William & Mary Journal of Race, Gender, and Social Justice

Volume 25 | Issue 2 Article 3

No Means No: An Argument for the Expansion of Rape Shield Laws to Cases of Nonconsensual Pornography

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NO MEANS NO: AN ARGUMENT FOR THE EXPANSION OF RAPE SHIELD LAWS TO CASES OF NONCONSENSUAL PORNOGRAPHY

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ABSTRACT

This Article considers the impact of a hypothetical nonconsensual pornography victim's previous sexual history on potential legal remedies, both criminal and civil. Due to jury bias and the difficulty in proving standard elements of many claims, the research shows that such a victim would likely be unsuccessful in court. This Article then turns to two legal concepts from related fields—the incremental harm doctrine and rape shield laws—and considers what effect their application would have on the hypothetical victim's case. Ultimately, the author presents an argument for the logical expansion of rape shield laws to cases of nonconsensual pornography.

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INTRODUCTION

Ending a romantic relationship is rarely a fun proposal, but in some cases it can be a nightmare. In 2017, Blac Chyna[1] learned first-hand the misery that comes with a scorned lover's revenge.[2] After dissolving her relationship with Robert Kardashian, Jr., the father of her child, Chyna said Kardashian would not leave her alone, so she sent him a video of herself with another man.[3] Little did she know, Kardashian would in turn post that video—along with a series of other sexually explicit images featuring Chyna—to his Instagram and Twitter accounts for his nearly ten million followers.[4] Carrie Goldberg, a lawyer who fights sexual exploitation, described the move as "completely unprecedented for somebody with such an enormous social media following."[5]

Kardashian's actions provide a textbook example of nonconsensual pornography. Professors Danielle Keats Citron and Mary Anne Franks define the phenomenon as "distribution of sexually graphic images of individuals without their consent," regardless of whether the images were originally obtained with consent.[6] A specific subgenre of nonconsensual pornography called revenge porn occurs when a former romantic partner distributes sexually explicit images without consent.[7] After falling victim to revenge porn, Chyna said she was "devastated."[8] "This is a person that I trusted," she said, adding, "I felt comfortable, you know, with even sending these pictures."[9]

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1. Blac Chyna's real name is Angela White. Valeriya Safronova, *3 Current-Day Duels (of the Social-Media Variety)*, N.Y. TIMES (Jan. 7, 2017), https://www.nytimes.com/2017/01/07/fashion/mens-style/feuds-soulja-boy-chris-brown-graydon-carter-donald-trump.html [https://perma.cc/VE2S-H52C].

2. *See* Elahe Izadi, *'Total Victory': Blac Chyna Granted Restraining Order After Rob Kardashian Posted Explicit Photos*, WASH. POST (July 10, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/07/10/blac-chyna-devastated-after-rob-kardashian-posted-explicit-photos-online-files-restraining-order/?noredirect=on&utm_term=.150f2b9a0571 [https://perma.cc/TC3P-LVJN].

3. *Id.*

4. Katie Mettler, *What Rob Kardashian Did to Blac Chyna Could Be 'Revenge Porn,' Lawyers Say, and Illegal*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/06/what-rob-kardashian-did-to-blac-chyna-could-be-revenge-porn-lawyers-say-and-illegal/?utm_term=.111e5534700a [https://perma.cc/6TQX-N8ZA].

5. *Id.*

6. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L.R. 345, 346 (2014).

7. *See id.* (describing that "images consensually given to an intimate partner who later distributes them without consent" are "popularly referred to as 'revenge porn'").

8. Izadi, *supra* note 2.

9. *Id.*

Nonconsensual pornography is not a new occurrence: just ask actress Pamela Anderson.[10] In 1996, *Penthouse* published intimate images of newlyweds Tommy Lee and Pamela Anderson from a video that had been stolen from their residence.[11] Then in 1998, she and ex-boyfriend Bret Michaels sued to prevent the dissemination of a tape depicting the couple having intercourse.[12] In perhaps the first case of nonconsensual pornography, *Playboy* published nude photographs of Marilyn Monroe without her consent in its first issue in 1953.[13] Kardashian's own sister, Kim Kardashian, fell victim to nonconsensual pornography in 2014 when a hacker stole nude photos of several celebrities and posted them online.[14]

The advent of the Internet has only served to amplify the amount and exposure of nonconsensual pornography events.[15] Websites dedicated to hosting nonconsensual pornography have proven popular amongst a certain audience, and one site, IsAnyoneUp?, peaked at thirty million page views a month.[16] One victim, Holli Thometz, found that her intimate "images had gone viral," appearing on more than 100,000 websites.[17] According to a recent study, about two percent of online Americans have had a nude or nearly nude photo of themselves posted online without their consent.[18] For those between the

10. Lee v. Penthouse Int'l, No. CV96-7069SVW(JGx), 1997 U.S. Dist. LEXIS 23893, at *2–3 (C.D. Cal. Mar. 18, 1997).

11. *See id.* (noting that the photos depicted "both of the Lees in various states of undress" and "sexual touching between the Lees").

12. *See* Michaels v. Internet Entm't Grp., 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998) ("On or about October 31, 1994, Michaels and Lee recorded the [t]ape, which depicts them having sex.").

13. *See* Lily Rothman, *How* Playboy*'s First Naked Centerfold Got Published*, TIME (Oct. 13, 2015), https://time.com/4071282/playboy-centerfold-1967-history [https://perma.cc/P6MS-HHEW] (quoting a *Time* story from 1967 that said "Hefner may have run the Marilyn Monroe shots without her consent, but now he has no problem finding big-name actresses eager to appear in the magazine.").

14. Maria Puente, *Who's Next? More Nude Celeb Pics Hacked, Leaked Online*, USA TODAY (Sept. 22, 2014, 5:11 PM), https://www.usatoday.com/story/life/people/2014/09/22/whos-next-more-nude-celeb-pics-hacked-leaked-online/16047773 [https://perma.cc/E5Y5-HNB5].

15. *See* Jillian Roffer, *Nonconsensual Pornography: An Old Crime Updates Its Software*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 935, 937 (2017) (footnote omitted) ("The Internet has changed the way society communicates and in turn, has created an opportunity for a new category of crimes. Specifically, the Internet has exacerbated nonconsensual pornography as a form of gender abuse and an invasion of privacy.").

16. *See* Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2027 (2014) (noting that IsAnyoneUp? is now defunct).

