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# NONCONSENSUAL PORNOGRAPHY: PREVENTION IS KEY

MATTHEW EDWARD CAREY\*

## INTRODUCTION

Adults today are sharing intimate content with each other at a rate never before seen: nearly half have used their mobile device to share or receive “intimate content,” 16 percent have sent intimate content to a complete stranger, and 14 percent have filmed “sexual content” on their mobile devices.<sup>1</sup> In the United States, one in three adults has filmed sexual content on a mobile device,<sup>2</sup> and teenagers film and share sexual content at an even higher rate.<sup>3</sup> But what happens to this content after it has been willingly shared? These consensually shared images are frequently used by their recipients in the manner intended by the sender, but oftentimes the images are further shared by the recipients without the sender’s permission in what has come to be known as “revenge pornography”<sup>4</sup> or nonconsensual pornography (NCP).<sup>5</sup> While NCP has rapidly grown from an

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\* J.D. Candidate, 2018, University of Colorado Law School; Forum Editor, *University of Colorado Law Review*. This note was inspired by my friend’s personal fight with nonconsensual pornography, which introduced me to the inadequacies of the current legal framework and led me to realize there is much work to be done in this area.

1. Robert Siciliano, *Stop! Do You Really Want to Send That Photo?*, MCAFEE (Feb. 4, 2014), [https://securingtomorrow.mcafee.com/consumer/identity-protection/love-and-tech/?\\_ga=1.175122916.75221177.1479607221](https://securingtomorrow.mcafee.com/consumer/identity-protection/love-and-tech/?_ga=1.175122916.75221177.1479607221) [<https://perma.cc/28BX-D8S4>].

2. *Id.*

3. Kelly Wallace, *Chances Are, Your Teen Has Sexted*, CNN: LIVING (Jan. 2, 2015), <http://www.cnn.com/2014/11/18/living/teens-sexting-what-parents-can-do/index.html> [<https://perma.cc/SN2D-7E2X>]. While a large set of data is available on teenagers’ sharing of intimate content, underage pornography is outside the scope of this article.

4. Charlotte Alter, *It’s Like Having an Incurable Disease’: Inside the Fight Against Revenge Porn*, TIME: SOCIETY (June 12, 2017), <http://time.com/4811561/revenge-porn/> [<https://perma.cc/K695-CPWV>].

5. The term “nonconsensual pornography” appears to have originally been introduced by Professor Mary Anne Franks of the University of Miami School of Law. See Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper 3* (Mar. 17, 2016) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2336537](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537) [<https://perma.cc/H33E-ZSUV>].

emergent genre into a major national concern,<sup>6</sup> the legal framework in the United States has yet to see an approach that adequately protects NCP victims.<sup>7</sup>

NCP is best described as the distribution of sexually graphic images<sup>8</sup> of an individual without his or her consent.<sup>9</sup> In 1980, *Hustler* magazine published intimate photos of a woman that were taken by her husband during a camping trip in what was one of the first instances of widely distributed NCP.<sup>10</sup> By the year 2000, the online sharing of intimate images had been identified as an emerging genre.<sup>11</sup> Modern communications, including ubiquitous access to cell phones and social media accounts, have contributed to the now-meteoric rise of NCP by

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6. For example, Facebook disabled 14,130 accounts in response to 53,750 reported cases of “non-consensual intimate imagery” in January 2017 alone. Nick Hopkins & Olivia Solon, *Facebook Flooded With ‘Sextortion’ and Revenge Porn, Files Reveal*, GUARDIAN (May 22, 2017), <https://www.theguardian.com/news/2017/may/22/facebook-flooded-with-sextortion-and-revenge-porn-files-reveal> [https://perma.cc/S43U-B2EY].

7. See discussion *infra* Part I. For conciseness and clarity, this Comment uses the terminology “NCP victim” to refer to any individual who has had his or her intimate image shared without his or her consent. Some commenters have suggested that the victims of NCP should be referred to as “survivors” because the term “victim” emphasizes passivity and powerlessness and the term “survivor” recognizes the ways in which people are able to actively resist crimes. See Peter W. Cooper, *The Right to be Virtually Clothed*, 91 WASH. L. REV. 817, 818 n.11 (2016). However, I have decided not to use the term “survivor” precisely because of the powerlessness and inability of the subjects of intimate images to withhold consent once those images are in the possession of another person. See discussion *infra* Part III. That is not to say that I disagree with the use of the term “survivor” in general; I only wish to emphasize an NCP victim’s inability to withhold consent in the context of NCP.

8. This Comment refers to nonconsensual pornography in the context of images, but nonconsensual pornography can also exist in the form of videos. Despite the difference in media used, the reasoning set forth in this article applies to both images and videos.

9. Franks, *supra* note 5. While NCP “includes images originally obtained without consent (e.g. hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent . . . (e.g. images consensually given to an intimate partner . . .),” *id.*, this Comment focuses only on images that were originally obtained with consent because cases involving images that were originally obtained without consent can be litigated under privacy laws. Such laws include surveillance, hacking, fraud, wire fraud, unlawful use of personal identifying information, identity theft and more. See, e.g., Bridgette Dunlap, *3 Ways Revenge Porn is Already Illegal*, ROLLING STONE: CULTURE (Sept. 26, 2016), <http://www.rollingstone.com/culture/news/3-ways-revenge-porn-is-already-illegal-w441928> [https://perma.cc/X5E2-2U3W].

10. Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 21, 2013), <http://nymag.com/news/features/sex/revenge-porn-2013-7/> [https://perma.cc/29J8-SV4Z].

11. *Id.*

making it much easier to commit these offenses.<sup>12</sup> Although national figures are not available for the United States due to the lack of a national NCP law, there were over 1,200 cases of revenge porn in the United Kingdom between April 2015 and January 2016.<sup>13</sup> This number only includes the reported cases of revenge porn<sup>14</sup> in a country that has barely one-fifth the population of the United States.<sup>15</sup>

The troubling reality of the current legal framework in the United States is that once a person shares an image, it is likely out of his or her control, and that person is reliant on someone else to protect the image.<sup>16</sup> In today's digital era, sharing an image might not equate to sharing just one copy: there is no limit to the number of times a digital image can be shared or how quickly it can spread.<sup>17</sup> If the image makes it to the internet, the internet never forgets.<sup>18</sup> To make matters worse, if an NCP victim attempts to remove an image from the internet, he or she runs the risk of causing the image to receive much more attention than it was previously receiving.<sup>19</sup>

Much like it is difficult to measure how many people an intimate image reaches once it is posted online, it is difficult to measure the harm suffered by NCP victims. However, a recent

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12. Steven Swinford, *Revenge Porn and Threatening Social Media Posts See Largest Rise In Violent Crime For Years*, TELEGRAPH (Oct. 20, 2016), <http://www.telegraph.co.uk/news/2016/10/20/violent-crime-has-increased-by-a-quarter-ons-figures-reveal/> [https://perma.cc/W8V5-Z65J].

13. Will Worley, *Revenge Porn: Hundreds of Images of Children Shared on Facebook and Instagram*, INDEPENDENT (Jan. 24, 2016), <http://www.independent.co.uk/news/uk/home-news/revenge-porn-hundreds-of-images-of-children-shared-on-facebook-and-instagram-a6830736.html> [https://perma.cc/P8F9-83ST].

14. *Id.*

15. The June 2016 population of the United Kingdom was estimated to be 65,648,100. Neil Park, *United Kingdom Population Mid-Year Estimate*, U.K. OFF. NAT'L STAT. (June 22, 2016), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/ukpop/pop> [https://perma.cc/3B6F-WL6P]. The June 2016 population of the U.S. was estimated to be 322,928,068. *Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2017*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Aug. 22, 2017) [https://perma.cc/2RDW-VXWP].

16. Siciliano, *supra* note 1.

17. See, e.g., *How Quickly Can a Photo Spread on the Internet?*, THE TECHIE GUY (Nov. 27, 2013), <http://thetechieguy.com/how-quickly-can-a-photo-spread-on-the-internet/> [https://perma.cc/R3FK-VPK7].

18. Nick Bilton, *Erasing the Digital Past*, N.Y. TIMES (Apr. 1, 2011), <http://www.nytimes.com/2011/04/03/fashion/03reputation.html?pagewanted=1&r=1> [https://perma.cc/XYQ9-BW4Y].

19. STREISAND EFFECT, <http://www.thestreisandeffect.com/about/> (last visited Aug. 22, 2017) [https://perma.cc/EFR5-TS3D].

online discussion on the website Reddit gave many NCP victims the opportunity to share how their lives have been affected.<sup>20</sup> The feelings reported by victims included humiliation, concern for personal safety, a need for hypervigilance, fear of being watched during sex, and body shame.<sup>21</sup> The harm doesn't stop there: one NCP victim shared that she quit her job and moved away because she was being harassed at work and couldn't bear to see or hang out with any of her friends.<sup>22</sup> And she is not alone.<sup>23</sup> At its worst, NCP can drive some victims to take their own lives.<sup>24</sup>

Despite the fact that some NCP victims have been awarded damages as high as \$500,000,<sup>25</sup> the law is currently ill-equipped to handle NCP.<sup>26</sup> This is best illustrated by *People v. Barber*,<sup>27</sup> which was one of the first NCP cases brought in New York.<sup>28</sup> In *Barber*, an NCP victim alleged that her boyfriend had posted naked pictures of her online, without her consent,

20. TastyJams, *Those Who Have Naked Pictures on the Internet; How Did They Get There and How Has It Affected Your Life?*, REDDIT: ASKREDDIT (Jan. 8, 2014), [https://www.reddit.com/r/AskReddit/comments/1upmim/those\\_who\\_have\\_naked\\_pictures\\_on\\_the\\_internet\\_how/](https://www.reddit.com/r/AskReddit/comments/1upmim/those_who_have_naked_pictures_on_the_internet_how/) [<https://perma.cc/67ZD-UK5B>].

21. Nina Bahadur, *Victims of 'Revenge Porn' Open Up on Reddit About how it Impacted Their Lives*, HUFF. POST (Jan. 10, 2014), [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) [<https://perma.cc/6RJK-C5LT>] (discussing the stories shared in TastyJams, *supra* note 20).

22. my\_ex\_is\_a\_dick, Comment to TastyJams, *supra* note 20.

