

# DECONSTRUCTING THE STATUTORY LANDSCAPE OF “REVENGE PORN”: AN EVALUATION OF THE ELEMENTS THAT MAKE AN EFFECTIVE NONCONSENSUAL PORNOGRAPHY STATUTE

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## INTRODUCTION

Changes in social mores and technology have yielded the phenomenon of sexting, which includes the capturing and forwarding of intimate images through the Internet.<sup>1</sup> Research reveals that nearly fifty percent of adults in the United States have sent or received intimate digital content.<sup>2</sup> At the same time, the confluence of these changes has spawned new violations of privacy and predatory actions when these images are made available on the Internet without the subject’s consent.<sup>3</sup> The re-distribution or dissemination of these intimate images without the consent of the subject and without a legitimate purpose (such as a law enforcement investigation) is referred to as nonconsensual pornography (“NCP”).<sup>4</sup>

NCP has caused victims to suffer substantial harm.<sup>5</sup> In some cases, NCP incidents have precipitated a victim’s suicide.<sup>6</sup> Prior generations might have concluded that a person who allowed such images to be captured and placed in the possession of another person assumed the risk of re-distribution; in essence, a negligence, recklessness, or constructive consent argument. In contrast, in the twenty-first century, capturing or sharing of intimate images is often regarded as an acceptable

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1. *Sexting*, THE MERRIAM-WEBSTER DICTIONARY (11th ed. 2019). *See also* Bianca Klettke et al., *Sexting Prevalence and Correlates: A Systematic Literature Review*, 34 *CLINICAL PSYCHOLOGY REV.* 44, 45 (2014) (sexting is the “sending, receiving, or forwarding of sexually explicit messages, images, or photos through electronic means, particularly between cell phones.”).

2. *See Love, Relationships, Technology: How We Expose Ourselves Today*, MCAFEE, <https://promos.mcafee.com/offer.aspx?id=605366&culture=en-us&cid=140612> (last visited Sept. 12, 2019); *Stop! Do Really Want to Send that Photo?*, MCAFEE (Feb. 4, 2014), <https://securingtomorrow.mcafee.com/consumer/identity-protection/love-and-tech/?culture=en-us&affid=0&cid=140623&pir=1>; *Sext Much? If So, You’re Not Alone*, SCIENTIFIC AMERICAN (Feb. 4, 2014), <https://www.scientificamerican.com/article/sext-much-if-so-youre-not-alone/>.

3. *See* *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019).

4. *See id.* at 794; *see generally* Sunny Freeman, *Porn 2.0 and its Victims*, THE TYEE (July 6, 2007), <http://theyee.ca/Mediacheck/2007/07/06/Porn2-0/>.

5. *See infra* Section I.D.

6. *See infra* Part I.

private activity that is part of the current social contract (for example, within intimate, romantic relationships).<sup>7</sup> As such, violations are worthy of punishment and consequent deterrence.<sup>8</sup>

Since 2013, forty-eight jurisdictions (forty-six states, the District of Columbia, and Guam), have enacted criminal statutes to deter and punish acts of NCP.<sup>9</sup> This suggests at least a general societal agreement that NCP should be a criminal offense. However, the significant differences in the construction of the criminal NCP statutes (particularly regarding essential elements) disclose the absence of consensus over the exact nature of the new social contract regarding the sharing of intimate images.<sup>10</sup> Additionally, challenges to the validity of NCP statutes raise the issue as to whether the U.S. legal system, including the U.S. Constitution, is capable of adapting to this new intersection of society and technology.

This Article examines these issues by deconstructing the regulatory schema of the jurisdictions that criminalize NCP into fundamental elements. Part I addresses background facts, representative incidents, and damages to victims. Part II analyzes the general construction of criminal statutes into *actus reus* and *mens rea* elements. Part III sets forth a review of the statutory schemes that criminalize NCP. Part IV reviews the circumstances of jurisdictions without NCP statutes. Part V considers some sources of differences in the elements included in the various NCP statutes.

This analysis reveals that the more numerous the essential elements of an NCP statute, the more likely the statute will allow substantial NCP conduct to escape prosecution. Conversely, statutes that focus on the issue of the victim's lack of consent for the defendant to distribute the intimate image and that have fewer additional essential elements allow fewer perpetrators of NCP to escape prosecution.

This Article also examines the underlying factors that resulted in these disparities, including the rigors and compromises inherent in the political process underlying the enactment of such statutes, and the influence of the First Amendment to the U.S. Constitution.

As described herein, the twenty-first century is characterized by constant technological innovation and an increased pace of change in social values. The shortcomings of these NCP regulatory schema raise the prospect that the U.S. legal system is struggling to protect the general public from bad actors that exploit these technological and social developments.

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7. See *Send Nudes, An Exploration of the Sext Generation*, ZAVAMED, <https://www.zavamed.com/uk/send-nudes.html> (last visited Sept. 12, 2019); *Love, Relationships, Technology: How We Expose Ourselves Today*, *supra* note 2; *Stop! Do Really Want to Send that Photo?*, *supra* note 2; see also *Sext Much? If So, You're Not Alone*, *supra* note 2.

8. See *People v. Austin*, No. 123910, 2019 WL 5287962, at \*14 (Ill. Oct. 18, 2019).

9. See *infra* Appendix.

10. See *infra* Appendix.

## I. BACKGROUND FACTS, REPRESENTATIVE INCIDENTS, AND DAMAGES TO VICTIMS

### A. *Revenge Porn and Nonconsensual Pornography*

“Nonconsensual pornography” may be defined generally as [the] ‘distribution of sexually graphic images of individuals without their consent.’”<sup>11</sup> So-called “revenge porn” is a well-recognized subset of NCP.<sup>12</sup> It involves NCP committed for “vengeful purposes,” generally by a former romantic partner.<sup>13</sup>

Persons who are not related to or acquainted with the victim also perpetrate NCP offenses.<sup>14</sup> Non-acquaintance NCP can occur when perpetrators hack into victims’ computers, mobile devices, cloud-based storage, and other private repositories of digital images.<sup>15</sup> Invasive tactics include sending emails from fake accounts<sup>16</sup> and capturing images of a person being victimized for other sex crimes.<sup>17</sup>

Additionally, software is publicly available that allows predators to remotely invade a victim’s cellular telephone and other technological devices; monitor their surroundings, calls, messages, view pictures, and videos; receive GPS locations; and access internet search histories and social media activities.<sup>18</sup> A 2009 Department of Justice report found that 10.9 percent of stalking crimes were perpetrated by people using GPS devices.<sup>19</sup>

To deter predatory conduct, NCP statutes must be drafted so that perpetrators with certain non-harassment or non-stalking motivations (e.g. profit motives, self-amusement motives) do not escape prosecution. The statistical evidence regarding the motives of the perpetrators of NCP helps to understand this issue. For example,

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11. *State v. VanBuren*, 214 A.3d 791, 794 (Vt. 2019) (internal citations omitted); *see generally* Freeman, *supra* note 4.

12. *VanBuren*, 214 A.3d at 794 (internal citations omitted); *see generally* Freeman, *supra* note 4.

13. *See VanBuren*, 214 A.3d at 794 (internal citations omitted); *see generally* Freeman, *supra* note 4.

14. *See generally* *Stalker Tells All: How I Peeped on Erin Andrews*, PAGE SIX (Mar. 1, 2016), <https://pagesix.com/2016/03/01/stalker-tells-all-how-i-peeped-on-erin-andrews/>; *Man Gets Prison in Erin Andrews Case*, L.A. TIMES (Mar. 15, 2010), <https://www.latimes.com/archives/la-xpm-2010-mar-15-la-sp-newswire-20100316-story.html>.

15. Sasha Goldstein, *Calif. Teen Guilty in Miss Teen USA ‘Sextortion’ Plot, Sentenced to 18 Months in Prison*, N.Y. DAILY NEWS (Mar. 17, 2014), <http://www.nydailynews.com/news/crime/mastermind-teen-usa-sextortion-plot-18-months-prison-article-1.1724809>.

16. *Id.*

17. Mike McPhate, *Teenager Is Accused of Live-Streaming a Friend’s Rape on Periscope*, N.Y. TIMES (Apr. 18, 2016), <https://www.nytimes.com/2016/04/19/us/periscope-rape-case-columbus-ohio-video-livestreaming.html>; *Woman Recorded Unconscious Friend Being Raped, Shared on Social Media, Prosecutors Say*, FOX NEWS (Sept. 1, 2017), <http://www.foxnews.com/us/2017/09/01/woman-recorded-unconscious-friend-being-raped-shared-on-social-media-prosecutors-say.html>.

18. *See, e.g.*, Alex Dobuzinskis, *California Man Agrees to Plead Guilty to Extortion of Miss Teen USA*, REUTERS (Oct. 31, 2013), <https://www.reuters.com/article/us-usa-missteen-extortion/california-man-agrees-to-plead-guilty-to-extortion-of-miss-teen-usa-idUSBRE99U1G520131031> [<https://perma.cc/58H8-SKB5>].

19. Katrina Baum et al., *National Crime Victimization Survey: Stalking Victimization in the United States*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (Jan. 2009), <https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf>.

a 2017 survey conducted by the Cyber Civil Rights Initiative identified a wide array of motivations not related to the stalking or harassment of NCP victims.<sup>20</sup> With regard to perpetrators, seventy-nine percent were “just sharing images with friends”; sixteen percent disclosed the image “for fun”; eleven percent disseminated the image “because it made [the perpetrator] feel good”; and six percent hoped to gain upvotes, likes, or similar Internet accolades.<sup>21</sup> Only twelve percent were driven by revenge porn motives.<sup>22</sup> In fact, the 2009 DOJ report previously mentioned indicated that most incidents of NCP are committed without the intent to cause harm to the victim.<sup>23</sup>

*People v. Austin*, decided by the Illinois Supreme Court in October 2019, recognized these diverse motives.<sup>24</sup> In this regard, the *Austin* court explained: “[Revenge Porn] connotes personal vengeance. However, perpetrators may be motivated by a desire for profit, notoriety, entertainment, or for no specific reason at all.”<sup>25</sup> This is particularly relevant since the damage to the victim is essentially the same regardless of whether the perpetrator was motivated to damage the victim.<sup>26</sup> Either way, images posted to the Internet are subject to viewing by the general public, including the victim’s family, friends, romantic partners, and professional colleagues.

A 2017 Cyber Civil Rights Initiative survey found that the following four factors served as the strongest deterrents: (1) required sex offender registration, (2) the specter of punishment by imprisonment, (3) the possibility of a federal felony conviction, and (4) the prospect of a state felony prosecution.<sup>27</sup>

Research into the incidence of NCP shows that it has developed into a national issue of serious concern.<sup>28</sup> In 2016, the Data & Society Research Institute and the Center for Innovative Public Health Research published a study that found that one in twenty-five Americans has been a victim of NCP.<sup>29</sup> The incidence was significantly higher for women under the age of thirty, where one in ten were targeted with the threat of nonconsensual image sharing.<sup>30</sup> A 2017 Australian study yielded

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20. ASIA A. EATON ET AL., 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION – A SUMMARY REPORT, CYBER CIVIL RIGHTS INITIATIVE 1, 4 (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

21. *Id.* at 20.

22. *Id.* at 20 (“Perpetrator’s reasons for sending.”).

23. Baum et al., *supra* note 19.

24. *People v. Austin*, No. 123910, 2019 WL 5287962, at \*3 (Ill. Oct. 18, 2019).

25. *Id.*

26. *See id.* at \*19 (“[W]e observe that the motive underlying an intentional and unauthorized dissemination of a private sexual image has no bearing on the resulting harm suffered by the victim.”).

27. EATON ET AL., *supra* note 20, at 20 (“Things that would have stopped perpetrators.”).

28. *See State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019); *Austin*, No. 123910, at \*3–4.

29. Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans has been a Victim of Revenge Porn*, DATA & SOCIETY RESEARCH INSTITUTE AND THE CENTER FOR INNOVATIVE PUBLIC HEALTH RESEARCH 4 (Dec. 13, 2016), [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf).

30. *Id.* at 5. This research was based upon a national telephone survey of 3,002 U.S. Internet users above the age of 15.

similar results, finding that twenty-three percent of persons between the ages of sixteen and forty-five indicated that they had been the victim of NCP.<sup>31</sup>

Applying the results of these studies to the U.S. population yields dramatic conclusions. Considering that the U.S. population was estimated at over 326,029,760 in June of 2019,<sup>32</sup> the findings of the Data & Society Research Society suggest that more than 13 million persons, and about 2.2 million women under the age of thirty have been victims of NCP. These statistics demonstrate that NCP disproportionately affects women.

*B. Technological Innovations of the Internet and Mobile Digital Devices and Their Role in the Rise of NCP*

NCP is rooted in the technological innovations of digital photography, the Internet, and mobile devices.<sup>33</sup> Prior to the digital era, the technological limitations of film cameras and development created significant obstacles to capturing and distributing intimate photographs or films. Capturing such an image involved taking out a camera, loading it with film, posing for photographs, and then finding a developer willing to expose and print the resulting image. Additionally, social conventions cautioned against a person consenting to the capture of such an image. Perhaps most importantly, prior to the advent of the Internet and social media, it was impossible to publish such an image to the entire world.

Now, taking a selfie and sharing it with an intimate partner or allowing an intimate partner to capture such an image is more commonplace. A survey by United Kingdom online medical provider Zava (which included 1,000 persons in the U.S.), found that “40 percent of American men between the ages of 18 and 24 and 36 percent of American women have sent a sexual picture out into the universe.”<sup>34</sup> Another study, conducted by the security software firm McAfee concluded that “[n]early 50% of adults have used their mobile device to share or receive intimate content.”<sup>35</sup>

Technological change has also facilitated this phenomenon, both in the ease of capturing digital images and the simplicity of distributing them via the Internet. In

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31. Anastasia Powell et al., *The Picture of Who is Affected by ‘Revenge Porn’ Is More Complex than We First Thought*, THE CONVERSATION (May 7, 2017), <http://theconversation.com/the-picture-of-who-is-affected-by-revenge-porn-is-more-complex-than-we-first-thought-77155>.

32. This figure is accurate as of June 8, 2019. U.S. and World Population Clock, THE U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited June 8, 2019).

33. See *People v. Austin*, No. 123910, 2019 WL 5287962, at \*3 (Ill. Oct. 18, 2019) (asserting that nonconsensual pornography offenses are “a unique crime fueled by technology”).

34. *Send Nudes, An Exploration of the Sext Generation*, *supra* note 7; see also *Love, Relationships, & Technology: How We Expose Ourselves Today*, *supra* note 2 (finding that nearly fifty percent of adults have used their mobile device to share or receive intimate content); *Stop! Do Really Want to Send that Photo?*, *supra* note 2 (finding the same).

35. *Love, Relationships, & Technology: How We Expose Ourselves Today*, *supra* note 2; *Stop! Do Really Want to Send that Photo?*, *supra* note 2; *Sext Much? If So, You’re Not Alone*, *supra* note 2.

this regard, the ubiquitous nature of mobile devices with high resolution cameras makes it easy to capture intimate content.<sup>36</sup>

The digital era has also facilitated the misappropriation and misuse of such images. A person who gains possession of such an image without the subject's consent, or who becomes an ex-intimate partner, can easily post the image to a social media account or to an amateur pornography website. This makes the offending NCP image instantly available throughout the world to any person with a computer and internet access. In this regard, the sponsor of the Delaware's NCP statute, Representative Andrea Bennett, explained:

In today's world of social media and digital communication, it has become very easy to share information with many people in a short amount of time . . . . As a result of that, this type of behavior has become more and more common—and more and more hurtful to the victims.<sup>37</sup>

Similarly, U.S. Congresswoman Jackie Speier, a sponsor of several proposed federal NCP statutes, notes that “for victims of nonconsensual pornography, technology today makes it possible to destroy a person's life with the click of a button or a tap on a cell phone. The damage caused by these attacks can crush careers, tear apart families, and, in the worst cases, has led to suicide.”<sup>38</sup>

### C. A Review of Representative NCP Incidents

Revenge porn is an archetype of NCP.<sup>39</sup> A well-publicized NCP incident involved a victim now known as Holly Jacobs, who later became an advocate for cyber civil rights.<sup>40</sup> The offending images were nude and intimate selfies of Jacobs

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36. See Ariel Ronneburger, *Sex, Privacy, and WebPages: Creating A Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 8 (2009); see generally Tim O'Reilly, *What Is Web 2.0*, O'REILLY.COM (Sept. 30, 2005), <http://www.oreilly.com/pub/a/web2/archive/what-is-web-20.html> (discussing the definition of 'Web 2.0' and the creation of the web as a platform).

37. Jon Offredo, *Legislation Seeks to Criminalize 'Revenge Porn'*, DEL. ONLINE (March 14, 2014), <https://www.delawareonline.com/story/firststatepolitics/2014/03/14/delaware-legislation-seeks-to-criminalize-revenge-porn/6416621/>.

38. Press Release, Office of Congresswoman Jackie Speier, Rep Speier and Sens Harris, Burr, and Klobuchar Introduce Bipartisan Bill to Address Online Exploitation of Private Images (Nov. 28, 2017), <https://speier.house.gov/2017/11/rep-speier-and-sens-harris-burr-and-klobuchar-introduce-bipartisan-bill>.

39. State v. VanBuren, 214 A.3d 791, 794 (Vt. 2019) (“‘Revenge porn’ is a popular label describing a subset of nonconsensual pornography published for vengeful purposes.”); *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, NAT'L CTR. FOR VICTIMS OF CRIME (Jan. 2007), <https://www.victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12> (last visited Jan. 30, 2020).

40. Beth Stebner, *'I'm Tired of Hiding': Revenge-Porn Victim Speaks Out Over Her Abuse After She Claims Ex Posted Explicit Videos of Her Online*, N.Y. DAILY NEWS (May 3, 2013), <http://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147>; Lauren Panariello, *The Women Who Want to Make Revenge Porn Illegal*, COSMOPOLITAN (Sept. 25, 2013), <http://www.cosmopolitan.com/sex-love/advice/a4825/revenge-porn-shutting-it-down/>; CCRI Board of Directors, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/ccri-board/> (last visited Jan. 30, 2020).

provided to a romantic partner.<sup>41</sup> After the relationship ended, the now ex-romantic partner posted the images to the Internet.<sup>42</sup>

The Marine Corps NCP occurrence is another example. During the summer of 2016, a cadre of thousands of active duty and retired Marine Corps and Navy men distributed NCP images of Marine Corps women on a secret Facebook page called “Marines United.”<sup>43</sup> The majority of the offending images were originally obtained by the perpetrators voluntarily.<sup>44</sup>

NCP can also be captured surreptitiously by strangers and posted to the Internet without the subject’s knowledge or consent. The case of television personality Erin Andrews is illustrative.<sup>45</sup> A predator stalked Andrews to several cities where she was assigned to cover sporting events, and situated himself in hotel rooms adjacent to Andrew’s.<sup>46</sup> From this vantage point, the predator used peepholes to secretly capture nude images of Andrews.<sup>47</sup> The predator posted the images on the Internet, where members of the general public viewed them.<sup>48</sup>

Another avenue for NCP is through hackers who remotely invade a victim’s digital device (e.g., a computer, cellular telephone, tablet, or smart TV) and use it to misappropriate or remotely capture intimate images of an unwitting subject. One former Miss Teen USA, among other contestants, was victimized in this manner.<sup>49</sup> The perpetrator “gain[ed] access to the Facebook and other social media accounts of the women and remotely t[ook] pictures of them by accessing their webcams . . . .”<sup>50</sup> The predator threatened “to post the pictures on the women’s social media pages unless they sent him more naked photos or videos or spoke to him by video chat on Skype and did what he demanded for five minutes . . . .”<sup>51</sup>

Perpetrators that act with a profit motive compose a particularly insidious category of NCP. A well-publicized example of a profit motivated perpetrator involved

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41. Stebner, *supra* note 40.