17. *See* Samantha Kopf, *Avenging Revenge Porn*, 9 AM. U. MODERN AM. 22, 22 (2014) (observing that sites hosting images of Thometz included "sextingpics.com, anonib.com, pinkmeth.tv and xhamster.com").

18. Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn",* DATA & SOC'Y RES. INST. (2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf.

ages of eighteen and twenty-nine, that number rises to five percent, or one in twenty young Americans.[19]

Victims of nonconsensual pornography can suffer devastating mental health consequences.[20] One study found that many victims suffer from post-traumatic stress disorder, anxiety, and depression and report trust issues, loss of control, and decreased self-esteem and confidence.[21] Some have even taken their own lives.[22] "The victims of these acts have lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment because of the actions of those who posted and distributed their images," Professor Mary Anne Franks writes, adding that "[t]he sexually explicit images of them have been sent to their parents, their children, their classmates, their employers; they have been used to blackmail, stalk, and threaten their subjects."[23]

As nonconsensual pornography has increased in popularity, victims have increasingly found difficulties in seeking civil remedies.[24] Victims may not have the financial resources to bring suit, or would-be defendants may be judgment proof.[25] Revenge porn site operators are largely immune from action due to Section 230 of the Communications Decency Act.[26] Furthermore, some victims fear creating a Streisand effect[27]: drawing even more attention to an event they want to end.[28] Copyright law may seem like an attractive option, but

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19. *Id.*

20. Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 22, 30 (2017).

21. *Id.*

22. Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013), https://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html [https://perma.cc/AF98-JVB9].

23. *Id.*

24. *See infra* Sections III.A–B and accompanying text.

25. *See* Citron & Franks, *supra* note 6, at 358.

26. *See* 47 U.S.C. § 230(c)(1) (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

27. *See* Catherine Rampell, *What Milo Yiannopoulos and Elizabeth Warren Have in Common*, WASH. POST (Feb. 9, 2017), https://washingtonpost.com/opinions/what-milo-yiannopoulos-and-elizabeth-warren-have-in-common/2017/02/09/ee5da942-ef0e-11e6-9662-6eedf1627882_story.html?utm_term=.80c89565d047 [https://perma.cc/J8C6-7GFQ] ("The term refers to what happens when an attempt to censor information backfires and instead unintentionally draws more attention to the censorship target. Its namesake is Barbra Streisand, who in 2003 sued a photographer for including a photograph of her Malibu home among a series of 12,000 aerial images documenting California coastal erosion. . . . [T]his previously little-seen photo soon received enormous publicity and hundreds of thousands of views.").

28. *See* Citron & Franks, *supra* note 6, at 358.

if the victim did not take the photo, she or he likely does not possess the bundle of rights granted to copyright holders.[29]

To help fill this gap, states have taken matters into their own hands by criminalizing the distribution of nonconsensual pornography.[30] Prior to 2013, only New Jersey had a law on the books specifically targeting nonconsensual pornography,[31] but by 2017, that number had risen to thirty-five states and the District of Columbia.[32] These laws have faced criticism,[33] with some doubting whether they could meet constitutional muster.[34] With prohibitions against "images that show sexual exposure or contact" and "dissemination without consent of persons depicted," Professor John Humbach argues that the laws "fly directly in the face of the free speech and press guarantees of the First Amendment."[35] Such clauses, Humbach contends, "constitute unconstitutional content discrimination, viewpoint discrimination and speaker discrimination, not to mention prior restraint."[36]

However, legal experts have lauded many statutes as a step in the right direction.[37] The state laws vary widely in labeling the offense, with some categorizing it as a misdemeanor, others a felony, and still others codifying it as "a sexual offense or an invasion of privacy."[38] This, along with the difficulties that arise from prosecuting interstate crimes, has led experts to call for federal legislation.[39]

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29. *Id.* at 359–60.

30. *See infra* note 31 and accompanying text.

31. *See* Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 94–95 (2014) ("Early in 2004, New Jersey enacted a statute making it a crime to take or distribute photographs of someone else without her consent if the photographs expose her 'intimate parts' or depict her being involved in sexual activity.").

32. *See* Pam Greenberg, *The Newest Net Threat*, NAT'L CONF. ST. LEGISLATURES, 5 (May 2017), https://www.ncsl.org/Portals/1/Documents/magazine/articles/2017/SL_0517-Trends.pdf.

33. *See* Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 688–93, 695–99 (2014) (describing both an early version of California's law and a proposed New York bill as well intended but flawed); Alex Jacobs, *Fighting Back Against Revenge Porn: A Legislative Solution*, 12 NW. J.L. & SOC. POL'Y 69, 80, 81 (2016) (noting that Virginia's law requires "actual knowledge or malicious intent" and that Arizona's first attempt was constitutionally overbroad).

34. John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 217 (2014) (footnote omitted).

35. *Id.* (emphasis omitted) (footnote omitted).

36. *Id.*

37. *See* Elaine Silvestrini, *Legislators Intend to Outlaw 'Revenge Porn'*, TAMPA TRIB. (Apr. 17, 2013, 2:32 PM), https://www.tbo.com/news/politics/legislators-intend-to-outlaw-revenge-porn-b82475546z1 [https://perma.cc/42NQ-UEUJ] (quoting law professor Mary Anne Franks as saying despite its flaws, she supported the passage of proposed Florida legislation targeting nonconsensual pornography).

38. Roffer, *supra* note 15, at 938 (footnote omitted).

39. *See* Katlyn M. Brady, *Revenge in Modern Times: The Necessity of a Federal Law Criminalizing Revenge Porn*, 28 HASTINGS WOMEN'S L.J. 3, 22 (2017) ("Congress should

The question posed here is do current legal options provide adequate remedies for victims who have previously released sexual images publicly? Blac Chyna formerly worked as a stripper,[40] and she has appeared nude on magazine covers.[41] Put to the extreme, how would an adult entertainment star's potential remedies be affected by her or his choice of career? Could such a hypothetical victim prove, as required by Chyna and Kardashian's home state of California,[42] that the perpetrator knew or should have known "that distribution of the image will cause serious emotional distress"?[43] Assuming civil claims are a viable option, a similar question would apply to the torts of intentional infliction of emotional distress[44] and intrusion upon seclusion.[45] Likewise, if a victim has previously released nude photos, could nonconsensual pornography still qualify as a public disclosure of private facts?[46]

This Article is divided into four remaining Parts. The first two Parts address the aforementioned questions approximately tracking Danielle Keats Citron's and Mary Anne Franks's seminal work in *Criminalizing Revenge Porn*, with Part I focusing on criminal law and Part II tackling civil remedies. Part III considers the application of two legal principles—the incremental harm doctrine[47] and rape shield laws[48]—and their opposite would-be effects on the question at hand. Finally, this Article concludes with a recommendation to incorporate the principles of rape shield laws into nonconsensual pornography jurisprudence.

