

A SNAPSHOT OF JUSTICE: CARVING OUT A SPACE FOR REVENGE PORN VICTIMS WITHIN THE CRIMINAL JUSTICE SYSTEM*

“The moral of the story is, like, he doesn’t respect me, so if you can’t respect me, you have to respect the law.”

– Blac Chyna¹

I. INTRODUCTION

Anyone who keeps up with the Kardashians is likely familiar with revenge porn.² After a hostile break up, Rob Kardashian posted nude photos of his ex-girlfriend Blac Chyna³ on his Instagram and Twitter accounts without her consent.⁴ Chyna had sent those photos to Rob Kardashian in confidence, within the context of their relationship.⁵ Seeking revenge, Rob Kardashian shared Chyna’s private photos on his public Instagram account with his over nine million Instagram followers.⁶ After he was blocked from Instagram, he posted

* Alisha Kinlaw, J.D. Candidate, Temple University Beasley School of Law, 2019. I had wonderful support throughout this writing process from my editors, David Nagdeman and Brandon Matsnev; from Sonya Bishop, who helped me turn my feelings into a viable topic; and from Peter Hyndman, who inspired me to care about the art of Bluebooking.

1. Joyce Chen, *Rob Kardashian and Blac Chyna’s Confusing, Troubling Saga Explained*, ROLLING STONE (July 6, 2017, 7:20 PM), <http://www.rollingstone.com/culture/news/rob-kardashian-blac-chynas-confusing-saga-explained-w491129> [<http://perma.cc/H4X5-TS8S>].

2. The Kardashians are a celebrity family, notoriously known as being famous for being famous. See Complaint ¶¶ 6–12, *White v. Kardashian*, No. BC680035 (Cal. Super. Ct. Oct. 17, 2017), 2017 WL 4684575. They have a reality television show called *Keeping Up with the Kardashians*. See *id.* Rob Kardashian is the sole brother in the Kardashian family. Elizabeth Kiefer, *Kardashians’ Origin Story Is Not What You Thought*, REFINERY29 (Feb. 2, 2016, 4:00 PM), <http://www.refinery29.com/2016/02/102194/how-the-kardashians-became-famous> [<http://perma.cc/DAB2-VFBT>]. He was recently in a relationship with celebrity Blac Chyna. Peggy Truong, *Like Rob Kardashian and Blac Chyna’s Relationship, Their TV Show Has Fizzled*, COSMOPOLITAN (Mar. 9, 2017), <http://www.cosmopolitan.com/entertainment/celebs/a9112116/rob-and-chyna-season-2-cancelled-breakup> [<http://perma.cc/FZD7-W9JA>]. The two had their own spinoff reality show called *Rob and Chyna. Id.*

3. Blac Chyna is referred to as Angela White throughout her court documents. See Complaint, *supra* note 2.

4. *Id.* ¶¶ 63–70, 198.

5. Rachael Revesz, *Blac Chyna Speaks Out on Rob Kardashian’s Revenge Porn: ‘I Was Devastated,’* INDEPENDENT (London) (July 10, 2017, 12:18 PM), <http://www.independent.co.uk/news/world/americas/black-chyna-rob-kardashian-revenge-porn-video-photos-speaks-out-devastated-a7833181.html> [<http://perma.cc/G2Y6-4N8M>].

6. Complaint, *supra* note 2, ¶ 65; Lindsay Kimble, *Rob Kardashian Could Face Revenge Porn Charges for Posting Explicit Photos of Blac Chyna, Expert Says*, PEOPLE (July 5, 2017, 1:36 PM), <http://people.com/tv/rob-kardashian-blac-chyna-instagram-rant-legal-expert-weighs-in-revenge-porn> [<http://perma.cc/G2AN-3J9B>]; see Amy Zimmerman, *Rob Kardashian Posts Revenge Porn To Slut-Shame His Ex Blac Chyna*, DAILY BEAST (July 5, 2017, 5:00 PM), <http://www.thedailybeast.com/rob-kardashian-posts-revenge-porn-to-slut-shame-his-ex-blac-chyna?ref=scroll> [<http://perma.cc/D8AC>].

the pictures on his Twitter account.⁷ This incident demonstrates a common revenge porn narrative.⁸

Revenge porn is the posting of an intimate picture of another person without their consent.⁹ According to a study conducted by the Cyber Civil Rights Initiative, approximately 12% of study participants had either been victims of revenge porn or been threatened with revenge porn.¹⁰ Despite the prevalence and publicity of revenge porn, there are many barriers to criminal prosecution, including ineffective or nonexistent criminal laws¹¹ and unresponsive police departments.¹² To eliminate these barriers, Congress has considered passing a federal law.¹³ On a more local level, states have worked to protect victims by creating or strengthening state criminal statutes.¹⁴

Even with these developments, however, there will still be other barriers to successful prosecution. A key issue within criminal revenge porn cases is the way that victims are devalued and dismissed. Victims' experiences must be legitimized in order to create an effective legal framework that takes this technological crime seriously. In Section II, I address these underlying barriers. In this Section, I also introduce the ideal victim theory, which identifies stereotypical characteristics that contribute to victim credibility. In Section III, I apply the ideal victim theory framework to revenge porn and argue that it is detrimental to victims and successful prosecution. I then propose a rule of evidence, akin to "rape shield" evidence rules,¹⁵ that aims to empower revenge porn victims by limiting the admissibility of victim-blaming evidence in a

2BGQ] (explaining the context behind Rob Kardashian posting revenge porn).

7. Complaint, *supra* note 2, ¶ 69.

8. Kimble, *supra* note 6.

9. MARY ANNE FRANKS, DRAFTING AN EFFECTIVE "REVENGE PORN" LAW: A GUIDE FOR LEGISLATORS 2 (2016) [hereinafter FRANKS, GUIDE FOR LEGISLATORS], <http://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf> [<http://perma.cc/8SHQ-7H9X>].

10. ASIA A. EATON ET AL., CYBER CIVIL RIGHTS INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION 11 (2017), <http://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [<http://perma.cc/B3N6-34XG>].

11. See *infra* Part II.E for an explanation of criminalization efforts and progress.

12. See *infra* Parts II.F–G for a discussion about how police and prosecutors interact with revenge porn victims.

13. See FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 4–5; see, e.g., Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

14. See Vanessa Nicholle Griffith, Comment, *Smartphones, Nude Snaps, and Legal Loopholes: Why Pennsylvania Needs To Amend Its Revenge Porn Statute*, 16 PITT. J. TECH. L. & POL'Y 135, 137 (2016); see, e.g., Vivian Wang, 'Revenge Porn' Law Finally Passes in New York, N.Y. TIMES (Feb. 28, 2019), <http://nyti.ms/2EDiDp4> [<http://perma.cc/6QGQ-X394>] (explaining the New York has just passed a revenge porn bill that was five years in the making).

15. FED. R. EVID. 412. This rule of evidence limits the admission of evidence of a rape complainant's sexual activities that are unrelated to the incident. *Id.* Each state also has its own rape shield law. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 81 & n.150 (2002) [hereinafter Anderson, *From Chastity Requirement to Sexual License*] (noting, in 2002, that Arizona was the only state that did not have "a rape shield law of any kind"); see also ARIZ. REV. STAT. ANN. § 13-1421 (West 2019) (Arizona's since-enacted rape shield law).

criminal proceeding, like showing the jury explicit photos of the victim.¹⁶ This rule endeavors to make the criminal justice process less emotionally harmful for victims who seek criminal recourse.

II. OVERVIEW

Some scholars reject the term revenge porn because the act is not limited to ex-partners seeking revenge.¹⁷ These critics fear that the term revenge porn excludes perpetrators like the Penn State fraternity brothers,¹⁸ and so they favor phrases like “nonconsensual pornography”¹⁹ or “nonconsensual image sharing.”²⁰ The use of these terms reflects the importance of including other motives and narratives in both the conversation about and criminalization of revenge porn.²¹ Whether it is called revenge porn, nonconsensual pornography, or nonconsensual image sharing,²² the posting of others’ naked pictures on the internet without their consent is becoming more prevalent, and existing consequences are frequently inconsistent with the severe harm inflicted.²³ I use the term *revenge porn* to refer to the action of publicly posting nonconsensual, sexually explicit images of a person, regardless of the poster’s motive. Although there are valid criticisms of the term, I use it because revenge porn is the term most commonly associated with this act.

In this Section, I first introduce revenge porn and its victims.²⁴ I then outline the progress of efforts to criminalize revenge porn.²⁵ Next, I explain how social factors influence victims’ reception within the criminal justice process.²⁶ To

16. See *infra* Part III.C.

17. See FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 2 (explaining that not all “revenge porn” is motivated by revenge and that it is not exactly pornography either, but rather intimate photos taken by people who maintain an expectation of privacy); Griffith, *supra* note 14, at 136–37 (“This Article uses the term ‘nonconsensual pornography’ instead of ‘revenge porn’ because ‘revenge porn’ is misleading; it assumes all perpetrators have the same single motivation: vengeance.”).

18. See Sarah Kaplan, ‘Everybody Fools Around,’ *Penn State Frat Member Says of Lewd Facebook Group*, WASH. POST (Mar. 19, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/03/19/everybody-fools-around-penn-state-frat-member-says-of-lewd-facebook-group/> [<http://perma.cc/T496-3HRJ>]. Members of Penn State’s chapter of the Kappa Delta Rho fraternity used a Facebook group to share nude or sexual pictures of women that were taken without the women’s consent. *Id.* According to these men, posting the pictures was intended to be a joke, differentiating this offense from perpetrators of revenge porn that post pictures to get revenge on exes. *Id.*

19. Griffith, *supra* note 14, at 136–37 (explaining the author’s use of the phrase “nonconsensual pornography”).

20. See AMANDA LENHART ET AL., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF “REVENGE PORN” 3 (2016), http://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf [<http://perma.cc/LKY4-GDB8>].

21. See Griffith, *supra* note 14, at 136–37, 150–51.

22. LENHART ET AL., *supra* note 20, at 3 (defining “nonconsensual image sharing”); Griffith, *supra* note 14, at 136 (using “nonconsensual pornography”).

23. See *infra* Part II.E.

24. See *infra* Parts II.A–D.

25. See *infra* Part II.E.

26. See *infra* Parts II.F–G.

unpack these social factors, I discuss the *ideal victim theory*²⁷ and how it reflects the barriers that victims face when seeking justice.²⁸

A. *Revenge Porn Victims*

Victims of revenge porn are both celebrities and average people; they are people who engage in sex work, corporate business workers, teenagers, people of all genders, and people of all races.²⁹ Perhaps the most surprising fact about victims of revenge porn is that not all victims have ever sent or even taken a nude photo.³⁰ The single attribute that ties victims together is that someone has posted the victims' private photos without their consent.

For example, Charlotte Laws, the mother of a revenge porn victim, began investigating Hunter Moore (a notorious purveyor of revenge porn via his website IsAnyoneUp.com) and his website after her daughter's picture appeared on it.³¹ She spoke to a sample of women who appeared on Moore's site and found that many of their photos were exposed by hackers, not exes.³² This is what happened to Laws' daughter, Kayla, who took a topless photo of herself while practicing some model poses.³³ She emailed the picture to herself from her phone; she planned to save it on her computer, but she never intended to share it with anyone.³⁴ Even further abstracted from the traditional revenge porn narrative, some victims on Moore's site had not taken naked pictures of themselves at all, but found their faces photoshopped onto other people's bodies.³⁵

B. *Revenge Porn Motivations*

An ex-boyfriend sharing pictures of his ex-girlfriend is a common revenge porn narrative: a man feels slighted by his girlfriend or ex-girlfriend, and so he

27. See generally Nils Christie, *The Ideal Victim* (introducing the theory and discussing what characterizes an "ideal victim"), in *FROM CRIME POLICY TO VICTIM POLICY* 17 (Ezzat A. Fattah ed., 1986).

28. See *infra* Part II.F.

29. See LENHART ET AL., *supra* note 20, at 6.

30. See *On the Media: Why One Mom's Investigation Might Actually Stop Revenge Porn*, WNYC (Dec. 6, 2013), <http://www.wnyc.org/story/why-one-moms-investigation-might-actually-stop-revenge-porn?tab=transcript> [<http://perma.cc/BSU6-TZJ9>] [hereinafter *On the Media*] ("You spoke to a random sample of women who'd been posted on the site over a two-week period, and you say that fewer than half, only 36 percent actually were victims of revenge porn, as we understand it, insofar as that an ex was taking revenge. Forty percent had been hacked, like your daughter. And 12 percent were actually Photoshopped. The people's heads were being superimposed on other bodies. It wasn't even them, and yet, they would be suffering the consequences, right?").

31. *Id.*

32. *Id.*

33. Charlotte Laws, *One Woman's Dangerous War Against the Most Hated Man on the Internet*, JEZEBEL (Nov. 22, 2013, 3:20 PM), <http://jezebel.com/one-womans-dangerous-war-against-the-most-hated-man-on-1469240835> [<http://perma.cc/22R9-5G4G>].

34. *Id.*

35. *On the Media*, *supra* note 30.

posts a sexual or revealing picture of her online.³⁶ While many are familiar with this slighted lover narrative, it is by no means the only story.

Revenge porn photos are also used in the commission of sex crimes or abuse.³⁷ In *State v. Melia*,³⁸ the defendants were convicted of an extensive list of first-, second-, and third-degree sexual assaults, as well as other sex crimes.³⁹ The revenge porn offense, third-degree invasion of privacy, was tacked on to the longer list of charges.⁴⁰ In *Patel v. Hussain*,⁴¹ the defendant ex-boyfriend used technology, including posting the victim's naked pictures on the internet, to extensively harass the victim.⁴² When committed in tandem with more traditional sex crimes like sexual assault, revenge porn perpetuates the violation by allowing the public to witness the crime, memorializing a traumatic experience in the victim's life.

Sharing explicit photos of a sexual assault victim that depict the assault or the victim's body just after an assault is another way in which perpetrators exert power over victims by controlling the narrative of the assault.⁴³ In 2012 a group

36. See FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 11–13. The story of Holly Jacobs, one of the founders of the Cyber Civil Rights Initiative, corresponds with this traditional narrative. See *id.* at 13–14. Holly and her ex-boyfriend had exchanged intimate photos while they were dating. *Id.* at 13. After she began a new relationship, she received an email threatening to distribute her private photos. *Id.* Subsequently, her image was posted on over two hundred websites. *Id.*

37. See, e.g., *State v. Aman*, No. A-1029-15T3, 2017 WL 2255436, at *1 (N.J. Super. Ct. App. Div. May 23, 2017) (listing the defendant's charges, which included a revenge porn charge, and then describing that he pled guilty to first-degree aggravated sexual assault, meaning that the invasion of privacy revenge porn offense was not prosecuted); *State v. Melia*, Nos. A-1912-12T1, A-1403-12T1, 2014 WL 10186793, at *1–3 (N.J. Super. Ct. App. Div. Aug. 3, 2015) (describing the incidents that led to the defendants' convictions of various crimes, including multiple counts of sexual assault, endangering the welfare of a child, and invasion of privacy); FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 14 (providing, in Alecia Andrews-Crain's story, an example of revenge porn occurring within an abusive relationship and, in Sarah's story, an example of revenge porn being used by human traffickers); Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013, 6:20 PM), <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917> [<http://perma.cc/J4MM-2MNP>] (telling the story of fifteen-year-old Audre Pott, who committed suicide after numerous boys sexually assaulted her and shared explicit photos of her among classmates); Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (Dec. 16, 2012), <http://nyti.ms/2jMICSf> [<http://perma.cc/WBY4-36M4>] (describing the infamous Steubenville, Ohio, case in which two sixteen-year-old boys raped a sixteen-year-old girl and others shared “compromising and explicit photographs of her” on social media without her consent).