42. *Id.*

43. Dave Philipps, *Inquiry Opens Into How a Network of Marines Shared Illicit Images of Female Peers*, N.Y. TIMES (March 6, 2017), <https://www.nytimes.com/2017/03/06/us/inquiry-opens-into-how-30000-marines-shared-illicit-images-of-female-peers.html>; *More Than A Year After Photo-Sharing Scandal, Marines Say They’ve Investigated 130 for Online Misconduct*, PBS NEWS HOUR (May 2, 2018) <https://www.pbs.org/newshour/nation/more-than-a-year-after-photo-sharing-scandal-marines-say-theyve-investigated-130-for-online-misconduct>.

44. *See More Than A Year After Photo-Sharing Scandal, Marines Say They’ve Investigated 130 for Online Misconduct*, *supra* note 43.

45. *Stalker Tells All: How I Peeped on Erin Andrews*, *supra* note 14; *Man Gets Prison in Erin Andrews Case*, *supra* note 14.

46. *Man Gets Prison in Erin Andrews Case*, *supra* note 14.

47. *Id.*

48. *Id.*

49. Alex Dobuzinskis, *California Man Agrees to Plead Guilty to Extortion of Miss Teen USA*, REUTERS (Oct. 31, 2013), <https://www.reuters.com/article/us-usa-missteen-extortion/california-man-agrees-to-plead-guilty-to-extortion-of-miss-teen-usa-idUSBRE99U1G520131031>.

50. *Id.*

51. *Id.*

the revenge porn website IsAnyoneUp.com and its proprietor, Hunter Moore.<sup>52</sup> Moore's site claimed to receive thirty million page views and \$10,000 in revenue each month.<sup>53</sup> In addition to providing a site for perpetrators to post NCP that was available to the general public, Moore paid a hacker "to break into the email accounts of victims and steal nude photos to post on the website isanyoneup.com . . . ."<sup>54</sup>

After his activities became publicly known, Moore's activities were also grounded in another non-revenge motive: The notoriety he achieved as a result of curating the NCP website. For example, Moore appeared on the television talk shows of Anderson Cooper and Dr. Drew and served as a master of ceremonies at nightclub events.<sup>55</sup>

In 2014, NCP gained widespread public awareness when more than 500 private images of numerous celebrities were distributed on the Internet in circumstances colloquially referred to as the "Fappening" or "Celebgate."<sup>56</sup> The five perpetrators

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52. In a 2012 interview with Rolling Stone magazine, Moore specifically professed his profit motive for creating the IsAnyoneUp.com website. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <https://www.rollingstone.com/culture/culture-news/hunter-moore-the-most-hated-man-on-the-internet-184668/>.

53. Megan Guess, *Revenge Porn Site Operator Hunter Moore Pleads Guilty to Hacking, ID Theft*, ARS TECHNICA (Feb. 18, 2015), <https://arstechnica.com/tech-policy/2015/02/revenge-porn-site-operator-hunter-moore-pleads-guilty-to-hacking-id-theft/>.

54. Moore became the target of an FBI investigation based on a report of the mother of a teenage hacking victim. Connor Simpson, *Revenge Porn King Hunter Moore Arrested for Hacking Email Accounts*, THE ATLANTIC (Jan. 23, 2014), [www.theatlantic.com/national/archive/2014/01/revenge-porn-king-hunter-moore-arrested-conspiracy-hack-email-accounts/357321/](http://www.theatlantic.com/national/archive/2014/01/revenge-porn-king-hunter-moore-arrested-conspiracy-hack-email-accounts/357321/). The investigation led to a fifteen-count indictment handed up to the U.S. District Court for the Central District of California in late 2013. October 2013 Indictment at 1, *United States v. Moore*, C.D. Cal. (Dec. 20, 2013) (No. 13-0917). The Indictment charged Moore with conspiracy in violation of 18 U.S.C. § 371; intentionally accessing a computer without authorization and thereby information from the protected computer in violation of 18 U.S.C. § 1028A(a)(1); and aggravated identity theft in violation of 18 U.S.C. § 2. *Id.* Moore pled guilty to all charges in or about February 2015. Nicky Woolf, 'Revenge Porn King' Hunter Moore Pleads Guilty to Hacking Charges, THE GUARDIAN (Feb. 19, 2015), <https://www.theguardian.com/technology/2015/feb/19/revenge-porn-hunter-moore-pleads-guilty-hacking-identify>. In December 2015, he was sentenced to two-and-one-half years in federal prison, a \$2,000 fine, three years of supervised release following the term of imprisonment, and a mental health evaluation during the period of incarceration. Abby Ohlheiser, *Revenge Porn Purveyor Hunter Moore Is Sentenced to Prison*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/>.

In 2012, (prior to the indictment), Hunter's website, IsAnyoneUp.com, was purchased for a nominal sum by James McGibney, who promptly shut down the site. April Corbin, *Cheaterville's James McGibney Swaps 'Revenge Porn' for Anti-Bullying Hope*, LAS VEGAS WEEKLY (May 16, 2012), <https://lasvegasweekly.com/as-we-see-it/2012/may/16/cheatervilles-james-mcgibney-swaps-revenge-porn-an/>. McGibney is the founder and operator of the website, "Cheatersville.com," which is described as an anti-bullying platform. *Id.*

55. Morris, *supra* note 52.

56. Five men, George Garofano, Emilio Herrera, Edward Majerczyk, Ryan Collins, and Christopher Brannan were charged in as a result of the FBI's "Celebgate" investigations. Gene Maddaus, *Fourth Celebgate Suspect Pleads Guilty to Hacking Charge*, VARIETY (Jan. 11, 2018), <https://variety.com/2018/biz/news/george-garofano-celebrate-plea-1202662591/>; J. Serna, *Man Convicted of Hacking Gmail and iCloud Accounts of At Least 30 Celebrities in L.A.*, L.A. TIMES (Sept. 28, 2016), <http://www.latimes.com/local/lanow/la-me-ln-phishing-scam-conviction-20160928-snap-story.html>; Feliks Garcia, *iCloud Celebrity Nude Leak: Man Pleads Guilty to Hacking Emails of Stars Including Jennifer Lawrence and Kate Upton*, THE INDEPENDENT (Sept. 26, 2016), <http://www.independent.co.uk/news/people/icloud-celebrity-nude-leak-jennifer-lawrence-kate-upton-man-pleads-guilty-a7334031.html>; Laura M. Holson, *Hacker of Nude Photos of Jennifer Lawrence Gets 8 Months in Prison*,

of Celebgate misappropriated the images from private email and cloud storage accounts by employing phishing attacks that yielded the necessary login credentials.<sup>57</sup> None of the five had a personal relationship with any of the victims.<sup>58</sup> This provides a particularly compelling example of NCP not based upon personal revenge or harassment motives. For example, one perpetrator, Edward Majerczyk, attributed his conduct to the fact that he was “suffering from depression and looked to pornography websites and internet chat rooms in an attempt to fill some of the voids and disappointment he was feeling in his life.”<sup>59</sup> Another preparator, Christopher Brannen, cited similar non-revenge or harassment motives; his “addiction to pornography and . . . anxiety and depression.”<sup>60</sup>

#### D. Harms to Revenge Porn Victims Cited as the Supporting Grounds for NCP Criminal Statutes

The available legislative history of NCP laws uniformly focuses on the serious harm to the victims. The preamble to Maryland House Bill 43 is illustrative. It provides that the explicit purpose of the relevant NCP statute is to “prohibit[] a person from intentionally causing serious emotional distress to another” by placing intimate images on the Internet.<sup>61</sup>

New York outlawed NCP in 2019.<sup>62</sup> The bill’s sponsor explained that the purpose of the statute was to redress

[A] pervasive problem that often results in victims being threatened with sexual assault, stalked, harassed, or fired from jobs. . . . Some victims have even committed suicide due to the severe emotional pain caused by the disclosure of their intimate photos.

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N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/arts/hack-jennifer-lawrence-guilty.html>; Christie Trower, *Man Responsible for Hacking Celebrities and Stealing Nude Photos Pleads Guilty*, SHOWBIZ SPY (Mar. 25, 2016), <https://showbizspy.com/scandals/man-responsible-hacking-celebrities-stealing-nude-photos-pleads-guilty/>. Each was charged with hacking, not with direct NCP violations. Suzannah Weiss & Ashley Chervinski, *Fifth Man Convicted in Hacking of Jennifer Lawrence & Other Celebrities’ Accounts*, REFINERY29, <https://www.refinery29.com/en-us/2016/10/127924/ryan-collins-leaked-celebrity-nude-photos> (last updated Mar. 2, 2019). All pled guilty and received sentences between eight months and thirty-four months in prison. *Id.*

57. *Man Behind Jennifer Lawrence Nude Photo Hack Sentenced to Prison*, THE GUARDIAN (Jan. 24, 2017), <https://www.theguardian.com/film/2017/jan/24/jennifer-lawrence-nude-photo-hacker-edward-majerczyk-prison>.

58. See Maddaus, *supra* note 56; Serna, *supra* note 56; Garcia, *supra* note 56; Holson, *supra* note 56; *Man Responsible for Hacking Celebrities and Stealing Nude Photos Pleads Guilty*, *supra* note 56; Weiss & Chervinski, *supra* note 56.

59. See Maddaus, *supra* note 56; Serna, *supra* note 56; Garcia, *supra* note 56; Holson, *supra* note 56; *Man Responsible for Hacking Celebrities and Stealing Nude Photos Pleads Guilty*, *supra* note 56; Weiss & Chervinski, *supra* note 56.

60. Weiss & Chervinski, *supra* note 56.

61. H.D. 43, 2014 Leg., Reg. Sess. (Md. 2014).

62. Mark Hallum, “Some Victims Have Committed Suicide”: Bayside Lawmaker’s Revenge Porn Bill Finally Becomes Law, QNS (Feb. 28, 2019), <https://qns.com/story/2019/02/28/some-victims-have-committed-suicide-bayside-lawmakers-revenge-porn-bill-finally-becomes-law/>.

As referred to in the legislative histories, NCP causes its victims to suffer serious harms, the most draconian of which is suicide. In June 2016, a high school student in Florida committed suicide after acquaintances recorded her showering without her consent, posted the images to Snapchat, and forwarded the video to dozens of students who redistributed the offending materials.<sup>63</sup> Additionally, the victim's boyfriend uploaded the images to Twitter.<sup>64</sup> The victim shot herself with her mother's gun.<sup>65</sup>

In 2012, a fifteen-year-old California girl committed suicide after a revenge porn incident.<sup>66</sup> The victim attended a party at a friend's home.<sup>67</sup> She became intoxicated and sexually assaulted by several boys.<sup>68</sup> The perpetrators photographed her while she was incapacitated and circulated the images throughout their high school.<sup>69</sup> The victim later learned what had transpired and, approximately a week later, hanged herself at home.<sup>70</sup>

Survivors of revenge porn uniformly suffer serious mental and physical consequences. Common psychiatric diagnoses include anxiety disorders, depression, and post-traumatic stress disorder.<sup>71</sup> One California-based psychologist explained, “[b]ecause of the humiliation and victimization involved with revenge porn, it can absolutely be a trigger for posttraumatic stress disorder . . . It’s the same thing that victims of physical sexual assault are vulnerable to.”<sup>72</sup>

Revenge porn victims fear the unknown, including whether they will be subject to stalking, physical injury, sexual assault, or death.<sup>73</sup> They also experience hyper-

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63. Sophie St. Thomas, *15-Year-Old Kills Herself After Nude Snapchat Video Circulates*, DEATH AND TAXES (June 10, 2016), <https://www.deathandtaxesmag.com/293393/tononna-holton-suicide-snapchat/> [<https://web.archive.org/web/20171120132437/https://www.deathandtaxesmag.com/293393/tononna-holton-suicide-snapchat/>].

64. *Id.*

65. *Id.*

66. “*Audrie & Daisy*”: *Mother of Audrie Pott, Teen Who Committed Suicide After Assault, Tells Her Story*, DEMOCRACY NOW! (Jan. 29, 2016), [https://www.democracynow.org/2016/1/29/audrie\\_daisy\\_mother\\_of\\_audrie\\_pott](https://www.democracynow.org/2016/1/29/audrie_daisy_mother_of_audrie_pott).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Michele Pathe et al., *Management of Victims of Stalking*, 7 ADVANCES IN PSYCHIATRIC TREATMENT 399, 401 (2001).

72. Panariello, *supra* note 40.

73. *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, *supra* note 39. “Each year, a terrible toll is exacted by stalkers on their victims. Held hostage by fear, a victim never knows when or where or how the harassment or violence will resume. When the violence does return, serious injury or death often results.” *Combating Stalking and Family Violence: Hearing on Antistalking Proposals Before the S. Comm. on the Judiciary*, 103d Cong. 2 (1993) (statement of Sen. Joseph Biden, Chairman, S. Comm. on the Judiciary). As one victim describes, “one of the questions, and it still scares me to this day, is what happens when he gets out of jail. I refuse to crawl under a rock when he does, but it still scares me every day. I know it’s going to come back around.” Dave Kurtz, *Stalking Ordeal Gains National Attention*, KPC NEWS (Dec. 11, 2013), [https://www.kpcnews.com/news/latest/newssun/article\\_dac18ef6-6841-5d78-bafc-40057286d0b1.html](https://www.kpcnews.com/news/latest/newssun/article_dac18ef6-6841-5d78-bafc-40057286d0b1.html). A year after the victim broke up with her former boyfriend, he started bombarding her with calls demanding that she meet him. He hacked into computers to stalk her for six years and distributed explicitly photos of Dawn to her clients, friends, and family. Kurtz, *supra* note 73.

vigilance, intrusive recollections, and insomnia.<sup>74</sup> Additionally, they suffer short-term memory loss, constant exhaustion, and the inability to concentrate.<sup>75</sup>

NCP victims increasingly suffer serious professional damages, which are exacerbated as employers increasingly utilize internet resources to investigate the background of current and prospective employees.<sup>76</sup> For example, a female Yale Law School student was targeted by defamatory attacks about her intimate life on the website AutoAdmit.<sup>77</sup> The law student did not receive a single summer job offer during on-campus recruiting with law firms despite the fact that she had strong grades.<sup>78</sup> A California NCP victim was terminated from her job after a co-worker distributed naked pictures of her.<sup>79</sup> A New York woman lost sales from her online handbag business when a predator posted pornographic photos of her along with statements that she was “sexually lustful and promiscuous.”<sup>80</sup>

Another example of the draconian professional consequences of NCP is presented by the circumstances of Holly Jacobs,<sup>81</sup> the NCP advocate and victim previously discussed. Jacobs worked at a public university.<sup>82</sup> An anonymous person emailed the human resources department claiming that “a professor is masturbating for her students and putting it online.”<sup>83</sup> The university investigated and summoned Jacobs to the Dean’s office.<sup>84</sup> Jacobs suffered substantial humiliation and eventually resigned from the university.<sup>85</sup>

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74. Pathe et al., *supra* note 71, at 401; *Hypervigilance*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hypervigilance> (last visited Jan. 29, 2020) (Hypervigilance is “extreme or excessive vigilance: the state of being highly or abnormally alert to potential danger or threat.”).

75. Melvin Huang, *Keeping Stalkers at Bay in Texas*, 15 TEXAS J. ON CIVIL LIBERTIES & CIVIL RIGHTS 53, 62 (2009).

76. *See, e.g.*, Steve Johnson, *Those Party Photos Could Cost You a Job*, CHICAGO TRIBUNE (Jan. 17, 2012), <http://www.chicagotribune.com/features/tribu/ct-tribu-facebook-job-dangers-20120117,0,1257938.column> (noting surveys show between 18% and 63% of employers use internet social media checks, but only 7% of candidates realize employers do so); Jacquelyn Smith, *How Social Media Can Help (Or Hurt) You in Your Job Search*, FORBES (Apr. 16, 2013), <http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search> (citing CareerBuilder study finding 37% of employers use social media sites to assess candidates, and that 34% of those employers found content causing them not to hire certain candidates); *Online Reputation in a Connected World*, CROSS-TAB (Jan. 2010), [https://www.job-hunt.org/guides/DPD\\_Online-Reputation-Research\\_overview.pdf](https://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf) (describing survey commissioned by Microsoft concluded that standard hiring procedures include an Internet search regarding the candidate).

77. Ellen Nakashima, *Harsh Words Die Hard on the Web*, WASH. POST (Mar. 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/06/AR2007030602705.html>.

78. *Id.*

79. *See* Second Amended Complaint, *Lester v. Mineta*, No. C-04-3074 SI, 2006 WL 1042226 at \*5 (N.D. Cal. Mar. 3, 2006); *see also Warren City Bd. of Educ. & Ohio Educ. Ass’n*, 124 BNA LA 532 (2007) (Skulina, Arb.) (upholding in arbitration an Ohio teacher’s termination based upon NCP disseminated by ex-spouse).

80. *Leser v. Penido*, 879 N.Y.S.2d 107, 108 (N.Y. App. Div. 2009).

81. *See supra* Introduction.

82. Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, OBSERVER (May 1, 2013), <http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>.