I. CRIMINAL PROVISIONS: THE IMPACT OF PREVIOUS PUBLIC DISTRIBUTION OF SEXUAL IMAGES

This Part has two Sections. The first analyzes how the prior consensual release of sexual images could affect a victim's case under

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pass a law making revenge porn or cyber exploitation a federal crime and placing it within the jurisdiction of assistant U.S. Attorneys.").

40. *See* Izadi, *supra* note 2 (noting that Chyna is "a model, business executive and former stripper").

41. *See* Tirdad Derakhshani, *Michael Strahan Isn't the Only Change Coming to 'Good Morning America'*, PHILA. INQUIRER (Aug. 30, 2016, 1:07 PM), http://www.philly.com/philly/columnists/sideshow/20160830_Michael_Strahan_isn_t_the_only_change_coming_to__Good_Morning_America_.html [https://perma.cc/9YYT-J9FG] (observing that Chyna posed "nude on the cover of Paper mag").

42. *See* Mettler, *supra* note 4.

43. *See infra* note 59.

44. *See infra* Section II.A and accompanying text.

45. *See infra* Section II.B and accompanying text.

46. *See infra* Section II.C and accompanying text.

47. *See infra* Section III.A and accompanying text.

48. *See infra* Section III.B and accompanying text.

California's nonconsensual pornography statute. The second Section explores the impact of the same scenario on various other criminal statutes related to nonconsensual pornography.

A. California's Nonconsensual Pornography Statute

Nearly a decade after New Jersey,[49] California became the second state to pass legislation specifically targeting nonconsensual pornography in 2013.[50] In addition to encompassing "the porn capital of the world,"[51] California is also the state Chyna and Kardashian call home,[52] providing a statute ripe for this analysis. Criminal defense attorney Louis Shapiro points out that Kardashian's actions are "in many ways, exactly what revenge porn law talks about," adding that "[a] prosecutor here could choose to make an example of him even if [Chyna] doesn't want to cooperate."[53]

Legal scholars criticized California's initial attempt to outlaw revenge porn as riddled with loopholes.[54] Perhaps the most glaring issue involved an exemption for images taken by the victim, commonly called "selfie[s]."[55] This means that if an individual were to send a sexually explicit photo to a partner and that partner later distributed that image, the act would fall outside the scope of the 2013 law.[56] Likewise, if an individual had sexual images saved to a private online cloud and a hacker stole and distributed the images, the hacker could not be guilty under the original California legislation.[57]

California lawmakers remedied the issue by amending the law in 2014.[58] The current law provides, in relevant part, that:

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49. *See* Larkin, *supra* note 31, at 94–95.

50. Michelle Daniels, *Chapters 859 & 863: Model Revenge Porn Legislation or Merely a Work in Progress?*, 46 MCGEORGE L. REV. 297, 300 (2014).

51. *See Tremor Slows 'Porn Capital,'* N.Y. TIMES (Jan. 31, 1994), https://www.nytimes.com/1994/01/31/us/tremor-slows-porn-capital.html [https://perma.cc/2MDF-P6T9] (quoting National Law Center for Children and Families lawyer Jan LaRue calling San Fernando Valley "the porn capital of the world").

52. Mettler, *supra* note 4.

53. Richard Winton, *Kardashian Brother's Posts Could Be Illegal: Explicit Images of His Child's Mother Online May Violate State Law on Revenge Porn*, L.A. TIMES (July 6, 2017), https://www.pressreader.com/usa/los-angeles-times/20170706/281792809056337 [https://perma.cc/5GYS-JJLA].

54. *See infra* notes 55–56 and accompanying text.

55. *See* Lawrence Siry, *Forget Me, Forget Me Not: Reconciling Two Different Paradigms of the Right to Be Forgotten*, 103 KY. L.J. 311, 339 (2014) (footnote omitted) (noting that the original law provided that "a user who posts a sexual 'selfie,' which he later regrets, ha[d] no recourse for removing or forgetting the image").

56. Eric Goldman, *California's New Law Shows it's Not Easy to Regulate Revenge Porn,* FORBES (Oct. 8, 2013, 12:03 PM), https://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/#2807cc1627bb [https://perma.cc/XCJ8-DW28].

57. *Id.*

58. CAL. PENAL CODE § 647(j)(4)(A) (West 2017).

> A[ny] person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.[59]

The law also defines intentional distribution,[60] intimate body part,[61] and exemptions,[62] as well as punishment.[63]

In particular, three segments of the law could negatively affect the hypothetical victim described here, especially in light of a prejudiced jury. In a classic study, Professors Harry Kalven and Hans Zeisel found that jurors were more likely to acquit defendants whose rape accusers participated in victim-precipitating actions not characterized by a chaste woman.[64] Further, Professor Michèle Alexandre indicated that evidence of a victim's sexual history "unfailingly permeates the jury's decision as to whether or not the victim's behavior and past acts are worthy of protection" in rape trials.[65]

The first issue arises "under circumstances in which the persons agree or understand that the image shall remain private."[66] This portion bears similarities to the tort of public disclosure of private facts, which receives more analysis in the next part of this Article.[67] Obviously a defense could argue, barring a previous explicit agreement that the images at question were to remain private, that an

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59. *Id.*

60. *See* CAL. PENAL CODE § 647(j)(4)(B) (West 2017) ("A person intentionally distributes an image described in subparagraph (A) when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.").

61. *See* CAL. PENAL CODE § 647(j)(4)(C) (West 2017) ("'Intimate body part' means any portion of the genitals, the anus and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.").

62. CAL. PENAL CODE § 647(j)(4)(D) (West 2017).

63. *See* CAL. PENAL CODE § 647 (West 2017) (mandating that those found guilty of crimes in that section are "guilty of disorderly conduct, a misdemeanor").

64. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 249–54 (1966).

