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Revenge Porn and Antidiscrimination Law: A Traditional Solution for the Modern Age

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This Note examines the phenomenon of nonconsensual pornography, or "revenge porn," and proposes a novel approach to addressing its consequences. Existing laws and discussions on revenge porn have focused too heavily on punishment and deterrence. As technological advances make it even more difficult to hold perpetrators criminally and civilly liable, lawmakers and advocates should focus on providing victims with the strongest tools to combat the aftereffects of revenge porn. While Title VII may provide an existing remedy for some victims that have suffered employment discrimination, the growing challenges surrounding revenge porn call for new and more comprehensive legislation. Specifically, federal and state law should define victims of revenge porn as an explicit class for purposes of antidiscrimination law. This Note proposes, using the Equality Act as a model, that antidiscrimination law can provide a new tool alongside existing remedies to protect and support these victims.

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INTRODUCTION

In 2015, Tara Dozier was working at a small chocolate company in Blaine, Washington, a town of around 5,000 people.[1] On November 5th, Dozier's ex-boyfriend contacted her and began posting nude photos of her online that she had previously sent him during their intimate relationship. Along with the photos, the ex-boyfriend posted Dozier's contact information and home address, which were downloaded and shared tens of thousands of times. The consequences were quick and unrelenting: Dozier received death threats and invitations for pedophiles to attack her children. She struggled to get the photos taken down. But her nude photos were not just posted to online forums; they were also sent directly by others to her friends and coworkers. After receiving the photos, Dozier's employer, the chocolate company, fired her. While it is unclear what, if any, action Dozier ultimately took, Washington State has both a criminal and civil remedy for revenge porn victims.[2]

Erick Adame was a familiar face to many New Yorkers as the on-air meteorologist on local news station NY1 for almost five years.[3] Adame received multiple awards for his work on "Mornings on 1," including two Emmy nominations. Yet his successful professional life came to a halt in September 2022, when he was fired from NY1 after his employer received sexually explicit images and video of Adame.[4] Adame shared in a public Instagram post that he had secretly performed for other men on an "adult

1. Melissa Crowe, *'Revenge Porn' Can Devastate Victims—and Their Employers*, PUGET SOUND BUS. J. (Aug. 5, 2016), https://www.bizjournals.com/seattle/blog/techflash/2016/08/revenge-porn-can-devastate-victims-and-their.html [https://perma.cc/6KQ6-PBVV].

2. WASH. REV. CODE § 7.110.020, 9A.86.010 (2024). While this Note refers to "victims" rather than "survivors" of revenge porn, this is not meant to reflect a position about "the best way to refer to those who have suffered sexual violence." Michele C. Nielsen, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230, 234 n.16 (2017).

3. Erick Adame, *Resume*, ERICKADAME.NET (2022), https://www.erickadame.net/_files/ugd/88bb93_8e8ccd7de446498aaea3f9261c55e61a.pdf [https://perma.cc/K9MV-4WGD].

4. Ted Johnson, *NY1 Meteorologist Erick Adame Pens Apology After Being Terminated for Appearance on Adult Cam Website*, DEADLINE (Sept. 19, 2022), https://deadline.com/2022/09/new-york-one-meteorologist-erick-adame-terminated-apology-adult-site-1235122429 [https://perma.cc/S2KK-HZJT].

cam website," which he believed was a private space, for over a decade.[5] After his termination, Adame sought a subpoena that would reveal the identity of the anonymous individual who allegedly captured the photos and video from his broadcasts, shared them in a public online forum, and sent them directly to his employer and his mother.[6]

Adame's subpoena request is based on New York's "revenge porn"[7] law, enacted in 2019, which provides a civil cause of action against those who engage in the "unlawful dissemination or publication of an intimate image."[8] If Adame successfully identifies the individuals who distributed images and videos of him and prevails on a claim under this law, he may be entitled to a variety of remedies, including injunctive relief, punitive damages, compensatory damages, and reasonable court costs and attorney's fees.[9]

Despite Adame's "hopes" for a return to NY1 and public support in the wake of his termination, his representative indicated he is unlikely to be hired back.[10] Dozier was able to find another job after several months, but her new workplace soon became aware of the explicit photos, and Dozier shared that they were working to keep it "quiet" (with unknown results).[11]

5. *Id.*; *see also* Matthew Rodriguez, *A News Outlet Fired a Gay Weatherman for Appearing on an Adult Cam Site*, THEM (Sept. 20, 2022), https://www.them.us/story/erick-adame-gay-weatherman-fired-adult-cam-site [https://perma.cc/4YCK-3YXC] (quoting Adame's Instagram post, which has since been deleted).

6. Verified Petition, Adame v. Unit 4 Media, Ltd., No. 158020/2022 (N.Y. Sup. Ct. Sept. 19, 2022).

7. "[A]lthough scholars still frequently use the term 'revenge porn' in light of its widespread familiarity, many prefer the broader term 'nonconsensual pornography' or 'nonconsensual disclosure of intimate imagery' so as to signal an appropriately broader scope. This [Note's] use of the term revenge porn is intended to reflect the colloquial usage of the term and is not tightly limited to circumstances involving vengeance toward the victim." Andrew Gilden, *The Queer Limits of Revenge Porn Laws*, 64 B.C. L. REV. 801, 813 (2023).

8. N.Y. CIV. RIGHTS LAW § 52-b (McKinney 2024).

9. *Id.*

10. Dominic Patten, Jill Goldsmith & Erik Pedersen, *Fired NY1 Meteorologist Erick Adame Fielding Offers, Doesn't Expect to Return to Spectrum Job After Sex Scandal, Rep Says*, DEADLINE (Sept. 20, 2022), https://deadline.com/2022/09/fired-ny1-weatherman-erick-adame-job-offers-wont-return-to-spectrum-1235123464 [https://perma.cc/M6GS-SAWH].

11. Crowe, *supra* note 1.

The concept of "revenge porn" has existed for decades,[12] but the rise of the internet, cell phones, and, most recently, artificial intelligence, has transformed it. In a millisecond, an intimate photo or video can be shared with millions and become permanently available online. Numerous scholarly articles have explored the nature, propriety, and effectiveness of anti-revenge porn laws.[13] These debates often focus on which laws are best equipped to tackle revenge porn and the appropriate, sometimes competing goals of such laws: deterring future acts of revenge porn, punishing past instances of revenge porn, compensating victims for the harm inflicted upon them, and making victims whole to the extent possible.

The fight against revenge porn is at an inflection point, with significant victories behind it and new challenges ahead. In the last decade, after intensive advocacy, every state in the United States has criminalized revenge porn. While these laws have provided a clear symbolic victory, successful prosecutions remain rare.[14] These criminal laws suffer from multiple deficiencies, from stringent *mens rea* requirements to the complexity of prosecuting the crime itself.[15] At the same time, the problem is evolving: Technological advances will make revenge porn still more difficult to prosecute.

This Note argues that lawmakers and advocates should focus on providing victims with the strongest tools possible to combat the *aftereffects* of revenge porn. To do so, federal and state law should define victims of revenge porn as an explicit class for purposes of antidiscrimination law. Currently, six states provide narrowly defined

12. *See infra* Section I.A.

13. *See* Gilden, *supra* note 7, at 810-17 (collecting articles and statutory developments).

14. *E.g.*, David Migoya, *Colorado's Revenge Porn Law Brings Nearly 200 Charges, but Getting Convictions Is a Challenge*, DENV. POST (Sept. 25, 2017), https://www.denverpost.com/2017/09/25/colorados-revenge-porn-law-brings-200-charges-convictions-challenge [https://perma.cc/Y4CQ-9FVN].

15. *See generally* Jordan Stevenson, *Revenge Porn: Four Barriers to Prosecuting the Crime*, CRIM. L. PRAC. (Feb. 26, 2024), https://www.crimlawpractitioner.org/post/revenge-porn-four-barriers-to-prosecuting-the-crime [https://perma.cc/3SND-GH4J] ("Due to the complex nature of these crimes and aspects of the state criminal laws against them, several issues arise when prosecuting non-consensual pornography or image-based sexual abuse, including narrow definitions of pornography, moderate penalties or difficult mens rea requirements.").

protections for revenge porn victims in employment.[16] But this Note recommends more ambitious laws that cover all areas of antidiscrimination, including housing and education. Such antidiscrimination legislation holds the potential to raise the ambition of civil protections where criminal legislation is more limited. To begin with, a civil antidiscrimination law should transcend the narrow statutory definitions in place for criminal-revenge porn laws. Criminal law is also limited in combatting cases of revenge porn involving AI-generated porn in which a perpetrator may be unidentifiable.[17] Criminal law will continue to have a role to play as a deterrent and for more "traditional" cases of revenge porn, but antidiscrimination law should be the next frontier. Rather than confronting difficult issues around identifying and prosecuting perpetrators and punishing digital platforms, antidiscrimination law has a well-developed and well-suited framework for protecting victims of revenge porn.

Part I of this Note provides an overview of the social and legal history of revenge porn, efforts by jurisdictions to combat this growing threat, the strengths and weaknesses of these efforts, and the resulting consequences for victims. Part II evaluates the promise of existing antidiscrimination law to combat revenge porn and outlines the stages of a hypothetical Title VII claim for gender-based employment discrimination. Part III proposes a new model for state and federal governments to adopt that would codify revenge porn victims as a discrete class for the purposes of antidiscrimination law across the board. This Part will offer arguments in favor and against this potential model. Finally, Part IV looks ahead at the next battlefield of sexual privacy—deepfake and AI-generated porn—and suggests that a new antidiscrimination law holds potential as an effective tool to protect victims.