23. Stories similar to the story shared by my\_ex\_is\_a\_dick are commonplace online. See, e.g., Katrease Stafford, *Oakland County Woman Gets \$500k in Revenge Porn Case*, DETROIT FREE PRESS (Aug. 25, 2016), <http://www.freep.com/story/news/local/michigan/oakland/2016/08/25/oakland-county-woman-receives-500k-revenge-porn-case/89351938/> [<https://perma.cc/8XPJ-CZHK>] ("It affected her employment and her attendance at college."); Annmarie Chiarini, Opinion, *I was a Victim of Revenge Porn: I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013), <https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change> [<https://perma.cc/7WZM-B52H>] ("I was too scared to leave my house. [My therapist] insisted I go on medical leave from work.").

24. See, e.g., Michelle Dean, *The Story of Amanda Todd*, NEW YORKER: CULTURE DESK (Oct. 18, 2012), <http://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd> [<http://perma.cc/STZ4-NABD>]; see also Paula Newton, *Canadian Teen Commits Suicide After Alleged Rape, Bullying*, CNN: JUSTICE (Apr. 10, 2013), <http://www.cnn.com/2013/04/10/justice/canada-teen-suicide/index.html> [<https://perma.cc/36UZ-6MG9>].

25. Stafford, *supra* note 23.

26. See discussion *infra* Part I.

27. 42 Misc. 3d 1225(A) (N.Y. Crim.Ct. 2014).

28. Steven Brill, *The Growing Trend of 'Revenge Porn' and the Criminal Laws That May Follow*, HUFF. POST (Feb. 25, 2014), [http://www.huffingtonpost.com/steven-brill/the-growing-trend-of-revenge-porn\\_b\\_4849990.html](http://www.huffingtonpost.com/steven-brill/the-growing-trend-of-revenge-porn_b_4849990.html) [<https://perma.cc/5C7M-FEC2>].

via his Twitter account and that he had also sent the images to her employer and to her sister.<sup>29</sup> Because NCP is not criminalized in New York,<sup>30</sup> the state had to bring ancillary charges of (1) aggravated harassment, (2) dissemination of an unlawful surveillance image, and (3) public display of offensive sexual material.<sup>31</sup> Before the first hearing, the judge granted the boyfriend's motion to dismiss all charges because (1) harassment could not be shown because the intimate images were not sent directly to the NCP victim,<sup>32</sup> (2) unlawful surveillance could not be shown because the intimate images were obtained with the NCP victim's consent,<sup>33</sup> and (3) public display of offensive sexual material could not be shown because nudity is not in and of itself offensive.<sup>34</sup>

The *Barber* case represents only one example of how the current state of the law does not provide sufficient protections to NCP victims. Even in the thirty-four states that have directly criminalized NCP,<sup>35</sup> NCP victims are not sufficiently protected because those laws require a showing of the NCP sharer's<sup>36</sup> intent to harm.<sup>37</sup> While the media<sup>38</sup> and some commenters<sup>39</sup> have suggested that NCP is perpetuated primarily due to the NCP sharer's intent to harm the subject of the shared images, an assumption that frequently appears

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29. Barber, 42 Misc. 3d 1225(A) at \*1.

30. Brill, *supra* note 28.

31. Barber, 42 Misc. 3d 1225(A) at \*1.

32. *Id.* at \*4–6.

33. *Id.* at \*2–4.

34. *Id.* at \*6–8.

35. For a collection of applicable state laws, see *State Revenge Porn Laws*, C. A. GOLDBERG, PLLC (last updated June 8, 2017), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> [<https://perma.cc/WG3J-EMCV>] and *Revenge Porn Laws*, CYBER CIV. RTS. INITIATIVE, <http://www.cybercivilrights.org/revenge-porn-laws/> (last visited Aug. 22, 2017) [<https://perma.cc/B6RX-TFUL>].

36. For conciseness and clarity, this Comment uses the terminology “NCP sharer” to refer to any individual who has shared an intimate image of another person without that person's consent.

37. See discussion *infra* Section I.A.

38. See, e.g., Dunlap, *supra* note 9 (noting that NCP is often perpetrated by a vindictive ex).

39. See, e.g., Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 78 n.79 (2014) (“An ex-partner posts revenge porn to humiliate the subject, not to make a profit or benefit in some other tangible way.”); Aubrey Burris, *Hell Hath No Fury Like A Woman Porned: Revenge Porn and the Need for A Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2325 (2014) (“This nonconsensual disclosure is generally fueled by an intent to harm, humiliate, and harass the individual after the relationship has deteriorated.”).

hand-in-hand with the use of the term “revenge porn,”<sup>40</sup> this assumption falls short of the reality of the situation because many NCP sharers have not done so with a demonstrable intent to harm the subject of the images.<sup>41</sup> Federal copyright law presents another potential avenue for relief, but has its own shortcomings: notably, it only applies when the NCP victim took the photo themselves.<sup>42</sup> Tort law is a final option for NCP victims, but it has many of the same shortcomings as criminal law.<sup>43</sup>

Part I of this Comment discusses the current remedies available to NCP victims and shows how these remedies are insufficient and fail to sufficiently protect NCP victims. Part II examines some current proposed solutions to the shortcomings of NCP law and how those solutions also fail to sufficiently protect NCP victims. Part III argues that a criminal strict liability approach solves this problem by directly attacking NCP sharers in the first instance of sharing—that is, strict liability for the crime of NCP if the NCP sharer (1) was an initial possessor of an intimate photo of another person, whether by taking the photo themselves or having it shared with them by the subject of that photo, and (2) shared that photo without the subject’s consent. This solution directly attacks the root of the problem—the first instance of sharing—because once the photo is shared it can be impossible to remove it from the public eye.