65. Michèle Alexandre, *"Girls Gone Wild" and Rape Law: Revising the Contractual Concept of Consent and Ensuring an Unbiased Application of "Reasonable Doubt" When the Victim is Non-Traditional*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 41, 46 (2009) (footnote omitted).

66. CAL. PENAL CODE § 647(j)(4)(A) (West 2017).

67. *See* discussion *infra* Section II.C.

alleged victim's previous consensual release of nude images created doubt as to whether they would. That is to say, the term "understand" creates ambiguity that might lead a prosecutor's case afoul.

The next two portions, "the person distributing the image knows or should know that distribution of the image will cause serious emotional distress"[68] and "the person depicted suffers that distress,"[69] come from the tort of intentional infliction of emotional distress, which this Article discusses more thoroughly in the next part.[70] By providing that the defendant "knows . . . that distribution of the image will cause serious emotional distress," the legislation contains an element of *mens rea*.[71] However, the would-be perpetrator may argue that she or he did not think the subject of the images would mind since similar images were publicly available. As for the "should know"[72] requirement of the law, an unsympathetic jury may concur that the defendant could not have foreseen serious emotional distress due to the victim's prior actions.

The final portion of the law, "the person depicted suffers that distress,"[73] involves harm. Whether a prosecutor could prove this element would rely largely on the jury and their perceptions of the victim's previous actions. Some jurors could assume that because the individual already consented to having nude images out for public display, the additional image or images could not have a serious emotional impact. The answer to this issue could rest on unpredictable human nature.

The aforementioned examples poke holes in the weakest elements of California's nonconsensual pornography statute.[74] If an individual has previously consented to the public distribution of her or his own nude images, the defense may have a case that the individual lacks the capability to control future consent. Furthermore, a case could rest upon a jury that has its own biases and prejudices. All of this flies in the face of one adult entertainment star who noted that all of the work she has produced was consensual, adding, "I am only objectified when I want to be."[75]

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68. CAL. PENAL CODE § 647(j)(4)(A) (West 2017).
69. *Id.*
70. *See* discussion *infra* Section II.A.
71. CAL. PENAL CODE § 647(j)(4)(A) (West 2017).
72. *Id.*
73. *Id.*
74. *See supra* notes 66–73 and accompanying text.
75. Tish Weinstock, *According to Feminist Porn Star Casey Calvert She's Only Objectified when She Wants to Be*, VICE (Feb. 5, 2015, 12:55 PM), https://i-d.vice.com/en_uk/article/evnva7/according-to-feminist-porn-star-casey-calvert-she39s-only-objectified-when-she-wants-to-be-mx-translation [https://perma.cc/YT7M-SE4T].

B. Sexual Harassment Law

Another potential criminal remedy for nonconsensual pornography comes from sexual harassment law.[76] The Equal Employment Opportunity Commission defines sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[77] However, as professors Danielle Keats Citron and Mary Anne Franks point out, "nonconsensual pornography that is produced, distributed, or accessed by a victim's coworkers, employers, school officials, or fellow students raises the possibility of a hostile environment sexual harassment claim under Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972," but claims arising outside of this narrow category would fall flat.[78] That is to say, the law only applies to a slim class of offenders.[79]

Additionally, the term "unwelcome" could present challenges for someone who has worked in the sex industry or otherwise released her or his own nude images publicly. As one adult entertainment actress put it, "[i]n an average work environment, it's easier to differentiate between acceptable behavior and harassment, but for an adult performer on a porn set, this is murky territory."[80] Another former actress faced an uphill battle when she tried to report sexual harassment at the hospital where she worked.[81] "In their eyes I was already labeled a pervert because I was in the industry, not him," she said.[82] Due to the limited applicability of sexual harassment laws and the vagueness of the term "unwelcome" coupled with the stigma surrounding adult entertainment workers, victims could have a hard time pursuing this path.

This section provides evidence that neither California's nonconsensual pornography statute nor sexual harassment laws provide much coverage for victims of nonconsensual pornography who have previously released nude images of themselves. Largely, issues arise

76. *See generally Facts About Sexual Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/facts/fs-sex.html [https://perma.cc/T684-PUD7] (discussing sexual harassment as a type of sex discrimination).

77. Citron & Franks, *supra* note 6, at 360 (footnote omitted).

78. *Id.* at 360–61 (footnotes omitted).

79. *See* 20 U.S.C.A. § 1681(a), (c) (West 1972); 43 U.S.C.A. §§ 2000e-1(a)–(c), 2000e-2(a)–(n) (West 1964).

80. Aurora Snow, *Porn Stars Can Be Sexually Assaulted Too: Why Adult Actresses Have a Hard Time Reporting*, DAILY BEAST (Apr. 25, 2015, 3:17 AM), https://www.thedailybeast.com/porn-stars-can-be-sexually-assaulted-too-why-adult-actresses-have-a-hard-time-reporting [https://perma.cc/L9VU-SG6Z].

81. *See id.*

82. *Id.*

from victims' histories and their impact on the elements required to prove these crimes.[83] A similar pattern emerges in the next part, which analyzes the impact of the potential victims' previous actions on various tort remedies.

II. CIVIL PROVISIONS: THE IMPACT OF PREVIOUS PUBLIC DISTRIBUTION OF SEXUAL IMAGES

This Part contains four Sections dedicated to exploring the impact of a nonconsensual pornography victim's previous consensual release of sexually explicit images on potential tort remedies. The first Section considers the effect on the intentional infliction of emotional distress tort, and the following two Sections focus on the privacy torts of intrusion upon seclusion and public disclosure of private facts. Finally, the fourth Section addresses copyright claims.

A. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress gained much of its traction as a legal concept after Dean William L. Prosser published an article on the subject in 1939.[84] Dean Prosser pressed for courts to accept the tort and "jettison the entire cargo of technical torts with which the real cause of action has been burdened."[85] The tort's eventual inclusion in the Restatement of Torts led to general acceptance in American jurisprudence, and "the elements of the tort as described in the Restatement being widely accepted and quoted."[86] Those elements provide that the tort occurs when "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[87]

Although intentional infliction of emotional distress subsists under extensive common law, many states have codified the tort, setting a high bar for a successful claim.[88] To establish the claim in

83. *See id.*

84. *See* Kroger Co. v. Willgruber, 920 S.W.2d 61, 65 (Ky. 1996) (citing Prosser's article as a "landmark law review article" that capsulized "[t]he essence of the tort").

85. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 892 (1939).