I. HISTORICAL OVERVIEW

A. History of Revenge Porn

"Revenge porn," also known by a number of other terms, including "nonconsensual pornography" and "image-based sexual abuse," is generally defined as the distribution of sexually graphic images or other media of

16. *See infra* notes 62-67 and accompanying text.

17. *See infra* Part IV.

individuals without their consent.[18] Revenge porn predated the internet,[19] but the Internet turbo-charged its potential harm, creating the ability to immediately share media worldwide alongside the difficulty of never fully "deleting" something once shared.[20] A prominent and early example of the online revenge porn phenomenon was IsAnyoneUp, an adult website created by Hunter Moore in 2010 that allowed anyone to upload nude photographs of individuals, often linked to identifying information such as their real names and social media profiles.[21] After sustained criticism by the media and a rumored government investigation, Moore decided to close the

18. *Definitions*, CYBER C.R. INITIATIVE, https://web.archive.org/web/20230326124551/https://cybercivilrights.org/definitions [https://perma.cc/TTX2-WBMV]; *see also Revenge Porn*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/revenge%20porn [https://perma.cc/9LZW-35DT] (defining revenge porn as "sexually explicit images of a person posted online without that person's consent especially as a form of revenge or harassment").

19. Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 19, 2013), https://nymag.com/news/features/sex/revenge-porn-2013-7 [https://perma.cc/4TT4-PX2X]; *see*, *e.g.*, Associated Press, *Police: Man Left DVDs of Ex-Girlfriend Performing Sex Acts on Car Windshields*, FOX NEWS (Jan. 13, 2015), https://www.foxnews.com/story/police-man-left-dvds-of-ex-girlfriend-performing-sex-acts-on-car-windshields [https://perma.cc/3FU9-RMGD].

20. Mary Anne Franks, *Drafting An Effective "Revenge Porn" Law: A Guide for Legislators*, CYBER C.R. INITIATIVE (Sept. 22, 2016), https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf [https://perma.cc/8XYH-J72C]; Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1304 (2017) [hereinafter Franks, *"Revenge Porn" Reform*] ("A judge can order a victim's ex-boyfriend to destroy any copies of nude photos he has in his possession and to stop posting such material to the Internet, but if the ex-boyfriend has already uploaded those photos to dozens of revenge porn sites, which in turn have allowed thousands of users to view, download, and forward those photos, this order can hardly make a dent in the damage.").

21. Danny Gold, *The Man Who Makes Money Publishing Your Nude Pics*, AWL (Nov. 10, 2011), https://www.theawl.com/2011/11/the-man-who-makes-money-publishing-your-nude-pics [https://perma.cc/EZF7-8QWS]; *see also* Anderson, *Exposed Women Confront Website Owner: 'What is Your Motive?'*, YOUTUBE (Nov. 21, 2011), https://youtu.be/GAcXjjD3nYg [https://perma.cc/72SV-YLRU] (showing a confrontation between Moore and two individuals whose photos were sent to his site).

site in 2012.[22] That same year, Dr. Holly Jacobs, a victim of revenge porn, launched the "End Revenge Porn" campaign to garner support for the criminalization of revenge porn.[23] At the time, only three U.S. states—Alaska, New Jersey, and Texas—had criminal laws that could be directly applied to revenge porn.[24] Dr. Jacobs joined forces with two law professors, one of whom developed model legislation first made public in September 2013.[25] As of March 2024, forty-eight states, Washington D.C., and two U.S. territories have enacted criminal laws explicitly targeting revenge porn.[26] A federal law to criminalize revenge porn has been introduced in multiple sessions of Congress in various forms[27] and most recently passed the U.S. House of Representatives in March 2021 as an amendment to the Violence Against Women Reauthorization Act.[28] At least half of the states that have

22. Tsoulis-Reay, *supra* note 19. Moore eventually pled guilty to charges of federal hacking and federal aggravated identity theft and was sentenced to thirty months in prison. Phil Helsel, *Revenge Porn Kingpin Hunter Moore Pleads Guilty, Faces Jail*, NBC NEWS (Feb. 25, 2015), http://www.nbcnews.com/news/crime-courts/revenge-porn-kingpin-hunter-moore-pleads-guilty-faces-jail-n313061 [https://perma.cc/RLR6-3TDY].

23. Holly Jacobs, *Being a Victim of Revenge Porn Forced Me to Change My Name—Now I'm an Activist Dedicated to Helping Other Victims*, XO JANE (Nov. 13, 2013), https://web.archive.org/web/20180522112722/https://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs [https://perma.cc/Z7M7-CM3].

24. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1280.

25. *Id.* at 1269 n.129; *see also* Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), https://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html [https://perma.cc/EPQ8-JCMD].

26. *Nonconsensual Pornography Laws*, CYBER C.R. INITIATIVE, https://cybercivilrights.org/nonconsensual-pornography-laws [https://perma.cc/G5D9-YPQQ].

27. *See, e.g.*, Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

28. Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021); Press Release, Off. of Congresswoman Jackie Speier, Speier and Katko Amendment to Address Online Exploitation of Private Images Included in Violence Against Women Reauthorization Act (Mar. 17, 2021), https://web.archive.org/web/20210318135348/https://speier.house.gov/press-releases?id=FB99CA92-BFA3-4E6A-AA97-56AE155C46E3 [https://perma.cc/RG2J-ZVGW]. For an update on the progress of federal legislation on criminalization in 2025, see *infra* note 193.

enacted criminal laws (as well as the federal government) have also created civil causes of action for revenge porn victims.[29] A number of these states have used the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act, adopted by the Uniform Law Commission in July 2018.[30] This Act includes the ability for victims to proceed anonymously and provides several remedies, including the potential for punitive damages and injunctive relief.[31] Victims of revenge porn have attempted (with mixed results) to use a variety of civil remedies over the years to seek redress, including copyright law and sexual harassment law.[32] Technology companies have also pledged to slow and stop the distribution of offending content.[33]

Anti-revenge porn efforts have not been limited to the United States. In 2009, the Philippines became the first country to criminalize revenge porn.[34] Since then, Australia, Canada, England, Italy, Israel, Japan, Malta, New Zealand, Northern Ireland, Scotland, Singapore, and Wales have made revenge porn a crime.[35] Australia also established an administrative scheme

29. Pam Greenberg, *Fighting Revenge Porn and 'Sextortion'*, NAT'L CONF. OF STATE LEG. (July 29, 2019), https://www.ncsl.org/research/telecommunications-and-information-technology/fighting-revenge-porn-and-sextortion.aspx [https://perma.cc/J2BR-LKYA]; *see, e.g.*, CAL. CIV. CODE § 1708.85(a) (West 2016); *Nonconsensual Pornography Laws*, *supra* note 26; Violence Against Women Act (VAWA) Reauthorization Act of 2022, Pub. L. No. 117-103, § 1309(b)(1)(A), 136 Stat. 840, 930.

30. UNIF. CIV. REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT (UNIF. L. COMM'N 2018).

31. *Id.*

32. *See infra* notes 42-43 and accompanying text.

33. *See* Gilden, *supra* note 7, at 818 ("[M]ajor search engines and social media platforms have [also] adopted new policies prohibiting nonconsensual nudity."); Franks, *"Revenge Porn" Reform*, *supra* note 20, at 1270 (noting that major technology companies took voluntary action to combat revenge porn).

34. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1279-80.

35. *Id.*; *see, e.g.*, Zoe Tidman, *Italy Criminalizes Revenge Porn with Prison Sentences of up to Six Years*, INDEPENDENT (Apr. 4, 2019), https://www.independent.co.uk/news/world/europe/revenge-porn-italy-five-star-league-red-code-bill-a8853591.html [https://perma.cc/4AJL-LBXJ]; Jessica Arena, *Viral Video Warns Against Spreading of Revenge Porn*, TIMES OF MALTA (Mar. 27, 2021), https://timesofmalta.com/articles/view/viral-video-warns-against-spreading-of-revenge-porn.860713 [https://perma.cc/74H6-CLE3]; *Singapore Outlaws 'Revenge Porn', 'Cyber-Flashing*,' YAHOO NEWS (May

that allows the Australian eSafety Commissioner to receive and investigate complaints of revenge porn, issue take-down notices to the appropriate website or hosting provider, and impose civil penalties on those who violate the law.[36] While there is no specific criminal or civil penalty for revenge porn in Germany, the country's Federal Court of Justice has held that "everyone ha[s] the right to decide whether to grant insight into their sex life—including to whom they grant permission and in what form" and "ordered a man to destroy intimate photos and videos of his ex-partner because they violate her right to privacy."[37]

In stories like Adame's and Dozier's, victims have lost their jobs after their employers received sexually explicit photos or videos with no connection to their work.[38] With one survey reporting that more than four out of five U.S. adults have sent or received explicit texts or photos, cases of backlash against those with leaked explicit images or other media will likely become more frequent.[39] In one online study that sampled proportionate numbers of men and women across all fifty states, one in twelve people reported at least one experience of revenge porn victimization in their lifetime, and one in twenty reported being perpetrators of revenge porn.[40]

7, 2019), https://news.yahoo.com/singapore-oulaws-revenge-porn-cyber-flashing-082920514.html [https://perma.cc/EPN9-9NVK].

36. Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018 (Austl.).