38. Nos. A-1912-12T1, A-1403-12T1, 2014 WL 10186793 (N.J. Super. Ct. App. Div. Aug. 3, 2015).

39. *Melia*, 2014 WL 10186793, at *2–3.

40. *Id.* Similarly, in *State v. Aman*, No. A-1029-15T3, 2017 WL 2255436 (N.J. Super. Ct. App. Div. May 23, 2017), the defendant was indicted on the revenge porn charge, but pled guilty to first-degree aggravated sexual assault, so the invasion of privacy revenge porn offense was not prosecuted. See *Aman*, 2017 WL 2255436, at *1.

41. 485 S.W.3d 153 (Tex. Ct. App. 2016).

42. *Patel*, 485 S.W.3d at 164–69.

43. See Clare McGlynn et al., *Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse*, 25 FEMINIST LEGAL STUD. 25, 37 (2017) (“One study found that ‘the most common type of rapist is one who is motivated by power and control.’” (quoting Gina Robertiello & Karen J. Terry, *Can We Profile Sex Offenders? A Review of Sex Offender Typologies*, 12 AGGRESSION & VIOLENT

of high school football players in Steubenville, Ohio, sexually assaulted an unconscious girl at a party and took explicit photos and videos of her.⁴⁴ The football players distributed these photos among themselves, other classmates, and the general public, through texting and social media.⁴⁵ This was a highly publicized case that drew national attention.⁴⁶ The victim learned about her assault at the same time as her friends and strangers, piecing together what happened to her from invasive photos and online harassment.⁴⁷ This story exemplifies how technology has added another facet to sex crimes, providing emboldened perpetrators with a new medium through which to share their sexual assaults and a new means through which to harm victims.

In addition to harassment, abuse, and violence, some posters claim to have less spiteful motives. In a survey conducted by the Cyber Civil Rights Initiative, 79% of 159 people who admitted to having distributed revenge porn indicated that they were just sharing the images with friends and did not intend to hurt anyone.⁴⁸ In 2015, a member of Kappa Delta Rho fraternity at Penn State University exposed a Facebook page on which members of the fraternity posted pictures of “naked, unconscious women.”⁴⁹ These pictures fall under the category of revenge porn but exemplify a motivation that diverges from the motivation that is present in the slighted lover narrative.⁵⁰ While photos that are posted in order to harass align with the revenge framework, the fraternity brothers purportedly acted with a different motivation.⁵¹ One member of Kappa Delta Rho explained his motive:

There’s literally sites like that that millions of people access, whether it’s totalfratmove.com or any of the other thousands of sites that post, you know, pictures of girls and post funny text conversations and Snapchat stories and things like that. It was a satirical group. It wasn’t malicious whatsoever. It wasn’t intended to hurt anyone. It wasn’t intended to demean anyone. It was an entirely satirical group and it was funny to some extent.⁵²

Hunter Moore, the creator of one of the first revenge porn sites, IsAnyoneUp.com,⁵³ exemplifies the range of motives behind posting and sharing pictures. Moore has accrued two infamous epithets related to his role promoting revenge porn: “King of Revenge Porn” and “the Most Hated Man on the Internet.”⁵⁴ He claimed in one interview that his motivations were entertainment

BEHAV. 508, 511 (2007)).

44. Macur & Schweber, *supra* note 37.

45. *Id.*

46. *Id.*

47. *Id.*

48. EATON ET AL., *supra* note 10, at 19.

49. Kaplan, *supra* note 18.

50. *Id.* (explaining that these pictures were posted as a “joke,” not with malicious intent).

51. *Id.*

52. *Id.*

53. See Samantha H. Scheller, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 559–60 (2015).

54. See Kristina Marusic, *The ‘King of Revenge Porn’ Will Serve a Disgustingly Short Prison*

and money,⁵⁵ but he said in another interview, “Of course my main reasoning was to hurt people and hurt the girl, or girls, that did hurt me.”⁵⁶

Hunter Moore enjoyed profiting off of naked women and had no interest in stopping. In an interview, Anderson Cooper asked Moore for an explanation: “Just because there’s a lot of people who are jerks out there, doesn’t mean you have to be one of them too, and that doesn’t mean that you have to profit off of it.”⁵⁷ Moore responded, “But I want to Why wouldn’t I? I get to look at naked girls all day.”⁵⁸ He had no sympathy for the women that appeared on his site: “No one put a gun to your head and made you take those pictures . . . there’s one easy way to never end up on my website.”⁵⁹

The operator of revenge porn site UGotPosted.com, Kevin Bollaert, shared the same self-serving interest as Moore.⁶⁰ Although Moore profited off of his victims by selling advertising on his website, Bollaert profited more directly from the people whose nonconsensual naked photos were on his website.⁶¹ Bollaert created a companion website, ChangeMyReputation.com, from which he contacted victims whose images were posted on UGotPosted.com and charged them a fee to have the photos removed.⁶² As the preceding examples demonstrate, motivations of those who post revenge porn go beyond revenge, ranging from insensitive jokes to overt maliciousness.⁶³

C. *The Unique Nature of the Internet*

While ubiquitous internet usage has created a platform for widespread harassment,⁶⁴ sharing photos of naked women without their consent is not a new phenomenon. Starting in the 1980s, *Hustler Magazine* published a serial issue called “Beaver Hunt” and solicited reader-submitted pictures.⁶⁵ Given this

Sentence, MTV NEWS (Dec. 3, 2015), <http://www.mtv.com/news/2679707/hunter-moore-king-of-revenge-porn-sentenced-no-justice> [<http://perma.cc/HE6J-T7Z5>].

55. Anderson Live, *So You Admit What You’re Doing Is Not Right?*, YOUTUBE (Nov. 21, 2011), <http://www.youtube.com/watch?v=u3Pr60saneo> [<http://perma.cc/PB4L-3JYP>] [hereinafter Anderson Live, *So You Admit What You’re Doing Is Not Right?*].

56. Dr. Drew, *Dr. Drew Interview with Owner of IsAnyoneUp.com Hunter Moore—Part 1*, at 3:05, YOUTUBE (April 25, 2012), <http://www.youtube.com/watch?v=0yWMqM55nUQ> [<http://perma.cc/U9C8-FCCK>].

57. Anderson Live, *So You Admit What You’re Doing Is Not Right?*, *supra* note 55, at 0:54.

58. *Id.* at 1:04.

59. Anderson Live, *Exposed Women Confront Website Owner: ‘What is Your Motive?’*, at 0:38, YOUTUBE (Nov. 21, 2011), <http://www.youtube.com/watch?v=GAcXjjD3nYg> [<http://perma.cc/GG36-AA59>] [hereinafter Anderson Live, *Exposed Women Confront Website Owner*].

60. See Emily Poole, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. REV. 181, 187–88 (2015) (noting that Bollaert was inspired by Moore to create his revenge porn websites).

61. *Id.*

62. *Id.*

63. Compare Kaplan, *supra* note 18 (detailing a fraternity member’s description of posts of unconscious women as satirical and “funny to some extent”), with Anderson Live, *So You Admit What You’re Doing Is Not Right?*, *supra* note 55 (exposing Moore’s maliciousness and motivation for profit).

64. See LENHART ET AL., *supra* note 20, at 4 (focusing on images that are posted online).

65. Poole, *supra* note 60, at 186.

opportunity, people sent in photos of naked women without consent.⁶⁶ Although taking and publicizing images of women without their consent is not new, the internet has provided greater opportunities to do so.⁶⁷

This digital landscape has allowed revenge porn to proliferate.⁶⁸ In a survey conducted by *Cosmopolitan*, 89% of respondents admitted to taking nude photos of themselves.⁶⁹ This statistic demonstrates the accessibility of ammunition for revenge porn posters. According to a study by the Cyber Civil Rights Initiative, 4.8% of participants reported that they had someone threaten to post their explicit photos on the internet, and 8% of participants had someone post explicit or intimate images without their consent.⁷⁰ Cyber harassment may have greater opportunity to injure victims than in-person harassment due to “(1) the veil of anonymity, (2) amplification, (3) permanence, and (4) virtual captivity and publicity.”⁷¹

1. Anonymity

Revenge porn is committed behind a computer or phone screen, which allows perpetrators to hide behind anonymity⁷² and pseudonyms.⁷³ Anonymity damages victims because they cannot pinpoint the source of their harassment.⁷⁴ This can be disturbing and prevents them from seeking justice.⁷⁵ If the content poster cannot be identified, then they cannot be held accountable.⁷⁶

66. *Id.*

67. Lucy Martin, *Revenge Porn Crackdown Hampered by Victim Blaming, Inconsistent Laws, Experts Say*, ABC NEWS (July 7, 2015, 1:01 AM), <http://www.abc.net.au/news/2015-07-07/revenge-porn-crackdown-hampered-victim-blaming-inconsistent-laws/6601164> [<http://perma.cc/FH2F-BMB5>] (“Queensland criminologist Terry Goldsworthy, who was a police officer for almost 30 years, said there was nothing new about the idea of a scorned lover sharing explicit pictures of their ex in a bid for revenge. ‘Back then, it would have been slipping a Polaroid photo into someone’s letterbox or putting it up on a noticeboard at work,’ he said. ‘There just wasn’t an ability to get to such a wide audience and do it remotely and spread it so widely.’”).

68. Jillian Roffer, Comment, *Nonconsensual Pornography: An Old Crime Updates Its Software*, 27 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 935, 936–37 (2017) (discussing how the internet and social media have exacerbated revenge porn as a form of abuse and an invasion of privacy).

69. Emma Barker, *Cosmo Survey: 9 out of 10 Millennial Women Take Naked Photos*, *COSMOPOLITAN* (Sept. 3, 2014), <http://www.cosmopolitan.com/sex-love/advice/a30675/ninety-percent-millennial-women-take-nude-photos-cosmo-survey> [<http://perma.cc/M6W8-CXBF>] (“Cosmopolitan.com conducted a survey of 850 readers—99 percent female, with an average age of 21—about taking naked pics. Eighty-nine percent have taken nude photos of themselves at some point.”).

70. EATON ET AL., *supra* note 10, at 11.

71. Roffer, *supra* note 68, at 950–51; see Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 *COLUM. J. GENDER & L.* 224, 255–56 (2011) [hereinafter Franks, *Unwilling Avatars*] (listing and defining the same terms).

72. Franks, *Unwilling Avatars*, *supra* note 71, at 255–56 (“Anonymity: The increased opportunity for harassers to attack their targets anonymously, making it difficult if not impossible for the targets to engage in self-help or legal remedies . . .” (emphasis omitted)).

73. See *id.* at 229.

74. See *id.* at 255–56.

75. *Id.* at 259.

76. *Id.* at 255–56.

Additionally, the ease of internet anonymity undermines the deterrent effect that fear of criminal repercussion provides.⁷⁷ Anonymity also dehumanizes victims in the eyes of revenge porn posters.⁷⁸ Moore, an unapologetic perpetrator of revenge porn, admitted that anonymity “makes it easier It is all anonymous, I don’t know these people.”⁷⁹

2. Amplification

Amplification is the phenomenon of sharing and reposting internet content, which keeps an image in circulation.⁸⁰ An image or video that has “gone viral”⁸¹ is the epitome of the amplification effect.⁸² The continuous reposting causes victims of revenge porn to be repeatedly victimized. Amplification increases the number of people that see the victim’s pictures.⁸³ Amplification also makes it more challenging to identify every place that the pictures exist online and find each reposter.⁸⁴ Amplification not only increases harm but also hampers potential remedies because the victim cannot bring suit or press charges against an unknown poster.⁸⁵ The difficulty in locating photos once they have been widely distributed contributes to the permanence of the online harassment.⁸⁶

77. See Adrienne N. Kitchen, Comment, *The Need To Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 261 (2015) (“A criminal deterrent is vital as disseminating revenge porn becomes increasingly easy and hundreds of websites monetize it. Because civil law does not carry the same social stigma as criminal law, it is not a successful deterrent.” (footnote omitted)); Victoria Murphy Barret, *Anonymity & the Net*, FORBES (Sept. 28, 2007, 6:20 PM), <http://www.forbes.com/forbes/2007/1015/074.html#7113a342269b> [<http://perma.cc/KS8R-DEL8>] (“‘People are cruel,’ says Hemanshu Nigam, chief security officer at MySpace, which requires no ID data for any post. ‘Anonymity doesn’t inspire this, but it does remove the fear to think, to act and to explore.’”).

78. Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 789 (2008) (discussing how anonymity insulates the perpetrator from the harmful effects on the victim by creating social and physical distance).

79. Anderson Live, *Exposed Women Confront Website Owner*, *supra* note 59, at 0:28.

80. See Franks, *Unwilling Avatars*, *supra* note 71, at 255–56 (“Amplification: The capacity for harassers to quickly find a wide audience for their harassment, including users who will join in the harassment” (emphasis omitted)); Apeksha Vora, Comment, *Into the Shadows: Examining Judicial Language in Revenge Porn Cases*, 18 GEO. J. GENDER & L. 229, 230–31 (2017).

81. When internet content is viral it means that it has been “widely spread or popularized especially by means of social media.” *Viral*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/viral> [<http://perma.cc/DCG3-V7QA>] (last visited Feb. 15, 2019).

82. See Vora, *supra* note 80, at 230 (“[T]he ‘amplification effect’ refers to the subsequent reposting and sharing of the initial revenge porn post.”).

83. *Id.* at 231.

84. *Id.*

85. *Id.*

86. See *id.* at 235 (“[T]here is no way to prevent those other individuals from saving the victim’s photographs or reposting them later. The only remedy for this latter concern is for the victim to regularly check websites for her photographs, which can be cumbersome.”).