83. *Id.*

84. *Id.*

85. *Id.*

Another significant issue is the disruption to victims' normal routines based on the fear that people will recognize them from the posted NCP images, which tend to remain on the Internet in perpetuity. Holly Jacobs canceled presenting her Ph.D. dissertation at an American Psychological Association conference based on her fear that attendees may have viewed the offending NCP images.<sup>86</sup> Another revenge porn victim, Rebekah Wells, explained, "When you have your pictures up like that, you don't know who's seen them and who hasn't . . . . Every time I walked into a classroom, I thought 'Has the professor seen them? Is he going to Google me?'"<sup>87</sup>

Victims have engaged in what has been referred to as "moving away tactics," in which they attempt "to be where the pursuer is not or cannot go."<sup>88</sup> This includes "unlisting phone numbers, changing to a post office box for mail, screening all calls, blocking numbers and email addresses, changing physical address, altering routes to and from scheduled activities, moving about in public only with friends . . . ."<sup>89</sup> Victims have also changed their entire identities, including their names and social security numbers. Holly Jacobs changed her name (Jacobs is not her birth name).<sup>90</sup>

The breadth and depth of the damages suffered by NCP victims are cited in both of the leading NCP cases. The 2019 case of *People v. Austin* stated that "nonconsensual dissemination of private sexual images causes unique and significant harm to victims . . . ."<sup>91</sup> Another 2019 case, *State v. VanBuren*, provided that "[t]he harm to the victims of nonconsensual pornography can be substantial."<sup>92</sup> Both cases were handed down by their state's highest court, upheld the relevant NCP statute, and based their decision on harms imposed upon NCP victims similar or analogous to those reviewed in this Part.<sup>93</sup>

## II. THE GENERAL CONSTRUCTION OF CRIMINAL STATUTES: *ACTUS REUS* AND *MENS REA* ESSENTIAL ELEMENTS

All criminal statutes, including NCP statutes, are constructed of essential elements that include an *actus reus* and *mens rea*.<sup>94</sup> *Mens rea*, or scienter, is necessary

86. Panariello, *supra* note 40.

87. Lorelei Laird, *Victims Are Taking On 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, ABA JOURNAL (Nov. 1, 2013), [http://www.abajournal.com/magazine/article/victims\\_websites\\_photos\\_consent](http://www.abajournal.com/magazine/article/victims_websites_photos_consent).

88. Brian H. Spitzberg & William R. Cupach, *The State of the Art of Stalking: Taking Stock of the Emerging Literature*, 12 AGGRESSION AND VIOLENT BEHAVIOR 64, 73 (2007).

89. *Id.*

90. Stebner, *supra* note 40; Panariello, *supra* note 40; CCRI Board of Directors, *supra* note 40; Roy, *supra* note 82.

91. No. 123910, 2019 WL 5287962, at \*20 (Ill. Oct. 18, 2019).

92. 215 A.3d 791, 810 (Vt. 2019).

93. *See supra* notes 90 and 91.

94. *Morrisette v. United States*, 342 U.S. 246, 252–53 (1952) ("Crime, [i]s a compound concept, generally constituted only from [the] concurrence of an evil-meaning mind with an evil-doing hand . . . .").

for significant punishment to be imposed.<sup>95</sup> As a result, a review of the possible categories of *mens rea* is instructive. Statutes can be divided into three categories based on their *mens rea* requirements: strict liability, general intent, and specific intent.

### A. *Strict Liability Considerations*

Strict liability is commonly understood as the imposition of criminal liability without the requirement of proof that a defendant acted pursuant to a culpable state of mind;<sup>96</sup> conviction of a crime solely upon proof of proscribed conduct and in the absence of intention, belief, recklessness, or negligence.<sup>97</sup>

In *Morrisette v. United States*, the U.S. Supreme Court held that a conviction without proof of scienter (i.e. upon strict liability) is unconstitutional for crimes that impose more serious punishments.<sup>98</sup> These include *mala in se*, or conduct which is considered inherently wrong by nature, independent of regulations governing the conduct.<sup>99</sup>

Relying in part on *Morrisette, United States v. X-Citement Video* (which interpreted the constitutionality of 18 U.S.C. § 2252, the federal possession of child pornography statute), found that “scienter requirement[s]” apply only to “statutory elements that criminalize otherwise innocent conduct.”<sup>100</sup>

The underlying *actus reus* proscribed by NCP statutes constitutes the distribution of a depiction of a victim in a state of nudity or engaged in sexually explicit conduct to the world without the victim’s consent. Under present social mores,<sup>101</sup> this is inherently unconscionable in its nature and therefore constitutes *mala*

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95. See generally *id.* (discussing the distinction between crimes referred to as *mala in se*—inherently serious crimes such as murder that violate societies norms—and *mala prohibita*—acts that violate a statute or regulation, but are not inherently unconscionable by their nature; and finding that a conviction for more serious offenses, such as stealing and larceny (e.g., *mala in se* crimes) that have significant consequences upon conviction, must include proof of scienter as an element). See also *scienter*, BLACK’S LAW DICTIONARY (8th ed. 2004) (“A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law . . . . An act is said to be *mala in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.”).

96. See generally MODEL PENAL CODE § 2.02(2) (1985) (excluding strict liability from proscribed categories of *mens rea* in criminal statutes); *Morrisette*, 342 U.S. at 246 (discussing prosecution with requiring proof of criminal intent); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 125 (2d ed. 1995) (defining strict liability offenses as “crimes that, by definition, do not contain a *mens rea* requirement regarding one or more elements of the *actus reus*”); Philip E. Johnson, *Strict Liability: The Prevalent View*, in 4 ENCYCLOPEDIA OF CRIME AND JUST. 1518 (Sanford Kadish ed., 1983).

97. See MODEL PENAL CODE § 2.02(2); *Morrisette*, 342 U.S. at 246; DRESSLER, *supra* note 96, at 125; Johnson, *supra* note 96, at 1518.

98. See MODEL PENAL CODE § 2.02(2); *Morrisette*, 342 U.S. at 246; DRESSLER, *supra* note 96, at 125; Johnson, *supra* note 96, at 1518.

99. See *Morrisette*, 342 U.S. at 259 (discussing *mala in se*); *United States v. Balint*, 258 U.S. 250, 252 (1922).

100. *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994).

101. See *Send Nudes, An Exploration of the Sext Generation*, *supra* note 7.

*in se*.<sup>102</sup> As a result, NCP statutes impose significant penalties, including years of incarceration and serious fines.<sup>103</sup> Accordingly, based on *Morrisette* and its progeny, a completely strict liability NCP statute would be unconstitutional.

However, none of the extant NCP statutes are strict liability statutes with regard to each of their essential elements. In this regard, the most austere statutes contain an element that (1) the distribution of the NCP image was intentional or purposeful, (2) the defendant had the intent to threaten or harass the victim, or (3) the defendant knew or should have known that the victim did not consent to dissemination of the image. Thus, the statutes do not violate the constitutional proscription against strict liability statutes.

### B. *General and Specific Intent*

General and specific intent are conceptually well distinguished. Black's Law Dictionary defines "specific intent" as follows: "[t]he intent to accomplish the precise criminal act that one is later charged with."<sup>104</sup> In contrast, general intent is defined as "the state of mind required for the commission of certain common-law crimes, not requiring a specific intent or imposing strict liability . . . . General intent crimes usually take the form of recklessness or negligence."<sup>105</sup> *X-Citement Video* also provides that general or specific intent must be interpreted onto elements when possible and when necessary to preserve the validity of such a statute.<sup>106</sup>

The simple distinction between general and specific intent as applied to NCP statutes may not provide sufficient differentiation. In this regard, intending to post an offending image on the Internet without some authorization from the victim completes the harmful activity, regardless of any *mens rea*. This supports basing a statute on recklessness or negligence in order to protect victims from the overwhelming harm caused by NCP.

### C. *The Model Penal Code*

The *mens rea* requirements in the Model Penal Code ("MPC") are set forth in § 2.02.<sup>107</sup> Subsection 2, entitled "Kinds of Culpability Defined," provides four separate and distinct categories of scienter that apply to the material elements of a statute: purposefully, knowingly, recklessly, or negligently.<sup>108</sup> "Purposefully" focuses on the "conscious object . . . to cause a result" or the awareness, belief, or hope

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102. See *Morrisette*, 342 U.S. at 259 (discussing *mala in se*); *Balint*, 258 U.S. at 252.

103. See *infra* Appendix.

104. *Specific Intent*, BLACK'S LAW DICTIONARY (8th ed. 2004).

105. *Id.*

106. *X-Citement Video*, 513 U.S. at 78.

107. MODEL PENAL CODE § 2.02 (1985); see also MODEL PENAL CODE § 1.13(10) (1985) (An element counts as "material" unless it relates exclusively to the statute of limitations, jurisdiction, venue, or other like questions.).

108. MODEL PENAL CODE § 2.02(2) (1985).

that certain attendant circumstances exist.<sup>109</sup> “Knowingly” involves a person’s awareness “that it is practically certain that [the defendant’s] conduct will cause such result.”<sup>110</sup> “Recklessness” is composed of the conscious disregard of “a substantial and unjustifiable risk that the material element exists or will result from his conduct.”<sup>111</sup> Such conduct is a “disregard [that] involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>112</sup> Finally, the MPC provides that “[a] person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.”<sup>113</sup> This involves a “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”<sup>114</sup>

MPC § 2.02 does not recognize strict liability convictions. In this regard, subsection (1) states, “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.”<sup>115</sup>

The level of scienter attached to or defining each element has a fundamental influence on what conduct falls within the scope of a statute, which acts are not criminalized, and the nature of the potential appellate issues. As set forth in the following analyses, NCP statutes that use a general intent or recklessness standard as to either sharing the NCP images or the prospect of harming the victim criminalize the widest array of NCP acts. As a result, they have the greatest deterrent effect, which in turn most effectively addresses the public health aspects of NCP. Statutes that require the specific intent of purposely or intentionally causing harm to, or harassing the victim, criminalize the narrowest scope of NCP conduct. Such statutes thus leave an important subset of pernicious NCP conduct unpunished. Accordingly, considering the foregoing *mens rea* categories is an essential part of the following analyses of the forty-eight extant NCP statutes.

### III. A REVIEW OF THE STATUTORY SCHEMES THAT CRIMINALIZE NCP

The widespread nature of sharing intimate images and the serious harm caused when such images are disseminated without consent demonstrates that NCP presents a nascent national health epidemic. This provides a basis for the enactment of statutes that criminalize NCP. Presently, forty-eight jurisdictions (forty-six states, the District of Columbia, and Guam) have enacted criminal NCP

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109. *Id.* § 2.02(2)(a).

110. *Id.* § 2.02(2)(b).

111. *Id.* § 2.02(2)(c).

112. *Id.*

113. *Id.* § 2.02(2)(d).

114. *Id.*

115. *Id.* § 2.02(1); see also *id.* § 1.13(10) (providing that an element counts as “material” unless it relates exclusively to the statute of limitations, jurisdiction, venue, or other like questions).

legislation.<sup>116</sup> The gravamen of an NCP crime is the violation of a victim's privacy.<sup>117</sup> The analogous disclosure of certain private information without consent has been criminalized in other contexts.

#### A. HIPAA as an Analogous Privacy Protection Scheme

Given that NCP statutes are enacted to counter the violation of a victim's privacy, examining other statutes that criminalize privacy violations are illustrative. The circumstances of personal health information and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") provides such a relevant example.<sup>118</sup> HIPAA criminalizes the use or disclosure by a covered entity of private health information without a patient's written consent.<sup>119</sup>

The text of the HIPAA statute provides:

A person who knowingly and in violation of this part—

- (1) uses or causes to be used a unique health identifier;
- (2) obtains individually identifiable health information relating to an individual; or
- (3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b) of this section.<sup>120</sup>

It is noteworthy that the HIPAA statute's scienter requirement is "knowingly." It does not require proof of a specific intent to harm the victim or proof of actual harm to the victim.<sup>121</sup> The implicit reason is that the disclosure per se causes the harm of improperly exposing a patient's personal medical information.

The HIPAA statute contains a tiered penalty scheme.<sup>122</sup> A violation is punishable generally as a misdemeanor by a fine of not more than \$50,000, imprisonment for not more than one year, or both.<sup>123</sup> Certain aggravating circumstances, such as violations committed under false pretenses, transform the offense into a felony and expose the perpetrator to the following higher penalties: a maximum fine of \$100,000, a five-year term of imprisonment, or both.<sup>124</sup> Finally, the most serious penalties are meted out for offenses committed "with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal

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116. *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Jan. 31, 2020).

117. *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019) (describing how NCP images "involve[] the most private of matters . . .").

118. Health Insurance and Portability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

119. *Id.*

120. *Id.* § 1320d-6(a).

121. *See supra* Part II.

122. Health Insurance and Portability Act of 1996, Pub. L. No. 104-191, § 1320d-6(b).

123. *Id.* § 1320d-6(b)(1).

124. *Id.* § 1320d-6(b)(2).

gain, or malicious harm.”<sup>125</sup> These provide for fines of not more than \$250,000, imprisonment for not more than ten years, or both.<sup>126</sup>

The fact that the HIPPA statute criminalizes analogous privacy violations under a general intent statute and has been found constitutional is persuasive authority that NCP statutes do not require an intentional or specific intent level of *mens rea*.<sup>127</sup>

### B. *The Panoply of Essential Elements Disclosed by Deconstructing the Forty-Eight NCP Statutes*

The main differentiator between the various NCP statutes is the nature and number of essential elements, including scienter requirements.<sup>128</sup> Does the statute require a general or specific intent? Is separate proof of an intent to harass, intimidate, humiliate, or seek revenge against the victim required? To what extent must the victim be identifiable from the image or accompanying information? How is the issue of consent to capture or distribute the image, or both, considered by the statute? Is separate proof of harm to the victim required? Is a reasonable expectation of privacy a separate and explicit element?

Given that each statute is designed to address the same harmful acts, the differences between the statutes disclose a variance that risks inconsistent outcomes for analogous criminal conduct, or worse, the possibility of creating states that are safe havens for NCP perpetrators. These differences result in inconsistent outcomes that risk rendering criminal justice in an arbitrary and capricious manner. To analyze these issues, this Part deconstructs the various NCP into a menu of seven possible essential elements:

1. An *actus reus*—the sharing with, or making available of, an NCP image to persons other than the defendant and victim;
2. Scienter as to the distribution of the image;
3. Whether the statute requires some proof that the sharing with, or making available the NCP image was undertaken without the consent of the victim;
4. Whether the posting was done with some intent to harass, harm, or cause similar damage to the victim;
5. Whether the statute requires explicit proof of some harm to the victim;
6. Whether the victim had a legitimate expectation of privacy with regard to the relevant circumstances; and

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125. *Id.* § 1320d-6(b)(3).

126. *Id.*

127. *See supra* Part II.

128. *See United States v. Bailey*, 444 U.S. 394, 405 (1980) (“Generally, even time-honored common-law crimes consist of several elements, and complex statutorily defined crimes exhibit this characteristic to an even greater degree. Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another?”).

7. Whether the statute includes a material element that the victim's identity was somehow revealed in connection with the sharing or making available of the NCP image.

The deconstruction of the forty-eight NCP statutes is set forth in the below Appendix, "Deconstructing NCP Statutes."

### 1. *Actus Reus*: The Dissemination of NCP Images

All forty-eight NCP statutes share a similar *actus reus*: the sharing or making available to third parties or the general public an NCP image depicting the victim.<sup>129</sup> This essential element can be further deconstructed into two sub-components. First, that the subject image was an NCP image.<sup>130</sup> Second, that image was somehow made available to third parties beyond the victim and defendant.<sup>131</sup> The various NCP statutes describe this requirement as the dissemination, distribution, disclosure, publication, posting, displaying of the image available.<sup>132</sup>

### 2. Scierter as to the Distribution, Dissemination, or Posting of the NCP Image

The NCP statutes display a wide variance in their treatment of scierter as to the distribution of an NCP image, from no scierter or strict liability on this element, to general intent or recklessness, to specific intent or purposeful actions. Sixteen (thirty-three percent) do not attach a scierter requirement directly to the posting of the NCP image. The remaining thirty-two statutes directly modify the *actus reus*.<sup>133</sup> In seventeen of the jurisdictions (thirty-five percent), the highest level of scierter directly modifies this distribution by requiring proof beyond a reasonable doubt that the NCP images were posted purposely or intentionally.<sup>134</sup> Another ten jurisdictions (twenty percent) require that the dissemination was done knowingly.<sup>135</sup> Interpreting this "knowingly" standard by applying the MPC levels of *mens rea*, a defendant must have desired to bring about, or knew that they were bringing about, the dissemination of the NCP image.<sup>136</sup> Only two jurisdictions (four percent) require the posting to be knowing and intentional. Another two jurisdictions (also four percent) provide that the posting was either knowing or intentional. Finally, one jurisdiction requires that the posting was malicious.<sup>137</sup>

The issue with the thirty-one jurisdictions that directly modify the *actus reus* by requiring proof that the posting was intentional, knowing, or both, is that such statutes leave unpunished defendants who disregarded "a substantial and unjustifiable

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129. See *infra* Appendix.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. See *supra* Section I.A.

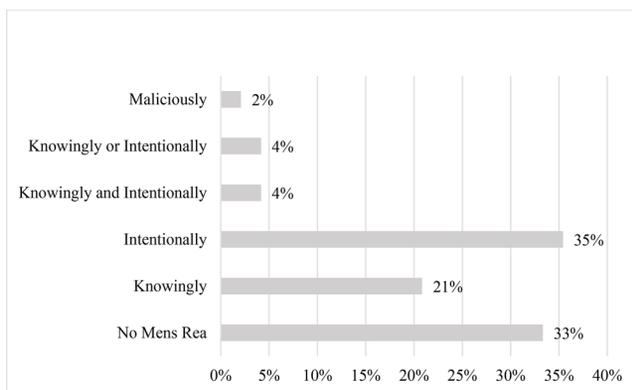
137. See *supra* Section I.A.

risk”<sup>138</sup> that such private images would be distributed to or by others. An example of this would be saving the private images of another person in a publicly accessible digital space, which allowed the images to fall into the hands of others with access. This suggests that a general intent *mens rea* would more effectively accomplish the purpose of the statutes, which is to protect persons from suffering harm from the unauthorized distribution of NCP images of themselves.<sup>139</sup>

Idaho has enacted such a statute; one that applies the “reckless disregard” scienter.<sup>140</sup> This MPC “reckless” standard imposes a higher level of responsibility in the way persons handle such private images.<sup>141</sup> If the recipient retains such an image, they must ensure that third persons cannot easily misappropriate or distribute the image. This imposes upon recipients the responsibility to delete the images or exercise discretion to safeguard them. Thus, the level of scienter directly attached to the dissemination act reflects a societal judgment on the level of responsibility that individuals must exercise vis-a-vis such images. To date, only Idaho has adopted such a standard.<sup>142</sup>

Finally, sixteen jurisdictions (thirty-three percent) do not directly attach a level of scienter to the act of the dissemination of the image. However, they are not invalid as strict liability statutes since proof of *mens rea* as to essential elements distinguishes illegal from innocent conduct (such as scienter as to the resulting harm to the victim or the intent to harass the victim). This is made clear by the reasoning of *X-Citement Video*, that “a scienter requirement” applies only to “statutory elements that criminalize otherwise innocent conduct.”<sup>143</sup>

**Fig. 1-A.** Posting *Mens Rea* (By %)



138. See MODEL PENAL CODE § 2.02(2)(c) (1985) (defining reckless mens rea).

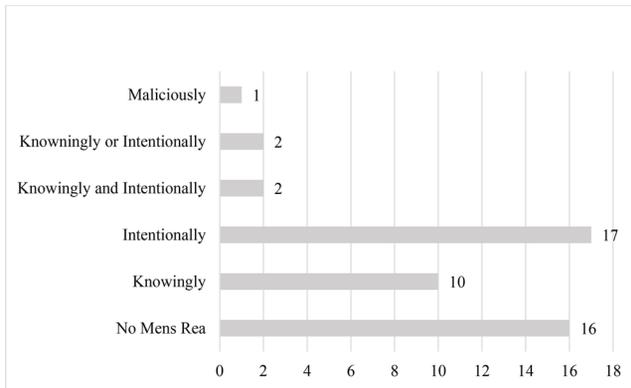
139. See *supra* Section I.D.