37. *Sex Tape Row: German Court Orders Man to Destroy Naked Images*, BBC NEWS (Dec. 22, 2015), https://www.bbc.com/news/world-europe-35159187 [https://perma.cc/J7LQ-4U9D].

38. *See, e.g.*, Anya Zoledziowski, *A Teacher Who Joined OnlyFans to Support Her Family Was Fired*, VICE NEWS (Sept. 23, 2022), https://www.vice.com/en/article/teacher-sara-juree-onlyfans-indiana [https://perma.cc/R76V-XKZC]; Annie Seifullah, *Revenge Porn Took My Career. The Law Couldn't Get It Back*, JEZEBEL (July 18, 2018), https://jezebel.com/revenge-porn-took-my-career-the-law-couldnt-get-it-bac-1827572768 [https://perma.cc/Y939-2PVX].

39. *See* Jessica M. Goldstein, *'Revenge Porn' Was Already Commonplace. The Pandemic Has Made Things Even Worse.*, WASH. POST (Oct. 29, 2020), https://www.washingtonpost.com/lifestyle/style/revenge-porn-nonconsensual-porn/2020/10/28/603b88f4-dbf1-11ea-b205-ff838e15a9a6_story.html [https://perma.cc/2TTK-ETRA].

40. Yanet Ruvalcaba & Asia A. Eaton, *Nonconsensual Pornography Among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration, and Health Correlates for Women and Men*, 10 PSYCH. VIOLENCE 1, 1 (2020).

B. Limits in Existing Anti-Revenge Porn Laws

Despite the seemingly uniform decision among states over the last ten years to use criminal law as the primary tool to combat revenge porn, the legal academy and commentators more broadly have been split on the proper framing of the problem and, consequently, the best way forward.[41] Mary Anne Franks and Danielle Keats Citron, the primary forces in the legal field behind the anti-revenge porn movement, have been vocal about their view that, while criminalization does not necessarily eliminate the need for other avenues of redress, it is a more effective deterrent than civil remedies.[42] Others, however, defend civil remedies on the basis that they are effective[43] and avoid problems inherent in criminalization.[44]

One significant weakness of existing criminal laws to combat revenge porn is their narrowing language to achieve compliance with the First Amendment. In the initial years of the anti-revenge porn legal movement, the American Civil Liberties Union (the "ACLU") and other allied organizations took a strong stand against these efforts. Initially, the position of the ACLU was that no anti-revenge porn criminal law could be compatible with the First Amendment.[45] The organization subsequently abandoned this position but nonetheless continued to oppose newly proposed and enacted state laws, arguing that anti-revenge porn laws as written could be read to cover constitutionally protected conduct, such as reporting on sexual conduct in the news or the inadvertent sharing of intimate media that could be considered revenge porn.[46] The ACLU achieved significant success

41. *See* Gilden, *supra* note 7, at 809-17 (providing an overview of the legal scholarly framings in the revenge porn debate).

42. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 360-61 (2014) (advocating for criminalization of revenge porn and describing the weaknesses of using tort law, copyright law, and sexual harassment law as anti-revenge porn tools).

43. *See, e.g.*, Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014) (advocating for the creation of a new negative right vested in identifiable subjects of intimate media over distribution and display); Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. LAW 422 (2014).

44. *See* Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013), https://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea [https://perma.cc/AC5D-ET3W].

45. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1327.

46. *Id.*; *see also* Gilden, *supra* note 7, at 819 n.90 (describing the ACLU's position).

on this front after filing a lawsuit challenging the constitutionality of Arizona's anti-revenge porn law in 2014.[47] The ACLU agreed to voluntarily dismiss the lawsuit after Arizona agreed not to enforce the law before passing an amended version. While the original law treated revenge porn as a violation of privacy, the revised law became a "duplicative anti-harassment provision," in the words of Franks.[48] Even though the ACLU's lawsuit was never adjudicated, the state legislature succumbed to the ACLU's demands and amended the statute to cover only those who act with "the intent to harm, harass, intimidate, threaten or coerce the depicted person."[49] Despite the fact that no anti-revenge porn law without an "intent to harass" requirement has ever been struck down by a state supreme court or the U.S. Supreme Court as unconstitutional,[50] the ACLU has insisted that only its narrow definition can satisfy constitutional scrutiny.[51] As a legal matter, this claim conflicts with the longstanding requirement that "constitutional overbreadth concerns 'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'"[52] There has not been any evidence of the type of overreach the ACLU cautioned against, such as prosecutions of reporters or parents sharing family photos.[53] The ACLU's position also ignores the nature of revenge porn itself:

> Treating nonconsensual pornography as a harassment issue instead of a privacy issue demotes the harm it causes from an invasion of privacy to something more akin to hurt feelings . . . The approach taken by the ACLU and special interest groups like the Media Coalition and the MPAA allows revenge porn site operators to destroy the lives, careers, reputations, and personal relationships of thousands of people, mostly women, so long as their motives are

47. *See* Complaint for Declaratory and Injunctive Relief, Antigone Books L.L.C. v. Horne, No. 14-CV-2100 (D. Ariz. Sept. 23, 2014) (suing to enjoin an allegedly overbroad revenge porn statute on First Amendment grounds).

48. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1327.

49. ARIZ. REV. STAT. § 13-1425 (2023).

50. New Jersey's revenge porn law, for example, has been in effect since 2003 with no "intent to harass" requirement and is arguably broader than the Cyber Civil Rights Institute's and Professor Franks' model statute. It has never been declared unconstitutional facially or in an "as applied" challenge. *See* N.J. REV. STAT. § 2C:14-9 (2023).

51. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1328 n.400.

52. *Id.* at 1330 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

53. *Id.* at 1329-30.

> greed or voyeurism: rapists may continue to distribute footage of their sexual assaults on social media; nursing home workers may continue to share nude photos of vulnerable patients for entertainment; and police officers may continue to trade naked photos stolen from women they have detained as a "game."[54]

However, while Franks's model legislation does not include the ACLU's preferred intent requirement and maintains a privacy-oriented approach to the crime, it does include limitations to help comply with the First Amendment. For example, the statute excludes "[i]mages involving voluntary exposure in public or commercial settings."[55] The statute also exempts "[d]isclosures made in the public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment."[56] Franks has defended these exceptions as necessary to "insulat[e] news reporting and commercial pornography from prosecution."[57] Both the "intent to harass" state-of-mind requirement and the "public and commercial settings" exceptions have found their way into nearly every criminal revenge porn law in the United States.[58] Similar exceptions can be found in the civil counterparts of these laws.[59] Many of

54. *Id.* at 1333, 1335.

55. *See* Gilden, *supra* note 7, at 819 n.94.

56. *Id*. at 820 n.97.

57. *Id*. at 820.

58. *Id*. at 820-21.

59. *See, e.g.*, *id*. at 822 ("A victim of sexual assault, of course, should not be deprived of legal remedies based on the location of their assault, but this provision signals that the [Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act ("UCRUDIIA")] does not draw distinctions solely based upon whether a person's naked body was visible to a large number of people. Instead, [UCRUDIIA] draws privacy distinctions based upon whether someone voluntarily displayed their body outside of their home or to people who are not their intimate partner, regardless of the defendant's motive or the plaintiff's injuries. To the extent that UCRUDIIA and other revenge porn laws are meant to push back against blaming victims for letting other people see their naked bodies, these laws nonetheless tolerate certain forms of victim-blaming.").

these laws are even narrower than just these two discrete exceptions and, as a result, are often simply duplicative of existing anti-harassment laws.[60]

II. EXISTING ANTIDISCRIMINATION LAW AND REVENGE PORN

While there has been significant legal scholarship and action to enact criminal and civil statutes targeting revenge porn, little has been written or enacted on revenge porn and antidiscrimination law.[61] Only six states have any explicit antidiscrimination protections for revenge porn victims.[62] And these protections have significant limits. First, they are limited exclusively to the employment context.[63] While this is a crucial area of protection since "one of the major consequences of revenge porn is the loss of employment opportunities,"[64] an employment-only protection leaves out many of the traditional areas of antidiscrimination law, including housing, public accommodations, education, federally funded programs, credit, and jury service.[65] Second, these employment protections are statutorily linked with their criminal statute counterparts and generally only apply when a victim falls within the criminal statute's protection. Professor Andrew Gilden provides an example of how this could operate in practice:

> [I]f a woman in Oregon was photographed by her then-boyfriend while she was showering, and he sends that nude photo to the woman's employer after they broke up, that employer would be

60. *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1940 (2019) ("Franks has worked closely with most state lawmakers interested in criminalizing nonconsensual pornography, yet far too many failed to follow her well-crafted proposed model statute. In Franks's view, many of the recently adopted state laws criminalizing nonconsensual pornography are so narrow that they will do little to combat the problem.").

61. *See* Gilden, *supra* note 7, at 863 ("Finally, one promising avenue for reform that has received little scholarly attention is the extension of antidiscrimination laws to the victims of revenge porn.").

62. These states are California, Hawaii, Illinois, New York, Oregon, and Washington State. *Id.* at 823.

63. *Id.*; *see, e.g.*, 820 ILL. COMP. STAT. § 180/30(a)(1)(A) (2023).

64. Gilden, *supra* note 7, at 824.

65. *Cf.* Civil Rights Act of 1964, 42 U.S.C. § 1971 (2018); Equality Act, H.R. 15, 118th Cong. (2023) (prohibiting discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system).