## I. THE CURRENT STATE OF THE LAW AND ITS FAILURES

NCP can encompass a range of acts that may violate state or federal criminal laws concerning harassment, stalking, blackmail, child pornography, extortion, surveillance, hacking, fraud, wire fraud, unlawful use of personal identifying information, identity theft, and more.<sup>44</sup> However, this Comment focuses on laws that target NCP *itself* rather than ancillary laws that may or may not have been broken by an

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40. See, e.g., Larkin, *supra* note 39; Burris, *supra* note 39.

41. *Frequently Asked Questions*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/faqs/> (last visited Aug. 22, 2017) [<https://perma.cc/389V-MZGK>] (“Many perpetrators are not motivated by revenge or by any personal feelings toward the victim.”); see also Franks, *supra* note 5.

42. See discussion *infra* Section I.B.

43. See discussion *infra* Section I.C.

44. Dunlap, *supra* note 9.

NCP sharer. This Part of the Comment discusses the laws that NCP victims can presently leverage in an attempt to find some form of relief.

### A. *Current Criminal Law Approach to NCP*

Thirty-four states have directly criminalized NCP,<sup>45</sup> and there are some advantages to using state criminal laws<sup>46</sup> to punish and prevent NCP when a state criminal remedy is available to an NCP victim. To begin with, the vast majority of criminal prosecutions occur in state courts, as opposed to federal courts.<sup>47</sup> State prosecutions are advantageous to NCP victims because direct enforcement of individual cases by federal law enforcement agencies is unlikely due to the lack of manpower and general focus on larger cases with more than just one victim.<sup>48</sup> Additionally, state agencies and law enforcement officers are not bound to follow federal law, but they are bound to follow state law, which leads to more uniform enforcement of a state statute.<sup>49</sup> Finally, because states enforce their own criminal laws, the victim does not have to fund an often prohibitively expensive civil litigation campaign.<sup>50</sup>

Despite these apparent advantages to using state law to criminalize NCP, there are numerous shortcomings. To begin with, most of these states' NCP laws mirror their harassment

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45. For a collection of applicable state laws, see C. A. GOLDBERG, PLLC, *supra* note 35, and CYBER CIVIL RIGHTS INITIATIVE, *supra* note 41.

46. A federal law criminalizing NCP has yet to materialize, but for a discussion on a proposed federal law that criminalizes NCP see *supra* Section II.A.

47. Paul Bergman, *State vs. Federal Criminal Prosecutions*, CRIMINAL DEF. LAWYER, <http://www.criminaldefenselawyer.com/resources/criminal-defense/federal-crime/state-vs-federal-crimes.htm#> (last visited Aug. 22, 2017) [<https://perma.cc/HZA7-GWFJ>].

48. See, e.g., DEPT OF JUSTICE, NEW SMART ON CRIME DATA REVEALS FEDERAL PROSECUTORS ARE FOCUSED ON MORE SIGNIFICANT DRUG CASES AND FEWER MANDATORY MINIMUMS FOR DRUG DEFENDANTS (2016), <https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and> [<https://perma.cc/G4B6-JHS7>].

49. Kevin Drum, *Can States Decline to Enforce Federal Laws?*, MOTHER JONES (May 7, 2013, 4:56 PM), <http://www.motherjones.com/kevin-drum/2013/05/can-states-decline-enforce-federal-laws> [<https://perma.cc/3T5K-VUVW>].

50. A civil action for copyright infringement can cost hundreds of thousands of dollars. See *How Much Does it Cost to Pursue a Copyright Infringement Claim?*, TRAVERSE LEGAL (Jan. 6, 2012), <http://www.traverselegal.com/blog/how-much-does-it-cost-to-pursue-a-copyright-infringement-claim/> [<https://perma.cc/W7N6-PTFL>]; see also discussion *infra* Section I.B.



laws in that they require some form of intent to harm.<sup>51</sup> Additionally, some states' NCP laws require that an NCP sharer attempt to obtain a pecuniary benefit as a result of the sharing of the intimate image.<sup>52</sup> These laws leave an NCP victim without recourse when the NCP sharer neither had an intent to harm nor attempted to profit from the sharing. Some states have even added a requirement that an NCP victim must have been in a "dating relationship" with the NCP sharer (which explicitly excludes a "casual relationship").<sup>53</sup> This leaves no legal remedy for the 16 percent of adults who have sent intimate content to a complete stranger.<sup>54</sup>

Some commenters have suggested that there is no need for a separate criminal statute that targets NCP because NCP frequently encompasses a range of acts that already violate state or federal criminal laws.<sup>55</sup> Under this theory, these ancillary crimes present the avenue for relief.<sup>56</sup> In fact, the operators of the largest NCP website in history were charged under ancillary federal crimes, including unauthorized access to a computer, identity theft, and extortion.<sup>57</sup>

However, this approach falls short of protecting many NCP victims because it requires the NCP sharer to have actually committed a crime when sharing the NCP victim's intimate image. While this may have worked to convict the operator of the largest NCP website in history,<sup>58</sup> this approach is not easily applied when prosecuting individual NCP sharers because oftentimes they have not committed a crime in the process of sharing the NCP victim's intimate image.<sup>59</sup> Because using state criminal laws to target NCP has not provided sufficient remedies for NCP victims, the victims must look elsewhere for relief.