140. See *infra* Appendix; see also IDAHO CODE § 18-6609 (2017).

141. See *supra* Section II.C.

142. See *infra* Appendix (N.B. no other state has adopted the same standard). Compare IDAHO CODE § 18-6609 (2017), with the other states’ NCP statutes.

143. *United States v. X-Citement Video Inc.*, 513 U.S. 64, 72 (1994).

**Fig. 1-B.** Posting *Mens Rea* (By Count)

### 3. *Mens Rea* as to Whether the Dissemination of the NCP Image was Undertaken Without Consent

States' essential element of whether a victim consented to the dissemination of images to third parties comprises the essence of NCP statutes.<sup>144</sup> With regard to scienter, consent may be treated as a strict liability factual issue, or it may be modified by some *mens rea* as to whether the defendant had some authorization from the victim to disseminate the image.<sup>145</sup> Consent may also be implicitly addressed through other essential elements, such as those regarding a victim's reasonable expectation of privacy or the intent to harass or embarrass the victim.<sup>146</sup> Finally, rather than defining the lack of permission to disclose the NCP image as an essential element, the provision of consent by the victim may be treated as an affirmative defense.<sup>147</sup>

Of the forty-eight NCP statutes, seventeen (thirty-five percent) require that the defendant knew that the victim did not consent to the dissemination of the NCP image.<sup>148</sup> If this component is the only element that distinguishes innocent from criminal conduct, then scienter as to the lack of consent is necessary or the statute would be an unconstitutional strict liability statute.<sup>149</sup> At the time of publication, Indiana has the only example of a statute in which the lack of consent to distribute the NCP image is the sole scienter element.<sup>150</sup> In this regard, the Indiana statute

144. See *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019) (“By definition, the proscribed images . . . must be dissemination without the consent of the victim.”).

145. See *infra* Appendix.

146. See *infra* Appendix.

147. See *infra* Appendix.

148. See *infra* Appendix.

149. See generally *U.S. v. X-Citement Video*, 513 U.S. 64 (1994).

150. See *infra* Appendix; see also IOWA CODE § 708.7(1) (2017), <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF526> (last visited Sept. 1, 2019) (“A person commits harassment when . . . [a person]

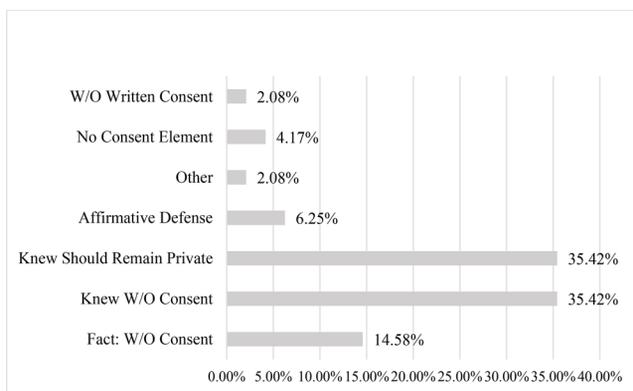
has only two essential elements: an *actus reus* that the defendant distributed the NCP image, and a *mens rea* that the defendant knew or reasonably should have known that the victim did not consent to the distribution.<sup>151</sup>

If other elements provide the *mens rea* of an NCP statute, then the consent element may be a simple factual element or strict liability. Seventeen jurisdictions (thirty-five percent) treat the issue in this manner; the element provides that the dissemination was factually without consent, regardless of whether a defendant knew he had no authorization to distribute the image.

Another nine NCP statutes (nineteen percent) contain no explicit element of consent. Instead, the issue is implicitly addressed by other elements, such as whether the victim had an expectation of privacy or was identifiable from the image or accompanying information.

The treatment of the consent issue in two jurisdictions bears noting. Kentucky requires proof that the distribution lacked the victim’s *written* consent.<sup>152</sup> Nevada requires proof that the victim did not provide *prior* consent.<sup>153</sup> This is similar to the requirements of the HIPAA statutory scheme, which requires prior written authorization to disclose or use private medical information.<sup>154</sup>

**Fig. 2-A.** Consent *Mens Rea* (By %)



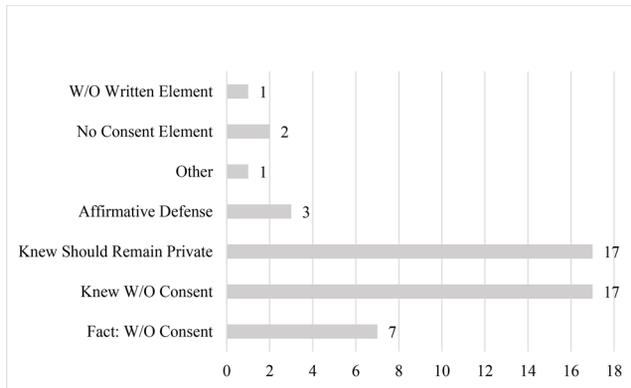
[d]isseminates, publishes, distributes, posts . . . another person in a state of full or partial nudity or engaged in a sex act, knowing that the other person has not consented to the disseminations . . .”).

151. IOWA CODE § 708.7(1) (2017).

152. KY. REV. STAT. ANN. § 531.120 (West 2018).

153. NEV. REV. STAT. § 200.780 (2015).

154. Health Insurance and Portability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

**Fig. 2-B.** Consent *Mens Rea* (By Count)

#### 4. Scier as to the Defendant's Motivation to Harass, Harm, or Cause Damage to the Victim

Another essential element included in many of the NCP statutes addresses whether the defendant intended to harass, intimidate, embarrass, threaten, torment, coerce, or injure the victim in some similar way.<sup>155</sup> This is separate and distinct from whether the victim suffered actual harm.<sup>156</sup> Again, the forty-eight NCP statutes are inconsistent on this issue.

Sixteen (thirty-three percent) of the forty-eight jurisdictions omit it. The remaining thirty-two jurisdictions (sixty-seven percent) include some permutation of the harassment scier as a component of their NCP statutes.<sup>157</sup>

If the purpose of the NCP statutes is to remedy what amounts to a cyber assault of a victim, then such a requirement essentially excludes from prosecution significant harmful conduct committed by a wide array of actors. In this regard, any person that distributes NCP images for his own prurient interest would fall outside the scope of the statute. If the statutory purpose is to prohibit and deter the unauthorized dissemination of an NCP image and the ensuing damage to the victim, the inclusion of a harassment scier element substantially undermines its purpose and efficacy.

Only two of thirty-two jurisdictions with an intent to harass element account for this limitation.<sup>158</sup> South Dakota explicitly addresses the issue by providing that a person violates the statute if he acts with an "intent to self-gratify, to harass, or embarrass and invade the privacy of that other person."<sup>159</sup>

155. See *infra* Appendix.

156. See *infra* Appendix.

157. See *infra* Appendix.

158. See *infra* Appendix.

159. S.D. CODIFIED LAWS § 22-21-4 (2016).

Rhode Island’s statute partially mitigates this limitation by using a general intent standard of scienter: reckless disregard for the harm or consequences to the victim.<sup>160</sup> The Model Penal Code defines recklessness as the conscious disregard of “a substantial and unjustifiable risk that the material element exists or will result from his conduct.”<sup>161</sup>

Applying this standard of *mens rea* provides for a conviction upon proof that the distribution for any reason “involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”<sup>162</sup> NCP statutes imply a change in community values such that sharing sexual images with a romantic partner is subject to the sacrosanct trust of an intimate relationship. Thus, this general intent standard provides the jury with the ability to apply community standards to this issue.

Pennsylvania and Arkansas present another anomaly. Pennsylvania restricts the scope of its NCP statute to revenge porn by requiring proof that the perpetrator is a current or former romantic partner.<sup>163</sup> The Arkansas NCP statute contains an essential element that the person depicted in the offending image is “a family or household member of the actor or another person with whom the actor is in a current or former dating relationship.”<sup>164</sup> The issue with this element is that it insulates against prosecution a wide array of otherwise improper NCP conduct committed by hackers, stalkers, non-romantic acquaintances, and other strangers. For example, it would exclude from prosecution the Erin Andrews stalker and the perpetrator who remotely commandeered the Miss Teen America computer and then blackmailed her. It insulates from prosecution the proprietors of social media and posting sites that host NCP without the subject’s consent,<sup>165</sup> as neither of these predators are current or former romantic partners.<sup>166</sup>

##### 5. Explicit Proof of Some Harm to the Victim

Certain NCP statutes include as an essential element proof of actual harm to the victim.<sup>167</sup> Posting a nude or compromising image of the victim to the Internet makes it available for viewing or downloading by the general public, worldwide and in perpetuity. As previously noted, there is extensive evidence that NCP victims’ suffering results in long-term sustained harm.<sup>168</sup> Preventing this harm is the legislative intent of these statutes.<sup>169</sup>

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160. 11 R. I. GEN. LAWS § 11-64-3 (2018).

161. See MODEL PENAL CODE § 2.02(2)(c) (1985).

162. See *id.* § 2.02(2)(c).

163. 18 PA. CONS. STAT. § 3131 (2014).

164. ARK. CODE ANN. § 5-26-314 (2015).

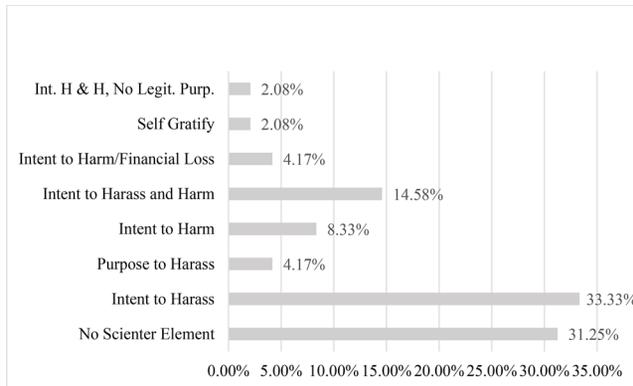
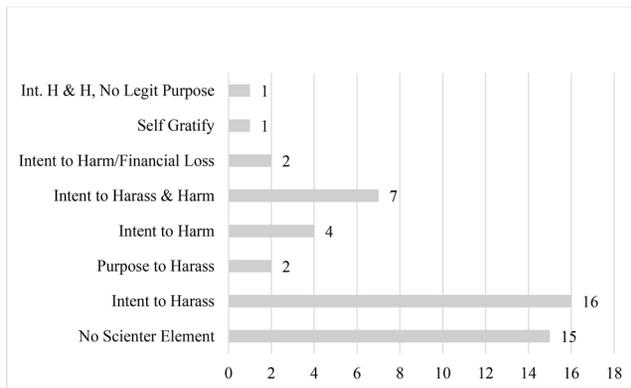
165. See *supra* Section I.C.

166. See *supra* Section I.C.

167. See *infra* Appendix.

168. See *supra* Section I.D.

169. See *supra* Section I.D.

**Fig. 3-A.** *Mens Rea* of Animus toward the Victim (By %)**Fig 3-B.** *Mens Rea* of Animus toward the Victim (By Count)

Out of the forty-eight NCP statutes, thirty-three jurisdictions (sixty-nine percent) do not include a separate element requiring proof of harm to the victim or the defendant's knowledge that it would cause harm. Thus, the majority of the statutes implicitly regard the unauthorized dissemination of the image as per se harmful. Another eleven statutes (twenty-three percent) require proof that NCP caused the harm but contain no *mens rea* regarding the harm. A victim's testimony or other proof of subjective harm to the victim appears to be sufficient to satisfy this element.

Kentucky, Oregon, and Vermont provide another variation in the treatment of harm to the victim. These three states are notable in that they adopted a subjective-objective standard.<sup>170</sup> That is, they require proof that the subjective harm experienced by the victim is such that a reasonable person would similarly suffer.

170. See *infra* Appendix.

Three statutes (six percent) in Washington D.C., Pennsylvania, and South Dakota contain a scienter requirement regarding harm to the victim. In each, the *mens rea* required is that the defendant knew or should have known that the victim would suffer harm under the circumstances.<sup>171</sup> Pennsylvania and South Dakota do not contain an element requiring proof of intent to harass the victim.<sup>172</sup> Washington, D.C. does contain an intent to harass element.<sup>173</sup>

The Delaware NCP statute articulates yet another statutory construction option. It provides that intent to cause mental anguish or distress is an aggravating factor, not an essential element.<sup>174</sup>

Requiring explicit proof of harm changes the fundamental nature of the victim’s participation in such a prosecution and alters what is required to establish such harm. The distribution of an NCP image does not result in visible, physical damages. As a result, the focus must be on psychological, emotional, or economic damages. This requires testimony from the victim about personal and often intimate details. It may trivialize the evaluation of the harm to victims reluctant to seek the services of mental health professionals.<sup>175</sup>

Statutes requiring proof of harm to the victim necessarily require finders of fact to evaluate whether a victim’s subjective feelings of harm rise to a level that would motivate them to vote to convict a defendant. This necessarily involves some focus on the credibility of the victim with regard to her claimed harm, rather than on the issues surrounding the distribution of the NCP. In addition to changing how finders of fact consider the evidence, requiring that the victim testify and be subject to cross-examination on their emotional suffering has the effect of discouraging victims from reporting and participating in NCP prosecutions. In this way, the inclusion of an element requiring proof of harm to the victim necessarily limits the efficacy of a statute in deterring and discouraging NCP.

## 6. Legitimate Expectation of Privacy with Regard to the Relevant Circumstance

The criminalization of NCP is based, among other things, on the privacy interests of victims in intimate images of themselves.<sup>176</sup> This element involves whether the image came into the possession of the defendant under circumstances in which the victim had a reasonable expectation of privacy.<sup>177</sup> Some statutes require that

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171. See *infra* Appendix.

172. See *infra* Appendix.

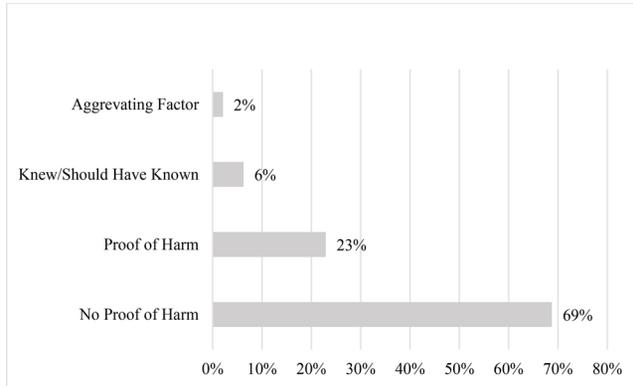
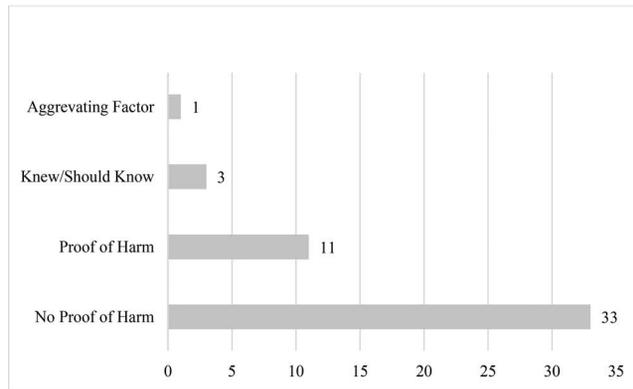
173. See *infra* Appendix.

174. See *infra* Appendix.

175. See Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 1 (June 20, 2016) (examining mental health consequences suffered by victims of revenge porn).

176. See *State v. VanBuren*, 214 A.3d 791, 810 (Vt. 2019) (noting that NCP “involves the most private of matters, with the least possible relationship to matters of public concern.”).

177. See *id.* at 814.

**Fig. 4-A.** Harm to Victim Element (By %)**Fig. 4-B.** Harm to Victim Element (By Count)

the circumstances involve a reasonable expectation of privacy on behalf of the victim as an essential element of proof.<sup>178</sup> This standard helps to distinguish an NCP image from images captured as a result of public nudity or similar circumstances.<sup>179</sup> Including an explicit privacy element, however, places the burden of proof on the prosecution and sets the level of proof at beyond a reasonable doubt.<sup>180</sup>

Thirty of the forty-eight NCP statutes (sixty-four percent) include an essential element regarding the privacy interests of the victim.<sup>181</sup> One other statute,

178. See *infra* Appendix.

179. N.B. All of the statutes include certain exceptions for public nudity.

180. For a well-recognized treatment of the reasonable doubt standard, see *Commonwealth v. Webster*, 59 Mass. 295 (Mass. 1850).

181. See *infra* Figure 5-A; see *infra* Figure 5-B.

Vermont’s, does not explicitly include this element. However, the Vermont Supreme Court interpreted the statute as including a reasonable expectation of privacy.<sup>182</sup> Thus, in a practical sense, thirty-one of the forty-eight NCP statutes require proof of a reasonable expectation of privacy.<sup>183</sup>

This raises issues as to what circumstances present a reasonable expectation of privacy. If a person receives an unwanted NCP image, but the sender believed that the recipient would have welcomed the file, would this justify the recipient posting the image to a public internet site? If a defendant misappropriates the NCP image not directly from the subject, but rather from the subject’s intimate partner, would this violate the reasonable expectation of privacy element?

To date, only one high court has considered the latter issue in the context of an NCP statute.<sup>184</sup> In a June 2019 supplemental ruling, the Vermont Supreme Court ruled that a third party who misappropriated NCP images from the former romantic partner of the person depicted in the images could not, as a matter of law, have violated the state’s NCP law.<sup>185</sup> The Vermont high court reasoned that the victim did not have a reasonable expectation of privacy because it was unclear whether the man who originally received the NCP image from the victim was her romantic partner.<sup>186</sup> He had not solicited the image, and the woman that disseminated the image was not the subject of the image.<sup>187</sup>

This essentially converts the Vermont NCP law into a version of the Pennsylvania law, which was enacted with essential elements that require an intimate relationship between the victim and defendant.<sup>188</sup> First, it appears that the image must be of a former sexual or intimate partner of the defendant.<sup>189</sup> Second, the defendant must have acted with the intent to harass, annoy, or alarm a former or current partner.<sup>190</sup>

Such narrow requirements convert an NCP law from a general NCP statute into a statutory scheme that only prohibits revenge porn (transgressions within the scope of a romantic relationship), or if the NCP image was misappropriated directly from a victim’s own computer or devices. This undermines the stated purpose of NCP statutes to protect against harm to victims, regardless of whether the perpetrator is a current or former intimate partner.<sup>191</sup>

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182. *State v. VanBuren*, 214 A.3d 791 (Vt. 2019). This case and its implications are analyzed in detail in Part V.C.