3. Permanence

The immediate fossilization of images on the internet makes online actions particularly damaging.⁸⁷ There are approximately three thousand websites that host revenge porn, and intimate images are also distributed via email, text messages, and other social media sites like Facebook and Instagram.⁸⁸ Once an image is posted on the internet, it can be archived forever.⁸⁹ People may have saved it to their hard drives, and other websites may have shared it.⁹⁰ Additionally, absent repercussions, the original poster remains free to repost it.⁹¹

Revenge porn victims can submit takedown requests to websites.⁹² Takedown notices can help; however, websites do not always comply.⁹³ While Facebook, Instagram, and Twitter typically comply with takedown requests,⁹⁴ revenge porn websites are less likely to comply. Host sites (websites that function as semipublic forums where individuals post content for the community) rarely comply with takedown notices.⁹⁵ Some host sites were created exclusively for sharing revenge porn and have created such platforms without facing legal consequences.⁹⁶

The Communications Decency Act (CDA)⁹⁷ hinders victims' efforts to remove their photos. Congress implemented the CDA to balance the nature of the internet as a "competitive free market"⁹⁸ with protecting consumers from "offensive material."⁹⁹ While this purpose of the CDA suggests that it could be a tool for compelling websites to take down revenge porn images, the CDA has been used to protect revenge porn posters rather than victims.¹⁰⁰ Section 230(c)

87. See Franks, *Unwilling Avatars*, *supra* note 71, at 255–56 ("Permanence: Online attacks, which often include personal information about their targets, such as home addresses and telephone numbers, are very difficult to erase from the web" (emphasis omitted)).

88. FRANKS, *GUIDE FOR LEGISLATORS*, *supra* note 9, at 2; *see, e.g.*, *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 240 (Cal. App. Dep't Super. Ct. 2016) (reciting the facts of the case, in which an ex-boyfriend posted intimate photos and vulgar comments to a victim's company's Facebook page and was therefore convicted of the crime of distributing a private image).

89. Vora, *supra* note 80, at 235 (explaining internet archiving).

90. *See id.* (discussing how easily and quickly images can spread across the internet).

91. *Id.*

92. *See Online Removal Guide*, CYBER CIVIL RIGHTS INITIATIVE, <http://www.cybercivilrights.org/online-removal/> [<http://perma.cc/DS7J-CQWM>] (last visited Feb. 15, 2019) (explaining the revenge porn policies of various internet platforms).

93. *See id.* (noting that for a request for removal to be granted, it must be a violation of the platform's policies).

94. *See id.* (explaining procedures for compliance with takedown requests).

95. *See Scheller*, *supra* note 53, at 561–65 (explaining difficulties with getting revenge porn websites to remove pictures and comply with takedown notices).

96. *See* Laura Cannon, Comment, *Indecent Communications: Revenge Porn and Congressional Intent of § 230(c)*, 90 TUL. L. REV. 471, 488 (2015) (discussing MyEx.com, which contains the tagline "Get Revenge" and requires the poster to include the victim's personal information upon submission of a photograph).

97. 47 U.S.C. § 230 (2018).

98. Cannon, *supra* note 96, at 477 (quoting 47 U.S.C. § 230(b)(2)).

99. *See id.*

100. *Id.* at 476–78.

of the CDA provides immunity for websites and service providers with offensive content on their platforms.¹⁰¹ Courts have interpreted this immunity to apply to “websites that host offensive content originating from third parties.”¹⁰² Courts have immunized revenge porn site hosts from liability for all posts that are not the site owner’s original content.¹⁰³ Because hosts are not held liable for the images shared on their sites, they have no legal motivation to comply with takedown notices.¹⁰⁴ Section 230(c) of the CDA can be and has been more narrowly interpreted as providing protection only to sites that do not intend to post offensive content, since the section is entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”¹⁰⁵ But this provision is currently expansively applied, and as such it generally protects “user-generated content” on revenge porn sites despite the fact that revenge porn host sites solicit and encourage users to post offensive content.¹⁰⁶

4. Publicity

The publicity¹⁰⁷ of revenge porn compounds the effects of the harassment because the widespread use of the internet provides the public with a platform to perpetuate the abuse.¹⁰⁸ In 2014 a sixteen-year-old girl named Jada went to a

101. *See id.* at 488.

102. *Id.* at 473; *see also* *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“[T]hese provisions bar state-law plaintiffs from holding interactive computer service providers legally responsible for information created and developed by third parties.”); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (“Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content created by third parties.” (footnotes omitted)); *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 984–85 (10th Cir. 2000) (“47 U.S.C. § 230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party.”).

103. *See* *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014); *S.C. v. Dirty World, LLC*, No. 11–CV–00392–DW, 2012 WL 3335284, at *3 (W.D. Mo. Mar. 12, 2012); *see also* *Cannon*, *supra* note 96, at 479–89.

104. *See* *Cannon*, *supra* note 96, at 479–83.

105. *Id.* at 491; *see also* 47 U.S.C. § 230(c) (2018).

106. *Cannon*, *supra* note 96, at 490–91 (“When interpreting the language of § 230 and the definitions provided by Congress within the CDA, Congress’ intent to provide immunity for websites that unwillingly post actionable content becomes clearer, while an intent to provide a blanket protection for all websites that rely upon user-generated content, regardless of a website’s platform, purpose, or response to knowledge that material is offensive or tortious, becomes less and less reasonable.”).

107. *Franks, Unwilling Avatars*, *supra* note 71, at 255–56 (“Virtual Captivity/Publicity: The options to avoid or exit situations in which cyber harassment occurs are extremely limited. Whereas specific acts of real-life harassment are often restricted to one place (for example, being harassed on the street does not necessarily impact one’s experience in the workplace), the effects of cyberspace harassment can manifest much more readily. Particularly if the online attack is indexable by a major search engine like Google, it is accessible to almost anyone (the target’s co-workers, fellow students, clients, children) almost anywhere (at her place of work, her school, her home, her doctor’s office).” (emphasis omitted) (footnote omitted)).

108. *See* *Roffer*, *supra* note 68, at 936–37.

party where she was drugged and raped.¹⁰⁹ She did not know what happened to her until weeks later when she began receiving pictures of herself from that night via text message.¹¹⁰ In the pictures she was naked and unconscious.¹¹¹ The pictures were then shared on social media, and Twitter users began sharing pictures of themselves, mimicking her position in the unconscious naked picture, with the hashtag #jadapose.¹¹² In addition to a sexual assault and invasion of her privacy through revenge porn, Jada faced continued harassment from peers and strangers mocking her violation.¹¹³

D. *Effects on Victims*

Revenge porn has devastating effects on victims. Victims often experience depression, and some have committed suicide.¹¹⁴ In a survey conducted by the Cyber Civil Rights Initiative, 93% of victims indicated that they suffered significant emotional distress.¹¹⁵ In *Doe v. Hofstetter*,¹¹⁶ the defendant created a fake Twitter account using the victim's persona and distributed pictures of her using this account.¹¹⁷ The victim was able to recover for the tort of intentional infliction of emotional distress.¹¹⁸ In this instance, the court legitimized the severity of the effects of this crime.¹¹⁹ Other victims have not had as much success recovering under this tort theory.¹²⁰ But victims are suffering emotionally, and some courts have recognized this suffering by allowing civil remedies in actions for intentional infliction of emotional distress.¹²¹

The effects of revenge porn on victims transcend the digital world. In addition to posting intimate photos, posters often provide identifying information, including names, contact information, addresses, and workplace

109. Alicia W. Stewart, *#IamJada: When Abuse Becomes a Teen Meme*, CNN (July 18, 2014, 3:51 PM), <http://www.cnn.com/2014/07/18/living/jada-iamjada-teen-social-media> [<http://perma.cc/LH7R-3V3A>].

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 2, 11, 13 (finding that “30% [of victims] said they have been harassed or stalked outside of the Internet (in person, over the phone) by users that have seen the material online . . . [and] 51% have had suicidal thoughts due to being a victim”); *see also* Burleigh, *supra* note 37.

115. FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 11.

116. No. 11-cv-02209-DME-MJW, 2012 WL 2319052 (D. Colo. June 13, 2012).

117. *Hofstetter*, 2012 WL 2319052, at *3-4.

118. *Id.* at *7.

119. *See id.*

120. *See, e.g.,* Patel v. Hussain, 485 S.W.3d 153, 177 (Tex. Ct. App. 2016) (“Neither on appeal nor at trial has Nadia identified evidence that would enable recovery under a theory of [intentional infliction of emotional distress] independent of her other claims.”).

121. *See* Austin McCullough, *Criminalization of Revenge Porn: Providing Victims with a Realistic Legal Avenue*, AM. CRIM. L. REV. (Oct. 31, 2015), <http://www.americancriminallawreview.com/acrl-online/criminalization-revenge-porn-providing-victims-realistic-legal-avenue/> [<http://perma.cc/D4TH-DCW2>].

contacts.¹²² Others then use this information to threaten victims with sexual violence as well as to harass and stalk victims.¹²³ For example, in *United States v. Sayer*,¹²⁴ an ex-boyfriend created an online advertisement on Craigslist using pictures of the victim in lingerie.¹²⁵ In addition to pictures, the page included a list of sexual acts, said that the woman was willing to perform them, and provided directions to her house.¹²⁶ For eight months she received unwanted visits from strange men looking for sex before she changed her name and moved.¹²⁷ Victims are also fired from their jobs or forced to leave their schools.¹²⁸ It is a common practice for employers to do internet searches on prospective employees, and intimate photos with identifying information are likely to appear on such searches.¹²⁹ As one leading scholar on revenge porn explained, revenge porn is “an easy way to make people unemployable, undatable and potentially at physical risk.”¹³⁰

E. *The Criminalization of Revenge Porn*

The criminalization of revenge porn began relatively recently. In 2004, New Jersey became the first state to pass a criminal revenge porn statute, criminalizing the act of posting an intimate picture of another person without their consent.¹³¹ Although New Jersey’s statute was intended to protect against cyberbullying more generally, it has been used to prosecute perpetrators of revenge porn.¹³² California was the next state to create legislation that provides criminal recourse for revenge porn.¹³³ In 2013 California became the first state to create criminal legislation specifically targeted to combat revenge porn.¹³⁴ Since

122. FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 11.

123. *Id.* at 2.

124. 748 F.3d 425 (1st Cir. 2014).

125. *Sayer*, 748 F.3d at 428.

126. *Id.*

127. *Id.*

128. FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 2, 12 (finding that “8% [of victims] quit their job or dropped out of school[,] . . . 6% were fired from their job or kicked out of school[,] and] . . . 13% have had difficulty getting a job or getting into school”); *see, e.g.*, *State v. Parsons*, No. 10-06-01372, 2011 WL 6089210, at *1 (N.J. Super. Ct. App. Div. Dec. 8, 2011) (detailing how the victim’s ex-boyfriend sent the victim’s naked pictures to the school where she worked).

129. *Cf.* Erica Goode, *Victims Push Laws To End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), <http://nyti.ms/17YbEyY> [<http://perma.cc/J3CM-23BG>] (explaining that some revenge porn victims are fired from their jobs).

130. *Id.* (quoting University of Maryland law professor Danielle Citron).

131. *See* Act effective Jan. 8, 2004, Ch. 206, § C.2C:14-9(b)–(c), 2003 N.J. Laws 1506, 1506 (2003) (current version at N.J. STAT. ANN. § 2C:14-9(b)–(c)); Griffith, *supra* note 14, at 143–44 (explaining that New Jersey was the first state “to enact [a] nonconsensual pornography statute[.]”).

132. Griffith, *supra* note 14, at 143–44; *see, e.g.*, *State v. Ravi*, 147 A.3d 455 (N.J. Super. Ct. App. Div. 2016); *Parsons*, 2011 WL 6089210.

133. Griffith, *supra* note 14, at 144; *see* Act of Oct. 1, 2013, Ch. 466, § 647(j)(4), 2013 Cal. Stat. 3897, 3899–900 (current version at CAL. PENAL CODE § 647(j)(4)).

134. Griffith, *supra* note 14, at 144; *see* Act of Oct. 1, 2013, § 647(j)(4).

then, legislatures in forty-three states and the District of Columbia have enacted criminal revenge porn laws.¹³⁵

Despite increased state criminalization of revenge porn, the federal CDA shields site owners like Hunter Moore of IsAnyoneUp.com from liability for content posted on their sites.¹³⁶ Thus site owners face no criminal repercussions, regardless of how effective a state criminal revenge porn statute may otherwise be because the CDA preempts state law.¹³⁷ Although the pioneer revenge porn website IsAnyoneUp.com has been taken down and its king has been dethroned,¹³⁸ neither dismantling was the consequence of revenge porn laws.¹³⁹ Rather, after appearing on Anderson Cooper, Moore's website began to receive an unfilterable amount of child pornography, leading Moore to sell the domain name.¹⁴⁰ Although Moore was ultimately incarcerated, it was not based on revenge porn laws, nor was it due to posting revenge porn images.¹⁴¹ The federal government prosecuted Moore for hacking under the Computer Fraud and Abuse Act.¹⁴² He pled guilty to aggravated identity theft and unauthorized access to a protected computer to obtain information.¹⁴³

Ideally, any criminal statutory framework would utilize the most expansive definition of revenge porn: "[t]he disclosure of sexually explicit images without consent and for no legitimate purpose."¹⁴⁴ The current inconsistent and piecemeal state framework does not adequately protect revenge porn victims because "[w]hile some existing voyeurism, surveillance, and computer hacking laws prohibit the nonconsensual observation and recording of individuals in states of undress or engaged in sexual activity, the nonconsensual *disclosure* of intimate images has been largely unregulated by the law."¹⁴⁵ This lack of clear

135. See *43 States + DC Now Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <http://www.cybercivilrights.org/revenge-porn-laws> [<http://perma.cc/U4TP-RRM6>] (last visited Mar. 10, 2019).

136. 47 U.S.C. § 230(c) (2018). See *supra* Part II.C.3 for an explanation of the CDA.

137. See Vora, *supra* note 80, at 241; see also 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with [the CDA].").

138. Moore has been called the "King of Revenge Porn" and the "Most Hated Man on the Internet." Marusic, *supra* note 54.

139. '*Most Hated Man on the Internet*' Sentenced to Federal Prison for Revenge Porn, L.A. DAILY NEWS (Dec. 2, 2015, 9:09 AM), <http://www.dailynews.com/2015/12/02/most-hated-man-on-the-internet-sentenced-to-federal-prison-for-revenge-porn/> [<http://perma.cc/PZK6-399S>] [hereinafter *Most Hated Man on the Internet*].

140. See Dr. Drew, *supra* note 56, at 1:50.

141. See Indictment at 1, United States v. Moore, CR No. 13-CR13-0917 (C.D. Cal. Dec. 20, 2013), 2013 WL 10937220.

142. *Id.* Moore was indicted on charges of conspiracy, unauthorized access to a protected computer to obtain information, identity theft, and aiding and abetting. *Id.*

143. *Most Hated Man on the Internet*, *supra* note 139. Similarly, Kevin Bollaert, operator of UGotPosted.com and ChangeMyReputation.com, was incarcerated based on convictions for extortion and identity theft. *People v. Bollaert*, 248 Cal. App. 4th 699, 704 (2016).

144. FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 2.

145. *Id.* at 3.

protection for victims of revenge porn has led to a call for a federal criminal law.¹⁴⁶

A federal law criminalizing revenge porn is in the works.¹⁴⁷ In 2016, U.S. Representative Jackie Speier introduced a bill intending to criminalize revenge porn on a federal level.¹⁴⁸ This bill was titled the Intimate Privacy Protection Act of 2016.¹⁴⁹ This bill was reworked and transformed into the Ending Nonconsensual Online User Graphic Harassment Act of 2017, or the ENOUGH Act, which Senators Kamala Harris, Richard Burr, and Amy Klobuchar introduced to the Senate on November 28, 2017.¹⁵⁰ The ENOUGH Act has been referred to the Senate Judiciary Committee.¹⁵¹

The ENOUGH Act would criminalize the “knowing[] distribut[ion of] a private visual depiction of an individual’s intimate parts” without the individual’s consent.¹⁵² Making revenge porn a federal crime would protect it from limitation by the CDA and provide victims with protection that state statutes cannot match.¹⁵³ Although the CDA supersedes state statutes, it explicitly stipulates that it must not be interpreted to limit other federal laws, and therefore a federal revenge porn statute would not be limited by immunities provided under the CDA.¹⁵⁴

F. *Barriers to Prosecution: Believability Politics and the Ideal Victim Theory*

There are a variety of factors that influence whether a victim is found credible enough for officials to pursue prosecution. These factors include the victim’s race, age, relationship to the perpetrator, activity at the time of the offense, use of drugs or alcohol, and criminal record.¹⁵⁵ Consideration of these

146. Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> [<http://perma.cc/N2GW-4FRF>] [hereinafter Franks, *Why We Need a Federal Criminal Law Response*].

147. See Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. § 2(a) (2016).

148. *Id.*

149. *Id.*

150. Ending Nonconsensual Online User Graphic Harassment Act of 2017, S. 2162, 115th Cong. (2017). For a list of organizations supporting this bill, see OFFICE OF CONGRESSWOMAN JACKIE SPEIER, THE ENOUGH ACT OF 2017—ENDING NONCONSENSUAL ONLINE USER GRAPHIC HARASSMENT 3 (2017), <http://speier.house.gov/sites/speier.house.gov/files/The%20ENOUGH%20Act%20One%20Pager%2011-27-17%20%28002%29.pdf> [<http://perma.cc/3UJM-6EQ8>].

151. S. 2162.

152. *Id.*

153. Layla Goldnick, Comment, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 CARDOZO J.L. & GENDER 583, 625 (2015) (“It must be noted that Section (e)(1) of the CDA explicitly states that nothing in the CDA should be interpreted [to] impair any ‘federal criminal statute.’”).

154. See 47 U.S.C. § 230(e)(1) (2018); Goldnick, *supra* note 153, at 625.

155. Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women’s Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 431 (2016) (“Researchers have long contended that variation in how women affected by sexual offenses are treated reflects the importance placed on the complainant’s sociodemographic characteristics (such as race, age, or relationship to the assailant) and moral qualities (including whether she was engaged in

factors contributes to “believability.”¹⁵⁶ The ideal victim theory is a framework for discussing how believability politics arise in the context of victimhood.

The ideal victim theory is a framework created by Nils Christie that defines barriers victims face in having society and the legal system legitimize their victim status.¹⁵⁷ This framework presents six attributes that characterize the ideal victim: the ideal victim is

1. “weak,” which can be someone who is “[s]ick, old, or very young,” or in the context of sexual assault can be defined as innocent;
2. “carrying out a respectable project” when victimized;
3. present somewhere that the victim could not be blamed for being;
4. victimized by an offender who is “big and bad”;
5. victimized by an offender who is unknown to the victim and has no personal relationship to the victim; and
6. powerful enough to make their case known.¹⁵⁸

This theoretical lens is a useful tool for understanding criminal prosecutions generally, and it has been especially useful when applied to prosecutions for sexual assault, a crime that often hinges on the credibility of the victim-witness.¹⁵⁹ Based on these attributes, the “ideal rape victim” is a virgin, on the way home from visiting sick relatives, who put up a fight while she was beaten and threatened.¹⁶⁰ Although I specifically apply these attributes to revenge porn victims in Section III, here I discuss how race fits into the ideal victim

non-gender normative behavior at the time of the offense, used drugs/alcohol, or had previous arrests).”).

156. Jane Mayer, *Anita Hill on Weinstein, Trump, and a Watershed Moment for Sexual-Harassment Accusations*, NEW YORKER (Nov. 1, 2017), <http://www.newyorker.com/news/news-desk/anita-hill-on-weinstein-trump-and-a-watershed-moment-for-sexual-harassment-accusations> [http://perma.cc/V63Y-Z4UE] (“[S]exual-harassment cases live and die on the basis of ‘believability,’ and that, in order for the accusers to prevail, ‘they have to fit a narrative’ that the public will buy. At least until now, very few women have had that standing.”).

157. Christie, *supra* note 27, at 17–30.

158. *See id.* at 19–21. While Christie does not use the term innocence in his construction of the ideal victim attributes, he provides an example of his factors with respect to a rape victim and parallels the “weak” attribute with “the young virgin.” *Id.*

159. *See, e.g.*, Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 TULSA L. REV. 1, 12 (2017) (noting barriers, premised on ideal victim theory, that sexual assault victims face at trial, such as corroboration requirements for victim-witness testimony or jury instructions suggesting sexual assault victims might not be credible witnesses).

160. Christie, *supra* note 27, at 19; *see also* JESSICA VALENTI, THE PURITY MYTH 14 (2010) (“In 2007, Republican South Dakota representative Bill Napoli described his support for a ban on abortion that allowed no exceptions for rape or incest by relaying a (quite vivid) scenario to a reporter. He explained under what circumstances the procedure *might* be warranted: ‘A real-life description to me would be a rape victim, brutally raped, savaged. The girl was a virgin. She was religious. She planned on saving her virginity until she was married. She was brutalized and raped, sodomized as bad as you can possibly make it, and is impregnated.’”); Hayley Krischer, *We’re Going To Need More Gabrielle Union*, N.Y. TIMES (Dec. 5, 2017), <http://nyti.ms/2nzIeZI> [http://perma.cc/QQ8W-KTDW] (“[Gabrielle Union] calls herself a ‘perfect victim’: not just because of her current celebrity status, but also because she was raped at work, because it was caught on surveillance and the police were called—but also because the majority of sexual assaults aren’t reported to the police, according [to] the Rape, Abuse and Incest National Network.”).

framework,¹⁶¹ and I discuss the power dynamic between victims and perpetrators.¹⁶²

1. Race, Innocence, and Ideal Victim Status

“I think the floodgates have opened for white women . . . I don’t think it’s a coincidence whose pain has been taken seriously. Whose pain we have showed historically and continued to show. Whose pain is tolerable and whose pain is intolerable. And whose pain needs to be addressed now.”

– Gabrielle Union¹⁶³

Race is a relevant factor in obtaining a legitimated victim status. Stereotypes about black women influence societal perception of their innocence, such that women of color have additional obstacles to fulfilling the “innocent” requirement of the ideal victim theory.¹⁶⁴ The hypersexualization of black women’s bodies is a systemic stereotype that is reflected in “society’s attribution of sex as part of the ‘natural’ role of Black women and girls.”¹⁶⁵ These stereotypes inform how black women and girls are perceived today, as “these stereotypes underlie the implicit bias that shapes many [adults’] view[s] of Black female[s] . . . as sexually promiscuous, hedonistic, and in need of socialization.”¹⁶⁶

The dismissal of women of color as victims is exemplified by the sexual harassment allegations against Harvey Weinstein. Discussing public response to these allegations, Jane Fonda said, “It’s too bad that it’s probably because so many of the women that were assaulted by Harvey Weinstein are famous and white and everybody knows them.”¹⁶⁷ The acceptance of Weinstein’s victims contrasts with how women of color are received when they come forward.¹⁶⁸ Fonda pointed out this conflict: “This has been going on a long time to black women and other women of color and it doesn’t get out quite the same.”¹⁶⁹ Amid sexual assault and harassment claims from more than eighty people,¹⁷⁰

161. *See infra* Part II.F.1.

162. *See infra* Part II.F.2.

163. Krischer, *supra* note 160.

164. REBECCA EPSTEIN ET AL., GEORGETOWN UNIV. LAW CTR., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 5 (2017), <http://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<http://perma.cc/Z666-NNT5>].

165. *Id.* (quoting another source).

166. Jamilia J. Blake et al., *Challenging Middle-Class Notions of Femininity: The Cause of Black Females’ Disproportionate Suspension Rates*, in CLOSING THE SCHOOL DISCIPLINE GAP 75, 76 (Daniel J. Losen ed., 2015); *see also* EPSTEIN ET AL., *supra* note 164, at 5.

167. Alanna Vagianos, *Jane Fonda: People Are Listening Now Because Weinstein Victims Are ‘Famous and White,’* HUFFINGTON POST (Oct. 26, 2017, 11:36 AM), http://www.huffingtonpost.com/entry/jane-fonda-people-are-listening-now-because-weinstein-victims-are-famous-and-white_us_59f1e023e4b043885915a337 [<http://perma.cc/A723-8NKV>].

168. *Id.*

169. *Id.*

170. Sara M Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87*

Weinstein only individually disputed the accounts of Salma Hayek and Lupita Nyong'o, two of the few women of color that have come forward against him.¹⁷¹

Time magazine demonstrated Fonda's point when it released its 2017 Person of the Year issue, *The Silence Breakers*, honoring those who spoke out about being victims of sexual assault or harassment.¹⁷² In the midst of Harvey Weinstein's victims speaking out against him, white actress Alyssa Milano initiated a Twitter campaign using the hashtag #MeToo.¹⁷³ She encouraged victims of sexual assault and harassment to share that they have experienced harassment to "give people a sense of the magnitude of the problem."¹⁷⁴ Within a day, Milano's tweet received more than thirty thousand replies.¹⁷⁵ But Tarana Burke, a black woman, originated the "Me Too" movement to support young women of color that she worked with who were victims of sexual abuse and assault.¹⁷⁶ Despite her pivotal role in inspiring this movement, which began "as a response to anti-Black and racial discrimination as well as sexual harassment and violence,"¹⁷⁷ *Time* did not include Burke on its cover.¹⁷⁸ The selection of which voices are highlighted, praising white activists while ignoring women of color that laid the foundation, exemplifies the way that women of color are overlooked when they come forward to assert their victimhood.

Accusers, USA TODAY (June 1, 2018, 4:51 PM), <http://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001> [<http://perma.cc/GCR9-GQVF>].

171. Stuart Oldham, *Salma Hayek Says Harvey Weinstein Only Responded to Her and Lupita Nyong'o's Harassment Claims Because Women of Color Are Easier To Discredit*, VARIETY (May 13, 2018, 6:33 AM), <http://variety.com/2018/film/news/salma-hayek-says-harvey-weinstein-only-responded-to-her-and-lupita-nyongos-harassment-claims-because-women-of-color-are-easier-to-discredit-1202808828> [<http://perma.cc/HNV2-44BH>] ("We are the easiest to get discredited," [Hayek] told *Variety's* Ramin Setoodeh at the Women In Motion panel. "It is a well-known fact. So he went back, attacking the two women of color, in hopes that if he could discredit us."); Amy B Wang, *Harvey Weinstein, Accused by Dozens, Specifically Disputes Lupita Nyong'o's Harassment Claims*, WASH. POST (Oct. 21, 2017), <http://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/10/21/harvey-weinstein-accused-by-dozens-specifically-disputes-lupita-nyongos-harassment-claims/> [<http://perma.cc/9HB3-XFBP>].

172. See Melissa V. Murray, *We Won't Let 'TIME' Erase Tarana Burke from the Movement She Started*, BET (Dec. 7, 2017), <http://www.bet.com/celebrities/news/2017/12/07/tarana-burke.html> [<http://perma.cc/CJ5H-L9NJ>]; Stephanie Zacharek et al., *TIME Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers> [<http://perma.cc/APH6-5MU2>].

173. See Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), http://twitter.com/alyssa_milano/status/919659438700670976 [<http://perma.cc/M2ZU-45WA>]; Zacharek et al., *supra* note 172.

174. Milano, *supra* note 173.

175. Zacharek et al., *supra* note 172.

176. Cassandra Santiago & Doug Criss, *#MeToo: An Activist, a Little Girl and the Heartbreaking Origin of 'Me Too'*, CNN (Oct. 17, 2017, 3:36 PM), <http://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html> [<http://perma.cc/WP8G-PDR4>].

177. Murray, *supra* note 172.

178. *Id.* ("Would Black actresses have been believed if they came out in droves in the same fashion? History tells us, definitively not. Even more the reason to have someone like Tarana Burke on the cover. Not only is she a survivor herself, but for the people who aren't white or famous, she is in the community listening.").

2. Power Double Standards

Acceptance as a victim, according to the ideal victim framework, requires a delicate balance of the victim's power and agency.¹⁷⁹ In order to claim victim status, the victim must be in a position such that they "are powerful enough to make [their] case known and successfully claim the status of an ideal victim. Or alternatively, that [they] are not opposed by so strong counter-powers that [they] can not [sic] be heard."¹⁸⁰ Success requires enough power to be listened to but not so much that it undermines the victim's "weakness."¹⁸¹ The ideal victim must have a voice but not one that is so loud as to make them unsympathetic in the public eye.¹⁸² Domestic violence victims experience the danger of this contradiction, providing a clear example of how these power dynamics function. In the past, domestic violence victims were unable to come forward, due to the social stigma of domestic violence and legal restrictions that related to marital status.¹⁸³ A slight shift in social norms has given domestic violence victims more independence and agency than in the past when domestic violence was not even considered a crime.¹⁸⁴ Now domestic violence victims might have enough power to come forward; however, obtaining this increase in power lost domestic violence victims some of their socially perceived weakness, such that an outsider might question why a victim would not just leave their abusive partner.¹⁸⁵

When victims use their power and their voice to speak out against their perpetrators, they are less likely to be believed if the perpetrator is powerful.¹⁸⁶ A victim is more likely to be believed if the perpetrator fits harasser stereotypes.¹⁸⁷ People are hesitant to accept that their friends or celebrities they idolize are harassers, abusers, and rapists.¹⁸⁸ Many want to believe that perpetrators of harassment are creepy strangers.¹⁸⁹ One of the reasons that Harvey Weinstein's victims' victimhood status has been heralded as a cultural shift is that these women have accused a famous and powerful man of sexual

179. Christie, *supra* note 27, at 21.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.* See also *infra* notes 226–29 for a discussion of the move towards criminalizing domestic violence in the mid-1970s.

185. Christie, *supra* note 27, at 21 ("Females can protect themselves by leaving. Why not then just leave if violence seems to come up?").

186. *See id.* (discussing a strong perpetrator overcoming the victim's ability to be heard).

187. *See id.* at 25–26.