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51. For a listing of states that have criminalized NCP, see CYBER CIVIL RIGHTS INITIATIVE, *supra* note 41. For an example of a state's NCP law that contains an element of intent, see COLO. REV. STAT. § 18-7-107 (2017) (titled "Posting a private image for harassment").

52. *See, e.g.*, COLO. REV. STAT. § 18-7-108 (2017) (titled "Posting a private image for pecuniary gain").

53. *See, e.g.*, ARK. CODE ANN. § 5-26-314 (2017) (titled "Unlawful distribution of sexual images or recordings").

54. Siciliano, *supra* note 1.

55. Dunlap, *supra* note 9.

56. *Id.*

57. *Id.*

58. *Id.*

59. Burris, *supra* note 39, at 2325; *see also* Franks, *supra* note 5, at 3.

### B. *Current Copyright Law Approach to NCP*

Federal copyright laws provide an alternative form of relief for NCP victims, but they too are a less-than-perfect solution. To begin with, because copyright is assigned to the photographer and not the subject of a photo,<sup>60</sup> copyright protection for intimate images only applies when the subject of the photo took the photo themselves. Second, to be eligible to initiate a lawsuit for statutory damages under federal copyright law, an NCP victim must first register his or her intimate image with the United States Copyright Office,<sup>61</sup> which places the image in a publicly searchable database.<sup>62</sup> Third, showing an image to only family or a small group of your friends is generally a permitted activity under copyright law.<sup>63</sup> And finally, enforcement actions typically require that a copy of the image has been illegally made and distributed or that the image has been publicly shared, such as when it is posted online.<sup>64</sup>

Even if an intimate image was shared online *and* the subject of the image owns the copyright to the image, the relief available under federal copyright law remains an imperfect and convoluted process. Under the Digital Millennium Copyright Act (DMCA), the first step towards obtaining a remedy is for the NCP victim to submit a DMCA takedown request to the hosting website of the intimate image.<sup>65</sup> A DMCA takedown request is submitted directly by a copyright owner, does not involve the courts, and provides the image's host the opportunity to remove the image from its website without being subject to monetary liability.<sup>66</sup> However,

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60. 17 U.S.C. § 201 (2012); *Copyright in General*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-general.html> (last visited Feb. 4, 2017) [<https://perma.cc/LD9F-285J>]; U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 1 (2012), <https://www.copyright.gov/circs/circ01.pdf> (last visited Sept. 3, 2017) [<https://perma.cc/GHR2-Y8EX>] [hereinafter COPYRIGHT BASICS].

61. 17 U.S.C. § 411(a) (2012).

62. Kaitlan M. Folderauer, *Not All Is Fair (Use) in Love and War: Copyright Law and Revenge Porn*, 44 U. BALT. L. REV. 321, 332–34 (2015).

63. *Copyright Guidelines for Showing Movies and Other Audiovisual Works*, WASH. & LEE UNIV., <https://www.wlu.edu/general-counsel/answer-center/copyright-and-intellectual-property/copyright-guidelines-for-showing-movies-and-other-audiovisual-works> (last visited Feb. 5, 2017) [<https://perma.cc/RF8J-MZHC>].

64. COPYRIGHT BASICS, *supra* note 60.

65. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 12 (1998).

66. *Id.*

utilizing the services of a lawyer to ensure that even a single DMCA takedown request is properly submitted will typically cost an NCP victim between \$1,500 and \$3,000.<sup>67</sup>

If the host of the intimate image chooses not to respond to the DMCA takedown request or sends a DMCA counter notification claiming the NCP victim is not the owner of the image's copyright, the NCP victim must then either convince the thinly spread DOJ to take an interest in his or her individual case (unlikely)<sup>68</sup> or file an action themselves in court to enforce their copyright.<sup>69</sup> However, copyright enforcement cases typically involve a great deal of time and expense:<sup>70</sup> attorney's fees and costs in these cases can be well into the six-figure range.<sup>71</sup> Additionally, "[a] lack of familiarity with these laws, combined with the fact that revenge porn lawsuits are not lucrative, leave many attorneys unwilling to spend time on these lawsuits. By one estimate, there are only four or five attorneys in the country who actively represent revenge porn victims."<sup>72</sup>

As yet another hurdle to enforcement, section 230 of the Communications Decency Act (CDA) provides a safe harbor to website owners by granting immunity to them for content that is submitted to their sites by third parties.<sup>73</sup>

Because of these limitations, federal copyright law only provides a remedy to NCP victims when (1) they took the intimate image themselves, (2) the image was publicly shared, and (3) the infringer either responds to a takedown request or the NCP victim has enough money to pursue civil litigation. Additionally, damages are only available to NCP victims if they publicly register their intimate photo with the Copyright Office, which places the image in a publicly searchable forum. Due to these limitations, federal copyright laws do not provide a sufficient, accessible remedy for NCP victims.

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67. *How Much Does it Cost to Pursue a Copyright Infringement Claim?*, TRAVERSE LEGAL (Jan. 6, 2012), <http://www.traverselegal.com/blog/how-much-does-it-cost-to-pursue-a-copyright-infringement-claim/> [<https://perma.cc/W7N6-PTFL>].

