can be too broad and thus violate First Amendment free speech principles,<sup>107</sup> or be too narrow to cover most nonconsensual pornography victims and impose too many hurdles regarding the burden of proof.<sup>108</sup> In response to criticism based on these issues, many of the state criminal revenge pornography laws fail to provide adequate protection for victims because they are constitutionally constrained and limited by intent requirements.<sup>109</sup>

Although state criminalization of nonconsensual pornography protects victims more than tort law does,<sup>110</sup> service providers still have broad immunity under § 230 that protects them from state criminal law.<sup>111</sup> Thus, service providers generally cannot be prosecuted under state criminal law for content posted by third parties.<sup>112</sup>

### III. A SOLUTION TO THE PROBLEM: FEDERAL CRIMINALIZATION AND A NOTICE-AND-TAKEDOWN PROVISION

To provide the greatest possible deterrence and the most useful remedies for victims, nonconsensual pornography should be criminalized at the federal level, and such legislation should include a

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degree); N.M. STAT. ANN. §§ 30-37A-1 (West 2015) (violation constitutes a misdemeanor or, if recidivist, a fourth degree felony); N.C. GEN. STAT. § 14-190.5A (2015) (violation constitutes class H felony, or class-1 misdemeanor if under age 18); N.D. CENT. CODE § 12.1-17-07.2 (2015) (violation constitutes a class-A misdemeanor); OR. REV. STAT. ANN. § 379 (S.B. No. 188) (West 2015) (violation constitutes a class-A misdemeanor, or a class-C felony if recidivist); 18 PA. CONS. STAT. § 3131 (2014) (violation constitutes a misdemeanor in the second degree or in the first degree if the person depicted is a minor); TEX. PENAL CODE ANN. § 21.15 (West 2013) (violation constitutes a state jail felony); UTAH CODE ANN. § 76-5b-203 (LexisNexis 2014) (violation constitutes a misdemeanor); VT. STAT. ANN. tit. 13, § 2606 (2015); VA. CODE ANN. § 18.2-386.2 (2014) (violation constitutes a class-1 misdemeanor); WASH. REV. CODE § 9A.86.010 (2015) (violation constitutes a gross misdemeanor); WIS. STAT. § 942.09 (2014) (violation constitutes a class-1 felony).

<sup>106</sup> Linkous, *supra* note 8, at 32.

<sup>107</sup> See U.S. CONST. amend. I; Cecil, *supra* note 30, at 2518, 2535.

<sup>108</sup> Linkous, *supra* note 8, at 32.

<sup>109</sup> Cecil, *supra* note 30, at 2537.

<sup>110</sup> See Citron & Franks, *supra* note 20, at 357.

<sup>111</sup> 47 U.S.C. § 230 (2012); Cecil, *supra* note 30, at 2534.

<sup>112</sup> 47 U.S.C. § 230.

provision similar to the notice-and-takedown provision of the Digital Millennium Copyright Act.<sup>113</sup>

*A. Federally Criminalize the Distribution of Nonconsensual Pornography*

An alternative, or perhaps additional, proposal to help victims fight back against those who post nonconsensual pornography is to federally criminalize such conduct and include a safe harbor provision with a “notice-and-takedown” procedure similar to the provision in § 512 of the DMCA.<sup>114</sup> The safe harbor provision would require Internet service providers to follow procedures in order to obtain a safe harbor from prosecution under the federal criminal law. Requiring Internet service providers to follow notice-and-takedown procedures and other requirements before obtaining immunity from prosecution would pressure service providers to remove nonconsensual pornography or links to nonconsensual pornography from their websites in order to avoid the threat of criminal punishment.

The proposed federal law would better deter nonconsensual pornography and provide victims with a means for removing their images from the Internet. Further, unlike § 512 of the DMCA, which requires that a copyright owner institute litigation in order for the content to remain off the website,<sup>115</sup> the proposed notice-and-takedown provision would not require a victim to file suit against the service provider for the content to remain off the website. The following paragraphs explain the contents of the proposed federal criminal law. The contents reflect Franks’s and Citron’s recommendations for criminal legislation, which are “informed by First Amendment doctrine, due process concerns, and the goal of encouraging the passage of laws that will deter revenge porn and its grave harms.”<sup>116</sup> Section III.B will discuss the safe harbor notice-and-takedown provision.