183. *See infra* Appendix.

184. *See VanBuren*, 214 A.3d at 791.

185. *Id.* at 823.

186. *Id.* at 820.

187. *Id.*

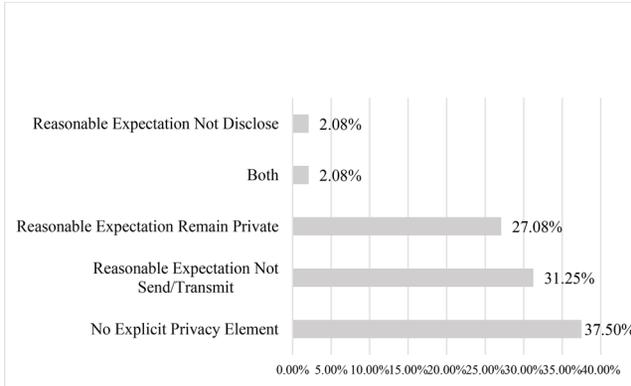
188. *See infra* Appendix; compare 18 PA. CONS. STAT. § 3131 (2014), with VT. STAT. ANN. 13, § 2606 (2015).

189. *See infra* Appendix.

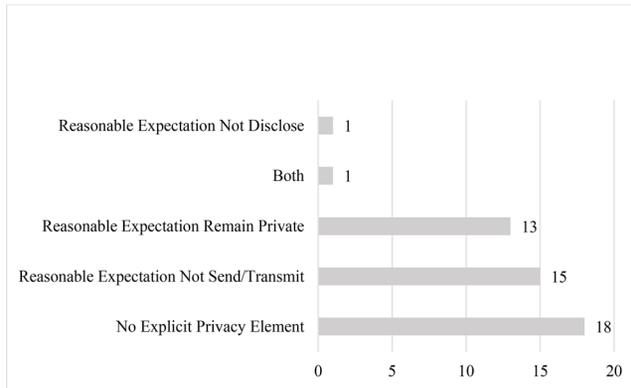
190. *See infra* Appendix.

191. *See supra* Section I.D.

**Fig. 5-A.** Reasonable Expectation of Privacy Element (By %)



**Fig. 5-B.** Reasonable Expectation of Privacy Element (By Count)



7. A Material Element that the Victim’s Identity was Somehow Revealed in Connection with the Sharing of the NCP Image

The final potential essential element considers whether the victim is identifiable from the image or attendant information.<sup>192</sup> To some extent, this is a corollary to the proof of harm element or the reasonable expectation of privacy element. In this regard, the identifiability element provides that the dissemination of an NCP image per se cannot cause harm, unless the subject is identifiable. This is based upon the proposition that any harm suffered by a victim is derived from the victim’s anxiety that persons at their employment or members of the general public will recognize them from their naked or sexualized images.<sup>193</sup> Similarly, the reasonable

192. See *infra* Appendix.

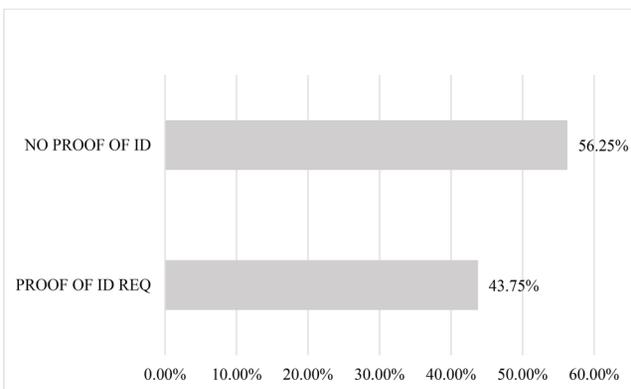
193. See *supra* Section I.D.

expectation of privacy element is not implicated unless the image provides a basis to conclude that it depicts the victim.

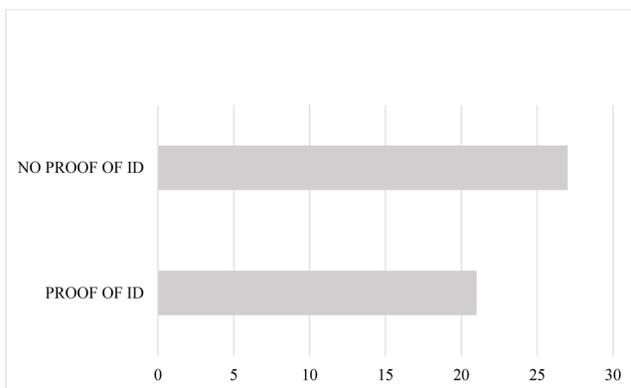
The fact that the identification element implicates at least some of the same issues as the reasonable expectation of privacy and proof of harm elements suggests that it may be redundant or cause the jury to continually reconsider whether the prosecution has proved these elements beyond a reasonable doubt.

Twenty-seven of the forty-eight NCP statutes (fifty-six percent), contain such an element. The inclusion of a proof of identity element is based on the implication that if the victim is not recognizable from the image, then anxiety and humiliation will not follow. However, only approximately one half of the statutes contain this element. The omission of such an element by a majority of the states suggests that it is either redundant and subsumed by the considerations inherent in the harm element, or unnecessary.

**Fig. 6-A.** Proof Of Victim’s Identity Element (By %)



**Fig. 6-B.** Proof of Victim’s Identity Element (By Count)



## IV. JURISDICTIONS WITHOUT NCP STATUTES

As of September 2019, only Massachusetts, South Carolina, Wyoming, Mississippi, and the federal government have not enacted NCP statutes.<sup>194</sup> A Massachusetts law was first proposed in 2017, but failed to pass the legislature.<sup>195</sup> The governor re-filed the state's NCP statute in February 2019.<sup>196</sup> As of March 2020, the bill was in the House and Judiciary Committees and has not passed the state legislature.<sup>197</sup>

In South Carolina, a proposed NCP statute was first filed in 2016.<sup>198</sup> It was never enacted. A new proposed NCP statute was filed in February 2019.<sup>199</sup> It remains in the South Carolina Senate Committee on the Judiciary.<sup>200</sup>

Wyoming had an NCP proposed as early as 2016.<sup>201</sup> It failed to make it out of committee.<sup>202</sup> In Mississippi, an NCP bill was proposed in February 2019 and passed its senate on February 14, 2019.<sup>203</sup> It was transmitted to the Mississippi House on February 19, 2019, referred to the House Judiciary Committee on February 20, 2019, tabled on March 13, 2020, and has not progressed any further.<sup>204</sup>

Additionally, there is no federal NCP statute, although such a statute has been proposed three times. The first federal NCP statute, known as the Intimate Privacy Protection Act (“the IPPA Act” or “IPPA”), was proposed in 2016.<sup>205</sup> The text of the IPPA Act is as follows:

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194. See *infra* Appendix.

195. Katie Lannan, *Lt. Gov. Polito Says It Is Urgent to Pass Bill to Make Revenge Porn A Felony*, WBUR NEWS (Feb. 7, 2019), <https://www.wbur.org/news/2019/02/07/polito-sexting-revenge-porn-bill>.

196. *Baker Files Bill Targeting “Revenge Porn”*, BOSTON.COM (Feb. 6, 2019), <https://www.boston.com/news/local-news/2019/02/06/baker-files-bill-targeting-revenge-porn>.

197. H.B. 76, 191st Gen. Court of the Commonwealth of Massachusetts, Reg. Sess. (Mass. 2019), <https://malegislature.gov/Bills/191/H76> (last visited Mar. 20, 2020) (Bill History).

198. Daniel J. Gross, *SC Bill Could Make ‘Revenge Porn’ a Crime*, SPARTANBURG HERALD-JOURNAL (Dec. 15, 2016), <https://www.thestate.com/news/politics-government/article121024693.html>.

199. S.B. 567, 2019 Gen. Assemb., 123rd Sess. (S.C. 2019).

200. *Id.*

201. Hunter Woodall, *Revenge Porn Bill Passes Introduction Vote in Wyoming House*, CASPER STAR TRIBUNE (Feb. 10, 2016), [https://trib.com/news/state-and-regional/govt-and-politics/revenge-porn-bill-passes-introduction-vote-in-wyoming-house/article\\_12c9eb4f-c04f-5146-9660-e0e428a4ad35.html](https://trib.com/news/state-and-regional/govt-and-politics/revenge-porn-bill-passes-introduction-vote-in-wyoming-house/article_12c9eb4f-c04f-5146-9660-e0e428a4ad35.html).

202. Unlawful Dissemination of an Intimate Image, H.B. 0069, 65th Leg. (Wyo. 2016) (“S: Died in Committee Returned Bill Pursuant to SR 5-4”).

203. *Mississippi Bill Proposes Penalties for Revenge Porn*, U.S. NEWS AND WORLD REPORT ON-LINE (Feb 17, 2019), <https://www.usnews.com/news/best-states/mississippi/articles/2019-02-17/mississippi-bill-proposes-penalties-for-revenge-porn>; James E. Gates, *Revenge Porn Bill Passes in Senate*, THE CLARION-LEDGER (Feb. 11, 2017), <https://www.clarionledger.com/story/news/politics/2017/02/11/revenge-porn-bill-passes-senate/97638082/>; S.B. 2528, 2019 Reg. Sess. (Miss. 2019), <http://billstatus.ls.state.ms.us/2019/pdf/history/SB/SB2528.xml> (last visited Mar. 21, 2020) (History of Actions).

204. Miss. S.B. 2528.

205. Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016) (sponsored by Rep. Jackie Speier, California).

Whoever knowingly uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of the person, with reckless disregard for the person’s lack of consent to the distribution, shall be fined under this title or imprisoned not more than 5 years, or both.<sup>206</sup>

The IPPA Act did not contain an element requiring an intent to harass or an element requiring proof of harm to the victim.<sup>207</sup> Its principal scienter elements were the knowing distribution of an NCP image and a perpetrator’s reckless disregard for the victim’s lack of consent. Thus, IPPA required proof of specific intent as to distribution, and general intent as to consent. The IPPA Act also addressed the issue of harm to the victim by including an element requiring proof of the NCP subject’s identity.

The bill was introduced in the House of Representatives on July 14, 2016, referred to the House Judiciary Committee on the same date, and referred by the Judiciary Committee on August 10, 2016.<sup>208</sup> The bill was never enacted.<sup>209</sup> According to Speirs, the Congressional Session closed prior to a vote on the bill.<sup>210</sup>

After the IPPA Act had essentially died in committee, a second proposed federal NCP law was introduced the following year on November 28, 2017. This second proposal, the Ending Nonconsensual Online User Graphic Harassment Act of 2017 (the “ENOUGH Act”) was introduced simultaneously in the House of Representatives<sup>211</sup> and the Senate.<sup>212</sup>

The ENOUGH Act proposed a federal crime as follows:

Except as provided in subsection (d), it shall be unlawful to knowingly use any means or facility of interstate or foreign commerce to distribute an intimate visual depiction of an individual—

- (1) with knowledge of or reckless disregard for—
  - (A) the lack of consent of the individual to the distribution;
  - (B) the reasonable expectation of the individual that the depiction would remain private; and
  - (C) harm that the distribution could cause to the individual; and

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206. *Id.*

207. *Id.*

208. Intimate Privacy Protection Act of 2016 (Actions), H.R.5896, 114th Cong. (2019).

209. *Id.*; see also, Ella Ceron, *Inside the Fight for a Federal Law Against Revenge Porn*, MTV (July 9, 2019), <http://www.mtv.com/news/3130562/sheild-act-federal-revenge-porn-law/>.

210. Ceron, *supra* note 209.

211. ENOUGH Act, H.R. 4472, 115th Cong. (2017) (principally sponsored by Rep. Jackie Speier, California).

212. ENOUGH Act, S. 2162, 115th Cong. (2017) (principally sponsored by Sen. Kamala Harris, California).

- (2) without an objectively reasonable belief that such distribution touches upon a matter of public concern.
- (c) Penalty.—Any person who violates subsection (b) shall be fined under this title, imprisoned not more than 5 years, or both.<sup>213</sup>

Like the IPPA Act, the ENOUGH Act omitted any proof of an intent to harass, included a specific intent element as to distribution, and a general intent element as to consent. The requirement of proof of identity of the victim was omitted. In its place is a general intent element requiring that the proof that the perpetrator acted with “reckless disregard of harm that the victim “could” suffer. Finally, a general intent element that the accused acted with reckless disregard that the image was to remain private was added.

The parallel Senate and House bills were introduced in the House and the Senate on November 28, 2017 and referred to the respective Committee on the Judiciary on the same day.<sup>214</sup> The House bill was further referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations on January 9, 2018.<sup>215</sup> The ENOUGH Act failed to progress to the floor of the House or Senate.<sup>216</sup>

A third iteration of the federal NCP statute, this time entitled the Stopping Harmful Image Exploitation and Limiting Distribution Act of 2019 (known as the “SHIELD Act”) was introduced in both houses of congress in 2019.<sup>217</sup> The SHIELD Act provides:

Except as provided in subsection (d), it shall be unlawful to knowingly use any means or facility of interstate or foreign commerce to distribute an intimate visual depiction of an individual—

- (1) with knowledge of or reckless disregard for—
  - (A) the lack of consent of the individual to the distribution; and
  - (B) the reasonable expectation of the individual that the depiction would remain private; and
- (2) without an objectively reasonable belief that such distribution touches upon a matter of public concern.
- (c) Penalty.—Any person who violates subsection (b) shall be fined under this title, imprisoned not more than 5 years, or both.

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213. H.R. 4472.

214. H.R. 4472; ENOUGH Act, S. 2162, 115th Cong. (2018).

215. H.R. 4472.

216. See S. 2162; H.R. 4472.

217. Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act of 2019, H.R. 2896, 116th Cong. (2019) (principally sponsored by Rep. Speier, California); Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act of 2019, S. 2111, 116th Cong. (2019) (principally sponsored by Sen. Kamala Harris, California).

Thus, the essential elements of the SHIELD Act are identical to those of its predecessor, the ENOUGH Act, except that it eliminates the essential element requiring proof of harm to the victim.

The SHIELD act followed the same procedural history and fate as its predecessor. It was introduced in the House on May 22, 2019, referred to the House Committee on the Judiciary on the same date, and subsequently to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations on June 26, 2019.<sup>218</sup> It was introduced in the Senate on July 15, 2019 and referred to the Senate Committee on the Judiciary on the same date.<sup>219</sup> Both bills apparently stalled in their respective committees.<sup>220</sup>

Thus, three NCP laws have been introduced in Congress between 2016 and 2019. None of the three emerged from subcommittee or committee for a vote on the floor of either the Senate or the House. Representative Speier addressed the lack of progress on a federal NCP statute, opining that Congress is not delaying based on the fact that NCP disproportionately affects women and other minority groups.<sup>221</sup> Instead, she attributes the stalled federal bills to “the fact that we have a lot of Luddites in Congress.”<sup>222</sup>

## V. SOME SOURCES OF DIFFERENCES IN THE ELEMENTS INCLUDED IN NCP STATUTES

The deconstruction of the forty-eight existing NCP statutes into their essential elements raises the issue of why so many different permutations of these elements exist. The diversity of the statutes appears to stem from compromises required by the rigors of the legislative process and the overarching specter of the First Amendment.

### A. *The Influence of the Legislative Process*

When a legislative purpose or history for an NCP statute is explicitly provided, it states that the aim of the law is to protect victims, and thereby society, from the harms and damages that result from the crime.<sup>223</sup>

California was an early entrant into protecting NCP victims with criminal legislation, enacting its statute in 2013.<sup>224</sup> A sponsor of the bill stated that “[u]ntil now, there was no tool for law enforcement to protect victims . . . Too many have had their lives upended because of an action of another that they trusted.”<sup>225</sup>

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218. H.R. 2896.

219. S. 2111.

220. H.R. 4472; S.2162.

221. Ceron, *supra* note 209.

222. *Id.*

223. *See supra* Section I.D.

224. Steve Gorman, *California Outlaws “Revenge Porn” in First-of-Its-Kind Legislation*, REUTERS (Oct. 2, 2013), <https://www.reuters.com/news/picture/california-outlaws-revenge-porn-in-first-idUSBRE99113H20131002>.

225. *Id.*

The Florida NCP statute contains the following preamble plainly stating its legislative purpose:

The Legislature finds that: (a) A person depicted in a sexually explicit image taken with the person's consent has a reasonable expectation that the image will remain private. (b) It is becoming a common practice for persons to publish a sexually explicit image of another to Internet websites without the depicted person's consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person. (c) When such images are published on Internet websites, they are able to be viewed indefinitely by persons worldwide and are able to be easily reproduced and shared. (d) The publication of such images on Internet websites creates a permanent record of the depicted person's private nudity or private sexually explicit conduct. (e) The existence of such images on Internet websites causes those depicted in such images significant psychological harm.<sup>226</sup>

The history of the Florida NCP statute demonstrates how the arbitrariness of the political process has undermined some of the NCP statutes. One of the bill's sponsors notes that the law has "major defects."<sup>227</sup> These include requirements that the subject must be identifiable from the image and that the image is accompanied by "personal identification" information such as a name or number.<sup>228</sup> Further, the law only applies to images posted to a website.<sup>229</sup> Thus, emailing, texting, or posting an image to digital repository that is not a website or a print distribution is excluded from the scope of the crimes defined by the statute.<sup>230</sup>

The shortcomings of the Florida statute were caused by the Speaker of the Florida House suddenly shuttering his chamber in order to address a stalemate with the Florida State Senate regarding an unrelated healthcare law.<sup>231</sup> This "forced some lawmakers to choose between accepting the House version of [the NCP] bill[]—without any opportunity to make changes—or allowing . . . [it] to die."<sup>232</sup>

The difficulty in passing an NCP law in New York also illustrates the influence of the legislative process. New York passed an NCP criminal law in 2019.<sup>233</sup> Previously, from 2013 through 2019, a series of proposed laws were stalled in the political process for the six prior years.<sup>234</sup> One NCP advocate opined that "the reason for the delay is that legislators refused to vote on the issue due to pressures

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226. Sexual Cyber Harassment, FLA. STAT. § 784.049 (2015).

227. Jason Garcia, *Act of Revenge? How the 'Revenge Porn' Law Ended up So Flawed*, FLORIDA TREND (July 24, 2015), <https://www.floridatrend.com/article/18766/act-of-revenge-how-the-revenge-porn-bill-ended-up-so-flawed>.