86. *Kroger*, 920 S.W.2d at 65 (citation omitted).

87. RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. LAW INST. 1965).

88. *See* Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 112 (2003) ("[M]ost states set a very high legal and factual standard for the common law tort of intentional infliction of emotional distress.").

California, one must prove that the defendant's "conduct was outrageous" and either "intended to cause" or performed "with reckless disregard of the probability that" the plaintiff "would suffer emotional distress."[89] Furthermore, the plaintiff must have actually "suffered severe emotional distress," and the defendant's conduct must have been "a substantial factor in causing [the] severe emotional distress."[90]

This analysis bears similarity to that of the California criminal statute[91] due to the law's inclusion of several elements from intentional infliction of emotional distress. As with the criminal law, "the jury determines whether the conduct has been extreme and outrageous" for a successful intentional infliction of emotional distress claim.[92] Accordingly, the issue persists that jury members could hold negative biases of those who have previously released nude images to the public.

Proving severe emotional distress rests on whether the anguish subsisted "of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it."[93] Moreover, the defendant's conduct must rise to the level of "so extreme as to exceed all bounds of that usually tolerated in a civilized community."[94] While these definitions may work in most cases,[95] the question at hand could leave jurors to consider whether the defendant's actions actually constitute outrageous behavior and whether the plaintiff truly suffered severe emotional distress.

Additionally, *Hustler Magazine v. Falwell* added a layer of constitutional protection to the tort.[96] Here, the Supreme Court opined that public figures—such as Chyna and potentially others who produce sexual content—cannot:

> recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.[97]

89. JUD. COUNCIL CAL. CIV. JURY INSTRUCTIONS § 1600 (2017), https://www.justia.com/trials-litigation/docs/caci/1600/1600 [https://perma.cc/FR6K-TADM] [hereinafter JUD. COUNCIL CAL. CIV. JURY].

90. *Id.*

91. *See* CAL. PENAL CODE § 647(j)(4)(A) (West 2017).

92. Plotnik v. Meihaus, 146 Cal. Rptr. 3d 585, 605 (2012).

93. Fletcher v. Western Life Ins. Co., 89 Cal. Rptr. 78, 90 (1970).

94. Davidson v. City of Westminster, 649 P.2d 894, 901 (1982).

95. *See id.*; *Fletcher*, 89 Cal. Rptr. at 90.

96. *See generally* 485 U.S. 46, 50–51, 56–57 (1988) (discussing constitutional limits concerning the intentional infliction of emotional distress).

97. *Id.* at 56 (emphasis omitted).

In the event of nonconsensual pornography of a public figure, a claim surely could not survive. No reasonable person would agree that nude images constitute falsity. Perhaps with additional text or under certain circumstances falsity could exist, but not with the images on their face.

Accordingly, it would prove exceedingly difficult for an individual who has previously disseminated nude images publicly to recover for nonconsensual pornography under intentional infliction of emotional distress. Similar to issues with the California criminal statute,[98] the victim's previous behavior could lead to jury bias against her or him. Moreover, the victim's actions could help to classify them as a public figure, making it nearly impossible to succeed in an intentional infliction of emotional distress claim.[99]

B. Intrusion upon Seclusion

In their 1890 landmark law review article, Samuel Warren and Louis Brandeis articulated a distinct need for a recognized privacy right.[100] Prior to this seminal work, the pair pointed out, "[h]owever painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria*."[101] Put simply, no legal remedy existed for invasions of privacy, no matter how extreme the emotional damage.[102]

By 1939, the First Restatement of Torts recognized invasion of privacy as "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[103] The Second Restatement laid out four distinct privacy torts: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public.[104] This section considers the result of a nonconsensual pornography victim's previous dissemination of nude photos on her or his chances at recovery under the tort of intrusion upon seclusion; the next section considers the same scenario's effect under a claim of public disclosure of private facts.[105]

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98. *See* CAL. PENAL CODE § 647(j)(4)(A) (West 2017).

99. *See Hustler Magazine*, 485 U.S. at 56–57.

100. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890).

101. *Id.* at 197.

102. *See id.*

103. RESTATEMENT (FIRST) OF TORTS § 867 (AM. LAW INST. 1939).

104. RESTATEMENT (SECOND) OF TORTS §§ 652B–E (AM. LAW INST. 1977).

105. *See* discussion *infra* Section II.C.

Presently, most jurisdictions in the United States recognize invasion of privacy torts.[106] To establish a successful claim in California, a plaintiff must prove that she or he "had a reasonable expectation of privacy" and that the defendant "intentionally intruded in" a circumstance that "would be highly offensive to a reasonable person."[107] Additionally, the plaintiff must prove that she or he suffered harm and that the defendant's conduct constituted "a substantial factor in causing [his or her] harm."[108]

The first issue an individual who has previously released nude images may face comes from the "reasonable expectation of privacy" clause. California provides three factors in determining whether a plaintiff held a reasonable expectation of privacy: (1) the defendant's identity; (2) "[t]he extent to which other persons had access to" the material; and (3) "[t]he means by which the intrusion occurred."[109] In particular, the second factor could provide trouble due to similar images already existing and available to the public.

Likewise, three factors exist for deciding whether a reasonable person would find the intrusion highly offensive: (1) "[t]he extent of the intrusion"; (2) the "[defendant's] motives and goals"; and (3) "[t]he setting in which the intrusion occurred."[110] The first factor[111] provides uncertainty in the scenario at question. A defense could likely argue that the previous images of the plaintiff minimize the effects of the intrusion, and as noted before, a jury may hold bias against an individual who has posed nude for the public eye.

C. Public Disclosure of Private Facts

In Warren and Brandeis's influential article on privacy, they condemned the press for overstepping their bounds.[112] "Gossip is no longer the resource of the idle and of the vicious," they found, "but has become a trade, which is pursued with industry as well as effrontery."[113] In perhaps the vilest affront, the pair observed that "the

106. *See* James W. Hilliard, *A Familiar Tort That May Not Exist in Illinois: The Unreasonable Intrusion on Another's Seclusion*, 30 LOY. U. CHI. L.J. 601, 602, 604 (1999) (observing that then, nearly two decades ago, "only a handful of states fail[ed] to recognize a common law cause of action for invasion of privacy.").

107. JUD. COUNCIL CAL. CIV. JURY, *supra* note 89, at § 1800.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* Warren & Brandeis, *supra* note 100, at 196 ("The press is overstepping in every direction the obvious bounds of propriety and of decency.").