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<sup>113</sup> See *infra* Section III.A; see also Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPS. (Feb. 15, 2013), <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html>.

<sup>114</sup> See Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (2012).

<sup>115</sup> See *id.*

<sup>116</sup> Franks, *supra* note 113; Citron & Franks, *supra* note 20, at 386–89.

The proposed federal law would make it a class-E felony pursuant to 18 U.S.C. § 3559<sup>117</sup> to knowingly disclose to another person or disseminate to more than one person an image or video, or data which could be converted into an image or video, depicting another person's buttocks, genitals, pubic area, or female breast(s); or another person engaged in sexually explicit conduct either alone or with others; when the discloser or disseminator of such image, video, or data, at the time of disclosure or dissemination, knew or had reason to know that the person or one of the persons depicted had an expectation that the image or video would remain private and did not consent to the image or video being disclosed or disseminated, and the person or one of the persons depicted suffered emotional distress, physical harm, or economic injury as a result of the disclosure or dissemination of the image or video.

"Sexually explicit conduct" would be defined as it is in 18 U.S.C. § 2256:

- (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
- (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.<sup>118</sup>

The proposed law would also include an exception for matters of public interest or concern and for individuals who acted with a lawful purpose.<sup>119</sup>

A large concern for civil liberties groups is that laws criminalizing nonconsensual pornography will not have a sufficiently narrow scope and will thus be interpreted too broadly to comport with First Amendment free speech values.<sup>120</sup> Additionally, some legal scholars

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<sup>117</sup> 18 U.S.C. § 3559 (2012) ("Sentencing classification of offenses").

<sup>118</sup> 18 U.S.C. § 2256(2)(B) (2012).

<sup>119</sup> See Citron & Franks, *supra* note 20, at 388.

<sup>120</sup> *Id.* at 386 (citing Anne Flaherty, "Revenge Porn" Victims Press for New Laws, ASSOC. PRESS (Nov. 15, 2013, 12:34 PM), <http://bigstory.ap.org/article/revenge-porn-victims-press-new-laws>).

are concerned that nonconsensual pornography laws may “criminalize speech in which the public has a legitimate interest.”<sup>121</sup> While these are legitimate concerns for any type of law, the proposed law comports with Franks’s and Citron’s drafting techniques recommended to strengthen the law and keep its scope sufficiently narrow.<sup>122</sup> Moreover, many First Amendment concerns “reflect the tendency to treat sexual autonomy, especially women’s sexual autonomy, as a category less deserving of respect than other social values,” such as trade-secret protection, consumer protection, and fraud protection.<sup>123</sup>

The proposed federal law specifies the *mens rea*<sup>124</sup> required for a violation: a person (1) must knowingly disclose or disseminate intimate media and (2) know or have reason to know that the depicted person or people did not consent to the disclosure or dissemination or reasonably expected that the media would remain private. Although a recently passed California nonconsensual pornography law requires that the defendant know or should know that the distribution of the image will cause serious emotional distress,<sup>125</sup> legal scholars and advocates have criticized the California law,<sup>126</sup> arguing that a malicious motive is irrelevant in the case of nonconsensual pornography.<sup>127</sup> The detriment to the victim is grave, no matter the motive.

The proposed law also requires proof that the victim suffered harm—namely, emotional distress, physical harm, or economic injury. A requirement of harm to the victim would satisfy civil liberties groups’ interests in not criminalizing speech that has no impact on victims.<sup>128</sup> As a reflection of current First Amendment doctrine, the proposed law includes exceptions for matters of public interest

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<sup>121</sup> *Id.*

<sup>122</sup> Franks, *supra* note 113; Citron & Franks, *supra* note 20, at 386–89.

<sup>123</sup> Citron & Franks, *supra* note 20, at 348–49.

<sup>124</sup> *See id.* at 387 (explaining that “revenge porn laws should clarify the defendant’s mental state”).

<sup>125</sup> CAL. PENAL CODE § 647(j)(4) (West 2014).