> legally prohibited from firing her. By contrast, if her ex-boyfriend photographed her topless on a clothing-optional beach, and he vengefully sent the nude photo to her employer, the employer would not be prohibited from taking action on the basis of the image.[66]

Three of the six states further limit the reach of their employment protections.[67] Before exploring how these relatively new laws can be improved and expanded, I examine in this Part existing legal frameworks as potential avenues for redress.[68] I focus on Title VII and domestic violence statutes in this Part because they have the strongest potential to aid revenge porn victims.

A. Analyzing a Potential Title VII Claim

Title VII offers one avenue of protection against employment discrimination. Under Title VII, it is illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex . . . ."[69] Violations of Title VII fall into two principal categories: first, intentional discrimination based on disparate treatment; second, employment practices that have a disparate impact on the basis of a protected trait and that employers cannot justify as sufficiently related to "business necessity."[70]

66. Gilden, *supra* note 7, at 824.

67. *Id.* ("[I]n California, Hawai'i, and Washington, employment protections only apply to revenge porn practices that fall within narrower statutory definitions of domestic violence, further excluding unauthorized disclosures for which the genesis lies outside familial or other traditionally intimate relationships.").

68. Given that the employment context is both the most frequently reported source of discrimination against revenge porn victims, *see infra* note 89, as well as a well-developed area of antidiscrimination law, this Note's analysis largely focuses on the employment case. However, this does not eliminate the need for protections in other areas, including housing, which may require greater protections as intimate media distribution continues to increase.

69. 42 U.S.C. § 2000e–2(a)(1) (2018).

70. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

To prove disparate treatment, a claimant must show "that the defendant had a discriminatory intent or motive for taking a job-related action."[71] An employee can either present direct evidence of discrimination or use the "burden-shifting" approach to prove an inference of discrimination established in *McDonnell Douglas v. Green*.[72] In certain instances, a revenge porn victim may have a claim for disparate treatment, such as if they face sexual harassment at work after their coworkers or supervisors find the explicit media posted without their consent.[73] At least one court has found (at the motion-to-dismiss stage) that the termination of a female employee after her ex-boyfriend allegedly sent intimate photographs to her employer may constitute disparate treatment based on gender under Title VII.[74] However, absent unique circumstances or specific evidence of gender-based motivation,[75] a victim may struggle to find direct evidence of

71. Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (internal quotation marks omitted) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)).

72. 411 U.S. 792 (1973); *see also, e.g.*, Rachells v. Cingular Wireless Emp. Servs., LLC, 732 F.3d 652, 661 (6th Cir. 2013) ("Under the *McDonnell Douglas* framework, [a plaintiff] must first make out a prima facie case of . . . discrimination. If he meets this requirement, [the employer] must articulate some legitimate, nondiscriminatory reason for its employment decision. Finally, if [the employer] offers such an explanation, [the plaintiff] must point out evidence from which a jury could reasonably reject [the employer's] explanation as pretextual." (internal quotation marks and citations omitted)).

73. *Cf.* Lauren Boone, *"Because of Sex:" Title VII's Failures Leave Legal Sex Workers Unprotect*ed, 100 N.C. L. REV. 883, 901-03 (2022) (discussing a Title VII sexual-harassment case where the employer discovered that an employee was engaged in sex work and where the court found that the subsequent harassment was based on sex); Samuels v. Two Farms, Inc., No. 10-CV-2480, 2012 WL 261196, at *7-8 (D. Md. Jan. 27, 2012) (finding that a supervisor's harassment based on employee's second job as an exotic dancer was likely because of "her sex").

74. Miranda v. S. Country Cent. Sch. Dist., 461 F. Supp. 3d 17, 24 (E.D.N.Y. 2020) ("Here, accepting plaintiff's allegations as true, she was fired despite her denial that she had sent the photo to any student and the lack of evidence suggesting she had ever disseminated it to anyone else but the male teacher who she was dating at the time. Before the revelation of the image, there was no reason for defendants to terminate plaintiff's employment.").

75. *See id.* at 26 ("The complaint reiterates that upon completion of the investigation into the photo's origin, [the school district's Superintendent]

discrimination or a "similarly situated" non-protected comparator required at the first prima facie stage of the *McDonnell Douglas* framework.[76] This is because, in the case of "sex-plus" discrimination, where an employer is allegedly discriminating against a certain subgroup of a protected class (e.g., women with children, women who are victims of revenge porn), courts have split on what type of "comparator" evidence is needed to demonstrate that "the sexes were treated differently."[77]

A more promising avenue is Title VII's "disparate impact" framework. This framework originated in 1971 in *Griggs v. Duke Power Co.*, in which the Supreme Court interpreted Title VII to prohibit facially neutral employment practices that are "discriminatory in operation,"[78] and was later codified in the Civil Rights Act of 1991.[79] Under this doctrine, courts use a burden-shifting framework to determine whether a disparately impactful provision is lawful under Title VII:

> [A] plaintiff establishes a prima facie violation by showing that an employer uses a particular employment practice that causes a disparate impact on the basis of [a protected characteristic]. An employer may defend against liability by demonstrating that the practice is job related for the position in question and consistent with business necessity. Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.[80]

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personally commented to plaintiff that she had to be fired because of the photo depicting her 'female breasts.' This was not an isolated or stray derogatory remark about women, but direct evidence specifically tethering plaintiff's termination to her gender.").

76. *See Rachells*, 732 F.3d at 661.

77. Marc Chase McAllister, *Proving Sex-Plus Discrimination Through Comparator Evidence*, 50 SETON HALL L. REV. 757, 761 (2020); *see also, e.g.*, Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997) ("[G]ender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender [to demonstrate that they were treated differently from similarly situated members of the opposite gender].").

78. Griggs v. Duke Power Co., 401 U.S. 431, 431 (1971).

79. *See* 42 U.S.C. § 2000e–2(k) (2018).

80. Ricci v. DeStefano, 557 U.S. 557, 578 (2009) (internal citations and quotation marks omitted).

Thus, to the extent employer policies that permit or mandate the termination of revenge porn victims have a disparate impact on the basis of gender or sexual orientation,[81] such policies can only comply with Title VII if they are adequately supported by business necessity. While the Court has held that Title VII's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and gender identity,[82] it has not directly addressed whether a disparate-impact theory of liability is available to queer and non-cisgender employees.[83] Absent specific guidance, however, it is likely that such a claim would be available on the same basis as it is for other kinds of sex discrimination.[84]

1. "Prima Facie" Case

The first stage of a disparate impact claim is the prima facie case. This stage requires a plaintiff to prove "a significant statistical disparity and to 'demonstrate that the disparity [they] complain of is the result of one or more of the employment practices that [they are] attacking.'"[85] In the context of disparate-impact liability under the Fair Housing Act, the Supreme Court has emphasized that disparate impact requires a "robust causality requirement" between an allegedly unlawful policy and the disparity at issue in order to satisfy potential constitutional concerns.[86]

81. *See* Bostock v. Clayton County, 590 U.S. 644, 655-59 (2020) (holding that discrimination based on sexual orientation or gender identity is discrimination "because of" sex under Title VII).

82. *Id.*

83. *See* Alex Reed, *The Title VII Amendments Act: A Proposal*, 59 AM. BUS. L.J. 339, 361-62 (2022).

84. *See Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1625, 1636 (1996) (discussing disparate impact claims based on sexual orientation under state nondiscrimination law).

85. NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464, 476-77 (3d Cir. 2011) (quoting Newark Branch, NAACP v. City of Bayonne, 134 F.3d 113, 121 (3d Cir. 1998)).

86. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 521 (2015); *see* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288, 60320 (Sept. 24, 2020) (noting that *Inclusive Communities* relied on Title VII disparate impact case law and that "[h]istorically, disparate impact standards under Title VII have tracked standards under Title VIII Fair Housing Act liability.").

In most examples, revenge porn victims should be able to present a prima facie case of disparate-impact discrimination. Employer policies that permit the termination of revenge porn victims have a clear disparate impact on women and queer individuals. Research has shown that women are victims of revenge porn at significantly higher rates than men.[87] While research among queer individuals is more limited, there is strong evidence that sexual minorities suffer disproportionately from both threats and actual instances of revenge porn.[88] Given that a significant proportion of revenge porn victims suffer employment consequences,[89] it is very likely that these consequences, like the act itself, fall disproportionately on women and sexual minorities.

Revenge porn victims might face demands for unknowable data—such as employer specific rather than population level statistics—but precedent does not require this level of specificity. Employer-level statistics could prove difficult for an employee in a workplace or industry where the incidence of revenge porn is significantly lower than in the general population (e.g., a small office with individuals who are mostly technology averse). Yet some courts have seemingly required statistical proof that a policy had a disparate impact on protected class members in an employee's specific workplace rather than the protected class as a whole.[90] Given that the Supreme Court has been reluctant to clearly define what constitutes a disparate impact, courts will likely continue to disagree on what level of

87. *See, e.g.*, Ruvalcaba & Eaton, *supra note* 40, at 75; Citron, *supra* note 60, at 1919; *cf.* Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977) (finding a prima facie case of sex discrimination where a height and weight requirement for prison guards had the effect of excluding about forty-one percent of the United States female population but only one percent of the male population).

88. Gilden, *supra* note 7, at 814-15; Ruvalcaba & Eaton, *supra* note 40, at 75; Citron, *supra* note 60, at 1920; *see also* Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 LAW & SOC. INQUIRY 987, 987 (2019) ("The problem [of revenge porn] is worse among sexual minorities.").

89. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1264 (citing a study that showed six percent of revenge porn victims were fired and eight percent of victims quit their job).