68. DEP'T. OF JUSTICE, *supra* note 48 (noting that federal prosecutors focus on larger cases with many alleged victims).

69. U.S. COPYRIGHT OFFICE, *supra* note 65, at 12.

70. *7 Common Questions About DMCA Counter-Notices*, PLAGIARISM TODAY (June 3, 2010), <https://www.plagiarismtoday.com/2010/06/03/7-common-questions-about-dmca-counter-notices/> [<https://perma.cc/LP2F-4GUQ>].

71. TRAVERSE LEGAL, *supra* note 67.

72. Folderauer, *supra* note 62, at 332.

73. 47 U.S.C. § 230(c)(1) (2012).

### C. *Current Tort Law Approach to NCP*

It is possible—and, for the NCP victim seeking recourse in a state without a criminal NCP statute, perhaps necessary—to pursue legal action against an NCP sharer directly under tort law. Tort law can compensate an NCP victim under numerous circumstances, which include: mental anguish, mental or physical pain and suffering, lost wages, and medical expenses.<sup>74</sup> However, compensatory damages still require a showing of *mens rea* on the part of the defendant.<sup>75</sup> As discussed above, the NCP sharer frequently lacks intent to harm the subject of the photo,<sup>76</sup> making it difficult for the NCP victim to prevail under tort law.

Intentional torts also do not provide an avenue for relief because consent to recording or photographing sexual acts in a private place typically precludes these types of suits.<sup>77</sup> This consent also precludes the NCP victim from pursuing claims under invasion of privacy torts.<sup>78</sup> Finally, the tort of defamation might not be an option for NCP victims because if the images are “substantially true”—even when the images contain sexually explicit material—they can be shared without the subject’s permission.<sup>79</sup>

## II. CURRENT PROPOSED SOLUTIONS AND THEIR SHORTCOMINGS

Numerous commenters have noted deficiencies in the current legal system for an NCP victim who desires to take legal action<sup>80</sup> and have proposed solutions to address these deficiencies. This Part of the Comment discusses the proposals

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74. Annotation, *Right to Recover for Mental Pain and Anguish Alone, Apart from other Damages*, 23 A.L.R. 361 (1923).

75. *Id.* (citing *Randolph v. Lambert*, 926 So. 2d 941, 946 (Miss. Ct. App. 2006)) (“To recover for mental anguish unaccompanied by demonstrable physical or mental injury, the defendant’s conduct must be malicious, intentional, willful, wanton, grossly careless, indifferent, or reckless.”).

76. See discussion *supra* INTRODUCTION.

77. Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How A Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHL.-KENT L. REV. 247, 257 (2015).

78. *Id.* at 257–58.

79. See, e.g., *Patel v. Hussain*, 485 S.W.3d 153 (Tex. App. 2016) (overturning a jury award for defamation related to NCP on the grounds that the shared personal videos were substantially true).

80. See discussion *supra* Part I.

that best illustrate the deficiencies and shows how each remedy is insufficient and fails to sufficiently protect NCP victims.

### A. *Proposed Changes to Criminal Laws*

Numerous commenters have proposed criminal solutions at the state and federal level. State statutes have gained traction in recent years: thirty-four states and the District of Columbia have criminalized NCP<sup>81</sup> since California passed the first such statute in 2013.<sup>82</sup> However, such statutes as proposed—and as actually implemented in various states—almost unilaterally require some form of intent to harm to be proven on the part of the NCP sharer,<sup>83</sup> a problem discussed in depth above.<sup>84</sup>

One commenter's proposed solution to the problem of NCP is a new federal criminal statute.<sup>85</sup> However, the proposed statute still requires a showing of intent to harm on the part of the NCP sharer.<sup>86</sup> This means the same issues that plague the current state statutes that criminalize NCP will carry through to this proposed federal statute: namely, that NCP sharers frequently lack a specific intent to harm NCP victims.<sup>87</sup> Additionally, direct enforcement of individual cases by federal law enforcement agencies is unlikely due to the lack of manpower and general focus on larger cases with more than just one victim.<sup>88</sup> Finally, state agencies and law enforcement officers are not bound to follow federal law, so uniform enforcement of a federal statute is by no means guaranteed.<sup>89</sup>

### B. *Proposed Changes to Copyright Law*

Commenters have also discussed changes to federal copyright law as an avenue to afford more protections to NCP

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81. CYBER CIVIL RIGHTS INITIATIVE, *supra* note 35.

82. David Stout, *Another State Moves to Criminalize 'Revenge Porn'*, TIME (Apr. 25, 2015), <http://time.com/76957/revenge-porn-criminalized/> [<https://perma.cc/SKC8-P3EJ>].

83. Kitchen, *supra* note 77, at 281–84; *see also* Franks, *supra* note 5, at 3.

84. *See* discussion *supra* Part I.

85. *See* Burris, *supra* note 39, at 2342–44; *see also* Franks, *supra* note 5, at 3.

86. *See* Burris, *supra* note 39, at 2351.

87. *See* discussion *supra* Section I.A.

88. *See, e.g.*, DEPT OF JUSTICE, *supra* note 48.

89. Drum, *supra* note 49.

victims. Copyright law is an excellent place to start because it is applicable nationwide and can be used to quickly remove images from the public eye via DMCA takedown notices.<sup>90</sup> This section discusses two such proposals: a proposal to remove copyright law's registration requirement and a proposal to assign a partial copyright to the subjects of intimate photos.