<sup>126</sup> *See Cecil, supra* note 30, at 2518.

<sup>127</sup> *See Citron & Franks, supra* note 20, at 387.

<sup>128</sup> *Id.* at 388.

and individuals who acted with a lawful purpose.<sup>129</sup> Lastly, the proposed law specifically defines its subject matter, “sexually explicit conduct,” and the law specifies that it prohibits disclosure to one person as well as dissemination to more than one person. These provisions take into account constitutional concerns about vagueness and notice to the public concerning the exact activity that is prohibited.<sup>130</sup>

A number of civil liberties groups and legal scholars have argued that federal criminalization of nonconsensual pornography is unnecessary. Some argue that a system of private enforcement could lead to greater deterrence than a system of public enforcement would.<sup>131</sup> The argument is based on the assumption that individuals tend to respond more to levels of enforcement than the level of sanctions or expected penalty.<sup>132</sup> Critics argue that enforcement levels in a private law system are greater than they are in a public law system, specifically the federal legal system, because prosecutors have more resource constraints; they must focus on “national security, narcotics, organized crime, and white collar crime investigations,” leaving fewer resources for prosecuting nonconsensual pornography offenders.<sup>133</sup> Thus, because a private law system has higher enforcement levels, deterrence would also be higher than it would be in a public law system.<sup>134</sup>

While resources are limited in a public law system, they are even more limited for nonconsensual pornography victims in a private law system, as discussed in Part II.<sup>135</sup> Most victims lack the resources to hire an attorney to file suit against nonconsensual pornography disclosers or disseminators, including website owners.<sup>136</sup> If the offenders are not prosecuted under criminal law, many victims do not have any recourse against their perpetrators at all. Even if a victim with sufficient resources is able to sue an individual who initially discloses the damaging material, that individual may be judgment-proof, meaning that he or she has insufficient resources to

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<sup>129</sup> *See id.*

<sup>130</sup> *See id.* at 386.

<sup>131</sup> Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2085 (2014).

<sup>132</sup> *Id.* at 2086.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Tariq, *supra* note 66, at 240.

<sup>136</sup> Citron & Franks, *supra* note 20, at 358.

"make a damages claim worthwhile."<sup>137</sup> It is highly unusual for victims to have redress against website owners who have notice of injurious material on their websites and refuse to take it down because most of these websites are immune to civil liability and state criminal law prosecution under § 230 of the CDA.<sup>138</sup> As it stands, the current legal framework leaves many victims out in the cold, with essentially nowhere to go and no plausible action to take in response to serious and dangerous invasions of their privacy and damage to their reputation and dignity.<sup>139</sup> Federal criminalization of nonconsensual pornography is important for deterring the damaging action and punishing judgment-proof defendants.<sup>140</sup>

State criminal nonconsensual pornography laws are an important tool for states to deter nonconsensual pornography and provide some sort of redress for victims. Alone, however, state criminal laws are insufficient to fully control the nonconsensual pornography issue. First, state laws are limited in jurisdiction to the states in which they were enacted. One state's criminal nonconsensual pornography laws will not apply in another state, leaving victims in the other state helpless if their state has not enacted similar laws and if tort law does not cover their situation.<sup>141</sup>

Additionally, the Internet facilitates the committing of interstate crimes.<sup>142</sup> Nonconsensual pornography that crosses state lines would fall under federal jurisdiction because the federal government is authorized to regulate interstate commerce and its instrumentalities, which would include the Internet.<sup>143</sup> Thus, interstate nonconsensual pornography would be within the reach of federal law.<sup>144</sup> State criminal nonconsensual pornography laws would still be useful in order to control acts committed solely within state borders, whether or not the acts occur via the Internet.<sup>145</sup> An added benefit of

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<sup>137</sup> Bambauer, *supra* note 131, at 2085; Franks, *supra* note 115.

<sup>138</sup> See 47 U.S.C. § 230 (2012).

<sup>139</sup> See Ronneburger, *supra* note 18, at 3.

<sup>140</sup> See Bambauer, *supra* note 131, at 2085.

<sup>141</sup> Franks, *supra* note 113.