90. *See* Julie Goldscheid, *Disparate Impact's Impact: The Gender Violence Lens*, 90 OR. L. REV. 33, 61-65 (2011); EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 192 (3d Cir. 1980); EEOC v. Navajo Refining Co., 593 F.2d 988, 991 (10th Cir. 1979).

specificity is necessary.[91] Still, the "proper comparison [is] between the . . . composition of [the at-issue jobs] and the . . . composition of the qualified . . . population in the relevant labor market."[92] The purpose of disparate impact liability is to stamp out hidden, systemic discrimination against protected classes. Using general population statistics, particularly when revenge porn is a "class-linked" characteristic predominantly affecting women and queer men, reflects this mission and is appropriate for a court to use.[93]

2. Business Necessity

Once a plaintiff makes their prima facie case of disparate impact, the burden shifts to the employer to demonstrate "business necessity." Formulations of the business necessity requirement have varied over the years as courts have narrowed in on different parts of the codified test: that the policy is "job related for the position in question and consistent with business necessity."[94] For the most part, however, courts have used the terms "business necessity" and "job related" interchangeably.[95]

Across the circuit courts of appeals, two primary formulations of the business necessity standard exist.[96] One approach has focused on the connection between the qualifications of the job and the challenged policy.[97] The Third Circuit, for example, has required that any discriminatory-in-practice policy can only be justified if it "define[s] the minimum qualifications necessary to perform the job."[98] Other circuits have adopted a slightly more relaxed standard, requiring only a "correlation" or relationship between the challenged practice and the job at issue.[99] Because

91. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988) (stating that what constitutes a disparate impact has "never been framed in terms of any rigid mathematical formula").

92. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977).

93. *See* Goldscheid, *supra* note 90, at 61-62.

94. 42 U.S.C. § 2000e–2(k)(1)(A)(i) (2018).

95. Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 382 (2d Cir. 2006).

96. *See* Easterling v. Conn. Dep't of Corr., 783 F. Supp. 2d 323, 335 (D. Conn. 2011).

97. *See, e.g.*, NAACP v. N. Hudson Reg'l Fire & Rescue, 665 F.3d 464 (3d Cir. 2011).

98. *Id.* at 477.

99. *See, e.g.*, *Gulino*, 460 F.3d at 373; EEOC v. Dial Corp., 469 F.3d 735, 742 (8th Cir. 2006) ("An employer using the business necessity defense must prove

the case of a revenge porn victim would not feature the type of "pre-employment test" most commonly associated with disparate-impact analyses and the "minimum qualifications" standard, it is possible that a court (absent binding precedent to the contrary) may be more drawn to this more relaxed "relational" standard.

The Third Circuit's formulation of the business necessity defense is not widely adopted and is unlikely to be used in this context. If it was, it seems unreasonable to consider "not being a victim of revenge porn" as a "qualification" for most positions. It does not seem plausible to argue that Dozier was suddenly unable to do her job at a small chocolatier company simply because her explicit images were leaked online. Nor is there a clear connection between NY1's mission to "empower New Yorkers with the information they need to make decisions"[100] and Adame engaging in sexual conduct with others in a private online space. But qualifications, particularly in the modern Internet age, may go beyond the functional ability to do a job. Since businesses have an interest in controlling their public image and the actions of their employees in how they are represented, they may argue that by continuing to employ someone with explicit media publicly accessible online, their customers or clients may associate them with the content.[101] This resulting association then becomes "job-related," and it is necessary for the business to avoid this association. Such an argument is particularly strong in the case of Adame, who was in a public-facing role as an on-air meteorologist.[102] It seems unlikely that there is a significant association between an employer and an average employee. But, "agents at all levels can

that the practice was related to the specific job and the required skills and physical requirements of the position."); Freyd v. Univ. of Or., 990 F.3d 1211, 1239-40 (9th Cir. 2021) (Van Dyke, J., concurring in part) ("A practice is 'job related' if 'it actually measures skills, knowledge, or ability required for successful performance of the job." (quoting Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572, 585 (9th Cir. 2000))).

100. *Our Journalists*, SPECTRUM NEWS NY1, https://ny1.com/nyc/all-boroughs/about-us/staff-profiles/our-journalists [https://perma.cc/VP9E-2RXB].

101. *Cf.* McVey v. AtlantiCare Med. Sys. Inc., 276 A.3d 677, 684 (N.J. App. Div. 2022) (finding no wrongful termination under the First Amendment in part because employee "posted her [racially-insensitive] remarks at the height of the Floyd protest demonstrations and [the employer] appropriately considered that the comments, and her public identification as a[] . . . 'Corporate Director,' opened its business up to the possibility of unwanted and adverse publicity and criticism."), *cert. denied,* 252 N.J. 322 (2022).

102. *But see infra* notes 175-179 and accompanying text.

have representative power," particularly in the Internet age where a previously anonymous person can quickly go viral and potentially have their off-duty conduct become associated with their employer.[103] This may be sufficient if a court only requires an employer to show a relationship between the status and the needs of the job.

Revenge porn victims may also share other characteristics that could be related to typical job performance. Given that revenge porn is a digital form of sexual violence, it is not uncommon for victims to experience similar effects as other forms of such violence. In one survey of revenge porn victims, "nearly all . . . (93%) reported suffering significant emotional distress as a consequence of victimization . . . [m]ore than half experienced suicidal thoughts; forty-two percent have sought psychological help . . . [and t]hirty-nine percent believed that the experience affected their professional advancement."[104] To the extent that these and other aftereffects of revenge porn impact an employee's ability to do their job, they may be sufficiently "job-related" to rebut a victim's prima facie case.[105]

3. Alternative Employment Practice

If an employer successfully rebuts an employee's prima facie case with a business necessity defense, an employee can still prevail by showing "that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[106] There is some confusion over to what extent, if any, an employer

103. Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 58 (2017); *see, e.g.*, David Moye, *Starbucks Barista Fired for Tweeting Customer's 'Crazy' Order Speaks Out*, HUFFPOST (May 14, 2021), https://www.huffpost.com/entry/starbucks-employee-fired-frappuccino_l_609e9ea7e4b014bd0cab9d60 [https://perma.cc/FTH9-33K2].

104. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1263-64.

105. Goldscheid, *supra* note 90, at 41. While some of these characteristics may qualify a victim for protection or accommodation under the Americans with Disabilities Act, that statute also contains a "business necessity" defense. 42 U.S.C. § 12113(a) (2018).

106. Ricci v. DeStefano, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. § 2000e–2(k)(1)(A)(ii), (C) (2018)).

must be subjectively aware of the alternative policy at the time relevant to the claim.[107]

One potential alternative is a policy that requires employees to conduct "best efforts" to remove the relevant content from publicly accessible websites or require proof of actual removal. Another alternative is requiring that any policy be limited to employees in unique, public, or customer-facing positions (e.g., an on-air meteorologist like Adame). However, such alternatives present their own difficulties. In an age in which digital content is easy to distribute but hard to erase, it is unclear what a "best efforts" standard imposed on lay users will accomplish.[108] Additionally, in the digital age, when does an employee become sufficiently "public-facing" that imposing additional requirements on their intimate media use and distribution becomes fair?[109] Further research is likely needed into these and other proposed alternatives and to what extent they could, in practice, lessen the disparate impact on victims.

4. Potential Weaknesses of a Title VII Claim

There are a number of potential difficulties with a Title VII disparate-impact claim. First, it is hard to determine the extent to which an employer would need to have an explicit policy on revenge porn to qualify as having a "particular employment practice" under Title VII. Prior to the codification of disparate impact in 1991, the Supreme Court explicitly held that subjective criteria and single decisions could be subject to a disparate-impact analysis.[110] However, disparate impact is most commonly thought of as applying to pre-employment tests and qualifications, like the "general intelligence test" originally at issue in *Griggs*.[111] Perhaps based on this

107. *See* Jones v. City of Boston, 845 F.3d 28, 37 (1st Cir. 2016) ("Is it enough that the alternative was available and not used, or must its availability have been known? Must it be specifically proposed, like a dinner special at a restaurant, or is it enough that it was on the known menu of options and not selected? What are we to make of the statute's use of the present tense ('refuses')?").

108. For a discussion of this difficulty in the context of the "right to be forgotten" under the European Union's General Data Protection Regulations, see Tally Netzer, *The Right to Be Forgotten - What Makes It Tough?*, K2VIEW: BLOG (Sept. 21, 2023), https://www.k2view.com/blog/gdpr-right-to-be-forgotten [https://perma.cc/M7SU-A39V].

109. *See supra* note 103.

110. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990-91 (1988).

111. Griggs v. Duke Power Co., 401 U.S. 426 (1971).

conception, several courts have held that a "single employment decision" is unable to serve as a "particular employment practice."[112] This improperly conflates a "specific" policy with a "single" policy or decision and is not required by Title VII.[113] Multiple practices taken together that facilitate the termination of revenge porn victims can serve as a foundation for liability. Even a one-off employment decision may be sufficient if it is part of a policy that provides discretion to supervisors to take adverse employment action against revenge porn victims.[114] However, given the hesitancy among many lower courts to apply disparate impact to these types of decisions, this concern may remain a barrier.