228. See FLA. STAT. § 784.049.

229. Garcia, *supra* note 227.

230. *Id.*

231. *Id.*

232. *Id.*

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

234. *Id.*

from tech companies and the American Civil Liberties Union, who have spent years lobbying for the inclusion of the ‘intent to harm’ clause.”<sup>235</sup> The NCP advocate continued, the bill’s sponsors and supporters “tried for years to hold their ground on this, but did not want to wait another year to have some relevant legislation in place.”<sup>236</sup>

The foregoing demonstrates that the legislative process has had a significant influence on the nature of the bills passed by the states and the elements included in the statutory schemes, particularly with regard to First Amendment issues. The specter of the First Amendment has also influenced the final statutory construction of a significant cross-section of the NCP statutes. The American Civil Liberties Union and other groups, including the Motion Picture Association of America and the New England First Amendment Coalition, attempted to persuade law makers that NCP laws, in whole or in part, improperly burden speech protected by the First Amendment.<sup>237</sup>

### B. *First Amendment Challenges to the Various NCP Statutes*

A number of states have experienced First Amendment challenges to their NCP statutes.

The original Arizona NCP statute was enacted in 2014 and did not include an essential element requiring proof of an intent to harm, harass, or intimidate the victim.<sup>238</sup> The law was challenged on the basis that it violated the First Amendment.<sup>239</sup> Arizona elected to enter into a consent decree not to enforce the law rather than defend the law through a series of appeals.<sup>240</sup>

In 2016, Arizona passed a new NCP law adding several specific intent essential elements. The first addition is that the perpetrator intentionally shared the image without the subject’s permission. The second is that offender intended to harm, harass, or intimidate the victim.<sup>241</sup> In this way, Arizona essentially amended the statute into an anti-harassment statute.

The original 2015 Texas NCP law was enacted without an intent to harass element.<sup>242</sup> It required proof that the images were disclosed without consent and that the disclosure caused harm.<sup>243</sup> An intermediate appellate court held that the law violated the First Amendment, reasoning that it infringed on the free speech rights

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235. *Id.*

236. *Id.*

237. See, e.g., Matt O’Brien, *Raimondo Vetoes Revenge Porn Bill Amid Free-Speech Worries*, WASH. TIMES (June 21, 2016), <https://www.washingtontimes.com/news/2016/jun/21/rhode-island-governor-vetoes-revenge-porn-bill/>.

238. ARIZ. REV. STAT. ANN. § 13-1425 (2014).

239. See *Antigone Books, LLC v. Brnovich*, No. 2:14-cv-02100-PHX-SRB, at \*1 (D. Ariz. July 10, 2015).

240. *Id.*

241. ARIZ. REV. STAT. ANN. § 13-1425 (2016).

242. Stephen Young, *Texas Fixes Its Revenge Porn Law*, DALLAS OBSERVER (May 20, 2019), <https://www.dallasobserver.com/news/texas-passes-revenge-porn-fix-11668838>.

243. *Id.*

of too many third parties.<sup>244</sup> Prosecutors appealed the ruling to the Court of Criminal Appeals of the State of Texas.<sup>245</sup> In 2019, while the appeal was pending, the Texas law was amended to address First Amendment concerns by adding a number of elements, including the intent to harm the victim.<sup>246</sup>

The Rhode Island legislature originally enacted an NCP law in 2016.<sup>247</sup> The bill did not include any essential elements that required proof of an intent to harass, intimidate, or harm the victim.<sup>248</sup> It was vetoed by the governor.<sup>249</sup> A new law, passed in 2018, included an essential element regarding the scienter of “knowledge or with reckless disregard” that the images will cause harm.<sup>250</sup>

The Wisconsin NCP statute also was challenged based on First Amendment grounds. The Court of Appeals of Wisconsin upheld the statute.<sup>251</sup>

Only two states, Vermont and Illinois, have had their highest appellate court rule on the validity of their NCP statute. Both statutes were challenged on, *inter alia*, First Amendment grounds. Both high courts found that their relevant NCP statutes did not violate the First Amendment and were valid exercises of their state’s police powers. Given the precedential importance of these decisions by the highest courts of two states, each case is analyzed in detail the following Section of this Article.

### C. *The First Amendment Rulings of Certain States’ Highest Courts*

The Vermont Supreme Court and the Illinois Supreme Court are the only highest jurisdictional courts to have considered the validity of their states NCP statutes. In both opinions, courts rejected the challenge based, *inter alia*, on First Amendment grounds.<sup>252</sup> The Vermont Supreme Court applied strict scrutiny analysis, while the Illinois Supreme applied intermediate scrutiny.<sup>253</sup> The different approaches account for the different essential elements of the two respective statutes.

In *State v. VanBuren*,<sup>254</sup> the Vermont Supreme Court held that the state’s NCP statute did not violate the First Amendment. The Vermont NCP law falls into the

244. *Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at \*1 (Tex. Crim. App. May 16, 2018).

245. State’s Petition for Discretionary Review to the Court of Criminal Appeals of the State of Texas, *Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at \*1 (Tex. Crim. App. May 16, 2018); Texas Attorney General Amicus Brief, *Ex Parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at \*1 (Tex. Crim. App. May 16, 2018).

246. H.B. 98, 86th Leg. (Tex. 2019) (including legislative history).

247. O’Brien, *supra* note 237.

248. *Id.*

249. *See* O’Brien, *supra* note 237.

250. Tom Mooney, *Governor Signs ‘Revenge Pornography’ Bill Amid Free-Speech Concerns*, PROVIDENCE J. (June 4, 2018), <https://www.providencejournal.com/news/20180604/governor-signs-revenge-pornography-bill-amid-free-speech-concerns>.

251. *State v. Culver*, 918 N.W.2d 103 (Wis. Ct. App. 2018).

252. *State v. VanBuren*, 214 A.3d 791 (Vt. 2019); *People v. Austin*, No. 123910, 2019 WL 5287962 (Ill. Oct. 18, 2019).

253. *Id.*

254. *VanBuren*, 214 A.3d at 814–15.

category of proof of harassment statutes.<sup>255</sup> In its ruling, the Court determined that the Vermont statute implicated protected speech (i.e. was a content-based restriction of speech).<sup>256</sup> This resulted in the application of the strict scrutiny standard.<sup>257</sup>

In upholding the law, the Vermont Supreme Court reasoned that the following factors made the law narrowly tailored:

- The narrow definitions of nude images and sexually explicit conduct provide “little gray area or risk of sweeping in constitutionally protected speech.”<sup>258</sup>
- The requirement that the individual depicted in the image must be identifiable.<sup>259</sup>
- Proof that the perpetrator knowingly disclosed the images without the victim’s consent is required.<sup>260</sup>
- The inclusion of the specific intent to harm, harass, intimidate, threaten, or coerce the person depicted or to profit financially.<sup>261</sup>
- That the proscribed disclosures are limited to those that would cause a reasonable person (not an unreasonably fragile person, “physical injury, financial injury, or serious emotional distress”).<sup>262</sup>
- The exclusion from the scope of the statute disclosures regarding matters of public concern or made in the public interest, such as for law enforcement, criminal reporting, corrections, legal proceedings, or medical treatment, are not proscribed.<sup>263</sup>
- The exclusion from the scope of the statute of “[i]mages involving voluntary nudity or sexual conduct in public or commercial settings or in a place where a person does not have a reasonable expectation of privacy.”<sup>264</sup>

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255. See *infra* CONCLUSION.

256. *VanBuren*, 214 A.3d at 807–08. Cf. *People v. Austin*, No. 123910, 2019 WL 5287962 (for an example of content neutral statute that does not implicate protected speech).

257. See *id.* “Content-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Strict scrutiny provides that regulations directed at speech that is not categorically excluded from the scope of the protections of the First Amendment are valid only if they are narrowly tailored to serve a compelling government interest. *R.A.V.*, 505 U.S. at 395.

258. *VanBuren*, 214 A.3d at 811–12 (citing 13 V.S.A. § 2606(a)(3)–(4)).

259. *Id.* (citing 13 V.S.A. § 2606(b)(1)).

260. *Id.*

261. *Id.* at 812 (citing 13 V.S.A. § 2606(b)(1)–(2)). The Vermont Supreme Court stated, “We express no opinion as to whether this narrowing element is essential to the constitutionality of the statute.” *Id.* at 813, n.10.

262. *Id.* at 812 (citing 13 V.S.A. §§ 2606(a)(2) & (b)(1)).

263. *Id.* (citing 13 V.S.A. § 2606(d)(2)).

264. *Id.* at 813 (citing 13 V.S.A. § 2606(d)(1)). The Vermont Supreme Court further narrowed the statute by excluding from its scope “images recorded in a private setting but distributed by the person depicted to public or commercial settings or in a manner that undermines any reasonable expectation of privacy.” *Id.* This was necessary to account for the fact that “there is no practical difference between a nude photo someone voluntarily poses for in the public park and one taken in private that the person then voluntarily posts in that same public park.” *Id.*

The Vermont Supreme Court noted that NCP “has no connection to matters of public concern.”<sup>265</sup> As a result, it reasoned that “the types of images at issue [in NCP] here have not historically enjoyed First Amendment protection.”<sup>266</sup> Additionally, the court found that victims have a substantial right to privacy in their explicit images.<sup>267</sup> It reasoned that “[i]n the constellation of privacy interests, it is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person’s [private parts], that the person has not consented to sharing publicly.”<sup>268</sup> The court continued that the state has a legitimate interest in addressing the “potentially severe harm to individuals arising from the nonconsensual publications of intimate depictions of them . . . .”<sup>269</sup> It also noted that the “Supreme Court has never struck down a restriction of speech on purely private matters that protected an individual who is not a public figure from an invasion of privacy or similar harms.”<sup>270</sup>

Despite these findings and reasonings, the Vermont Supreme Court declined to define NCP as “a new categorical exclusion from the full protections of the First Amendment” based on the fact that the Supreme Court has not yet addressed the question.<sup>271</sup>

The Illinois NCP law was also challenged on, *inter alia*, First Amendment grounds.<sup>272</sup> The relevant scienter elements are (1) whether a defendant knew or should have known that the images were to remain private and (2) whether the defendant knew or should have known that the person in the image did not consent to the dissemination.<sup>273</sup> The Illinois Supreme Court found that the Illinois NCP statute is not a content based regulation of speech.<sup>274</sup> As a result, the court applied intermediate level scrutiny, and thereby upheld the validity of the law.<sup>275</sup>

In perhaps its most significant finding, the Illinois Supreme Court held that the Illinois NCP statute is content neutral. The court reasoned:

[The] law distinguishes the dissemination of a sexual image not based on the content of the image itself but, rather, based on whether the disseminator obtained the image under circumstances in which a reasonable person would

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265. *Id.* at 810.

266. *Id.* at 801 (citing *United States v. Stevens*, 559 U.S. 460, 469–72 (2010)).

267. *Id.* at 811.

268. *Id.* at 810.

269. *Id.* at 808.

270. *Id.* at 802.

271. *Id.* at 801–02.

272. *People v. Austin*, No. 123910, 2019 WL 5287962, at \*1 (Ill. Oct. 18, 2019). A trial court judge held the statute was “facially unconstitutional as an impermissible restriction on the right to free speech guaranteed by the United States and Illinois Constitutions.” *Id.* at \*1–2. The State of Illinois “filed a direct appeal challenging the judgment of the circuit court.” *Id.* at \*2.

273. 720 ILL. COMP STAT. 5/11-23.5(b) (2015); *see also Austin*, No. 123910, 2019 WL 5287962, at \*2 (“our General Assembly . . . [chose] not expressly include ‘malice’ as a distinct element of the offense.”).

274. *Austin*, No. 123910, 2019 WL 5287962, at \*2–3.

275. *Id.* at \*3–5.

know that the image was to remain private and knows or should have known that the person in the image has not consented to the dissemination. There is no criminal liability for the dissemination of the very same image obtained and distributed with consent. The *manner* of the image’s acquisition and publication, and not its *content*, is thus crucial to the illegality of its dissemination.<sup>276</sup>

The court also noted that the “statute regulates a purely private matter.”<sup>277</sup> The private nature of the speech at issue and the content neutral character of the statute provides for the application of intermediate scrutiny.<sup>278</sup>

In upholding the law and applying intermediate scrutiny,<sup>279</sup> the Illinois Supreme Court reasoned:

- “[N]onconsensual dissemination of private sexual images causes unique and significant harm to victims.”<sup>280</sup>
- Criminalizing NCP based malfeasance serves the substantial government interest of “protect[ing] the health and safety of [its] citizens,” which is a valid exercise of the state’s police powers.<sup>281</sup>
- “The nonconsensual dissemination of private sexual images “is wrong because exposing a person’s body against her will fundamentally deprives that person of her right to privacy.”<sup>282</sup>
- Thus, “The lack of consent to dissemination forms the core of the statute and its protective purpose.”<sup>283</sup>
- “[T]he United States Supreme Court has never declared unconstitutional a restriction of speech on purely private matters that protected an individual who is not a public figure for an invasion of privacy.”<sup>284</sup>
- The foregoing demonstrates that the NCP statute “serves a substantial government interest unrelated to the suppression of speech.”<sup>285</sup>
- This substantial government interest ‘would be achieved less effectively absent [the Illinois NCP statute].’<sup>286</sup>

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276. *Id.* at \*2 (emphasis in original).

277. *Id.*

278. *Id.* (“Content neutral laws are subject to an intermediate level of scrutiny because they generally present a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”); *id.* (“first amendment protections are less rigorous where matters of purely private significance are at issue . . . ‘[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas’”).

279. Intermediate scrutiny requires that the law at issue serves “an important or substantial governmental interest unrelated to the suppression of free speech and must not burden substantially more speech than necessary to further that interest . . . .” *Id.* at \*3 (internal citations omitted).

280. *Id.* at \*3–4 (citing psychological, physical, and career harms).

281. *Id.* at \*3 (internal citations and quotations omitted).

282. *Id.* at \*1 (internal citations and quotations omitted).

283. *Id.* at \*5.

284. *Id.* at \*11.

285. *Id.* at \*12.

286. *Id.* at \*13.

- The relevant statute “does not entirely foreclose any means of communication” on the basis that people “remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images,” and “remain free to criticize or complain about fellow citizens in ways that do not violate the privacy rights of others.”<sup>287</sup>
- The law is not overbroad<sup>288</sup> because it “prohibits a certain and limited category of knowing conduct that involves the unauthorized and intentional dissemination of an intensely personal image of another person. It encompasses only an image of a private and sexual nature, which the disseminator must know or understand is to remain private and which is disclosed without the consent of the person depicted in the image.”<sup>289</sup>
- Criminalizing NCP “is a vital deterrent. As neither privacy torts nor copyright law successfully removes revenge porn images or deters it in the first instance, a more effective deterrent is necessary.”<sup>290</sup>

The Illinois Supreme Court’s criticism of the lower court’s decision in *Austin* is relevant to several aspects of NCP statutes. The lower court referred to the absence of a “malicious intent” (e.g. an intent harass the victim) as a grounds for rendering the statute overbroad.<sup>291</sup> The Illinois Supreme Court noted that such a motive “has no bearing on the resulting harm suffered by the victim.”<sup>292</sup> As a result, the court concluded that requiring proof of such an “illicit motive or malicious purpose would not advance the substantial governmental interest of protecting individual privacy rights, nor would it significantly restrict its reach.”<sup>293</sup>

The lower court was concerned that an NCP statute, without an intent to harass element, would improperly criminalize artistic nude sketches of posed models, such as Andrew Wyeth’s “Helga Pictures.”<sup>294</sup> The Illinois Supreme Court dismissed this criticism, explaining “that a model who poses for an artist is aware of that person’s profession, it will generally be understood that the sketch or painting may be displayed to others at some point in time.”<sup>295</sup> It continued that “such a

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287. *Id.* at \*16 (internal citations and quotations omitted).

288. The following set forth the First Amendment’s overbreadth doctrine. “A statute is facially invalid if it prohibits a substantial amount of protected speech.” *United States v. Williams*, 533 U.S. 285, 292 (2008). “Under intermediate scrutiny, a content-neutral statute is overbroad only when it burdens substantially more speech than necessary to advance its substantial governmental interest.” *Austin*, No. 123910, 2019 WL 5287962, at \*17 (citing *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 662 (1994)). Overbreadth “is to be applied ‘only as a last resort’ and where the statute is not subject to a limiting construction.” *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

289. *Austin*, No. 123910, 2019 WL 5287962, at \*17.

290. *Id.* at \*14 (internal citations and quotations omitted).

291. *Id.* at \*18.

292. *Id.* at \*19.

293. *Id.*

294. *Id.* at \*18.

295. *Id.*

situation is rare and should be addressed on a case-by-case basis.”<sup>296</sup>

The lower court criticized the absence of an element requiring proof of “any specific harm to the victim.”<sup>297</sup> The Illinois Supreme Court dismissed this concern stating, “the unauthorized dissemination of a private sexual image, which by definition must depict a person while nude, seminude, or engaged in sexually explicit activity, is presumptively harmful.”<sup>298</sup>

The Illinois Supreme Court also denounced the argument advanced by the defendant that NCP statutes “criminalize[] an adult complainant’s own stupidity . . . .”<sup>299</sup> The *Austin* opinion dismissed this proposition as a “crude attempt to ‘blame the victim’ [which] is not well received and reinforces the need for criminalization.”<sup>300</sup>

The Illinois Supreme Court deferred to the U.S. Supreme Court on the issue of whether NCP will be defined as a new category of exceptions to speech protected by the First Amendment.<sup>301</sup> However, in exercising such discretion, *Austin* provided that the court “acknowledge[s], as did the Vermont Supreme Court, that the nonconsensual dissemination of private sexual images ‘seems to be a strong candidate for categorical exclusion from full First Amendment protections.’”<sup>302</sup>

In summary, the reasoning of both *VanBuren* and *Austin* suggests that NCP statutes will form a new category of speech completely exempted from First Amendment scrutiny. However, both cases left the issue to be decided by the U.S. Supreme Court. Moreover, *VanBuren* and *Austin* each provide authority that proof of harassment NCP statutes and NCP statutes that omit such a scienter requirement respectively are not unconstitutional under the First Amendment. In this way, *Austin* supports the adoption of NCP statutes that focus on the absence of consent to disseminate the offending images without requiring proof of a malicious intent (a standard that allows significant categories of bad actors to escape culpability simply because they acted for their own amusement, for profit, or for other similar motive).

## CONCLUSION

In summary, deconstructing the forty-eight NCP statutes into their most essential elements yields four archetypical NCP statutes that we categorize as “Compound Elements Statutes,” “Proof of Harassment Statutes,” “Intimate Partner Statutes,” and “Comprehensive Statutes.”

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296. *Id.* (citing, *inter alia*, *New York v. Ferber*, 458 U.S. 747, 773–74 (1982) (holding that impermissible applications of a statute that do not amount to a more than a small fraction of the scope of the law should be addressed on a case-by-case basis)).