### 1. Removal of the Registration Requirement

One commenter's proposed solution is to remove the registration requirement for copyrighted images that contain content of a pornographic nature.<sup>91</sup> This solution would remove the catch-22 inherent in having to publicly register an intimate image in order to be eligible to bring a copyright infringement suit for the unauthorized use of that same image.<sup>92</sup> While removing the registration requirement would remove one of the current hurdles for NCP victims who use copyright law for a legal remedy, it is an insufficient remedy on its own because it does not address copyright law's other limitations in this context: that (1) copyright ownership only belongs to the photographer, (2) an intimate image must have been publically shared, and (3) pursuing private litigation under the Copyright Act is costly.<sup>93</sup>

### 2. Assigning Copyright to Subjects of Intimate Photos

Another commenter has proposed a different amendment to the federal copyright statute to offer further legal protections to NCP victims.<sup>94</sup> Such an amendment would include two primary changes. First, the amendment would grant a waivable-yet-unalienable partial copyright to the subject of intimate photos, where the subject of the photos would need to give permission before the photographer could exercise their own copyright rights.<sup>95</sup> Second, it would expand copyright

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90. For a discussion on the DMCA takedown process, see discussion *supra* Section I.B.

91. Folderauer, *supra* note 62, at 333–36; see also discussion *supra* Section I.B.

92. Folderauer, *supra* note 62. For a discussion on the catch-22, see discussion *supra* Section I.B.

93. See discussion *supra* Section I.B.

94. See Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014).

95. *Id.* at 2059–60.

protections to the private viewing of intimate photos.<sup>96</sup> While this would address photos not taken by the subject, it would not address the public registration problem or the problems of private civil enforcement.<sup>97</sup>

### III. STRICT LIABILITY ATTACKS THE ROOT OF THE PROBLEM

This Comment argues that NCP is best punished and discouraged through a criminal strict liability statute because strict liability for initial NCP sharers provides an ideal solution to the law's current shortcomings. Under this framework, an NCP sharer would be held strictly liable under criminal law if he or she (1) was the initial possessor of an intimate photo of another person, whether by taking the photo themselves or having it shared with them by the subject of that photo, and (2) shared that photo without the subject's consent. This part of the Comment briefly discusses the justifications for and concerns with the use of strict liability in the criminal context, then argues that the primary concerns can be overcome in the criminalization of NCP under a strict liability regime.

#### A. *Strict Liability*

A strict liability crime is “[a]n offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state.”<sup>98</sup> The use of strict liability in the criminal context is most commonly associated with “public welfare offenses,” also known as *malum prohibitum* offenses—“minor violations of the liquor laws, the pure food laws, the anti-narcotics laws, motor vehicle and traffic regulations, sanitary, building and factory laws and the like.”<sup>99</sup> However, there are two notable circumstances where strict liability has been applied broadly nationwide to *malum in se* offenses—“crime[s] or act[s] that [are] inherently immoral”:<sup>100</sup> statutory rape<sup>101</sup>

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96. *Id.* at 2059.

97. See discussion *supra* Section II.B.

98. *Crime*, BLACK'S LAW DICTIONARY (10th ed. 2014) (under the heading “strict-liability crime”).

99. JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIAL ON CRIMINAL LAW 175 (6th ed. 2012) (citing *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 497 (E.D.N.Y. 1993) (quoting Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM.L.REV. 55, 78 (1933))).

100. *Malum in se*, BLACK'S LAW DICTIONARY (10th ed. 2014).

101. DRESSLER & GARVEY, *supra* note 99, at 175.

and child pornography.<sup>102</sup>

Strict liability is used in *malum in se* offenses to protect those who we as a society have deemed cannot protect themselves, such as minors in statutory rape and child pornography scenarios.<sup>103</sup> Its application to statutory rape has been upheld by courts in a majority of states because it is considered that a person below a certain age is legally unable to consent to sex,<sup>104</sup> and its application in child pornography cases has been upheld by all federal circuit courts in part due to the same reasoning.<sup>105</sup> Likewise, people who are in possession of intimate images of others are in a position to take advantage of the images' subjects, and those subjects are unable to withhold consent and unable to protect themselves because they no longer have the ability to physically control the images. This makes strict liability the ideal vehicle for addressing these concerns because of the parallels between NCP, statutory rape, and child pornography.

### *B. Criminalizing NCP Under a Strict Liability Regime*

#### 1. Removal of the Intent Requirement

By their nature, strict liability statutes do not contain an intent element, making the commission of a criminalized act enough to bring forth a charge.<sup>106</sup> Removing the requirement of a mental state would address the issues noted above regarding (1) proving a mental state and (2) the fact that many NCP sharers do not have an intent to harm even though their actions do cause harm.<sup>107</sup> The harm caused by NCP is similar to the harm caused by the distribution of child pornography in that NCP “victims suffer due to continued circulation of their images or the ongoing potential for circulation of their

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102. PATTI B. SARIS ET AL., U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 35 (2012), <https://www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses> [<https://perma.cc/A2SV-Y66P>].

103. *Id.*

104. *Id.* (citing *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 497 (E.D.N.Y. 1993)).

105. SARIS ET AL., *supra* note 102, at 35, 109 n.13 (noting that “[r]egardless of whether a child appears to consent, a child cannot legally consent to participation in production of child pornography”).