Another potential weakness is the inherently limited nature of a gender discrimination claim. While revenge porn has traditionally been heavily gender-based and often motivated by gendered stereotypes, this has not exclusively been the case. A gender-based claim arguably fails to reflect the full scope of harm that revenge porn can inflict as a violation of sexual privacy of persons of all genders and sexual orientations.[115] While claims from queer individuals like Mr. Adame are arguably protected by Title VII under *Bostock*, the majority opinion sidestepped a stereotype-approach that would have offered more protection to queer revenge porn victims.[116]

112. Goldscheid, *supra* note 90, at 48-59; *see, e.g.*, Wright v. Nat'l Archives & Recs. Serv., 609 F.2d 702, 712 (4th Cir. 1979).

113. Cobb County v. Bank of Am. Corp., No. 15-CV-4081, 2020 WL 13200158, at *4 (N.D. Ga. Sept. 18, 2020) ("'Specific' is not synonymous with 'single.'").

114. *Id.* at *5 (rejecting the contention that *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), foreclosed a disparate-impact claim based on supervisor discretion); *see Wal-Mart Stores*, 564 U.S. at 355 (noting that "giving discretion to lower-level supervisors can be the basis [for] liability under a disparate-impact theory" since "an employer's undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination" (alteration in original) (internal quotation marks omitted)).

115. *See* Gilden, *supra* note 7, at 812-17 (discussing the "privacy" framework of revenge porn and its particular relevance to the queer community).

116. *See* Jeremiah A. Ho, *Queering* Bostock, 29 AM. U. J. GENDER SOC. POL'Y & L. 283, 346 (2021) ("As a result of eclipsing the factual and historical iterations of lived experiences, Justice Gorsuch's textualism in *Bostock* functionally precludes the case's doctrinal anti-stereotyping potential."); Bostock v. Clayton County, 590 U.S. 644, 699-701 (2020) (Alito, J., dissenting) (noting that the majority opinion did not rely on a *Price Waterhouse*-based argument and rejecting it on its own terms); *Contra* Alexandra R. Johnson, Note, *Curious*

Additionally, the job-relatedness aspect of the business necessity defense may weigh more heavily against the queer community, where public sexual practices have been historically linked with political activism.[117] Finally, it is also possible that the Supreme Court will overturn or limit *Griggs* and determine that the disparate impact theory of liability violates the Constitution.[118]

B. The Applicability of Domestic Violence Antidiscrimination Statutes

Another potential source of antidiscrimination law applicable to victims of revenge porn is laws for victims of domestic violence. More than ten states have antidiscrimination laws that prohibit discrimination either based on an individual's status as a victim of domestic violence or for taking leave from their employment in relation to domestic abuse. [119] Other states have more general antidiscrimination laws for crime victims or those actively engaged in the criminal justice system (e.g., seeking a protective

Continuity: How Bostock *Preserves Sex-Stereotyping Doctrine*, 23 DUKEMINIER AWARDS J. 235 (2024) (arguing that *Bostock* should be read as a continuation of prior sex-stereotyping cases).

117. Gilden, *supra* note 7, at 833. ("Many of the social settings that have provided important connective tissue for queer communities—both historically and today—almost certainly fall outside the scope of most revenge porn statutes. Sex in these public settings may defy majoritarian intuitions around sexual propriety, but it also can be a powerful source of individual pleasure, communal belonging, and political action.").

118. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 547 (2015) (Thomas, J., dissenting); *see also* Alison Somin, *Disparate Impact as a Non-Delegation Violation and Major Question*, 2024 HARV. J.L. & PUB. POL'Y PER CURIAM 18 (2024) (arguing that "disparate impact liability violates the nondelegation doctrine" and "some disparate-impact rules constitute major-questions violations").

119. *State Guide on Employment Rights for Survivors of Domestic Violence, Sexual Assault, and Stalking*, WOMEN'S LEGAL DEF. & EDUC. FUND (Sept. 2022), https://www.legalmomentum.org/library/state-guide-employment-rights-survivors-domestic-violence-sexual-assault-and-stalking [https://perma.cc/Y7KG-4MGC]; *e.g.*, N.Y. EXEC. LAW § 296(1)(a) (McKinney 2024) ("It shall be an unlawful discriminatory practice [f]or an employer or licensing agency, because of an individual's . . . status as a victim of domestic violence, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.").

order or taking time off to comply with a subpoena).[120] Federal antidiscrimination law does not include specific protections for crime victims or victims of domestic violence, but the Equal Employment Opportunity Commission (EEOC) has interpreted federal antidiscrimination law to protect domestic violence and sexual assault victims in some circumstances.[121] While these laws would not apply to all revenge porn or nonconsensual pornography victims, many acts of revenge porn take place in the context of intimate relationships that may fall under the definition of "domestic violence" in these statutes.[122]

There are significant limitations to this solution. Most states and the federal government do not currently recognize domestic violence victim status as a protected class in their antidiscrimination laws. Among the states that do, the statutory definitions in these laws vary significantly; many borrow from their criminal counterparts in ways that needlessly exclude certain victims. "For example, in states which include a 'pattern of behavior' in their definition of domestic violence, a perpetrator who disseminates a sexually explicit image of the victim only once may not constitute domestic violence under the state's definition."[123]

120. *State Guide on Employment Rights*, *supra* note 119; *e.g.*, OHIO REV. CODE § 2930.18 (2024) ("No employer of a victim shall discharge, discipline, or otherwise retaliate against the victim, a member of the victim's family, or a victim's representative . . . .").

121. *See* Maria Greco Danaher, *EEOC Suggests That Title VII and ADA May Apply to Employment Situations Involving Domestic Violence and Sexual Assault*, OGLETREE DEAKINS (Nov. 1, 2012), https://ogletree.com/insights-resources/blog-posts/eeoc-suggests-that-title-vii-and-ada-may-apply-to-employment-situations-involving-domestic-violence-and-sexual-assault [https://perma.cc/XZK8-S6EP]; *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, EEOC (Oct. 12, 2012), https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who [https://perma.cc/7BE5-HJ5R].

122. *See* Nora Greene, *When 'Revenge Porn' Constitutes Domestic Violence: Applying Workplace Anti-Discrimination Protections to Victims of Nonconsensual Pornography*, AM. U. J. GENDER SOC. POL'Y & L.: BLOG (Apr. 19, 2022), https://jgspl.org/when-revenge-porn-constitutes-domestic-violence-applying-workplace-anti-discrimination-protections-to-victims-of-nonconsensual-pornograph [https://perma.cc/K8BW-UHT2].

123. *Id.*

III. PROPOSED EXPANDED ANTIDISCRIMINATION STATUTE FOR REVENGE PORN VICTIMS

Given the limitations of existing state and federal law in offering antidiscrimination protections to revenge porn victims, this Note proposes that a new federal antidiscrimination statute is needed.[124] This model statute is primarily based on the Equality Act,[125] which sought to add "sexual orientation" and "gender identity" to existing federal antidiscrimination statutes, including Title II and Title VI of the Civil Rights Act of 1964, Title IV (desegregation of public schools), Title VII (employment discrimination), and the Fair Housing Act.[126]

A. Statutory Language

While this Note does not include a full proposed statute, it includes key sections and statutory language that would be included in such a bill (save one, addressed *infra* in Section III.B):

A BILL

To prohibit discrimination on the basis of status as a victim of revenge porn.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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124. While this Note advocates for federal adoption of a new antidiscrimination law, this model legislation can also serve as a template for states—particularly those with legislatures and judiciaries more favorable to the enactment and enforcement of antidiscrimination laws. *See, e.g.*, Ann C. McGinley, *Laboratories of Democracy: State Law as a Partial Solution to Workplace Harassment*, 30 AM. U. J. GENDER SOC. POL'Y & L. 245, 282-87 (2022). *But see* Anastasia E. Lacina, *Small Gestures and Unexpected Consequences: Textualist Interpretations of State Antidiscrimination Law After* Bostock v. Clayton County, 90 FORDHAM L. REV. 2393, 2401 (2022) ("Despite the many substantive and procedural differences between federal and state antidiscrimination laws, state courts have traditionally interpreted their own statutes in line with analogous federal law.").

125. Equality Act, H.R. 15, 118th Cong. (2023) (prohibiting discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system).

126. *Id.*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Revenge Porn Antidiscrimination Act".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds the following:

(1) Discrimination can and does occur against those who have been a victim of revenge porn and any form of unauthorized disclosure of intimate media.[127]

(2) The unauthorized distribution of intimate media violates an individual's privacy even when it was originally distributed in a public or commercial manner.[128]

(3) Women, LGBTQ+ people, and other sexual minorities are disproportionately impacted by revenge porn.[129]

(4) Federal courts have widely recognized that, in enacting the Civil Rights Act of 1964, Congress validly invoked its powers under the Fourteenth Amendment and Article I, Section 8, Clause 3 [the Commerce Clause] of the U.S. Constitution to provide a full range of remedies in response to persistent, widespread, and pervasive discrimination by both private and government actors.[130]

(5) National surveys have demonstrated the existence of discrimination against victims of revenge porn.[131]

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127. *See supra* Section I.A.

128. *See* Gilden, *supra* note 7, at 847-49.

129. *See* Citron, *supra* note 60, at 1919-20.

130. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964).

131. Franks, "*Revenge Porn" Reform*, *supra* note 20, at 1264 (citing study that showed six percent of revenge porn victims were fired and eight percent of victims quit their job).

(6) Courts consistently have found that the government has a compelling interest in preventing and remedying discrimination.[132]

(7) As with all prohibitions on invidious discrimination, this Act furthers the government's compelling interest in the least restrictive way because only by forbidding discrimination is it possible to avert or redress the harms described in this subsection.