113. *Id.*

details of sexual relations are spread broadcast in the columns of the daily papers."[114] This type of invasion now falls under the tort of public disclosure of private facts.[115]

For a successful public disclosure of private facts claim in California, a plaintiff must prove several elements.[116] Many of the elements exist in the intrusion upon seclusion claim,[117] and as such they do not need belaboring here. However, the most important distinction lies within the first element—"[t]hat [the defendant] publicized private information concerning [the plaintiff]."[118] As you might imagine, this essential element could leave an individual who has previously and publicly disseminated nude images without recourse.

Diaz v. Oakland Tribune provides an example of how an existing public fact can derail a public disclosure of private facts case.[119] Diaz underwent gender corrective surgery, and she "scrupulously" kept this a secret from all but her closest friends and family.[120] However, the *Oakland Tribune* outed her as transsexual in a column following a controversy that arose during her stint as student body president of a community college.[121] The staff published the article after verifying the fact through police records,[122] and the court held that "[g]enerally speaking, matter which is already in the public domain is not private, and its publication is protected."[123]

If someone cannot prevail in a public disclosure of private facts case even when they strive to keep certain details of her or his life secret, the hypothetical nonconsensual pornography victim discussed here may have little or no hope.[124] If nude images have already entered the public domain, they fail to qualify as private, and therefore, the would-be plaintiff could not successfully prove the necessary elements to bring about this claim.[125]

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114. *See id*.

115. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW. INST. 1977).

116. JUD. COUNCIL CAL. CIV. JURY, *supra* note 89, at § 1801 (listing an additional element of "[t]hat the private information was not of legitimate public concern [or did not have a substantial connection to a matter of legitimate public concern]," which is not relevant to the current discussion).

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

118. *See* JUD. COUNCIL CAL. CIV. JURY, *supra* note 89, at § 1801.

119. *See* 188 Cal. Rptr. 762, 765–68, 771 (1983).

120. *Id*. at 765.

121. *See id*. at 765–66 (detailing that the newspaper column read: "The students at the College of Alameda will be surprised to learn their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio.").

122. *Id*. at 766.

123. *Id*. at 771.

124. *See supra* notes 119–23 and accompanying text.

125. *See id*.

D. Copyright

Some nonconsensual pornography victims have found success in copyright claims.[126] Only a copyright owner has the authority to authorize the reproduction of their works.[127] Despite the fact that many images at issue in nonconsensual pornography cases are not previously published—or ever intended to be—by the owner, the Copyright Act protects unpublished works as well.[128] The Digital Millennium Copyright Act's notice and takedown procedure provides that victims simply need to submit a signed statement identifying the unauthorized images and where they are located.[129] As long as the service provider removes the images, the provider escapes liability.[130]

This solution is not wholly without issue. While victims themselves take more than eighty percent of images in this genre,[131] if a victim did not take the image, à la selfie, she or he likely does not own the copyright.[132] Some scholars have also pointed out that issuing a notice and takedown request does not stop the "whack-a-mole" effect[133]: once an image appears on the Internet, it may travel from site to site, leading the victim down an endless wormhole.[134] Such sites include those outside of the jurisdiction of the U.S. government.[135] Additionally, some websites are reluctant to comply with requests at all, banking on the fact that a victim lacks the resources to hire a lawyer and sue.[136]

To the effect that copyright claims can help some nonconsensual pornography victims, it could also likely help those who have previously published nude images. The law makes no room for bias or ambiguity concerning the victim or her or his past.[137] Assuming the victim meets the qualifications of any other individual seeking to

126. *See* Margaret Chon, *Copyright's Other Functions*, 15 CHI.-KENT J. INTELL. PROP. 364, 370 (2016) (footnote omitted) ("Various plaintiffs who have been victims of NCP have adopted as a litigation strategy the notice and takedown approach Bartow suggests.").

127. 17 U.S.C.A. § 106(1) (West 2002).

128. 17 U.S.C.A. § 104(a) (West 2002) ("The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.").

129. 17 U.S.C.A. § 512(c)(3) (West 2010).

130. 17 U.S.C.A. § 512(g)(1) (West 2010).

131. *See* Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC (Feb. 4, 2014), https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564 [https://perma.cc/YH8B-9RN5].

132. Citron & Franks, *supra* note 6, at 360.

133. Levendowski, *supra* note 131.

134. Citron & Franks, *supra* note 6, at 360.

135. Chon, *supra* note 126, at 371.

136. Citron & Franks, *supra* note 6, at 360.

137. *See generally supra* note 20 and accompanying text.

use the notice and takedown procedure, this remedy may prove the best route of any suggested in this Article.

III. INCREMENTAL HARM DOCTRINE VERSUS RAPE SHIELD LAWS—A COMPARATIVE ANALYSIS

This Article now turns to examine two legal concepts from fields related to nonconsensual pornography. The first Section outlines the incremental harm doctrine associated with defamation law. Next, the underpinnings of rape shield laws are explored. Along with overviews, this Section provides consideration of how the application of these external theories could impact the hypothetical nonconsensual pornography victim described earlier in this Article.[138]

A. Incremental Harm Doctrine

The Restatement of Torts defined defamation as communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[139] To successfully claim defamation, one must prove four elements, including "a false and defamatory statement concerning another."[140] The Second Restatement goes on to say that "truth is an affirmative defense which must be raised by the defendant."[141] Parsed more simply, without falsity, there can exist no liability for defamation.[142]

However, even partial falsity can nullify a defamation cause of action.[143] For instance, substantial truth has proven an adequate defense in some cases.[144] In *Liberty Lobby, Inc. v. Anderson*,[145] Judge Antonin Scalia—then sitting on the D.C. Circuit—illustrated this point with a hypothetical: "If, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34,

138. *See generally infra* Sections III.A–B.

139. RESTATEMENT OF TORTS § 559 (AM. LAW INST. 1939).

140. RESTATEMENT (SECOND) OF TORTS § 558(a) (AM. LAW INST. 1977).

141. *Id.* § 581A cmt. b.

142. *Id.* § 581A.