<sup>142</sup> *Id.*

<sup>143</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>144</sup> See *id.*; Citron & Franks, *supra* note 20, at 389 n.287.

<sup>145</sup> Franks, *supra* note 113.



enacting federal legislation is that a federal criminal law would provide a model for state laws.<sup>146</sup> Lastly, under § 230 of the CDA's broad grant of immunity, Internet service providers are immune from civil and state criminal liability, but not federal criminal liability.<sup>147</sup> Thus, federal criminal nonconsensual pornography laws would be useful for holding Internet service providers accountable for the content posted on their sites of which service providers have notice.

Although civil liberties groups may be concerned that nonconsensual pornography laws would impair free speech, there is little free speech value in the nonconsensual disclosure of a person's private, intimate images or videos.<sup>148</sup> In fact, it is the nonconsensual disclosure of sexually graphic media that chills speech.<sup>149</sup> Disclosing any information, let alone nude images or images of a person engaging in sexual acts, that was thought to be shared in confidence or that was never actually shared at all would chill even the most private speech because of the ever-present fear that the information or images could be disclosed. It is already clear that nonconsensual pornography affects the sharing of intimate images with others, which is a form of private speech: victims are constantly blamed for having allowed their partners to take photos of them or for having taken the photos of themselves.<sup>150</sup> Because of victim blaming in the context of nonconsensual pornography, individuals may refrain from expressing the private speech (intimate media) to begin with for fear of being shamed for their expression.

All efforts to punish offenders and help nonconsensual pornography victims obtain compensation and recourse are certainly beneficial. However, a federal criminal law like the one proposed, guided by recommendations by legal scholars like Franks and Citron, can give the government more power to deter the damaging behavior and can give victims more power in taking control of their situation and rebuilding their lives.

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

<sup>147</sup> 47 U.S.C. § 230 (2012).

<sup>148</sup> Citron & Franks, *supra* note 20, at 385.

<sup>149</sup> *Id.*

<sup>150</sup> See Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 700 (2014).

B. *Include a Provision Similar to the “Notice-and-Takedown”  
Provision of the Digital Millennium Copyright Act*

Nonconsensual pornography victims have a better chance of minimizing their damages if Congress enacts a federal law criminalizing nonconsensual pornography and includes a provision that victims can use to remove their images from the web. Unlike previous proposals, this proposal includes a notice-and-takedown provision modeled on the provision in § 512 of the DMCA.<sup>151</sup> Despite the limitations on using copyright law to battle nonconsensual pornography,<sup>152</sup> copyright law may be helpful to nonconsensual pornography victims in another way. Copyright law’s existing framework for removing infringing content from the Internet can be used as a model for similar provisions in a federal criminal nonconsensual pornography law. Thus, the proposed notice-and-takedown provision would be similar to the procedure outlined in § 512 of the DMCA.<sup>153</sup>

1. OCILLA—§ 512 OF THE DMCA

Past proposals for helping nonconsensual pornography victims have referred to the OCILLA portion of § 512 of the DMCA as a model for an amendment to the CDA.<sup>154</sup> With the increasingly widespread use of the Internet, and thus the growing threat of copyright infringement, the DMCA was passed in 1998 to impose harsher penalties for Internet copyright infringement.<sup>155</sup> The DMCA criminalizes the production or dissemination of technology that allows third parties to circumvent copyright laws.<sup>156</sup>

OCILLA creates a safe harbor for Internet service providers who either do not know about copyright infringement on their website or who, upon receiving notice of copyrighted material on their website, respond promptly by complying with a set of procedures defined in

<sup>151</sup> 17 U.S.C. § 512 (2012).

<sup>152</sup> See, e.g., Bambauer, *supra* note 131, at 2092; Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 45–46 (2012); Levendowski, *supra* note 15, at 439.

<sup>153</sup> 17 U.S.C. § 512.

<sup>154</sup> See Ronneburger, *supra* note 18, at 4.

<sup>155</sup> *Id.* at 14.