(b) PURPOSE.—It is the purpose of this Act to expand federal antidiscrimination law to include victims of revenge porn and to provide guidance and notice to individuals, organizations, corporations, and agencies regarding their obligations under the law.

SEC. 3. PUBLIC ACCOMMODATIONS.

PROHIBITION ON DISCRIMINATION IN PUBLIC ACCOMMODATIONS.—Section 201 of the Civil Rights Act of 1964 (42 U.S.C. 2000a) is amended in subsection (a), by inserting "status as a victim of revenge porn," before "or national origin".

SEC. 4. PUBLIC FACILITIES.

PROHIBITION ON DISCRIMINATION IN PUBLIC FACILITIES.—Section 301(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000b(a)) is amended by inserting "status as a victim of revenge porn," before "or national origin".

SEC. 5. PUBLIC EDUCATION.

(a) DEFINITIONS.—Section 401(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b)) is amended by inserting "status as a victim of revenge porn," before "or national origin".

(b) CIVIL ACTIONS BY THE ATTORNEY GENERAL.—Section 407 of such Act (42 U.S.C. 2000c–6) is amended, in subsection (a)(2), by inserting "status as a victim of revenge porn," before "or national origin".

132. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) ("[E]liminating discrimination and assuring . . . citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order.").

(c) CLASSIFICATION AND ASSIGNMENT.—Section 410 of such Act (42 U.S.C. 2000c–9) is amended by inserting "status as a victim of revenge porn," before "or national origin".

SEC. 6. FEDERAL FUNDING.

PROHIBITION ON DISCRIMINATION IN FEDERAL FUNDING.—Section 601 of the Civil Rights Act of 1964 (42 U.S.C. 2000d) is amended by inserting "status as a victim of revenge porn," before "or national origin".

SEC. 7. EMPLOYMENT.

(a) RULES OF CONSTRUCTION.—Title VII of the Civil Rights Act of 1964 is amended by inserting after Section 701 (42 U.S.C. 2000e) the following:

"SEC. 701A. RULES OF CONSTRUCTION.

"Section 1106 shall apply to this title except that for purposes of that application, a reference in that section to an 'unlawful practice' shall be considered to be a reference to an 'unlawful employment practice'".

(b) UNLAWFUL EMPLOYMENT PRACTICES.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended—

(1) except in subsection (e), by inserting "status as a victim of revenge porn," before "or national origin" each place the latter term appears;

(c) OTHER UNLAWFUL EMPLOYMENT PRACTICES.—Section 704(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–3(b)) is amended—

(1) by inserting "status as a victim of revenge porn," before "or national origin" each place the latter term appears;

(d) CLAIMS.—Section 706(g)(2)(A) of the Civil Rights Act of 1964 (2000e–5(g)(2)(A)) is amended by inserting "status as a victim of revenge porn," before "or national origin" each place the latter term appears;

(e) EMPLOYMENT BY FEDERAL GOVERNMENT.—Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) is amended—

(1) in subsection (a), by inserting "status as a victim of revenge porn," before "or national origin"; and

(2) in subsection (c), by inserting "status as a victim of revenge porn," before "or national origin".

(f) GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.—The Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16a et seq.) is amended—

(1) in section 301(b), by inserting "status as a victim of revenge porn," before "or national origin"; and

(2) in section 302(a)(1), by inserting "status as a victim of revenge porn," before "or national origin".

* * *

B. Definition of "Status as a Victim of Revenge Porn"

The most critical element of this legislation would be the statutory definition of "victim of revenge porn" required to trigger protection under the law. While the characteristics currently protected under federal civil rights law are generally immutable characteristics (e.g., race, national origin) or easily ascertainable characteristics (e.g., religion, pregnancy), antidiscrimination law is not always limited in these ways. For example, the definition of "disability" under the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act, is often a significant issue in ADA claims, and courts are frequently called upon to make a fact-based determination as to who is covered by the statute based on their alleged disability.[133] As previously discussed, many states have enacted antidiscrimination laws protecting crime victims generally or victims of domestic violence, sexual assault, or harassment specifically.[134] However, many of these laws suffer from similar deficiencies as the previously described existing employment protections for revenge porn victims in six states. These laws often use identical language to define the crime in antidiscrimination law as in the corresponding criminal statute and, in the case of domestic violence or sexual abuse, can require victims to "certify"

133. *See generally* Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1 (2013).

134. *See supra* Section II.B.

the abuse with outside documentation.[135] In addition to needlessly retraumatizing survivors of sexual violence, the wholesale adoption of statutory language from criminal law fails to appreciate the different aim of antidiscrimination law. While criminal law must balance a variety of aims (e.g., deterrence, rehabilitation, incapacitation) along with the particular due process rights of criminal defendants, antidiscrimination law does not. Revenge porn victims should not be required to meet a "beyond a reasonable doubt" burden of proof before availing themselves of protections against discrimination in employment, housing, and elsewhere.

For these reasons, this Note proposes using the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (UCRUDIIA)[136] definition of revenge porn as an initial starting model for an antidiscrimination statute. However, in line with Professor Gilden's critique of UCRUDIIA as inappropriately narrow in defining when an individual has a "reasonable expectation of privacy" under the Act,[137] this Note proposes going beyond the UCRUDIIA definition to include intimate media that has been initially voluntarily disclosed or commercialized and then later distributed in an unauthorized fashion (this additional language is underlined *infra)*:

SECTION XX: DEFINITION:

(a) In this Act:

(1) "Consent" means affirmative, conscious, and voluntary authorization by an individual with legal capacity to give authorization.

(2) "Depicted individual" means an individual whose body is shown in whole or in part in an intimate image.

(3) "Disclosure" means transfer, publication, or distribution to another person. "Disclose" has a corresponding meaning.

(4) "Identifiable" means recognizable by a person other than the depicted individual:

135. *State Guide on Employment Rights*, *supra* note 119, at 2.

136. UNIF. CIV. REMEDIES FOR UNAUTHORIZED DISCLOSURE OF INTIMATE IMAGES ACT (UNIF. L. COMM'N 2018).

137. Gilden, *supra* note 7, at 822.

(A) from an intimate image itself; or

(B) from an intimate image and identifying characteristic displayed in connection with the intimate image.

(5) "Identifying characteristic" means information that may be used to identify a depicted individual.

(6) "Individual" means a human being.

(7) "Intimate image" means a photograph, film, video recording, or other similar medium that shows:

(A) the uncovered genitals, pubic area, anus, or female post-pubescent nipple of a depicted individual; or

(B) a depicted individual engaging in or being subjected to sexual conduct.

(8) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(9) "Sexual conduct" includes:

(A) masturbation;

(B) genital, anal, or oral sex;

(C) sexual penetration of, or with, an object;

(D) bestiality; or

(E) the transfer of semen onto a depicted individual.

(10) "Harm" includes physical harm, economic harm, and emotional distress whether or not accompanied by physical or economic harm.

(11) "Private" means:

(A) created or obtained under circumstances in which a depicted individual had a reasonable expectation of privacy; or

(B) made accessible through [theft, bribery, extortion, fraud, false pretenses, voyeurism, or exceeding authorized access to an account, message, file, device, resource, or property].

(12) The term "digital forgery" means any intimate visual depiction of an identifiable individual created through the use of software, machine learning, artificial intelligence, or any other computer-generated or technological means, including by adapting, modifying, manipulating, or altering an authentic visual depiction, that, when viewed as a whole by a reasonable person, is indistinguishable from an authentic visual depiction of the individual.[138]

SECTION XX: STATUS DEFINITION:

(b) Except as otherwise provided, an individual is a victim of revenge porn for the purposes of this statute if they have suffered harm from a person's intentional disclosure or threatened disclosure of an intimate image that was private without the depicted individual's consent when the person knew or acted with reckless disregard for whether:

(1) the depicted individual did not consent to the disclosure;

(2) the intimate image was private; and

(3) the depicted individual was identifiable.

(c) The following conduct by a depicted individual does not establish by itself that the individual consented to the disclosure of the intimate image or that the individual lacked a reasonable expectation of privacy:

(1) consent to creation of the image; or

(2) previous consensual disclosure of the image, including disclosure for commercial purposes.

(d) A depicted individual who does not consent to the sexual conduct or uncovering of the part of the body depicted in an intimate image of the

138. *See* DEFIANCE Act of 2024, S. 3696, 118th Cong. (2024).

individual retains a reasonable expectation of privacy even if the image was created when the individual was in a public place.

(e) A depicted individual who does not consent to a specific disclosure or distribution of an intimate image of the individual retains a reasonable expectation of privacy even if the individual previously distributed the image, including commercial distributions.

(f) The subchapter shall be construed to cover images that are digital forgeries.

* * *

C. Arguments in Favor

Several arguments support a federal antidiscrimination statute for victims of revenge porn. First, this statute should not be seen as displacing existing criminal or civil remedies that specifically target revenge porn or that can be used as a tool against revenge porn (e.g., copyright law). While this Note has previously outlined the limits of those remedies and how an antidiscrimination statute could fill the existing gaps between them, an "all of the above" approach is still needed to combat revenge porn at every level.

Second, antidiscrimination laws like the Civil Rights Act of 1964 have profoundly impacted the shape of American society. Expanding liability for those discriminating against protected classes has provided concrete gains to those communities.[139] In the case of employment, Title VII "[c]hanged the [f]ace of the American [w]orkplace" and "set up a whole new concept" for how private employers could be held accountable moving forward.[140] Expanding this framework to victims of revenge porn would similarly provide new tools to protect against the harms that individuals like Erick Adame and Tara Dozier experience all too often.