188. *See id.*

189. See Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 WIS. L. REV. 429, 429 ("[W]e grow up thinking we can pinpoint potential perpetrators—the creepy guy in the park, the man in the hoodie walking closely behind you." (quoting Ximena R., *There Is No Such Thing as a "Classic Rapist,"* CARE2 (July 12, 2014), <http://www.care2.com/causes/there-is-no-such-thing-as-a-classic-rapist.html> [<http://perma.cc/CLH2-72V9>])). Of course, harassers benefit from perpetuating this narrative as well. *See id.* (quoting Ximena R., *supra*).

harassment, and despite his power and influence, they have been believed.¹⁹⁰ Weinstein does not fit the stereotype of what harassers look like because he is successful and powerful.¹⁹¹ One explanation for why women who accused Weinstein have been believed now is that each of these women has become powerful enough that her voice is respected; these women's celebrity status has given them a level of independent power so that they are listened to.¹⁹² These women have been able to overcome the power catch-22 because they are now powerful enough to be heard, and they were powerless enough when the harassment occurred that their claims of victimhood are believed.¹⁹³ They are able to simultaneously wield their current power and demonstrate their past weakness.

G. *Unsympathetic Police and Prosecutors*

Ideal victimhood affects how police and prosecutors do their jobs. In sexual assault cases, police have “categorize[d] as unfounded allegations involving complainants who engaged in risky behavior at the time of the incident, complainants who were unwilling to cooperate in the prosecution of the suspect, complainants who delayed reporting, or complainants whose allegations were inconsistent or contradictory.”¹⁹⁴ Issues of credibility pervade each stage of the reporting and criminal justice processes.¹⁹⁵ Both police officers and prosecutors are concerned with “downstream orientation,” which is anticipation of how other institutional actors will respond to a case.¹⁹⁶ The ultimate concern is whether a

190. Carina Chocano, *Why the Harvey Weinstein Allegations Could Change Our Culture*, ROLLING STONE (Oct. 19, 2017, 3:54 PM), <http://www.rollingstone.com/culture/culture-news/why-the-harvey-weinstein-allegations-could-change-our-culture-119273> [<http://perma.cc/83CH-7T3F>] (“[T]he story that keeps the system in place, and vice versa—is finally starting to crack.”). *But see* Rebecca Traister, *Why the Harvey Weinstein Sexual-Harassment Allegations Didn't Come Out Until Now*, CUT (Oct. 5, 2017), <http://www.thecut.com/2017/10/why-the-weinstein-sexual-harassment-allegations-came-out-now.html> [<http://perma.cc/5496-TH6J>] (“I was also struck by his physical diminishment; he seemed small and frail, and, when I caught sight of him in May, he appeared to be walking with a cane. He has also lost power in the movie industry, is no longer the titan of independent film, the indie mogul who could make or break an actor's Oscar chances.”).

191. *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <http://nyti.ms/2xVPfVW> [<http://perma.cc/RAX9-T2DS>] (“In public, he presents himself as a liberal lion, a champion of women and a winner of not just artistic but humanitarian awards.”).

192. Vagianos, *supra* note 167.

193. *See* Christie, *supra* note 27, at 21.

194. Cassia Spohn et al., *Unfounding Sexual Assault: Examining the Decision To Unfound and Identifying False Reports*, 48 L. & SOC'Y REV. 161, 164 (2014). “[U]nfounding will be less likely if the crime is serious, the victim and suspect are strangers, the victim was injured, the victim's allegations are consistent with detectives' ‘typifications of rape scenarios’, and the victim is viewed as credible and without ulterior motives for making allegations against the suspect.” *Id.* at 168 (citation omitted).

195. *See id.* at 164.

196. Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC'Y REV. 531, 535 (1997); *see also* Spohn et al., *supra* note 194, at 188 (applying “downstream orientation” to police officers).

jury will convict.¹⁹⁷ In considering the likelihood of conviction, “[f]irst, prosecutors anticipate defense arguments to assess whether they can construct a credible account of the incident for the jury. Second, prosecutors invoke anticipated jurors’ interpretations of case ‘facts’ as the standard of convictability.”¹⁹⁸ Juries are expected to perceive a victim through an ideal victim theory lens, imparting stereotypes about victimhood to determine the validity of a claim and credibility of a victim-witness.¹⁹⁹

Sometimes victims of revenge porn are simply not prioritized; police refuse to use resources to obtain warrants to search perpetrators’ computers for what will amount to only misdemeanor offenses.²⁰⁰ A prosecutor in California noted that it is difficult to justify seeking a warrant to search for information on a suspect’s computer in order to substantiate a charge that is a misdemeanor.²⁰¹ One woman named Holly Jacobs faced this issue.²⁰² Charges against her ex-boyfriend were dismissed because of the prosecutor’s refusal to seek a warrant for a misdemeanor case.²⁰³ A warrant to search a perpetrator’s computer is necessary to refute a common defense in cybercrimes cases where the accused claims that they were hacked and someone else actually committed the offense.²⁰⁴ Due to the case’s misdemeanor status, “Jacobs’s case apparently was not serious enough for the police to obtain a warrant to search a defendant’s computer or home.”²⁰⁵

In addition to the difficulty of finding sympathetic police officers and prosecutors, victims also face uninformed authorities.²⁰⁶ Victims encounter

197. Frohmann, *supra* note 196, at 535.

198. *Id.* at 536.

199. *Id.* at 532 (“For example, do this woman’s actions leading up to an assault give her the moral authority (i.e., her behavior corresponds with typical features of the cautious woman) to call herself a ‘victim?’” (citations omitted)). Although Frohmann’s article does not explicitly talk about the ideal victim theory, she talks about stereotypes and characteristics that give a victim “moral authority.” *See id.* These are the stereotypes that provide the foundation for the ideal victim theory. *See* Christie, *supra* note 27, at 17–30.

200. *See* Luke Fiedler, Comment, *Public Shaming in the Digital Age: Are Criminal Laws the Most Effective Means To Regulate Revenge Porn?*, 34 LOY. L.A. ENT. L. REV. 155, 168–69 (2014).

201. *Id.* While in many states revenge porn is criminalized as a felony, the logic remains that officers do not want to utilize resources on an individual case, particularly in light of the reception revenge porn victims receive from police. *See* 43 States + DC Now Have Revenge Porn Laws, *supra* note 135.

202. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 367 (2014).

203. *Id.*

204. *Id.*

205. *Id.*; *see also* Joseph J. Pangaro, Comment, *Hell Hath No Fury: Why First Amendment Scrutiny Has Led to Ineffective Revenge Porn Laws, and How To Change the Analytical Argument To Overcome This Issue*, 88 TEMP. L. REV. 185, 211 (2015) (“Prosecutors traced the leak of [a victim’s] intimate media to the IP address of [her] ex-boyfriend. But then the charges were dismissed. The prosecutors could not search the ex-boyfriend’s computer without a warrant, and they could not justify seeking a warrant for a misdemeanor.” (footnotes omitted)).

206. *See* Roffer, *supra* note 68, at 947.

police officers who are not aware of revenge porn laws.²⁰⁷ Because of their limited knowledge of revenge porn laws, police turn away victims who could have legally cognizable claims.²⁰⁸ On an even more basic level, victims encounter police officers who do not understand the technologies that are used to perpetrate revenge porn.²⁰⁹ Journalist Amanda Hess struggled while reporting threats against her to police because the responding officer was completely unaware of Twitter.²¹⁰ Similarly, writer Anna Merlan experienced difficulty reporting harassment against her because police had not heard of the website 4chan.²¹¹ Police officers who are not technologically savvy present an additional barrier to victims reporting revenge porn, a crime that more and more occurs through use of technology.²¹²

Even more egregious than the uninformed or uncaring police officer, some police officers use their authority to obtain intimate images and participate in revenge porn.²¹³ In California, officer Sean Harrington confessed to stealing explicit photos from the cellphone of a woman he arrested for driving under the influence.²¹⁴ He sent the photos to himself from her phone and also forwarded the images to at least two of his coworkers.²¹⁵ In his confession, Harrington

207. *Id.* (“Further, when victims try to report crimes, police officers frequently do not recognize a harm and tell victims there is nothing they can do. By not taking this harm seriously, law enforcement inhibits victims from coming forward after they discover their images on the Internet.” (footnote omitted)).

208. *Id.*

209. *See id.* at 989.

210. Amanda Hess, *Why Women Aren’t Welcome on the Internet*, PAC. STANDARD (Jan. 6, 2014), <http://psmag.com/social-justice/women-arent-welcome-internet-72170> [<http://perma.cc/X3RD-CQZQ>] (“Two hours later, a Palm Springs police officer lumbered up the steps to my hotel room, paused on the outdoor threshold, and began questioning me in a steady clip. I wheeled through the relevant background information: I am a journalist; I live in Los Angeles; sometimes, people don’t like what I write about women, relationships, or sexuality; this was not the first time that someone had responded to my work by threatening to rape and kill me. The cop anchored his hands on his belt, looked me in the eye, and said, ‘What is Twitter?’”).

211. Anna Merlan, *The Cops Don’t Care About Violent Online Threats. What Do We Do Now?*, JEZEBEL (Jan. 29, 2015, 3:10 PM), <http://jezebel.com/the-cops-dont-care-about-violent-online-threats-what-d-1682577343> [<http://perma.cc/5QXB-CQRR>].

212. *See* Roffer, *supra* note 68, at 989 (“Although it will be more difficult in smaller precincts, there should be dedicated cyber harassment units or at least officers who are familiar with the harms of revenge porn, the use of technology, and the status of the state’s laws. Since technology is changing, there should be frequent mandatory training for these officers.”).

213. *See, e.g.*, Tim Cushing, *California Cops Passed Around Explicit Photos Harvested from Arrestees’ Phones*, TECHDIRT (Oct. 27, 2014, 10:05 AM), <http://www.techdirt.com/articles/20141027/09222128951/california-cops-passed-around-explicit-photos-harvested-arrestees-phones.shtml> [<http://perma.cc/PX8P-6T6W>].

214. *Id.* (“In a typical DUI arrest, there’s really no reason for a cop to be going through the suspect’s phone. Evidence of drunk driving is usually contained within the arrestees themselves, not their phones. At best, any time a cop does this, it’s a fishing expedition for bigger charges. At worst, it’s Harrington and his complicit bro cops, passing around nudie pics just because they can. Access and ability are the worst enablers.”).

215. *Id.*

referred to taking intimate images from arrestees' phones as a game.²¹⁶ He explained that officers in his precinct routinely sent around intimate pictures from female arrestees.²¹⁷ In another instance in California, a female police officer had an affair with her fellow officer, Los Angeles Police Department officer Danny Reedy.²¹⁸ When she ended the relationship he sent her intimate photos to other officers.²¹⁹ Police misconduct through privacy violations demonstrates to victims that police will not be sympathetic to their victimizations, discouraging reporting of revenge porn.²²⁰

III. DISCUSSION

Although the ideal victim theory was formulated before revenge porn existed, it can be used to understand how revenge porn victims are blamed for their own victimization and are disbelieved. Six attributes that define the ideal victim can be construed to apply to revenge porn. The six attributes of an ideal victim describe a victim who is

1. "weak," which can be someone who is "[s]ick, old, or very young," or in the context of sexual assault can be defined as innocent;
2. "carrying out a respectable project" when victimized;
3. present somewhere that the victim could not be blamed for being;
4. victimized by an offender who is "big and bad";
5. victimized by an offender who is unknown to the victim and has no personal relationship to the victim; and
6. powerful enough to make their case known.²²¹

In order to more directly apply these attributes to revenge porn, I reformulate them to apply specifically to issues within revenge porn; the attributes can be recharacterized as six questions:

1. Is the victim innocent and pure?
2. Did the victim take naked pictures of themselves?
3. Did the victim share naked pictures online?
4. Was the perpetrator someone "big and bad"?

216. *Id.*

217. *Id.*; see also David Moye, *Deputy Chad Hightower Suspected of Making Sex Offenders Pose for Nude Photos*, HUFFINGTON POST (Dec. 6, 2017), http://www.huffingtonpost.com/2014/09/19/chad-hightower-nude-photos-sex-offenders_n_5850362.html [<http://perma.cc/4RCG-QZP8>] ("A sheriff's deputy in Texas[] is facing charges of improper photography after allegedly making sex offenders pose for nude photographs.").

218. *LAPD Investigates Revenge Porn Scandal Within Department*, DAILY INDEP. (Ashland, Ky.) (Dec. 22, 2018), http://www.dailyindependent.com/cnhi_network/lapd-investigates-revenge-porn-scandal-within-department/article_1b397766-6d6d-5527-ac1e-1a33b8c824a5.html [<http://perma.cc/Y9GD-M6US>].

219. *Id.*

220. *Cf.* Roffer, *supra* note 68, at 947 ("Further, when victims try to report crimes, police officers frequently do not recognize a harm and tell victims there is nothing they can do. By not taking this harm seriously, law enforcement inhibits victims from coming forward after they discover their images on the Internet." (footnote omitted)).

221. See Christie, *supra* note 27, at 19–21.

5. Was the perpetrator someone they knew or dated?

6. Does the victim have enough power to be heard?

The ideal victim theory is a useful tool to conceptualize the ways in which revenge porn victims are criticized by prosecutors, police officers, and society. In order to protect revenge porn victims from continued criticism, the ideal victim framework must be addressed before a jury deliberates.²²² The first step toward responding to this framework is to understand it. In this Comment, I unpack who the “ideal” revenge porn victim is and the ways in which reality is inconsistent with this ideal.²²³ I then propose a rule of evidence for revenge porn prosecutions.²²⁴ This rule is meant to mitigate jurors’ victim-blaming biases by excluding evidence that seeks to reinforce the ideal victim narrative. By excluding these attributes, the rule prevents them from contributing to the credibility determination of the victim.

A. *Why Does the “Ideal Victim” Matter?*

“Imagine a world where moral turpitude for women was based on our making decisions for ourselves—not on our bodies, our sexuality, our skin color, or the number of sexual partners we’ve had. Imagine a world where women had nothing to be ashamed of.”

– Jessica Valenti²²⁵

Historically, women were viewed as property.²²⁶ A woman belonged to her father until she was married, and then she belonged to her husband.²²⁷ Rape was thought of as a crime against the man that the woman “belonged” to, rather than as a crime against her bodily autonomy and safety.²²⁸ In the United States it was not a crime for a man to sexually assault his wife until the mid-1970s.²²⁹ The belief that a woman’s chastity and virginity are valuable dates back to the days of

222. See Regina A. Schuller et al., *Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 *NEW CRIM. L. REV.* 759, 763 (2010) (“[R]esearchers have consistently demonstrated that lay people (hence, jurors) will question the validity of a sexual assault, judge the victim with greater skepticism, and blame her more if the context of the assault and/or the characteristics and actions of the victim do not fit with their expectations.” (footnotes omitted)).

223. See *infra* Part III.B.

224. See *infra* Part III.C.

225. VALENTI, *supra* note 160, at 201.

226. Rebekah Smith, *Protecting the Victim: Rape and Sexual Harassment Shields Under Maine and Federal Law*, 49 *ME. L. REV.* 443, 448 (1997).

227. *Id.*; see also Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 *CLEV. ST. L. REV.* 351, 356 (1995) (“Since women were regarded as property, the common law treated rape not as a crime against women, but rather as a violation of a man’s property interest. The rape laws were concerned with protecting a husband’s property interest in his wife’s fidelity, and a father’s interest in his daughter’s virginity.” (footnote omitted)).