297. *Id.* at \*20.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at \*6.

302. *Id.* (citing *State v. VanBuren*, 214 A.3d 791, 791 (2019)).

Compound Elements Statutes contain numerous essential elements. For example, two states, Louisiana and Maryland, have enacted statutes that contain all seven potential elements.<sup>303</sup> These include elements that require proof of an intent to harass or cause emotional distress to the victim, knowledge that the disclosure of the image would cause actual harm to the victim, knowledge that the victim did not consent to the dissemination of the image, proof that the victim had a reasonable expectation that the image would remain private, and proof that the victim was identifiable from the image or accompanying information. Another eleven jurisdictions include at least five of the potential elements in their NCP statutes.<sup>304</sup>

The redundant nature of the numerous essential elements in the Compound Elements Statutes creates a risk of undermining the stated purpose of the statutes, which is to deter perpetrators of NCP from victimizing their subjects and punishing those engage in NCP violations. For example, the proof of harm element and the reasonable expectation of privacy element contain certain redundancies. In this regard, the proof of harm element inherently may involve a jury evaluating whether the subject was sufficiently identifiable to connect the NCP as the cause of the victim's harm. The jury would then need to re-evaluate the identifiability of the victim from the image as a separate element. Requiring the jury to reconsider its decision on such factors in the same trial for redundant essential elements and under such a strict burden of proof as reasonable doubt would appear to have the effect of increasing the probability of jury nullification.

Proof of Harassment Statutes contain an element requiring proof that the defendant acted with some animus towards the victim. This category includes the thirteen Compound Elements Statutes (each of which includes such an essential element),<sup>305</sup> and an additional twenty-three statutes.<sup>306</sup>

Colorado has amended its statute to change from a Proof of Harassment Statute to a Compound Elements Statute. The original Colorado statute, enacted in 2014, contained a requirement that the images depicted the victim nude and an additional element that the defendant intended to inflict serious emotional distress on the victim.<sup>307</sup> In 2018, it eliminated these two requirements.<sup>308</sup>

The major shortcoming of Proof of Harassment Statutes is that they undermine the purpose of the NCP statutes, which is to help protect potential NCP victims

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303. See *infra* Appendix; see LA. STAT. ANN. § 14:283.2 (2015); see MO. REV. STAT. § 573.110 (2019).

304. See *infra* Appendix.

305. See *infra* Appendix. (N.B. Colorado, Washington D.C., Kentucky, Michigan, Missouri, New York, North Carolina, Ohio, Oklahoma, Rhode Island, and Vermont).

306. *Id.* (N.B. The relevant states are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Hawaii, Kansas, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Mexico, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, and West Virginia.).

307. David Magoya, *Colorado Law Makers Moving to Close Loopholes in Revenge-Porn Law*, THE DENVER POST (Apr. 3, 2018), <https://www.denverpost.com/2018/04/03/colorado-revenge-porn-law-loopholes/>.

308. Concerning Measures to Clarify the Scope of Revenge Porn Criminal Offenses, H.B. 18-1264, 2018 Leg. (Colo. 2018); see also Changes to Revenge Pornography Crimes, H.B.18-1264, 2018 Leg., Reg. Sess. (Colo. 2018).

through deterrence and punishment. Only twelve percent of NCP perpetrators harbor revenge porn motivations.<sup>309</sup> Thus, the remaining eighty-eight percent of NCP perpetrators—those that engage in NCP incidents for amusement, profit, and other non-revenge porn motives—are beyond the scope of criminal prosecution under statutes that require a specific intent to harass, intimidate, or otherwise harm the victim.<sup>310</sup>

Further, substantial deterrence can be derived from the threat of punishment by imprisonment and the possibility of a state or federal felony conviction.<sup>311</sup> This presents another shortcoming of Proof of Harassment Statutes. Only five of the thirty-two Proof of Harassment Statutes punish first offenses as a felony.

In summary, the Proof of Harassment Statutes leave substantial NCP activities outside the scope of prosecution and present limited deterrence since few punish a first offense as a felony. This leaves a wide array of NCP perpetrators free to operate with impunity. For example, parties that misappropriated NCP images from victims solely with a profit motive do not violate a Proof of Harassment Statute. As a result, Proof of Harassment Statutes are in reality anti-harassment statutes in which the disturbance to the victim involves the distribution of their nude images.

Intimate Partner Statutes require proof that the perpetrator is a current or former romantic partner.<sup>312</sup> Pennsylvania is currently the only state with such an Intimate Partner Statute. A notable issue with Intimate Partner Statutes is that NCP perpetrators who are not, or were not, involved in intimate relationships with the victim escape prosecution.

Comprehensive Statutes contain the fewest essential elements and thereby most effectively accomplish the legislative intent of NCP statutes. The absence of an element requiring proof of animus towards a victim is an important characteristic of this archetype. Comprehensive Statutes simply criminalize the sharing of an NCP image without the consent of the subject.

Four states have Comprehensive Statutes: Wisconsin, Indiana, Iowa, and New Jersey. Each contains only one scienter element; an element that considers the lack of consent, license, or privilege to disseminate or disclose an NCP image. These Comprehensive Statutes define general intent crimes to require only knowledge of the lack of consent, not a purpose to cause harm to the victim.<sup>313</sup> They do not require specific proof of the victim’s harm, proof of scienter to harass the victim, or proof that the image is identifiable from the image or context. This allows the Comprehensive Statutes to bring within their scope virtually all NCP activities, without regard to whether the perpetrators are current or former romantic partners committed their NCP offenses for profit, for their own amusement or gratification,

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309. EATON ET AL., *supra* note 20.

310. *Id.*

311. *Id.* at 22 (“Things that would have stopped perpetrators”).

312. 18 PA. CONS. STAT. § 3131 (2014).

313. *Id.*

or for any other motive. As a result, Comprehensive Statutes more closely serve the legislative purposes of protecting potential NCP victims by deterring NCP acts and punishing NCP perpetrators.

The Illinois statute is similar to the Comprehensive Statutes with one essential element in addition to the lack of consent: that “the image was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private . . . .”<sup>314</sup>

The fact that a large majority of NCP laws are Compound Elements Statutes or Proof of Harassment Statutes allows significant NCP perpetrators to operate with impunity. This suggests a number of shortcomings in the legal system. First, that it is failing to keep pace with changing social mores regarding the capturing and sharing of intimate images. Second, the technology that facilitates the misappropriation and sharing of such images without the consent of the subject has outpaced the legal system’s ability to respond with effective criminal regulatory schema.

In order to close this gap, certain factors must change. The majority of statutes (all but the Comprehensive Statutes and possibly the Illinois statute) must be amended to eliminate the unnecessary elements, such as the proof of harm to the victim and proof of intent to harass the victim. This will better align those NCP statutes with their stated purposes. Statutes must be amended to adopt the MPC’s scienter of recklessness as to the lack of consent as the sole scienter element. Again, this more effectively serves the legislative purpose since it prevents NCP perpetrators from escaping culpability on the sole basis that they did not have the specific intent to cause harm to or otherwise harass the victim. This *mens rea* leaves the statutes valid under the principles articulated in *Morrisette*, which prohibit a strict liability statute when such significant penalties are imposed.<sup>315</sup>

The Vermont Supreme Court and the Illinois Supreme Court have considered their respective NCP statutes and upheld their validity. It is notable that both held that the First Amendment did not render the relevant statute unconstitutional. The Vermont Supreme Court found that the Vermont NCP statute was a content-based regulation and upheld the regulatory scheme under the strict scrutiny standard. In contrast, the Illinois Supreme Court ruled that Illinois statute was content-neutral and validated the law under intermediate-level scrutiny.

It is also notable that both high courts reasoned that NCP is of a character that could form a new category of speech or expression that is excluded from the protections of the First Amendment. Yet, both high courts deferred the issue for possible consideration by the U.S. Supreme Court, which has not considered the issue at this time.

If the issue is considered by the U.S. Supreme Court, and if the Court were to hold that NCP is not outside the scope of protected speech, the Court would likely

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314. 720 ILL. COMP. STAT. ANN. 5/11-23.5(b) (West 2016).

315. See generally *Morrisette v. United States*, 342 U.S. 246 (1952).

be left to rule on the adequacy of the scienter requirements of the various NCP statutory schemes.

Finally, given that perpetrators cited that a felony conviction was a principal deterrent to committing NCP violations,<sup>316</sup> increasing the statutes’ penalties so that violations for first time offenders are felonies will increase the efficacy of NCP statutes.

As previously noted, *Austin* and its reasoning support the adoption of Comprehensive NCP Statutes in order to prevent categories of bad actors from escaping culpability simply because they acted for their own amusement, profit, or other similar motive. Until jurisdictions adopt or amend laws with elements that conform to the framework of Comprehensive Statutes, which we have identified as the most effective, NCP regulatory schema will not achieve their legislative purpose: helping prevent the draconian harm suffered by victims of NCP by deterring such conduct and punishing the perpetrators of NCP.

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316. EATON ET AL., *supra* note 20, at 22.

## APPENDIX

## DECONSTRUCTED NCP STATUTES (BY STATE)

STATUTES (ALABAMA-CALIFORNIA)					
State	AL	AK	AZ	AS	CA
<b>Citation</b>	ALA. CODE §§ 15-20A-4 – 15-20A-43	ALASKA STAT. § 11.61.120 (6) (2016)	ARIZ. REV. STAT. ANN. § 13-1425 (2016)	ARK. CODE ANN. § 5-26-314 (2015)	CAL. PENAL CODE § 647(j)(4) (West 2013)
<b>Date Enacted</b>	2017	2006	2014	2015	2013
<b>Amendment Details</b>			2016		2014 (original excluded selfies)
<b>Posting Scienter</b>	knowingly		intentionally		intentionally
<b>Actus Reus</b>	posts . . . .	publishes or distributes	disclose	distributes	distributes
<b>Proscribed Subject Image</b>	private image	intimate body parts or engaged in sex	state of nudity or engaged in sexual activity	sexual nature or state of nudity	intimate body parts or engaged in sexual activity
<b>Scienter re Harass Victim</b>	intent to harass, threaten, coerce, or intimidate	intent to harass or annoy	intent to harm, harass, intimidate or coerce	purpose to harass, frighten, intimidate, threaten, or abuse	
<b>Element re Emotional Distress or Harm</b>			intent to harm etc. required (see above); not proof of harm required		know or should know serious emotional distress AND depicted person suffers
<b>Element re Absence of Consent</b>	subject not consent to transmission		consent is exception	(consent to the capture of the image is not a defense)	

<b>Continued</b>					
<b>STATUTES (ALABAMA-CALIFORNIA)</b>					
<b>State</b>	<b>AL</b>	<b>AK</b>	<b>AZ</b>	<b>AS</b>	<b>CA</b>
<b>Element re Expectation of Privacy</b>	reasonable expect against transmission		reasonable expectation of privacy (fact subject sent image does not per se remove expect. privacy)	(person depicted = family or household member or current or former dating partner)	agree or understand image shall remain private
<b>Element re Whether Victim is Recognizable</b>			identifiable from image or info		
<b>1st Offense Class</b>	Misd. Class A	Misd. Class B	Felony Class 5	Misd. Class A	Misdemeanor
<b>Subsequent Offense Class</b>	Felony Class C		Class 4 if elect		Misd.
<b>Penalties</b>	Misd.: 1 yr., \$10K, double gain/loss; Felony: 1 1d to 10yrs	not more than 90 days	(4) 2-6 aggravated 3-9 (5) 2 to 2-6	1 year	1st - CA PC 19 - 1st: 6 mos., \$1k, both; 2nd: >45 days; 3rd: >90 days

STATUTES (COLORADO-FLORIDA)					
State	CO	CT	DE	DC	FL
<b>Citation</b>	COLO. REV. STAT. § 18-7-107, § 18-7-108 (2014)	CONN. GEN. STAT. § 53a-189c; CONN. GEN. STAT. § 53a-189c (2015)	DEL. CODE ANN. tit. 11 § 1335 (2014)	D.C. CODE § 22-3052 (2015)	FLA. STAT. § 784.049 (2015)
<b>Date Enacted</b>	2014	2015	2014	2015	2015
<b>Amendment Details</b>	2018				
<b>Posting Scierter</b>		intentionally	knowingly	knowingly	
<b>Actus Reus</b>	posts or distributes	disseminates	reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates	disclose	publish
<b>Proscribed Subject Image</b>	intimate parts or sexual acts	photograph, film, videotape or other recorded image (intimate images or sex)	depiction of a person who is nude, or who is engaging in sexual conduct	sexual images	sexually explicit
<b>Scierter re Harass Victim</b>	2014 intent to harass AND inflict serious emotional harm - removed in 2018			intent to harm or receive financial gain	intent of causing emotional distress AND no legit purpose
<b>Element re Emotional Distress or Harm</b>	results in emotional distress	suffers harm based on dissemination			

<b>Continued</b>					
<b>STATUTES (COLORADO-FLORIDA)</b>					
<b>State</b>	<b>CO</b>	<b>CT</b>	<b>DE</b>	<b>DC</b>	<b>FL</b>
<b>Element re Absence of Consent</b>	without consent	without consent for dissemination	knows or should – cre- ated without consent	not consent to the disclosure	without consent
<b>Element re Expectation of Privacy</b>	reasonable ex- pectation image would remain private	knowing other person under- stood image would not be disseminated	created or provided cir- cumstances reason expect. of privacy (consent to capture of image within intimate relationship maintains this expect. of privacy)		
<b>Element re Whether Victim is Recognizable</b>	identified or identifiable person			identified or identifi- able person	contains or conveys personal ID info
<b>1st Offense Class</b>	Misd. Class 1	Misd. Class A	Felony Class G	Misd.	Misd. 1st degree
<b>Subsequent Offense Class</b>					Felony 3rd degree
<b>Penalties</b>	6-18 mos.; \$500-5,000 . . . +\$1K to VW fund; statute authorizes +\$1K fine	Up to one year in jail and a fine of up to \$2,000. (Conn. Gen. Stat. § § 53a-36, 53a- 42.)	Up to 2 years - title 11, section 4205	180 days, fine up to \$1k	

STATUTES (GEORGIA-INDIANA)					
State	GA	HI	ID	IL	IN
<b>Citation</b>	GA. CODE ANN. § 16-11-90 (2014)	HAW. REV. STAT. § 711-1110.9 (2014)	IDAHO CODE § 18-6609(3) (2004)	720 ILL. COMP. STAT. 5/11-23.5 (2015)	IND. CODE § 35-45-4-8 (2019)
<b>Date Enacted</b>	2014	2014	2004	2015	2019
<b>Amendment Details</b>		2018 - made threat to disclose also class c felony	2014 - amended to video voyeurism bill		
<b>Posting Scierter</b>	knowingly	knowingly	intentionally or with reckless disregard	intentionally	
<b>Actus Reus</b>	electronically transmits or posts or causes . . .	discloses	disseminates, publishes or sells (or conspires to . . .)	disseminates	distributes
<b>Proscribed Subject Image</b>	knowing content	nude or sexual conduct	images of the intimate areas	engaged in sex or intimate parts exposed	
<b>Scierter re Harass Victim</b>	transmission or post is harassment or causes financial loss AND no legit purpose	intent to harm substantially . . . person's health, safety, business, calling, career, financial condition, reputation, or personal relationship, or revenge or retribution			
<b>Element re Emotional Distress or Harm</b>					

<b>Continued</b>					
<b>STATUTES (GEORGIA-INDIANA)</b>					
<b>State</b>	<b>GA</b>	<b>HI</b>	<b>ID</b>	<b>IL</b>	<b>IN</b>
<b>Element re Absence of Consent</b>			without the consent	knew or should have known no consent	knows or reasonably should know that an individual depicted in an intimate image does not consent to distribution
<b>Element re Expectation of Privacy</b>			knows or reasonably should have known that one or both parties agreed or understood that the images should remain private	obtains under circumstances reasonable person know or understand was to remain private	
<b>Element re Whether Victim is Recognizable</b>		identifiable		ID from image or info supplied with image	
<b>1st Offense Class</b>	Misdemeanor of a high and aggravated nature	Class C Felony	Felony	Felony Class 4	Class A Misd.

**Continued**

**STATUTES (GEORGIA-INDIANA)**

State	GA	HI	ID	IL	IN
<b>Subsequent Offense Class</b>	Felony				Level 6 Felony
<b>Penalties</b>	Misd.: fine of up to \$5,000 and up to 12 months in county jail (17-10-04); Felony: 2nd: 1-5 +\$10K		Idaho Code 18-112 - Punishment for Felonies: State prison not more than 5 yrs., fine not exceeding \$50K, or both.	1-3 years + >\$25K	Class A misdemeanor is the most serious type of misdemeanor, punishable by up to one year in jail and a fine of up to \$5,000.  (Ind. Code Ann. § 35-50-3-2.); Level 6 felonies are punishable by at least six months in jail (a misdemeanor sentence) or as much as two and a half years in prison (a felony sentence), as well as a fine of up to \$10,000.