<sup>156</sup> *Id.* at 24.

the Section.<sup>157</sup> The law sets out procedures that must be followed by both Internet service providers and individuals claiming that the provider is hosting infringing material.<sup>158</sup> If the procedures are followed, the service provider is immune from liability for the infringing content posted by third parties on the service provider's website.<sup>159</sup> The notice-and-takedown procedure outlined in OCILLA requires service providers to "act[] expeditiously to remove, or disable access to, the material" upon notice of infringing material on its site.<sup>160</sup> The service provider must also have a designated agent to receive notifications of copyright infringement.<sup>161</sup>

The notification must include a physical or electronic signature of someone authorized to act on behalf of the owner of the copyright, a statement of good faith belief that copyrighted material is being infringed, and a statement that the information in the notification is accurate under penalty of perjury.<sup>162</sup> The notification must also identify the allegedly infringing material and list the complaining party's contact information.<sup>163</sup> The notification of copyright infringement is to be received by the designated agent, who must determine whether the notification meets OCILLA's standards and whether the material should be removed.<sup>164</sup> If a service provider removes the allegedly infringing material in a timely manner, then the service provider may avoid liability for contributory copyright infringement claims for the third-party infringement.<sup>165</sup>

Once allegedly infringing material is taken down, the service provider's agent must notify the alleged infringer, who may then file a counter-notification that includes a good-faith belief that the material was mistakenly removed.<sup>166</sup> The service provider is required to wait ten to fourteen days for a copyright infringement suit to be filed.<sup>167</sup> If no suit is filed within the time frame, the service provider

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<sup>157</sup> See 17 U.S.C. § 512.

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*; Ronneburger, *supra* note 18, at 4 n.14.

<sup>160</sup> 17 U.S.C. § 512(c)(1)(A)(iii).

<sup>161</sup> *Id.* § 512(c)(2).

<sup>162</sup> *Id.* § 512(c)(3)(a).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* § 512(c).

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

<sup>166</sup> *Id.* § 512(g).

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

can place the material back on the provider's website.<sup>168</sup> If the service provider does not act and copyright infringement has occurred, then the service provider can be sued for contributory infringement.<sup>169</sup>

The DMCA notice-and-takedown regime ensures that infringing material is kept off of websites as long as an infringement suit is filed.<sup>170</sup> Thus, only copyright owners with sufficient resources to file suit are able to protect their copyrighted work.<sup>171</sup>

## 2. NOTICE-AND-TAKEDOWN PROVISION SIMILAR TO OCILLA

A provision similar to OCILLA should be included in the proposed federal criminal nonconsensual pornography law. The safe harbor provision would require Internet service providers to follow a notice-and-takedown procedure and include certain provisions in their content policies to obtain immunity from prosecution under the proposed law. In order to obtain immunity, service providers would be required to implement deterrent provisions and procedures in their online content policies similar to policies that many websites have already adopted concerning illegal content such as child pornography or obscenity.<sup>172</sup>

The notice-and-takedown provision of the proposed law would have a similar procedure to that of the OCILLA in the DMCA, except that complainants would not have to file suit and prosecutors would not have to prosecute in order for the material to remain off of the service provider's website. The removal of the suit and prosecution requirements provides a possible solution to the problem of limited resources in both the public law and private law realms. The notice-and-takedown provision would require websites to publish information on whom to contact to report unauthorized intimate media. Complainants would also have to follow the same requirements for notification as the ones listed in § 512 of the DMCA.<sup>173</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> *See* Ronneburger, *supra* note 18, at 27.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See* list of policies, *supra* note 23.

<sup>173</sup> *See* 17 U.S.C. § 512 (2012).

If the requirements of the notice-and-takedown provision are followed and the service provider includes the requisite provisions in its content policy, then the service provider is immune from prosecution for knowingly hosting nonconsensual pornography on its website. However, if the service provider fails to act upon notice or fails to provide information on whom to contact to file a complaint, then the safe harbor provision no longer grants the service provider immunity.