143. *See* Nat Stern, *Creating a New Tort for Wrongful Misrepresentation of Character*, 53 U. KAN. L. REV. 81, 132 (2004) (footnote omitted) (finding that "[i]n some libel suits, the defendant concedes that his communication contains elements of falsity but contends that these are cleansed by an underlying truth" and that "[t]hree distinct doctrines have been developed as articulations of this defense: the substantial truth doctrine, the incremental harm doctrine, and the Court's standard for judging altered quotations set forth in *Masson v. New Yorker Magazine, Inc.*").

144. *See infra* notes 147–50 and accompanying text.

145. 746 F.2d 1563 (D.C. Cir. 1984), *vacated,* 477 U.S. 242 (1986).

it is not likely that the statement is actionable."[146] As Judge Scalia went on to rationalize, "since the essentially derogatory implication of the statement ('he is an habitual burglar') is correct, he has not been libeled."[147]

Bearing similarity to the substantial truth defense, the incremental harm doctrine provides an additional caveat to proving a communication's truth.[148] Professor Joseph King explains that "the incremental harm doctrine provides that if the potentially actionable parts of a publication do not add significantly to the adverse reputational impact beyond that attributable to the nonactionable portions of the same publication, then the defamation claim should, to that extent, be dismissed or at least ultimately denied."[149] As attorney Erin Daly succinctly put it, "[t]he incremental harm doctrine merely precludes liability where there is no actual injury to a plaintiff's reputation."[150]

Simmons Ford, Inc. v. Consumers Union of the United States, Inc.[151] laid the groundwork for the doctrine in 1981.[152] Consumers Union of the United States published an article with a laundry list of criticisms against Simmons Ford's CitiCar.[153] At issue, one claim stated, was that a certain safety standard existed for other vehicles but that electric cars such as CitiCar received exemptions making them unsafe.[154] While the safety of the car escaped dispute, Simmons Ford claimed that such a standard did not exist and therefore their car could not receive exemption.[155] The court granted summary judgment to Consumers Union of the United States because "the portion of the article challenged by plaintiffs, could not harm their

146. *Id.* at 1563 n.6.

147. *Id.*

148. *See* Stern, *supra* note 143, at 135 ("The incremental harm doctrine is closely related to the question of substantial truth.").

149. Joseph H. King, Jr., *The Misbegotten Libel-Proof Plaintiff Doctrine and the "Gordian Knot" Syndrome*, 29 HOFSTRA L. REV. 343, 351–52 (2000) (footnotes omitted).

150. Erin Daly, *The Incremental Harm Doctrine: Is There Life After* Masson*?*, 46 ARK. L. REV. 371, 375 (1993).

151. 516 F. Supp. 742 (1981).

152. *See* Stern, *supra* note 143, at 135 ("The doctrine had its origin and prototypical application in *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*").

153. *See Simmons Ford*, 516 F. Supp. at 744 (The article discussed, "at length a variety of safety problems plaguing the CitiCar and Elcar, notably their flimsy construction and low maximum speed, both of which rendered the cars, in the opinion of the article's writers, unsafe for use on public highways also traveled by faster and heavier automobiles.").

154. *See id.* at 744 (noting that Consumers Union of the United States, Inc. published an article stating "[c]onventional passenger cars must conform to certain Federal safety standards. But to spur the development of low-emission vehicles, the Government has granted temporary exemptions from some of those standards to manufacturers of electric cars—with unfortunate results.").

155. *See id.*

reputations in any way beyond the harm already caused by the remainder of the article."[156]

However, some have suggested its health is waning.[157] A decade after the doctrine's inception, the Supreme Court dealt a blow to it in *Masson v. New Yorker Magazine, Inc.*[158] In delivering the opinion of the Court, Justice Anthony Kennedy wrote that they "reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech."[159] Instead, he added, states may individually choose if they will adopt it.[160] Following this decision, the Ninth Circuit rejected the doctrine's applicability in California law, and other jurisdictions have rejected or come close to rejecting it.[161]

Under current law, something akin to the incremental harm doctrine already provides the lens through which nonconsensual pornography victims are judged. Without safeguards, their previous disclosures of nude images exist freely for the record. It takes no real leap of the imagination for one to envision that a jury might find that the victim suffered no real damage beyond what they themselves had already published for the public eye.

B. Rape Shield Laws

The United States carries with it a troublesome history of gender bias in rape jurisprudence.[162] In particular, women who lack sexual purity also lack credibility in making rape claims.[163] As Professor Aviva Orenstein described, "the law treated a woman claiming to be a rape victim with great suspicion, subjecting her to intense cross-examination regarding her dress, sexual history, and proclivities. Any

156. *See id.* at 750.

157. *See* Daly, *supra* note 150, at 372 ("The doctrine is currently not in good health, and some might even say that it is beyond hope.").

158. *See* 501 U.S. 496 (1991).

159. *Id.* at 523.

160. *See id.* (opining that the matter is "a question of state law" and that "we are given no indication that California accepts this doctrine, though it remains free to do so").

161. *See* Daly, *supra* note 150, at 372 (footnote omitted) (writing that before *Masson*, "[t]he District of Columbia Circuit had already rejected it, and the Second Circuit (credited with having spawned the doctrine) had come close to repudiating it.").

162. *See* Alexandre, *supra* note 65, at 45–46 (footnotes omitted) ("Until the complete eradication of gender bias from rape laws is made an expressed goal by the legislature and judicial bodies, women, particularly non-traditional women, will continue to suffer from implied and express gender biases in the implementation of rape laws.").

163. *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 53 (2002) (footnote omitted) (finding that "an unchaste woman was considered more likely to have succumbed willingly to the defendant's sexual advances and to have lied about it later").

prior sexual activity on her part outside of marriage undermined the veracity of the victim's claim."[164] Coupled with the rape, this dual victimization provided an avenue for further attack on her values, character, and dignity.[165] The humiliation and harassment women faced during trial led to rape becoming "the least reported crime."[166]

In response, jurisdictions across the United States began to pass rape shield laws in the 1970s.[167] By the next decade, every state and the federal government had adopted some version of this legislation.[168] Rape shield laws, to varying degrees, prohibit the introduction of a victim's previous sexual history as evidence in rape trials.[169] In essence, these statutes serve to combat the so-called "chastity requirement" formerly inherent in rape law.[170]

Federal Rules of Evidence Rule 412 forbids "(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition" from admission in proceedings involving alleged sexual misconduct.[171] In criminal cases, exemptions exist for:

> (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights.[172]

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164. Aviva Orenstein, *The Seductive Power of Patriarchal Stories*, 58 HOW. L.J. 411, 413 (2015) (footnote omitted).