STATUTES (IOWA-MAINE)					
State	IA	KS	KY	LA	ME
<b>Citation</b>	IOWA CODE § 708.7 (2017)	KAN. STAT. ANN. § 21-6101(a)(8) (2016)	KY. REV. STAT. ANN. § 531.120 (West 2018)	LA. STAT. ANN. § 14:283.2 (2015)	ME. STAT. tit. 17-A, § 511-A (2015)
<b>Date Enacted</b>	2017	2016	2018	2015	2015
<b>Amendment Details</b>					
<b>Posting Scier</b>	-strict liability to disseminate - knowing as to consent		intentionally	intentionally	knowingly
<b>Actus Reus</b>	disseminates, publishes, distributes, posts, or causes	dissemination or permitting the dissemination	distributes	discloses	disseminates, displays, publishes
<b>Proscribed Subject Image</b>	photograph or film nude or engaged in a sex act	nude or engaged in sexual activity	erotic matter	intimate parts exposed in whole or part	nudity sexual act
<b>Scier re Harass Victim</b>		intent to harass, threaten or intimidate	intent to profit, or to harm, harass, intimidate, threaten, or coerce	intent to harass or cause emotional distress	intent to harass, torment or threaten
<b>Element re Emotional Distress or Harm</b>			would cause a reasonable person to suffer harm	knew or should have known cause emotional distress or harass subject	
<b>Element re Absence of Consent</b>	knowing not consented to dissemination	without consent	without written consent	knew or should have known not consent	knew or should have known not consent

<b>Continued</b>					
<b>STATUTES (IOWA-MAINE)</b>					
<b>State</b>	<b>IA</b>	<b>KS</b>	<b>KY</b>	<b>LA</b>	<b>ME</b>
<b>Element re Expectation of Privacy</b>		reasonable expectation of privacy	excludes places with no reasonable expectation of privacy (2a)	reasonable person would know or understand image was to remain private	
<b>Element re Whether Victim is Recognizable</b>		identifiable		ID from image or information	known or should have known ID from image
<b>1st Offense Class</b>	Aggravated Misd.	Felony - level 8 person	Misd. A		Class D Crime
<b>Subsequent Offense Class</b>			Felony D; profit Felony D Subsequent Felony C		
<b>Penalties</b>	not more than 2 years, \$650 - \$6,250		A Class A misdemeanor is punishable by 90 days to 12 months in jail and a fine of up to \$500. (Ky. Rev. Stat. Ann. §§ 532.020, 532.090, 534.040.). Class D felony is punishable by one to five years in prison. (Ky. Rev. Stat. Ann. §§ 532.020, 532.060.)	imprisoned not more than 2 years, fined not more than \$10K	up to 1 year in jail, up to \$2K

STATUTES (MARYLAND-MONTANA)					
State	MD	MI	MN	MO	MT
<b>Citation</b>	MD. CODE ANN., CRIM. LAW § 3-809 (West 2018)	2016 Mich. Pub. Acts. 210, § 1(f)	MINN. STAT. § 617.261 (2016)	MO. REV. STAT. § 573.110 (2018)	MONT. CODE ANN. § 45-8-213 (2019)
<b>Date Enacted</b>	2018	2016	2016	2018	2019
<b>Amendment Details</b>					
<b>Posting Scierter</b>	intentionally	intentionally		intentionally	
<b>Actus Reus</b>	placing on the internet	disseminates	disseminated	disseminates	publishes or distributes
<b>Proscribed Subject Image</b>	intimate parts exposed or sexual act	sexually explicit visual material	image sex act or intimate parts	sexual act or intimate parts exposed	the visible [intimate parts]; or . . . depicted engaged in a real or simulated sexual act.
<b>Scierter re Harass Victim</b>	intentionally cause serious emotional distress (lead mens rea)	intent to threaten, coerce, intimidate		intent to harass, threaten or coerce	purpose to terrify, intimidate, threaten, harass, or injure
<b>Element re Emotional Distress or Harm</b>	proof of emotional stress is an element				
<b>Element re Absence of Consent</b>	knowing not consent to placement on Internet	knows or reasonably should know not consent to dissemination	without consent to disseminate - consent to creation not a defense	knows or should have known did not consent	without the consent of the person depicted

<b>Continued</b>					
<b>STATUTES (MARYLAND-MONTANA)</b>					
<b>State</b>	<b>MD</b>	<b>MI</b>	<b>MN</b>	<b>MO</b>	<b>MT</b>
<b>Element re Expectation of Privacy</b>	reasonable expectation kept private	reasonable person know or understand to remain private	reasonable expectation of privacy	obtains in circs reasonable person would know or should have known would remain private	
<b>Element re Whether Victim is Recognizable</b>	that reveals individual identity	ID from visual material or information displayed in connection posted by perpetrator	ID from image, other person in image, or personal information displayed	identifiable from image or connected information	identifiable persons
<b>1st Offense Class</b>	Misd.	Misd.	Gross Misd.	Felony C1 D	Misd.: 1 & 2
<b>Subsequent Offense Class</b>			Felony		Felony 3 & subsequent
<b>Penalties</b>	up to 2 years or \$5K fine	1st: up to 93 days and \$500; 2nd: 1 year & \$1K.	one year in jail and fines up to \$1,000. felony-level revenge porn crime in Minnesota, they can be punished by up to three years in prison	A class D felony is punishable by up to 7 years in prison. The court has discretion to imprison a defendant in the county jail for up to one year for a class D felony. If the court imposes a sentence of imprisonment for a term longer than one year, it must send the defendant to the Department of Corrections. A court may order a person convicted of a class D felony to pay a fine up to \$10,000.00.	1st: fined an amount not to exceed \$500 or be imprisoned in the county jail for a term not to exceed 6 months, or both; 2nd: county jail for a term not to exceed 1 year or be fined an amount not to exceed \$1,000, or both; 3rd: state prison for a term not to exceed 5 years or be fined an amount not to exceed \$10,000, or both

STATUTES (NEBRASKA-NEW MEXICO)					
State	NE	NV	NH	NJ	NM
<b>Citation</b>	NEB. REV. STAT. § 28-813 (2019)	NEV. REV. STAT. § 200.780 (2015)	N.H. REV. STAT. § 644:9-a (2016)	N.J. STAT. ANN. § 2C:14-9 (West 2004)	N.M. STAT. ANN. § 30-37A-1 (2015)
<b>Date Enacted</b>	2019	2015	2016	2004	2015
<b>Amendment Details</b>	2019				
<b>Posting Scierter</b>	knowingly and intentionally		intentionally	knowing not licensed or privileged	
<b>Actus Reus</b>	distribute or otherwise make public	electronically disseminates or sells	disseminates	discloses	distributing, publishing or otherwise making available
<b>Proscribed Subject Image</b>	intimate area or of another person engaged in sexually explicit conduct	intimate image	image sexual act or intimate parts	intimate parts exposed or engaged in designated sex acts	sensitive images of a person
<b>Scierter re Harass Victim</b>	sec 4: serves no legitimate purpose; sec 5: intent to intimidate, threaten, or harass any person	intent to harm, harass, or terrorize			intent to (a) harass, humiliate, intimidate; (b) incite . . . ; (c) cause to reasonably fear for safety of self or family; (d) suffer unwanted physical contact or injury; (e) cause suffer substantial emotional distress
<b>Element re Emotional Distress or Harm</b>					would cause suffer substantial emotional distress

<b>Continued</b>					
<b>STATUTES (NEBRASKA-NEW MEXICO)</b>					
<b>State</b>	<b>NE</b>	<b>NV</b>	<b>NH</b>	<b>NJ</b>	<b>NM</b>
<b>Element re Absence of Consent</b>	not consent to distributing or making public	did not give prior consent to disseminate or sell	knows or should know not consent to dissemination	unless consented to such disclosure	without consent
<b>Element re Expectation of Privacy</b>	reasonable expectation that image would remain private	reasonable expectation that image would be kept private AND not made visible to public	obtains circs reasonable person know or understand subject intended to remain private	... reproduces ... without that person's consent and under circumstances in which a reasonable person would not expect to be observed	
<b>Element re Whether Victim is Recognizable</b>		excludes if "not clearly identifiable"	ID from image or connected info		
<b>1st Offense Class</b>	Misd.	Felony C1 D	Felony C1 B	Crime of 3rd degree	Misd.
<b>Subsequent Offense Class</b>	sec 4: 2nd + = class IV Felony			N.J.S.A. 2C:43-1(b)	Felony 4th Deg
<b>Penalties</b>	year in prison, a \$1,000 fine or both. second and all subsequent offenses are a Class IV felony, which would be punishable by up to two years in prison with 12 months of post-release supervision, a \$10,000 fine or both	maximum penalty is: 4 years state & \$5K	Class B felony will face a incarceration of 3 and ½ years to a maximum sentence of 7 years. These charges also often result in fines of \$4,000 and up to 5 years of probation.	Indictable offense or felony. Up to 18 months in New Jersey State Prison & fine of up to \$10,000	< 1 yr. jail and/or \$1K; subsequent 18 mos. + \$5K

STATUTES (NEW YORK-OKLAHOMA)					
State	NY	NC	ND	OH	OK
<b>Citation</b>	N.Y. PENAL LAW § 245.15 (McKinney 2019)	N.C. GEN. STAT. § 14-190.5A (2015)	N.D. CENT. CODE § 12.1-17-07 (2015)	OHIO REV. CODE ANN. § 2917.211 (West 2018)	OKLA. STAT. tit. 21, § 1040.13b (2016)
<b>Date Enacted</b>	2019	2015	2015	2018	2016
<b>Amendment Details</b>		2017 (illuminated in relationship & changed expectation of privacy to expected remain private)			
<b>Posting Scierter</b>	intentionally	knowingly	knowingly or intentionally	knowingly	intentionally
<b>Actus Reus</b>	disseminates or publishes	discloses	distributes	disseminate	disseminates
<b>Proscribed Subject Image</b>	still or video image of such other person - unclothed or exposed intimate parts, engaged in sexual conduct	intimate parts or sexual conduct	any intimate image	state of nudity or is engaged in a sexual act.	engaged in sexual act or private parts exposed
<b>Scierter re Harass Victim</b>	intent to cause harm to the emotional, financial or physical welfare	intent to do either of the following: (a) Coerce, harass, intimidate, demean, humiliate, or cause financial loss to the depicted person. (b) Cause others to engage in any of the conduct in (a)		with intent to harm the person in the image	intent to harass, intimidate or coerce . . . or circumstances reasonable person would know or understand would . . .

<b>Continued</b>					
<b>STATUTES (NEW YORK-OKLAHOMA)</b>					
<b>State</b>	<b>NY</b>	<b>NC</b>	<b>ND</b>	<b>OH</b>	<b>OK</b>
<b>Element re Emotional Distress or Harm</b>			actual emotional distress or harm caused		
<b>Element re Absence of Consent</b>		disclosed without affirmative consent	knows not consent to distribution	without consent of person depicted	Knows or a reasonable person should have known that the person in the image has not consented to the dissemination
<b>Element re Expectation of Privacy</b>	taken under circumstances where the person depicted had a reasonable expectation that the image would remain private and the actor knew or reasonably should have known the person depicted intended for the still or video image to remain private	obtained without consent or circumstances where the person knew or should have known there was a reasonable expectation of privacy		person in the image is knowingly and willingly in a state of nudity or engaged in a sexual act and is knowingly and willingly in a location in which the person does not have a reasonable expectation of privacy	reasonable person would know or understand that the image was to remain private

<b>Continued</b>					
<b>STATUTES (NEW YORK-OKLAHOMA)</b>					
<b>State</b>	<b>NY</b>	<b>NC</b>	<b>ND</b>	<b>OH</b>	<b>OK</b>
<b>Element re Whether Victim is Recognizable</b>	ID from image or info	ID from image or connected info		identified from the image itself or from information displayed in connection with the image and the <i>offender supplied the identifying information.</i>	ID from image or connected info
<b>1st Offense Class</b>	Misd. Cl A	Misd. Cl 1	Misd. Cl A	3rd degree Misd.	Misd.
<b>Subsequent Offense Class</b>		Felony Class H		2nd: 2nd degree; 3rd +: Misd. 1st degree	
<b>Penalties</b>	misdemeanor, a court may sentence an individual to a maximum of one year in jail or three years' probation. In addition, a fine of up to \$1,000 or twice the amount of the individual's gain from the crime may be imposed.	1st: <120 jail & discrete fine; subsequent: 4-25 mos. prison	Class A misdemeanor punishable by up to one year in jail and a \$3,000 fine.		one (1) year or by a fine of not more than \$1K

STATUTES (OREGON-TENNESSEE)					
State	OR	PA	RI	SD	TN
<b>Citation</b>	OR. REV. STAT. § 161.005 (2015)	18 PA. CONS. STAT. § 3131 (2014)	11 R.I. GEN. LAWS § 11-64-3 (2018)	S.D. CODIFIED LAWS § 22-21-4 (2016)	TENN. CODE ANN. § 39-17-318 (2016)
<b>Date Enacted</b>	2015	2014	2018	2016	2016
<b>Amendment Details</b>	2019: remove requirement that posted to a website;	2017: amendment stuck in session			
<b>Posting Scienter</b>	knowingly		Intentionally		
<b>Actus Reus</b>	disclosed through an Internet website	disseminates	any means, disseminates, publishes or sells	disseminate for the purpose of viewing	distributes
<b>Proscribed Subject Image</b>	intimate parts visible or engaged in sexual conduct	visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct	sexually explicit conduct or intimate parts	without clothing or under or through the clothing, or with another person depicted in a sexual manner	image of the intimate part or parts
<b>Scienter re Harass Victim</b>	intent to harass, humiliate or injure another person	intent to harass, annoy or alarm a former or current . . . partner	knowledge or with reckless disregard for the likelihood that the depicted person will suffer harm, or with the intent to harass, intimidate, threaten or coerce the depicted person	intent to self-gratify, to harass, or embarrass and invade the privacy of that other person	intent to cause emotional distress

<b>Continued</b>					
<b>STATUTES (OREGON-TENNESSEE)</b>					
<b>State</b>	<b>OR</b>	<b>PA</b>	<b>RI</b>	<b>SD</b>	<b>TN</b>
<b>Element re Emotional Distress or Harm</b>	1. is harassed, humiliated or injured AND 2. reasonable person would be harassed .....				suffers emotional distress
<b>Element re Absence of Consent</b>	knows or reasonably should know not consent to disclosure	consent is an affirmative defense, not an element	disseminated, published or sold without the consent of the depicted person	without consent or knowledge	
<b>Element re Expectation of Privacy</b>			made, captured, recorded, or obtained under such circumstances in which a reasonable person would know or understand that the image was to circumstances in which a reasonable person would know or understand that the image was to remain private	circumstances reasonable expectation of privacy	image was photographed or recorded under circumstances where the parties agreed or understood that the image would remain private
<b>Element re Whether Victim is Recognizable</b>	identifiable image of another		identifiable person		identifiable person

**Continued**

STATUTES (OREGON-TENNESSEE)					
State	OR	PA	RI	SD	TN
<b>1st Offense Class</b>	Misd. Cl A	Misd. 2nd Deg	Misd.	Misd. Cl 1	Misd. Cl A
<b>Subsequent Offense Class</b>	Felony Cl C		Felony		
<b>Penalties</b>	Up to 364 days in jail (2017 OR 161.615) & \$6,250 (635); subsequent: 5 years prison (161.605)	Max 2 years imprisonment & \$5K	1 year \$1K; 3 yr. \$3K; extortions: 5 yr. and felony	1 yr. jail \$2K fine	11 mos . . .29 days - \$2,500

STATUTES (TEXAS-WASHINGTON)					
State	TX	UT	VT	VA	WA
<b>Citation</b>	TEX. PENAL CODE ANN. § 21.16 (West 2014)	UTAH CODE ANN. § 76-5b-203 (West 2019)	VT. STAT. ANN. 13 § 2606 (2015)	VA. CODE ANN. § 18.2-386.2 (2014)	WASH. REV. CODE § 9A.86.010 (2016)
<b>Date Enacted</b>	2014	2019	2015	2014	2016
<b>Amendment Details</b>	2019: proposed amendment aids intent to harm; 2017: raised penalties to max 2 years, \$10k			2019	2016
<b>Posting Scierter</b>	intentionally	knowingly or intentionally	knowingly	maliciously	knowingly
<b>Actus Reus</b>	discloses	distributes	discloses	disseminates	discloses
<b>Proscribed Subject Image</b>	visual material depicting another person with the person 's intimate parts exposed or engaged in sexual conduct	intimate image (long list)	image nude or engaged in sexual conduct	totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast	intimate image
<b>Scierter re Harass Victim</b>		intent to cause emotional distress or harm	intent to harm, harass, intimidate, threaten, or coerce	intent to coerce, intimidate, harass	
<b>Element re Emotional Distress or Harm</b>	causes harm	actual emotional distress or harm is caused as a result of distrib	would cause a reasonable person to suffer harm		knows or should have known disclosure would cause harm to depicted person

<b>Continued</b>					
STATUTES (TEXAS-WASHINGTON)					
State	TX	UT	VT	VA	WA
<b>Element re Absence of Consent</b>	without the effective consent of the depicted person	not given consent to . . . distribute	Consent to recording of the visual image does not, by itself, constitute consent for disclosure of the image	knows or has reason to know that he is not licensed or authorized to disseminate or sell	knows or should have known not consented to disclosure
<b>Element re Expectation of Privacy</b>	reasonable expectation that the visual material would remain private	created by or provided to the actor under circumstances . . . reasonable expectation privacy			reasonable would know or understand . . . remain private
<b>Element re Whether Victim is Recognizable</b>	reveals the identity of the depicted person in any manner		ID by info or image		
<b>1st Offense Class</b>	Misd. Cl A	Misd. Cl A	Misd.	Misd. Cl 1	Misd. Gross
<b>Subsequent Offense Class</b>		Felony 3rd degree.			Felony Class C

**Continued**

**STATUTES (TEXAS-WASHINGTON)**

State	TX	UT	VT	VA	WA
<b>Penalties</b>	1 yr. jail - \$4K Fine, see 2017 amendment	1 year in jail and a fine of up to \$2,500. (Utah Code Ann. § § 76-3-204, 76- 3-301); 5 years in prison and a fine of up to \$5,000. Third degree fel- onies are the least serious felonies in Utah. (Utah Code Ann. § § 76-3-203, 76- 3-301.)	(b)(1) imprisoned not more than two years or fined not more than \$2,000.00, or both.  (b)(2) If the viola- tion is with the intent of disclos- ing the image for financial profit shall be impris- oned not more than five years or fined not more than \$10,000.00, or both.  <i>see</i> 13 V.S.A. § 1 (felony = max term of punish- ment over 2 years, life, or death; all other offenses are misdemeanors).	1 yr. jail - \$2,500 fine	364 d county jail - \$5K fine; 5 years state correc- tional insti- tution + \$10K

STATUTES (WEST VIRGINIA-GUAM)			
State	WV	WI	GU
<b>Citation</b>	W. VA. CODE § 61-8-28 (2000)	Wis. STAT. § 942.09 (2017)	Guam Pub. L. No. 33-171 (2016)
<b>Date Enacted</b>	2000	2017	2016
<b>Amendment Details</b>			
<b>Posting Scienter</b>	knowingly and intentionally		intentionally
<b>Actus Reus</b>	disclose	possesses, distributes, or exhibits	disclose or cause another to disclose
<b>Proscribed Subject Image</b>	intimate parts or sexually explicit conduct	intimate representation	state of nudity or engaged in sexual conduct
<b>Scienter re Harass Victim</b>	intent to harass, intimidate, threaten, humiliate, embarrass, or coerce		intent to harm, harass, intimidate, threaten, coerce depicted person
<b>Element re Emotional Distress or Harm</b>			
<b>Element re Absence of Consent</b>		captured without consent, circumstances requiring a reas. expectation priv., reason to know not consent to capture; reproduction without consent	
<b>Element re Expectation of Privacy</b>	captured under circumstances where the person depicted had a reasonable expectation that the image would not be publicly disclosed	captured under circumstances where the person depicted a reasonable expectation of privacy	reasonable expectation—subject in the image sending the image does not remove reasonable expectation of privacy

<b>Continued</b>			
<b>STATUTES (WEST VIRGINIA-GUAM)</b>			
<b>State</b>	<b>WV</b>	<b>WI</b>	<b>GU</b>
<b>Element re Whether Victim is Recognizable</b>			ID from info or depiction
<b>1st Offense Class</b>	Misd.		Misd.
<b>Subsequent Offense Class</b>	Felony		3rd degree felony
<b>Penalties</b>	1 yr. jail & \$1K - \$5K; 3yrs & \$2.5K - \$10K		not more than \$1k, 1yr or both; not more than 5 years - repeat or multi of-fender etc. up to 10 yr.