228. Smith, *supra* note 226, at 448–49.

229. Ruthy Lowenstein Lazar, *The “Vindictive Wife”: The Credibility of Complainants in Cases of Wife Rape*, 25 *S. CAL. REV. L. & SOC. JUST.* 1, 13 (2015).

dowries, when a father exchanged his daughter for other “goods.”²³⁰ Viewing a victim’s legitimacy as contingent on her innocence harkens back to these antiquated views that value women based on their virginity and chastity.²³¹ In order for victims of revenge porn to receive justice, society and law enforcement must stop perceiving victims through the ideal victim lens.

A necessary endeavor in supporting victims of revenge porn is to foster a society that believes revenge porn victims when they come forward. In order to believe victims, we need to deconstruct societal conceptions about who is worthy of being believed.²³² This means breaking down the factors that contribute to society believing in certain categories of victims in order to demonstrate how arbitrary these “ideal victim” attributes are.²³³ As part of this endeavor, it is vital to recognize that the ideal victim is defined by systemic racism and sexism.²³⁴ Acknowledging this is integral to moving beyond the ideal victim framework to allow all victims to claim their victimhood.²³⁵ Validating victims’ status as victims is the first step toward prosecuting the crimes against them.²³⁶

B. The “Ideal” Revenge Porn Victim

The ideal victim theory provides an analytic device to understand how victims are treated and breaks down the rationale behind why some victims are believed and supported whereas others are dismissed.²³⁷ The ideal victim theory is therefore a useful tool to understand the barriers to being accepted as a victim; it is useful in that it identifies a toxic social narrative that disempowers individuals on the basis of race, sex, and class.²³⁸ The dismissal of revenge porn

230. See VALENTI, *supra* note 160, at 23–24.

231. *Id.*

232. See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1014–15 (1991) (“Even though these myths are untrue and are overwhelmingly refuted by the data, they continue to play an important role in the way judges, jurors, and others perceive testimony in rape trials.” (footnote omitted)).

233. *Id.* at 1016 (“Because rape myths prevent justice for rape victims, for women, and for society as a whole, there is a compelling need to reveal the lies and misogyny behind the myths.”).

234. See VALENTI, *supra* note 160, at 30. The categorization of the ideal victim requires the same attributes that make up what Jessica Valenti describes as the fetishized conception of purity. *Id.* at 44. She describes the feminine ideal as the “desirable virgin”: “The desirable virgin is sexy but not sexual. She’s young, white, and skinny. She’s a cheerleader, a baby sitter; she’s accessible and eager to please (remember those ethics of passivity!). She’s never a woman of color. She’s never a low-income girl or a fat girl. She’s never disabled.” *Id.* at 30; see also Frohmann, *supra* note 196, at 553–54 (“Micro-level interpretive practices that may not appear to have race-, class-, or gender-biased intentions nevertheless contribute to the institutionalization of these biases. Prosecutorial accounts can unintentionally perpetuate historical social relations by contextualizing prosecution decisions in cultural representations of places and people.”).

235. See I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 857 (2013) (“In other words, when jurors are told nothing, they do not assume ‘nothing.’ Instead, they use the information they are provided, as well as the surface appearance of the complainant—does she look like a good girl or a bad girl?—to fill in the blank.” (footnote omitted)).

236. See Frohmann, *supra* note 196, at 553–54.

237. See Christie, *supra* note 27, at 18.

238. See *id.* at 19–21.

victims is often informed by the social coding of victims as not fulfilling requirements of the ideal victim.²³⁹

1. Innocent and Pure

The ideal victim is presented as a model of purity and innocence.²⁴⁰ This is reflected in Christie's depiction of the ideal rape victim as a virgin.²⁴¹ Revenge porn victims are disadvantaged here because they are unable to fulfill the virginal ideal. By taking naked pictures of themselves, they automatically lose all coding of "virginal innocence," regardless of why these pictures were taken.²⁴² In addition to the inherent tension between the idea of virginal purity and revenge porn, marginalized groups experience additional barriers to being perceived as innocent victims.²⁴³ These barriers stem from society's view of the "perfect virgin" as someone who is "young, good-looking, straight, and white."²⁴⁴

When people of color are victims of revenge porn, they face additional barriers to having their victim status recognized.²⁴⁵ This is not unique to revenge porn, as resistance to accepting the victimhood of women of color has occurred in the context of other forms of harassment as well.²⁴⁶ By responding specifically to Lupita Nyong'o and Salma Hayek among his many accusers, Harvey Weinstein demonstrated the way in which many people respond to women of color claiming victimhood.²⁴⁷ Although he only generally denied the many claims from white women, he specifically went out of his way to respond to two women of color.²⁴⁸ Similarly, in the revenge porn context, when a group of celebrities was hacked in 2014, there was outrage at the photos, but the names that were mentioned in the media the most were white women's, despite the fact that women of color were hacked as well.²⁴⁹

239. See *supra* Part II.G.

240. See Christie, *supra* note 27, at 19.

241. *Id.*

242. See *On the Media*, *supra* note 30.

243. See VALENTI, *supra* note 160, at 201.

244. *Id.* at 44.

245. See Frohmann, *supra* note 196, at 554 ("We live in a culture that has been built on an unequal distribution of economic and political resources by race, class, and gender. Drawing on these frameworks of interpretation to make sense of case facts and to justify case decisions continues the current social order and its division of resources and influences.").

246. See Oldham, *supra* note 171; Wang, *supra* note 171.

247. See Oldham, *supra* note 171; Wang, *supra* note 171.

248. See Oldham, *supra* note 171; Wang, *supra* note 171.

249. Shannon Miller, *Black Chyna's Leaked Nudes Reveal an Unsettling Acceptance of Revenge Porn Against Sex Workers*, WEAR YOUR VOICE (July 5, 2017), <http://wearyourvoicemag.com/more/entertainment/blac-chynas-leaked-nudes-reveal-unsettling-acceptance-revenge-porn-sex-workers> [http://perma.cc/F6CR-KW3S] ("When a hacking scandal resulted in the release of photos featuring Jennifer Lawrence, Ariana Grande, and Kirsten Dunst in 2014, the rightful roar of mainstream media ready to denounce the heinous act as a sex crime was bone-rattling. It also highlighted the noticeable lack of outrage for Gabrielle Union, Rihanna, and other Black and non-Black women of color who were just as violated." (citation omitted)).

According to a study by Georgetown Law's Center on Poverty and Inequality, in the United States, black girls are perceived as less innocent than white girls.²⁵⁰ This study indicated that adults in the United States view black girls collectively as more adult than white girls. Responses revealed, in particular, that participants perceived black girls as needing less protection and nurturing than white girls, and that black girls were perceived to know more about adult topics and to be more knowledgeable about sex than their white peers.²⁵¹

This bias toward viewing black girls as less innocent contributes to the discrepancy between public reactions to the victimization of white women and black women.²⁵² Accordingly, black women's victimhood status is given less credence, even with nearly identical crimes like the mass celebrity hacking.²⁵³

Situated in contrast to the innocent virgin, people who engage in sex work also have a clear barrier to overcome to obtain victimhood status.²⁵⁴ The response to Blac Chyna's²⁵⁵ victimization demonstrates how society reacts to people who engage in sex work being victimized through revenge porn.²⁵⁶ Many who reacted to Chyna's photos reflected an "erroneous line of thinking: the idea that a sex worker who chooses to reveal her body during work hours should be comfortable with her nude image being publicized in any capacity."²⁵⁷ People who engage in sex work should be allowed to control and have agency over their bodies to the same extent as people employed in any other line of work.²⁵⁸ Revenge porn takes away individual agency over one's body.²⁵⁹ Regardless of who the person is, "[t]he choices a woman makes for her body are just that—her choices."²⁶⁰ Perpetrators of revenge porn take those choices away from the individual, by sharing a person's photo without their consent.

The belief that chastity and purity are necessarily intertwined with being a victim excludes many victims from having their victim status accepted.²⁶¹ In

250. EPSTEIN ET AL., *supra* note 164, at 2.

251. *Id.* at 8.

252. *See id.* at 5 (explaining the hypersexualization of black women).

253. *See* Miller, *supra* note 249.

254. Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1231 (1999) ("When a woman engages in prostitution, however, no questions need be asked. Both society and the law simply presume that the woman provoked, welcomed, and consented to the conduct, given what she was wearing, where she went, and the fact that she received money.").

255. Blac Chyna is an "entertainer, social media influencer, and entrepreneur." Complaint, *supra* note 2, ¶ 19. In her late teens and early twenties, Chyna participated in sex work: "When [she] turned eighteen, Ms. White [Blac Chyna] began performing as an exotic dancer to save money for college. Two years later, Ms. White moved to Miami to attend Johnson and Wales University, where she took classes during the day and performed at the King of Diamonds strip club at night." *Id.* ¶ 16.

256. Miller, *supra* note 249.

257. *Id.*

258. *Id.*

259. *See id.*

260. *Id.*

261. *See* Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A*

addition, this belief commodifies victims, particularly women, by suggesting that their pain and victimization matter only if it lessened their societal value.²⁶² This slut-shaming perspective inherently demonizes most victims of revenge porn by suggesting that even if a photo is posted without the victim's consent, the victimization is not important enough to take seriously.²⁶³

2. Victim Blaming: Why Did You Take the Picture in the First Place?

Victim blaming plays into why victims are not taken seriously. In the context of revenge porn, the ideal victim attribute that considers what the victim was doing when they were victimized asks why the victim took naked pictures at all.²⁶⁴ This question blames the victim for what was done to them.²⁶⁵ When Kayla Laws went to police they asked her, "Why would you take a picture like this if you didn't want it on the Internet?"²⁶⁶ Victim blaming occurs in the context of revenge porn when victims are blamed for their conduct rather than blaming the person who posted the image.²⁶⁷ The normalization of victim blaming not only affects public perception of victims but also police's willingness to assist victims.²⁶⁸ Police conduct has a direct effect on disclosures.²⁶⁹ Once police are established as an ineffective resource, victims are less likely to come forward.²⁷⁰

Feminist Critique of Recent Rape Legislation, 81 B.U. L. REV. 127, 148–49 (2001) ("At all stages of prosecution, they argued, police, prosecutors, judges, and juries relied on rape myths to discount the possibility that a rape had occurred. Such myths included . . . that only 'bad' women are raped, and that women provoke rape through their appearance and behavior." (footnotes omitted)).

262. See VALENTI, *supra* note 160, at 30–31 ("Viewing virginity as a commodity—as it was seen back in the days in which daughters were exchanged as property—lives on, just in less obvious ways (though, arguably, much more insidiously). Now fathers participate in purity balls and virginity pledges to maintain ownership over their daughters, even if it's only symbolic. Women's sexuality is still very much for sale.").

263. See Roffer, *supra* note 68, at 947. Slut-shaming is the act of ridiculing someone for their sexual behaviors, often done in conjunction with blaming a sexual violence victim for the sexual harassment or assault that they experienced. See Wendy N. Hess, *Slut-Shaming in the Workplace: Sexual Rumors & Hostile Environment Claims*, 40 N.Y.U. REV. L. & SOC. CHANGE 581, 581 (2016) ("Slut-shaming' is the act of criticizing a woman for her real or perceived sexual promiscuity.").

264. See Christie, *supra* note 27, at 18–19.

265. See Citron & Franks, *supra* note 202, at 366–67.

266. Laws, *supra* note 33 ("Kayla and I [her mother] went to the Los Angeles Police Department, where we hoped to find sympathy and an 'eager to help' attitude. We found neither. A female detective from the cyber-crimes division was more interested in condescending stares and judgmental remarks than taking a report.").

267. See Citron & Franks, *supra* note 202, at 366–67 ("They are shooed away because, officers say, they are to blame for the whole mess, since they chose to share their intimate pictures." (quoting Danielle Citron, *How To Make Revenge Porn a Crime*, SLATE (Nov. 7, 2013, 1:04 PM), <http://slate.com/news-and-politics/2013/11/making-revenge-porn-a-crime-without-trampling-free-speech.html> [<http://perma.cc/5DEF-QPWW>])).

268. See *id.*

269. Maureen O'Connor, *The Crusading Sisterhood of Revenge-Porn Victims*, CUT (Aug. 29, 2013), <http://www.thecut.com/2013/08/crusading-sisterhood-of-revenge-porn-victims.html> [<http://perma.cc/A9DL-7YH2>].

270. *Id.* ("When explicit images of the Nederland resident appeared on the geographically searchable website, she didn't go to the police. 'I was embarrassed. It's a small town,' she says. She'd

Victims of revenge porn are often told by police officers that if they did not want their naked pictures on the internet, then they should not have taken them in the first place.²⁷¹ The mere act of having taken a naked picture delegitimizes victimhood status in the eyes of police officers.²⁷² Although it is unsurprising that revenge porn perpetrators pass the blame to the victim,²⁷³ it is frustrating that police officers, to whom victims go to for help, perpetuate these attitudes.²⁷⁴

When revenge porn victims are blamed for having taken pictures, the blamers are playing into the ideal victimhood requirement that a victim was doing something “respectable” when they were victimized.²⁷⁵ There are victims that may be able to survive this requirement. First, there are those who had their faces photoshopped on to other people’s bodies.²⁷⁶ The photoshopped victim is nearly parallel to the rape victim who was walking home during the day after participating in a respectable activity.²⁷⁷ Someone like Kayla Laws might also receive some leniency in this category, because she was not taking naked pictures for explicitly sexual purposes, but rather she was playacting modeling by herself, with no intention of sharing the pictures.²⁷⁸ Her activity may be considered “harmless enough” that she can maintain the requisite respectability to be taken seriously.²⁷⁹ The most blameless victim is the victim who was recorded without their consent or knowledge, though they could still be blamed for putting themselves in a situation in which they were recorded.²⁸⁰

spoken to other women featured on the site—she’d even recognized a few—and they’d told her law enforcement hadn’t helped.”).

271. See, e.g., Laws, *supra* note 33 (quoting the police asking Kayla Laws why she would take a naked picture like this if she did not want it on the internet); see also Anderson Live, *Exposed Women Confront Website Owner*, *supra* note 59, at 1:03 (“Okay, I mean, but there’s one easy way to never end up on my website—is by [not] taking those photos.”). Based on a survey of teenagers and young adults about their use of technology, 20% of teenagers and 33% of young adults have “sent/posted nude or semi-nude pictures or video of themselves.” THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1 (2008), http://www.drvc.org/pdf/protecting_children/sextech_summary.pdf [<http://perma.cc/23GY-JHY9>].

272. See, e.g., Laws, *supra* note 33.

273. See, e.g., Anderson Live, *Exposed Women Confront Website Owner*, *supra* note 59, at 1:03.

274. Although this is frustrating, it is not surprising that victims do not report their victimization to police officers who not only refuse to take victims’ reports seriously but also perpetrate revenge porn themselves. See *supra* notes 213–20.

275. See Christie, *supra* note 27, at 19.

276. *On the Media*, *supra* note 30.

277. See Christie, *supra* note 27, at 19 (noting that the ideal victim, when victimized, “was carrying out a respectable project—caring for her sister”).