165. *See id.* at 413–14.

166. *See* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764 (1986) (footnote omitted) (additionally quoting then Representative Elizabeth Holtzman as saying that "[i]t is estimated that as few as one in ten rapes is ever reported.").

167. *Id.* at 765.

168. *See* Tasha Hill, *Sexual Abuse in California Prisons: How the California Rape Shield Fails the Most Vulnerable Populations*, 21 UCLA WOMEN'S L.J. 89, 90 (2014) ("In the 1970s and 1980s, recognizing the importance of protecting complaining witnesses, all fifty states, the federal government, and the District of Columbia passed varying versions of rape shield laws.").

169. *See* Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1246 (1989) ("[Rape shield] laws are designed, through a variety of means, to restrict the historically unlimited inquiry into a woman's sexual past in order to negate the claim of nonconsensual sex.").

170. *See* Anderson, *supra* note 163, at 54 ("Rape shield laws emerged on the legal landscape to curtail the excesses of the chastity requirement.").

171. FED. R. EVID. 412.

172. *Id.* R. 412(b)(1).

And in a civil case, Rule 412 requires the judge to weigh whether the evidence's "probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[173]

While the laws could face constitutional challenges, these challenges seem unlikely to succeed.[174] The Sixth Amendment right to present a complete defense—as the Supreme Court pointed out in *Michigan v. Lucas*[175]—stops short of absolute.[176] In upholding Michigan's statute, the Court found that rape shield laws "represent[] a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."[177]

Due to its similarities to rape, some refer to nonconsensual pornography as "cyber rape."[178] Like rape, the act serves as a way to exert sexual dominance over victims[179] and to deny victims control of their own bodies.[180] A recent study showed that nonconsensual pornography victims even share symptoms of rape trauma syndrome such as "high levels of stress, alcohol use, PTSD, clinical depression, and [blaming] themselves for the assault."[181] The study also found that victims of both forms of violence share common coping mechanisms including avoidance, denial, and self-medication.[182]

The fundamental difference between rape and nonconsensual pornography rests with physical contact.[183] However, as Justice Horace Gray opined in 1891,

> [t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass.[184]

Furthermore, Professors Danielle Keats Citron and Mary Anne Franks keenly note that voyeurism laws already acknowledge that harm and suffering can result without physical contact.[185]

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173. *Id.* R. 412(b)(2).
174. Hill, *supra* note 168, at 128.
175. 500 U.S. 145 (1991).
176. *See id.* at 149.
177. *Id.* at 150.
178. Citron & Franks, *supra* note 6, at 346 n.10.
179. *See* Bates, *supra* note 20, at 25.
180. Citron & Franks, *supra* note 6, at 353.
181. Bates, *supra* note 20, at 33.
182. *Id.* at 39.
183. *See* Citron & Franks, *supra* note 6, at 362.
184. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891).
185. Citron & Franks, *supra* note 6, at 363.

With these things in mind, one could logically deduce how victims of rape and nonconsensual pornography should share one more notion: shield laws. In promoting the willingness of victims to come forward and protecting them from jury bias, the protections would operate comparably to existing laws. By providing an escape from the "chastity requirement"[186] in today's laws related to nonconsensual pornography, victims could successfully find remedies regardless of their previous sexual history—including their *consensual* publishing of nude images.

CONCLUSION

In commenting on the Blac Chyna/Rob Kardashian incident, California trial attorney Mitch Jackson said that "[w]hen it comes to social media, the law (in general) is 10 years behind the times."[187] This Article illustrates Jackson's point. Under California criminal law, a perpetrator who publishes nonconsensual pornography of someone who has previously released nude images may elude prosecution.[188] Likewise, the victim stands little chance of recovering through tortious remedies such as intentional infliction of emotional distress, intrusion upon seclusion, and public disclosure of private facts.[189]

Because the victim already has sexual images on display, it can prove difficult to demonstrate such factors as whether she or he actually suffered serious emotional distress,[190] whether the perpetrator's conduct was outrageous,[191] or even whether the victim had a reasonable expectation of privacy.[192] Under current criminal and civil law, something akin to the incremental harm doctrine comes into play for the hypothetical victims discussed here.[193] In other words, a jury may determine a victim only suffered minimal damage compared to what images already exist for the public eye.[194] At which point, the jury could foreseeably determine that one or more of the aforementioned elements were not met.[195]

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186. *See* Anderson, *supra* note 163, at 53.

187. Maria Puente, *Rob Kardashian's X-Rated Rant Against Blac Chyna Could Be a Crime*, USA TODAY (July 5, 2017, 7:10 PM), https://www.usatoday.com/story/life/people/2017/07/05/rob-kardashians-x-rated-online-rant-against-blac-chyna-could-be-crime/103453660 [https://perma.cc/N3EG-ZRJZ].

188. *See* discussion *supra* Part I.

189. *See supra* Sections II.A–C.

190. *See supra* note 89 and accompanying text.

191. *See supra* note 87 and accompanying text.

192. *See supra* notes 100–08 and accompanying text.

193. *See* discussion *supra* Section III.A.

194. *Id.*

195. *Id.*

However, rape shield laws provide a possible path forward.[196] These laws already exist to keep a victim's previous sexual history out of the courtroom in cases involving sexual misconduct,[197] so their application to nonconsensual pornography episodes seems obvious. Given the similarities between victims of rape and nonconsensual pornography,[198] it logically follows that these shield laws would also protect nonconsensual pornography victims from "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."[199] As Chyna's attorney Lisa Bloom stated, "any explicit photos that she may have chosen to post in the past, that's her choice."[200]

Chyna's attorney laid out the principles of exactly what this Article argues.[201] "We have the right to say no to the release of explicit images," Bloom said, adding that "[i]t doesn't matter what images may already be out there."[202] This author thinks she hit the nail on the head. In the words of our unanticipated hero, "I am Angela White, I'm Blac Chyna. I can do whatever I want. It's my body."[203]

196. *See* discussion *supra* Section III.B.
197. *Id.*
198. *See id.*
199. *See* FED. R. EVID. 412 advisory committee's note to 1994 amendment (explaining the intent in the Notes of Advisory Committee on proposed 1994 Amendment).
200. Izadi, *supra* note 2.
201. *Id.*
202. Mettler, *supra* note 4.
203. Izadi, *supra* note 2.