106. *Id.*

107. *See supra* Parts I & II.



images.”<sup>108</sup> Because this possibility of harm is so great, whether it be the initial harm of having the image viewed by others or the recurrent victimization through the existence of the images, it is essential that we must remove the element of intent. Strict liability is the best way to do so. This would not only provide NCP victims with an effective remedy, but would also serve to disincentivize individuals from committing the crime in the first place.

## 2. Requirement of Consent

One difference in NCP that stands in stark contrast with statutory rape is that the *consensual* sharing of pornography is not considered a *malum in se* offense in any jurisdiction, as opposed to consensual sex between an adult and a minor. In the majority of states, “it does not matter [in a statutory rape case] that the victim consented, or that he or she may have initiated the contact, or that he or she fully appreciated the nature and consequences of sexual intercourse.”<sup>109</sup> Unlike a minor’s legal inability to consent to statutory rape, the subject of an intimate image *is* able to consent to the sharing of that image. However, due to the unique inability to withhold consent once an intimate image is shared, I propose that any law criminalizing NCP prohibit a reasonable and good-faith mistake as to the consent of the subject of the photo, much like how a majority of states do not permit a mistake-of-age defense in statutory rape laws. The law must also specify that the consent required to avoid punishment is express consent to sharing the intimate image with third parties, with the burden on the sharer to show that express consent was gained. It is not enough for an NCP victim to have consented to the taking of the image to defeat charges under a proposed statute. This will sufficiently recognize the difference between consent to view or possess an image and consent to the disclosure of that image to third parties, address the unique powerlessness of NCP victims to protect themselves once their intimate image has been shared, and normalize the stance that the sharing of an intimate image is done so under the legal expectation of privacy.

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108. SARIS ET AL., *supra* note 102, at 112.

109. Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim’s Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499 § 2[a] (1997).

### 3. Limiting to the Sharer in the First Instance

While criminalizing actions under a strict liability regime runs the risk of casting an overly broad net,<sup>110</sup> one way a strict liability statute can be sufficiently tailored to the most harmful actors in an NCP scenario is to limit the strict liability element to the sharer in the first instance. Such a limitation is “needed to more fully differentiate among offenders based on their culpability and . . . dangerousness.”<sup>111</sup> For example, because it is almost impossible to remove an image or file from the internet after it is first uploaded, deterring future uploads is more important than simply punishing uploaders after the fact. Similar to the current sentencing recommendations for child pornography, this limitation will more accurately “reflect current offense conduct, evolving modes of electronic communications and other technologies used by offenders, and knowledge gained from emerging social science research.”<sup>112</sup>

Extending strict liability beyond these sharers in the first instance to second-order sharers of NCP—that is, NCP sharers who neither generated the intimate image themselves nor had the intimate image shared with them by the subject of the image—would run the risk of being an overly broad implementation. First, one of the major rationales for applying strict liability to NCP sharers is to prevent the initial dissemination of an image onto the internet. By the time the second-order sharer has had the photo shared with them, the photo is already out there. Additionally, while one reason for applying strict liability to second-order sharers of child pornography is to prevent the “normaliz[ation] and valid[ation] [of] the sexual exploitation of children,”<sup>113</sup> that logic simply does not apply to pornography involving adults—it has already been validated as normal, with just one of the many online pornography networks receiving approximately one hundred million visits per day.<sup>114</sup> Applying strict liability to second-order NCP sharers runs the risk of punishing someone who might not be aware of the source of the photo and therefore

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110. DRESSLER & GARVEY, *supra* note 99, at 183–85.

111. SARIS ET AL., *supra* note 102, at 311.

112. *Id.*

113. *Id.* at 312.

114. Cade Metz, *The Porn Business Isn't Anything Like You Think it is*, WIRED (Oct. 15, 2015), <https://www.wired.com/2015/10/the-porn-business-isnt-anything-like-you-think-it-is/> [<https://perma.cc/L5H4-RWFZ>].

could believe they were sharing a normal commercial pornographic image of an adult. Therefore, extending strict liability to second-order sharers of NCP would be an impermissibly broad implementation. Because of the above reasons, any proposed NCP statute should only apply to a sharer in the first instance—that is, a proposed strict liability criminal statute should only apply to a person who either (1) received the image directly from the subject of the image or (2) took the image themselves.

#### CONCLUSION

While adults today are sharing intimate images at a rate never seen before, the law has been unable to keep up and sufficiently protect NCP victims. The current and proposed laws that criminalize revenge porn all include an intent element, but NCP sharers frequently do not show the required intent. The current and proposed copyright laws require the NCP victim to have taken the photo themselves, require the NCP victim to publicly register their intimate image to seek relief, require the intimate image to have been viewed publicly, and copyright litigation is prohibitively expensive. Due to the above limitations, neither criminal law nor copyright law provides a sufficient, accessible remedy for NCP victims.

However, as this Comment demonstrates, a state law criminalizing revenge porn as a strict liability crime *can* provide a sufficient, accessible remedy for NCP victims much as similar laws have provided remedies to the victims of statutory rape and child pornography. A properly worded law can provide the deterrence needed to prevent the unstoppable harm to NCP victims once their intimate image makes it to the internet. This law must (1) remove any intent requirement, (2) require the express consent of the subject of the intimate image, and (3) limit enforcement to the sharer in the first instance.