278. Laws, *supra* note 33.

279. See *id.*

280. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009) (“The profiles contained nude photographs of Barnes and her boyfriend, taken without her knowledge, and some kind of open solicitation, whether express or implied is unclear, to engage in sexual intercourse.”); *Doe v. Doe*, No. 16 Civ. 0332, 2017 WL 3025885, at *1 (S.D.N.Y. July 14, 2017) (involving a defendant recording himself and a plaintiff having sex without her knowledge or consent, uploading it to X-Tube, and sending the link to at least three specific people); *State v. Ravi*, 147 A.3d 455, 463–66 (N.J. Super. Ct. App. Div. 2016) (involving a defendant setting up his computer to record his roommate having sex

Asking if a victim was doing something “respectable” is victim blaming, and this question should be irrelevant.²⁸¹ What someone was doing when they were violated does not change the fact that they were violated. Unfortunately, it does affect how victims are treated, as evidenced by police asking why a victim would take a naked photo if they did not want it shared on the internet.²⁸²

3. Where Did the Pictures Come From?

The manner in which perpetrators obtain the victims’ images will also affect the acceptability of revenge porn victims.²⁸³ The ideal victim attribute that considers if the victim was present somewhere that the victim could not be blamed for being, blames the victim who was not in an innocent place for being in a risky situation.²⁸⁴ In the context of revenge porn, this blame rests on where the pictures came from. Although most revenge porn is perpetrated via social media, the internet, or cell phones, the images are not all acquired in the same way or from the same places.²⁸⁵ Some photos are posted directly by ex-partners or other acquaintances to whom the images were sent, whereas some are acquired through hacking, and others are digitally created.²⁸⁶ As mentioned in the previous Part, those who send their pictures to another person are blamed for having taken and sent the pictures in the first place.²⁸⁷ Even if this exchange happened within the context of a trusting relationship, people tend to blame the sender for having sent the picture instead of rightfully blaming the person who betrayed the victim’s trust.²⁸⁸ Even when the victim sends the picture at the behest of the poster or in response to threats and abuse, the victim-sender often receives the blame.²⁸⁹

and streaming it to other Rutgers University students).

281. This is the premise of rape shield in sexual assault cases. See FED. R. EVID. 412. See *supra* Part III.C.1 for an explanation of rape shield. See *infra* Part III.C.2 for an application of rape shield to revenge porn.

282. Laws, *supra* note 33.

283. Cf. Christie, *supra* note 27, at 19 (explaining that the context of the victimization is relevant to ideal victimhood, in saying that an ideal victim “was where she could not possibly be blamed for being”).

284. *Id.*

285. See *On the Media*, *supra* note 30.

286. *Id.*

287. See *supra* Part III.B.2; see also Roffer, *supra* note 68, at 945–46 (“By victim blaming, and essentially punishing women for sending these images, the belief that women are ‘sluts’ and should be shamed, whereas men are ‘studs’ and are applauded. Historically, society has ignored harms suffered ‘where women could have ostensibly mitigated the injury.’” (footnotes omitted) (quoting Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 393 (2009))).

288. See Roffer, *supra* note 68, at 945–46.

289. See, e.g., Complaint, *supra* note 2, ¶ 68 (“The truth is that Rob Kardashian and Ms. White had not been romantically involved for months. Ms. White sent these private nude photos to her former fiancé after they had broken-up and only because Rob Kardashian would beg for Ms. White to send him nude photos . . . Ignoring him did not work. [T]elling him to stop did not work. She thought giving him the photos he wanted might work. Sadly, it did not.”).

Further, women are blamed for taking naked pictures whether they send them out or not.²⁹⁰ When a group of celebrities had their computers hacked in 2014, the celebrities were blamed for having naked photos on their computers or in the iCloud.²⁹¹ The photoshopped victim is the most likely to be able to fulfill the requirement of not having participated in “blameworthy” behavior, because they neither took naked pictures nor sent them out.²⁹² A photoshopped victim cannot be blamed for putting themselves at risk, which is a victim-blaming accusation that is used to belittle victims and deprive them of their victim status. The photoshopped victim was not participating in risky conduct, aside from having an internet presence.²⁹³

The extent to which victims are blamed for having naked pictures raises the question of what a reasonable expectation of privacy is in the technological era. Holding a victim responsible for hacked pictures suggests that using a platform that can be hacked strips a person of their expectation of privacy.²⁹⁴ This problematic belief explains why the proposed federal revenge porn bill is classified as a privacy law.²⁹⁵

4. The “Ideal” Revenge Porn Perpetrator: The Big Bad Stranger

Many victims of revenge porn are victimized by people they know,²⁹⁶ people they once trusted with their intimate photos.²⁹⁷ This does not fit the bill of the

290. See *On the Media*, *supra* note 30.

291. Jill Filipovic, *Why You Shouldn't Look at Those Stolen Naked Celebrity Photos*, COSMOPOLITAN (Sept. 2, 2014), <http://www.cosmopolitan.com/entertainment/celebs/news/a30667/dont-look-at-stolen-nude-photos> [<http://perma.cc/297N-BLZX>] (“The photos circulated quickly, with tsk-tsking commentators close behind, telling women []the best way to avoid a criminal hacking into your phone and stealing your private nude photos is to not take nude photos in the first place (see also: don't go out in a short skirt if you don't want to be raped). Even better advice might be simply not to exist in a female body.”).

292. See *On the Media*, *supra* note 30.

293. See *id.*

294. See Scott Mendelson, *Jennifer Lawrence Nude Photo Leak Isn't a 'Scandal.' It's a Sex Crime.*, FORBES (Sep. 1, 2014, 10:05 AM), <http://www.forbes.com/sites/scottmendelson/2014/09/01/jennifer-lawrence-nude-photo-leak-isnt-a-scandal-its-a-sex-crime/#45c9aa334238> [<http://perma.cc/2WVE-Q4XQ>] (“You may argue, without any intended malice, that it may be unwise in this day-and-age to put nude pictures of yourself on a cell phone which can be hacked and/or stolen. But without discounting that statement, the issue is that these women have the absolute right and privilege to put whatever they want on their cell phones with the expectation that said contents will remain private or exclusive to whomever is permitted to see them just like their male peers.”). Similarly, the National Security Agency has access to pictures in cell phones and abuses this access. Alyson Shontell, *Edward Snowden Says NSA Workers Pass Around Your Nude Photos*, BUS. INSIDER (July 17, 2014, 3:18 PM), <http://www.businessinsider.com/edward-snowden-guardian-interview-on-naked-photos-2014-7> [<http://perma.cc/BM8A-MLVC>].

295. See Ending Nonconsensual Online User Graphic Harassment Act of 2017, S. 2162, 115th Cong. (2017).

296. FRANKS, GUIDE FOR LEGISLATORS, *supra* note 9, at 11 (“Fifty-seven percent of victims said their material was posted by an ex-boyfriend, 6% said it was posted by an ex-girlfriend, 23% said it was posted by an ex-friend, 7% said it was posted by a friend, 7% said it was posted by a family member.”).

297. See *id.* (“Eighty-three percent of revenge porn victims said they had taken nude

ideal victim theory's "big bad perpetrator."²⁹⁸ When the perpetrator is someone the victim knows, the victim is either blamed for trusting that person or people are quicker to believe that the victim consented to the picture being shared.²⁹⁹ Even if that consent is not explicit, the suggestion is that the victim tacitly consented.³⁰⁰ Further, the belief is that since the victim allowed one person to view the picture, that picture is now under the control of the person it was sent to.³⁰¹ This is antithetical to a true definition of consent; just because someone consents to share a picture with one person does not mean that they consent to everyone seeing it.³⁰²

When the perpetrator has power, they use it to silence and discredit victims. When Blac Chyna obtained court orders against Rob Kardashian, exposing that his perpetration of revenge porn against her constituted a form of domestic abuse, Rob Kardashian and his family attempted to use their power to silence and discredit her.³⁰³ Chyna's civil complaint against Rob Kardashian and his family stated:

The unwritten rule no one told [Chyna] when she embarked on a relationship with Mr. Kardashian is: the entire family takes it personally if you leave and will come after you, using their fame, wealth and power to take you down. They will get your television show cancelled. They will go after your endorsement deals. They will condone slut-shaming of you. They will spread lies about you. They will claim you are a bad mother, without evidence. They will even fund a lawsuit about crumbled cookies . . . to get revenge on you for leaving a Kardashian.³⁰⁴

photos/videos of themselves and shared [them] with someone else.”).

298. Christie, *supra* note 27, at 19.

299. See, e.g., Citron & Franks, *supra* note 202, at 348 (noting that some people reason that sharing photos with particular individuals “should be taken as wide-ranging permission to share them with the public”).

300. See, e.g., Laws, *supra* note 33 (“Why would you take a picture like this if you didn’t want it on the Internet?”).

301. See Amanda Levendowski, Comment, *Using Copyright To Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 439–40 (2014) (“When Hunter Moore was asked whether the images he posted on IsAnyoneUp violated copyright laws, he offered this fascinatingly misguided explanation: ‘[B]ut when you take a picture of yourself in the mirror, it was intended for somebody else so, actually, the person you sent the picture to actually owns that picture, because it was intended as a gift.’” (alteration in original) (quoting *On the Media: Revenge Porn’s Latest Frontier*, WNYC (Dec. 2, 2011), <http://www.wnyc.org/story/173718-revenge-porns-latest-frontier/?tab=transcript> [<http://perma.cc/PV9T-AK77>])).

302. See Amanda L. Cecil, Comment, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt To Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2520 (2014) (“The victim willingly provides the photos with the trust and confidence that they remain within the boundaries of the romantic relationship; however, once the relationship ends—perhaps on hateful terms—the partner holding the images seeks ‘revenge’ by posting the material online.”).

303. See Complaint, *supra* note 2, ¶ 2.

304. *Id.* ¶¶ 2–3 (footnotes omitted). In mentioning a “lawsuit about crumbled cookies,” Chyna is referencing that Rob Kardashian and Kylie Jenner sued Chyna for damage to a gingerbread house. *Id.* ¶ 2.

This demonstrates the devastating ways that powerful perpetrators can silence victims and continue to victimize them.

Many perpetrators of revenge porn are anonymous.³⁰⁵ Even if the perpetrator is someone the victim knows, it is hard to prove the identity of perpetrators online.³⁰⁶ This anonymity creates a complicated dynamic in which it is the victim's word against an unknown person. The unknown perpetrator is neither explicitly sympathetic and believable nor menacing. Without a known perpetrator, the victim's credibility will be based more heavily on the victim's individual believability and ability to fit the ideal victim mold.³⁰⁷

5. Who Has Enough Power To Claim Victim Status?

There is an impossible constraint on how independent an individual must be in order to have enough power to be taken seriously but not so much power that they are blamed for not protecting themselves.³⁰⁸ That the victim is required to have enough power and agency to report their victimization is not unique to revenge porn.³⁰⁹ Harvey Weinstein's victims demonstrate this tension. They were victimized when they first arrived on the acting scene, at a time when they did not have the social power to fight him off.³¹⁰ Time has passed and many of these women have made names for themselves, such that they are now in a position in which their allegations are heard, believed, and validated.³¹¹ Victims should not have to wait until they have established independent power in order to receive help and support. The requisite power to get help is both enough power that the victim is found credible and also enough power that the police or other authorities care enough to help.³¹²

In instances when revenge porn victims seem to have had the power to get their voices heard, they tend to have had the support of prominent attorneys.³¹³

305. Franks, *Unwilling Avatars*, *supra* note 71, at 229 (explaining that online harassment “is promulgated by users who overwhelmingly self-identify as male, though most remain anonymous beyond that”).

306. *Id.* at 227 (“In most cases of cyberspace harassment, the perpetrators use pseudonyms” (footnote omitted)).

307. *See* Christie, *supra* note 27, at 25.

308. *Id.* at 21 (“[T]he more [women] gain independence, materially, the less credibility is given to any claim of victim-status as a result of weakness or lack of possibilities for self-protection.”).

309. *See, e.g.*, Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”*: *Assaulted Women’s “Image Problems” in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 110 (2004) (discussing agency with respect to victims of domestic violence).

310. Kantor & Twohey, *supra* note 191. Lauren O’Connor, a former employee of Harvey Weinstein, wrote: “I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. The balance of power is me: 0, Harvey Weinstein: 10.” *Id.*

311. Vagianos, *supra* note 167.

312. Christie, *supra* note 27, at 21 (“A minimum of strength is a precondition to being listened to, but sufficient strength to threaten others would not be a good base for creating the type of general and public sympathy that is associated with the status of being a victim.”).

313. *See, e.g.*, Kaitlin Menza, *How I Get It Done: Lisa Bloom*, CUT (Aug. 29, 2017),

In an interview on *The View*, Mischa Barton discussed how lucky she had been to have civil rights activist attorney Lisa Bloom fighting for her.³¹⁴ Not everyone has an attorney like Bloom fighting for them.³¹⁵ In the interview, Lisa Bloom discussed potential actions victims of revenge porn can take and encouraged even those who do not have an attorney to seek legal recourse.³¹⁶ Ideally, victims of revenge porn should be able to take that advice, if they want to; however, it is important to recognize that doing so is difficult when victims of revenge porn are largely met with skepticism and blame.³¹⁷

C. Proposal

The interplay between what is acceptable in society and what is acceptable in the courtroom demonstrates the catch-22 of believability politics. Police and prosecutors are more likely to take victims seriously if society takes them seriously, and society is more likely to believe victims if their victim status is certified by arrests and prosecutions.³¹⁸

Because of this vicious cycle, it is important for actors in the legal system to proactively support and believe victims of revenge porn. One way to push prosecutors and police officers in the right direction is by adding a rule of evidence that protects victims from having their credibility called into question based on stereotypes.

1. Rape Shield

On a federal level, the term “rape shield” refers to Federal Rule of Evidence 412,³¹⁹ which provides special protections for victims of sex crimes.³²⁰ This rule prevents the admission of evidence offered in both civil and criminal trials to prove that a victim engaged in sexual behavior or that a victim had a particular sexual predisposition.³²¹ The rule ensures that mere propensity evidence—evidence that suggests that because someone consented to past sexual

<http://www.thecut.com/2017/08/lisa-bloom-interview-how-i-get-it-done.html> [<http://perma.cc/QW9N-W4J8>] (explaining the relationships that celebrity attorney Lisa Bloom forms with her clients, citing an instance of Blac Chyna texting her); *LAPD Investigates Revenge Porn Scandal Within Department*, *supra* note 218 (citing Bloom as the attorney for the victim in a “revenge porn scandal [that] is rattling the Los Angeles Police Department”); *The View, Mischa Barton, Lisa Bloom Discuss Revenge Porn Case*, YOUTUBE (Sep. 9, 2017), http://www.youtube.com/watch?v=xMja-5knZ_8 [<http://perma.cc/JM55-H9RJ>] (depicting Mischa Barton with Bloom, her attorney, in an interview on *The View*).

314. *The View*, *supra* note 313, at 6:15.

315. *See* Menza, *supra* note 313 (discussing Bloom’s firm’s “elaborate vetting process”).