The required content policy provisions and procedures could include a provision stating that the service provider may suspend or delete third-party user accounts that upload nonconsensual pornography. The proposed law could also include, as a prerequisite for immunity, a requirement that service providers' content policies contain a provision stating that users who upload sexually graphic content must provide an affirmative showing of consent by each individual depicted. Legislators would have to decide whether the evidence of consent should be provided at the time of initial uploading by the third party or by counter-notice after the media has been removed by the service provider on notice that it is nonconsensual. Civil liberties groups might prefer for evidence of consent to be required in a counter-notice in order to lessen any "chilling effect"<sup>174</sup> on speech that a requirement of evidence of consent upfront might have.

Drafters of a proposed law would also have to decide what types of evidence of consent would suffice under this provision. Possible forms of evidence could include a video or audio recording of each depicted individual or a signed written statement or form from each depicted individual in which the individual provides affirmative consent to the distribution of the media.

### 3. WHY A NOTICE-AND-TAKEDOWN PROVISION WOULD WORK FOR NONCONSENSUAL PORNOGRAPHY VICTIMS

Including a notice-and-takedown provision in a federal criminal nonconsensual pornography law would incentivize Internet-service providers to remove unauthorized content from the web and, thus, provide victims with what they want most—a way to stop people from viewing the images or videos without the victims' consent.

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<sup>174</sup> See Ronneburger, *supra* note 18, at 32.

Critics may argue, like they do in the copyright realm about OCILLA in the DMCA, that a notice-and-takedown system results in a “whack-a-mole” problem, in which complainants find themselves fighting to have an image or video removed only to see it be uploaded onto several other sites.<sup>175</sup> However, while a notice-and-takedown regime in a federal criminal law is not a perfect solution, it is at least an alternative to previous proposals or a new starting point for victims on their path to gaining redress for the harms they have suffered.

If nonconsensual pornography is federally criminalized and a notice-and-takedown provision is included, as long as victims know of websites that have unauthorized content, victims would have the option to notify the service providers. The onus would be on the service provider to act in order to be immune from prosecution. This type of system can “help do away with the permanency that comes along with embarrassing Internet postings.”<sup>176</sup> In the realm of copyright law, the takedown notices of the DMCA have been criticized for several reasons.<sup>177</sup> However, despite the imperfections of a notice-and-takedown system, this type of framework provides as many or more disincentives for service providers to ignore claims of non-consensual pornography than current law does. Similar to what would result for noncomplying service providers under copyright law, service providers who fail to respond to nonconsensual pornography notices would “sacrifice the immunity afforded” by the proposed safe harbor provision, “thereby risking exposure to tremendous legal liability.”<sup>178</sup> Although the loss of immunity pursuant to the safe harbor provision would deter service providers under the proposed law as it currently does under copyright law, there would be a greater benefit for victims under the proposed law than under copyright law because victims would not need to file suit in order for the unauthorized material to remain off of the website.

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<sup>175</sup> Linkous, *supra* note 8, at 23.

<sup>176</sup> Ronneburger, *supra* note 18, at 31.

<sup>177</sup> See Levendowski, *supra* note 15, at 444.

<sup>178</sup> *Id.*

## CONCLUSION

Nonconsensual pornography is a growing trend that has affected many people and will continue to do so. Well-known celebrities like Jennifer Lawrence, whose private digital photos were hacked into and stolen,<sup>179</sup> and everyday individuals like Alecia, the Missouri insurance agent and mother whose trust was betrayed by her ex-husband,<sup>180</sup> have experienced the damages that nonconsensual pornography causes to a person's personal and professional life. The injuries caused to victims include emotional, mental, physical, and economic harms that are often severe, long-lasting, and difficult to overcome. Although legal scholars and advocates for victims have proposed numerous paths for victims to take after their privacy is seriously invaded, under the current legal framework, most victims still find it difficult to obtain redress. Moreover, the deterrence level for nonconsensual pornography is inexcusably low.

This Comment proposes an alternative that could make a difference in the lives of victims and possibly prevent more people from being unnecessarily victimized. A federal criminal nonconsensual pornography law with a notice-and-takedown safe harbor framework for Internet service providers would effectively deter individuals from disclosing people's private intimate media. Such a law would give victims a tool to regain their privacy and dignity by having their private intimate media removed from the most public stage in the world: the Internet.

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<sup>179</sup> Kashner, *supra* note 12.

<sup>180</sup> Moritz, *supra* note 1.