316. *The View*, *supra* note 313, at 4:45 (“[Y]ou can go into court and get domestic violence restraining orders, which is what I did for Mischa . . . and anybody can do that.”).

317. *See infra* Part II.G.

318. *See* Christie, *supra* note 27, at 21; Vagianos, *supra* note 167. *See supra* notes 194–99 and accompanying text for a discussion of how society’s view of the ideal victim influences prosecutors’ decisions of whether to pursue criminal charges for revenge porn.

319. FED. R. EVID. 412. Rule 412 is commonly referred to as the “Rape Shield Rule.” *See, e.g.*, COLIN MILLER, EVIDENCE: RAPE SHIELD RULE, at vii (2012) (ebook).

320. FED. R. EVID. 412.

321. *Id.*

encounters they must have consented to the interaction in question—is inadmissible at trial.³²² According to the advisory committee notes, the purpose of this evidentiary rule is “to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”³²³ With this rule, the committee intended to “encourage[] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”³²⁴ In amendments made in 1994, the rule was extended beyond cases with sex crime charges to all criminal cases, meaning that the crime charged does not specifically need to be a sex crime for the rape shield rule to apply.³²⁵

In early common law, prior to rape shield, a woman’s sexual history or the fact that she was “unchaste” was considered relevant evidence to determine the woman’s credibility and whether she consented to the alleged rape.³²⁶ The belief that a woman’s credibility could be determined by her sexual choices was widely accepted in society and in the courtroom.³²⁷ It was believed that if a woman was unchaste, then it was more likely she would be willing to lie under oath.³²⁸ In addition to being seen as a reflection of a woman’s character for truthfulness, her sexual history was used to suggest that she was more likely to consent to sex.³²⁹ As explained by the Illinois Supreme Court, “In order to show the probability of consent, the general reputation of prosecutrix for immorality and unchastity is of extreme importance and may be shown.”³³⁰ The introduction of rape shield has prevented the factfinder from drawing credibility inferences from a victim’s sexual background.³³¹

322. *Id.*

323. FED. R. EVID. 412 advisory committee’s note to 1994 amendments.

324. *Id.*

325. *Id.* (“The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim’s privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.”); MILLER, *supra* note 226, at 2 (“Rule 412(a) applies not only in rape or sexual assault cases but also in other cases, including sexual harassment cases.”).

326. *See, e.g.*, Michelle J. Anderson, *Time To Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, CRIM. JUST., Summer 2004, at 14, 14 [hereinafter Anderson, *Time To Reform Rape Shield Laws*]. The same standard did not apply to men, as the Missouri Supreme Court stated in 1895: “It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman,” *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895).

327. Anderson, *Time To Reform Rape Shield Laws*, *supra* note 328, at 14.

328. *Id.*; *see, e.g.*, *Calhoun v. State*, 214 S.W. 335, 339 (Tex. Crim. App. 1919) (“[T]hat she was in the habit of bestowing carnal favors indiscriminately upon men . . . would certainly have had a very strong bearing upon her credibility as a witness in the case . . .”).

329. Anderson, *Time To Reform Rape Shield Laws*, *supra* note 328, at 14.

330. *People v. Fryman*, 122 N.E.2d 573, 576 (Ill. 1954).

331. *See* FED. R. EVID. 412.

2. Applying Rape Shield to Victims of Revenge Porn: The Need for a Revenge-Porn-Specific Rule

Applying rape shield laws to revenge porn cases would prevent defendants from exploiting a complainant's sexual history.³³² This application would prevent a defendant from arguing that because an individual sent a naked picture or took a naked picture in the past, that they must have consented to the publication of the image in question.³³³ Applying rape shield would also prevent prior acts of victims that took, sent, or posted their intimate image in the past from being used to question the character and veracity of the victim.³³⁴ Just because someone has posted a naked picture in the past does not create a presumption of consent to widespread sharing of images in the future. A past history of posting naked pictures does not prevent someone from being victimized and does not take away their right to have agency over their bodies, their pictures, and their right to consent to which pictures are posted of them.

Rape shield does have exceptions. The federal rape shield statute allows defendants to introduce a victim's past sexual history in order to prove their defense that the victim consented.³³⁵ The defendant can introduce instances in which the defendant and the victim engaged in consensual sex.³³⁶ This is one particularity that prevents the rape shield rule from being an exact fit for a revenge porn proceeding. For the victim's consent to be relevant in a revenge porn case it would have to tend to show that the victim consented to the photo's dissemination, not just to the photo being sent to the poster.³³⁷ Consenting to having your photo publicly posted on social media does not follow from sharing a picture with an individual in the context of a relationship. There might be different exceptions that should apply, but the exceptions to rape shield are not

332. *Cf. id.* (preventing the same in the context of sex crimes).

333. Part of the purpose of rape shield is to prevent the use of past victim conduct as propensity evidence. *See id.* In the context of rape this prevents someone from claiming that because a victim has consented to sex with other partners in the past, they are more likely to have consented to the "sex" involved in the rape allegation. *See id.*

334. *See id.*

335. FED. R. EVID. 412(b)(1)(B).

336. *Id.* On a state level, each state has its own rape shield law, with a variety of exceptions, including, but not limited to,

the admission of evidence of prior sexual conduct between the complainant and the accused; evidence of an alternative source of semen, pregnancy, or injury; evidence of a pattern of prior sexual conduct by the complainant; evidence of bias or motive to fabricate the sexual assault; evidence offered to prove that the accused had a reasonable but mistaken belief in the complainant's consent; and evidence of prior false accusations of sexual assault by the complainant.

Anderson, *From Chastity Requirement to Sexual License*, *supra* note 15, at 81–86 (footnotes omitted) (noting also, in 2002, that Arizona was the only state that did not have "a rape shield law of any kind"); *see also* ARIZ. REV. STAT. ANN. § 13-1421 (West 2019) (Arizona's since-enacted rape shield law).

337. Pangaro, *supra* note 205, at 187 ("The most common—and legally complex—cases involve a person pictured in the media who is over eighteen, consented to participation in the media, and then allowed another person to take possession of the images.").

applicable.³³⁸ Although rape shield could be expanded to apply to revenge porn, revenge porn needs its own revenge-porn-specific evidentiary shield.

3. Drafting a Revenge-Porn-Specific Evidentiary Shield

Members of Congress are working toward providing a legal framework that will support and protect victims of revenge porn by introducing a bill that will criminalize revenge porn at the federal level.³³⁹ Although many states have passed revenge porn laws, a federal law will create consistency,³⁴⁰ protect those in states without criminal revenge porn laws,³⁴¹ and communicate to perpetrators, victims, and society as a whole that dissemination of intimate images without a person's consent is not only unacceptable, it is a crime.

The purpose of a revenge-porn-specific rule of evidence would be to add legitimacy to revenge porn prosecutions, protect victims from revictimization within criminal justice proceedings, and instruct judges on how to rule on evidentiary matters within revenge porn cases.

The following is my proposal for a revenge-porn-specific rule of evidence.

(a) DEFINITIONS.—In this section:

- (1) *Dissemination*. The term “dissemination” or “disseminate” includes enabling access to by posting, sharing, sending, or otherwise making public.
- (2) *Intimate Image*. The term “intimate image” includes any visual representation (including photographs and videos), in original or modified format, in which—
 - (A) the individual is engaging in sexually explicit conduct; or
 - (B) naked genitals or female postpubescent nipple of the individual are visible.³⁴²

(b) PROHIBITED USES OF OTHER ACTS. The following evidence is not admissible in a civil or criminal proceeding involving alleged dissemination of an intimate image without consent:

338. See FED. R. EVID. 412(b)(1)(A)–(C).

339. See Ending Nonconsensual Online User Graphic Harassment Act of 2017, S. 2162, 115th Cong. (2017); Ending Nonconsensual Online User Graphic Harassment Act of 2017, H.R. 4472, 115th Cong. (2017).

340. Franks, *Why We Need a Federal Criminal Law Response*, *supra* note 146 (“A federal criminal law on non-consensual pornography would also have the salutary effect of providing a model for state laws.”).

341. *Id.* (“State laws, while important, have limited jurisdiction. The fact that one or even many states might criminalize non-consensual pornography will not help a person who is victimized in a state that does not. The Internet has greatly facilitated the capacity to commit interstate crimes, and the only way to reach such crimes is through federal law.”).

342. This definition of “Intimate Image” is based on the definition of “intimate visual depiction” in the ENOUGH Act. See S. 2162. Although I feel that the use of the term “female” in this definition is limiting and excludes people of other genders within the language of the bill, I am trying to maintain some parallelism with the proposed federal statute. My intention is that this rule of evidence would reinforce the federal law, if and when it is passed.

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
 - (2) evidence offered to prove that a victim engaged in consensual intimate image sharing.
 - (3) EXCEPTION. In criminal cases, the court may admit the following evidence in a criminal case: evidence showing that the victim did consent to the image in question's dissemination, including consenting to the intended audience, within fourteen days prior to the posting.
- (d) LIMITATIONS ON USES OF PHOTOGRAPHIC AND VIDEO EVIDENCE. Photographs and video that were disseminated in relation to a revenge porn prosecution or civil suit may be admitted subject to the following conditions:
- (1) The prosecution or complainant may enter photographs or videos into evidence.
 - (2) The defendant may enter photographs into evidence if they are doing so
 - (A) in order to support a claim or defense that the photograph or video does not meet the definition of an intimate image under (a)(2); and
 - (B) the judge determines that reasonable jurors could differ as to whether the photo meets the definition.

4. Intended Effect of the Rule

The purpose of an evidentiary rule specific to revenge porn is multifaceted. First, in tandem with a federal law, an evidentiary rule would communicate to revenge porn victims that there are protections in place for them, encouraging those who want to report their offenders to do so because they will have support throughout the process.³⁴³ It could protect victims from having their personal and intimate images shared in the course of trial proceedings. This limitation could thereby also limit jurors' ability to inappropriately resort to victim blaming in their deliberations, by excluding evidence of irrelevant past conduct.

Second, it would communicate to prosecutors and police officers that revenge porn is a serious offense that should be approached with care. Although there are federal law enforcement agencies backing the federal revenge porn bill,³⁴⁴ victims of revenge porn have been met with both hesitancy and ridicule from law enforcement when trying to report and press charges.³⁴⁵ As police officers have demonstrated susceptibility to buying into ideal victim

343. Cf. O'Connor, *supra* note 230 (explaining that the police's dismissive responses to some victims discouraged reporting by others).

344. OFFICE OF CONGRESSWOMAN JACKIE SPEIER, *supra* at note 150, at 3.

345. See, e.g., Citron & Franks, *supra* note 202, at 366-67 (explaining that police officers are dismissive and blame victims); Laws, *supra* note 33 (recollecting that police were apathetic and judgmental); O'Connor, *supra* note 230 (explaining that victims said that their experience with the police was unhelpful, which discouraged other victims from reporting).

requirements, communicating an intention to take revenge porn seriously could encourage police officers to be less dismissive of victims.³⁴⁶

This evidentiary rule would also require judges to take victim protection seriously in revenge porn cases. Judges have great discretion to determine which evidence is probative and which is prejudicial.³⁴⁷ Without a revenge-porn-specific evidentiary rule, a judge's decision regarding which evidence to admit and which to exclude is governed by the broad and highly discretionary Federal Rule of Evidence 403.³⁴⁸ Rule 403 is a catchall provision that grants judges discretion to exclude prejudicial evidence.³⁴⁹ The admission of explicit photographs and screenshots of explicit text messages could be limited under this rule; however, although this rule allows judges to exclude relevant evidence, reliance solely on this rule rests a victim's fate on the judge's broad discretion in determining if such evidence is prejudicial.³⁵⁰

The proposed evidentiary rule would guide judges and flip Rule 403's burden. Rule 403 states that a judge "*may* exclude relevant evidence if its probative value is *substantially outweighed* by a danger of . . . *unfair prejudice*."³⁵¹ Exclusion of intimate images under Rule 403 hinges on the judge's discretion and a showing (1) that there is prejudice, (2) that the prejudice is unfair, and (3) that the unfair prejudice is substantially greater than the probative value of the evidence.³⁵² Although this is a rule of exclusion, it grants the judge great discretion and weighs the balance in favor of admission.³⁵³ The proposed rule is not a way in which evidence may be *excluded* but a way in which the evidence may be *included*. This requires evidence to satisfy a number of factors in order to be admitted, creating a presumption of exclusion. This is in contrast with Rule 403, which requires evidence to satisfy a number of factors in order to be excluded, creating a presumption of inclusion.³⁵⁴

Excluding intimate images and references to past sexual activities from revenge porn prosecutions prevents destructive narratives based on the ideal victim theory from influencing jurors.³⁵⁵ Preventing references to victims' sexual backgrounds limits jurors' abilities to judge a victim based on the victim's innocence or purity.³⁵⁶ Unfortunately, this rule does not control for all ideal

346. See *supra* Part II.G for an explanation of police failings with respect to revenge porn victims.

347. See, e.g., *United States v. Poole*, 929 F.2d 1476, 1482 (10th Cir. 1991) ("The trial court has broad discretion to determine whether prejudice inherent in otherwise relevant evidence outweighs its probative value.").

348. FED. R. EVID. 403.

349. See *id.*

350. See, e.g., *Poole*, 929 F.2d at 1482 (noting the court's broad discretion).

351. FED. R. EVID. 403 (emphases added).

352. See *id.*

353. See, e.g., *Poole*, 929 F.2d at 1482 (noting the court's broad discretion).

354. See FED. R. EVID. 403.

355. See *supra* Part III.A for a discussion of how a victim's past behavior and other circumstances influence whether society validates the victim's status as a victim.

356. See *supra* Part III.B.1 for a discussion of an ideal revenge porn victim being pure or innocent and examples of using victims' past behaviors as evidence of consent.

victim factors. For example, it is still a reality that women of color are perceived as less innocent than white women.³⁵⁷ This is an issue that is directly related to the biases that this rule seeks to prevent, but it is beyond the scope of what an evidentiary rule can control.

IV. CONCLUSION

Revenge porn victims deserve protection, and they deserve justice. The ideal victim theory highlights the ways in which society blames victims for crimes committed against them. This theory acutely applies to victims of revenge porn, who are consistently met with hesitation and hostility from police officers, prosecutors, and society. As federal legislators work to criminalize revenge porn on a national level, other actors both within and outside of the justice system need to support those efforts by understanding that only the perpetrators of revenge porn are to blame for its proliferation. There is no ideal victim. Victims that do not meet society's expectations for what makes a victim deserve a voice and deserve respect to the same extent as those who come closer to fitting the ideal victim mold. Criminalization of revenge porn and the application of a revenge-porn-shield evidentiary rule to protect victims are important beginning steps to ensure that the legal system addresses this critical issue. Realistically, the understanding of revenge porn as a sex crime that deserves attention requires progress from both the legal sphere and society, but creating a revenge porn evidentiary rule is a step in the right direction.

357. See *supra* notes 245–53 and accompanying text for a discussion of how a victim's race affects whether society will view the victim as a true victim.