Third, beyond the specific remedies this statute would give revenge porn victims, it would also send a powerful signal to businesses across the United States to take active steps to avoid discrimination against revenge

139. *See, e.g.*, Jenny Bourne, "*A Stone of Hope": The Civil Rights Act of 1964 and Its Impact on the Economic Status of Black Americans*, 74 LA. L. REV. 1195 (2014); *see also infra* note 147(describing economic-based and status-based gains of racial minorities in the wake of federal antidiscrimination law).

140. Tamara Lytle, *Title VII Changed the Face of the American Workplace*, HR MAG. (May 21, 2014), https://www.shrm.org/topics-tools/news/hr-magazine/title-vii-changed-face-american-workplace [https://perma.cc/FQ6J-HVJ9].

porn victims in both their individual decision-making and policies for employment, housing, and other areas. Antidiscrimination laws can have wide-ranging effects beyond the legal regime they create,[141] and the legal and psychological impact of naming revenge porn victims as a protected class should not be underestimated.

Fourth, like UCRUDIIA, a civil statute allows for a lower burden of proof (e.g., preponderance of evidence) and does not require the victim to face the perpetrator in a criminal case in order to receive justice. While a victim will likely have to reveal their status to an employer in order to trigger the statute's protections, this process would likely be much less burdensome than a criminal trial or even a full-blown civil proceeding. Additionally, because the distributor of the revenge porn is not being criminally or civilly prosecuted, any alleged First Amendment right of distribution would not be at issue, allowing for this lower burden of proof and a less stringent (or the absence of) a *mens rea* requirement.[142]

D. Addressing Counterarguments

There are also several potential arguments against a federal antidiscrimination statute for revenge porn victims. While some of these overlap with general arguments against remedies for revenge porn victims more broadly,[143] I focus on several that are more specific to this proposed statute.

First, this proposal is subject to the same broad critiques that antidiscrimination law has faced in recent years.[144] Scholars have argued

141. *See, e.g.*, Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1269 (1999) (arguing that "[a]doption of a legal rule that is based on a social norm sends a message that the community regards the norm as especially important"); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996) (arguing that law's expressive function can reconstruct or solidify social norms "through a legal expression or statement about appropriate behavior"); Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias*, 4-5 (Yale L. Sch. Pub. L. Working Paper No. 148, 2015).

142. Employers or other entities facing liability under this proposed law may assert their own First Amendment rights, which are discussed *infra*.

143. See generally Franks, *"Revenge Porn" Reform*, *supra* note 20, for a summary of these arguments.

144. This is not to be confused with an argument against the idea of antidiscrimination law in principle, which is not widely held but does exist.

that current antidiscrimination law fails to capture the core of discriminatory action in the modern era—implicit bias.[145] Also, some scholars have argued that antidiscrimination law has failed to address intersectional discrimination (i.e., discrimination based on multiple protected identities and classes).[146] However, even assuming the validity of these critiques of older antidiscrimination laws and their impact today, it is widely accepted that, while antidiscrimination laws are not a silver bullet, they still have the opportunity to make a significant impact, particularly when first adopted.[147]

Second, similar First Amendment critiques to those discussed above in the context of criminal law have some force against antidiscrimination laws. Antidiscrimination laws are not facially unconstitutional,[148] but they may be unconstitutional as applied to "expressive" conduct by private businesses. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, the Supreme Court reasoned that the governmental interest in combating discrimination does not justify applying antidiscrimination laws to

See, e.g., RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS xii (1992).

145. Jolls, *supra* note 141, at 12 ("In sum, there is currently a relatively broad consensus in the field of antidiscrimination law, both constitutional and statutory, that existing doctrines are quite limited in responding to the problem of implicitly biased behavior. There is also a relatively broad consensus that these doctrines should be significantly reformed to create meaningful liability for such behavior."). Other scholars argue that such laws should not reach implicit bias as a normative manner. *See* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1132-33 (1999).

146. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Elena S. Meth, *Title VII's Failures: A History of Overlooked Indifference*, 121 MICH. L. REV. 1417 (2023).

147. *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (stating that overt, race and gender-based classifications have become "things of the past"); Gavin Wright, *The Regional Economic Impact of The Civil Rights Act of 1964*, 95 B.U. L. REV. 759, 776-79 (2015) (demonstrating Black economic gains, particularly with the decline in low paid, historically Black workplaces in the South).

148. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995) ("Provisions like [antidiscrimination laws] are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.").

expressive conduct protected by the First Amendment.[149] An entity might bring an as-applied challenge against such an antidiscrimination law by arguing that forcing them to retain a revenge porn victim as an employee violates their First Amendment rights because they could be seen as endorsing the victim's "public" sexual conduct. A similar challenge could be brought by a bank that refuses to lend to a revenge porn victim seeking to buy a house.

While the full merits of such a challenge are beyond the scope of this Note, such constitutional claims would face significant obstacles. For instance, as articulated in *Dale*, a group must engage in "expressive association" to avail itself of the First Amendment expressive associational right.[150] The *Dale* Court also clarified that "an expressive association can[not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[151] The vast majority of for-profit employers in the United States would not be engaged in "expressive association" similar to the Boy Scouts in *Dale*. It is also unlikely that continuing to employ an individual would even itself be "expressive conduct" constituting First Amendment speech in most circumstances.[152] For similar reasons, such continued employment would not be compelled speech because while "'[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . such a kernel is not sufficient to bring the activity within the protection of' the Free Speech Clause."[153]

149. *Id.* at 578-79; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that applying New Jersey's public accommodations law to require the Boy Scouts to readmit an assistant scoutmaster fired for being gay violated the Boy Scouts' First Amendment right of expressive association); 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023) ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

150. *Dale*, 530 U.S. at 648; *see also id.* ("The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.").

151. *Id.* at 653.

152. *See* McMahon v. World Vision, Inc., 704 F. Supp. 3d 1121, 1146 (W.D. Wash. 2023) ("World Vision has not shown that continuing to employ Ms. McMahon would amount to expressive conduct that communicates its views so as to constitute 'speech' within the meaning of the First Amendment."), *appeal docketed*, No. 24-3259 (9th Cir. May 22, 2024).

153. *Id.* (quoting City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989)).

Third, another critique of this approach is the practicality of basing an antidiscrimination law on a "status." As mentioned earlier, federal and state antidiscrimination law already protects some non-immutable "statuses."[154] While these laws may sometimes impose additional burdens or verification to determine a status that is not readily ascertainable, this challenge is not insurmountable. For example, in Hawaii, it is illegal for an employer to refuse to hire, employ, fire, discriminate, or retaliate against a current or potential employee based on an employee's status as a victim of domestic or sexual violence if the employee provided notice to the employer of their status or the employer had actual knowledge of their status.[155] The law allows employers to verify this status by various means while still minimizing the burden on domestic violence victims:

> Employers are allowed to verify that the employee is a victim by requesting that the employee provide them with police or a court record or with a signed written statement from a victim services organization, attorney or advocate, a health care provider or a member of the clergy from whom the employee has sought assistance in connection with the violence. Employers may seek recertification every six months from the date they first became aware of the employee's status. There is an exception to recertifying every six months if an employee used a protective order to verify their status. Under that exception, the employer must use the date of the protective order or six months, whichever is later, to recertify the employee's status.[156]

A similar certification system could apply to the proposed statute. Employers (or other entities subject to public accommodations law) could verify a victim's status by requesting one of the above records. As noted in Section III.B, advocates for victims of domestic violence have argued that

154. *See supra* Section II.B; *see also* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2111 (2017) ("In recent years, courts and commentators have embraced a somewhat broader concept—sometimes dubbed the 'new immutability'—that includes not only *actually* unchangeable traits, but also, in the words of one influential decision, 'traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.'" (internal citations omitted)); Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015) (critiquing the centrality of immutability in antidiscrimination law).

155. HAW. REV. STAT. § 378-2(a) (2024).

156. *State Guide on Employment Rights*, *supra* note 119, at 33.

any requirement that a victim "certify" their abuse is wrong and, at the very least, they should have the option to self-certify their status.[157] However, if certification is required, it should be at the request of the entity and allow for a broad range of acceptable documentation, as in Hawaii.[158]

This critique also touches on the additional challenge of separating discrimination based on status from conduct related to that status. For example, an employer may argue that they terminated an employee not because of their "status" as a victim of revenge porn, but because of their opposition to employing anyone who distributes intimate media of themselves in any form, regardless of the context. But conduct inextricably linked with an individual's status as a revenge porn victim cannot and should not be a basis for termination. The Supreme Court has noted that its Equal Protection Clause jurisprudence "ha[s] declined to distinguish between status and conduct."[159] While courts usually enforce stricter distinctions between "status" and "conduct" in interpreting antidiscrimination statutes,[160] this objection is unpersuasive here because the protected class, in this instance, is a status defined by conduct. In a state that prohibits discrimination based on sexual orientation, an employer cannot credibly argue that they fired a gay employee, not for their "status" as gay, but for engaging in homosexual conduct.[161] Similarly, the conduct defined in the proposed statute is inseparable from one's "status" as a revenge porn victim. In enacting this type of law, society, through its government, would determine that it is unacceptable for an employer to apply a blanket policy against intimate-media distribution when an

157. *Id.* at 3.

158. *Id.*

159. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010).

160. Widiss, *supra* note 154, at 2113; *see also id.* ("For example, courts usually reject challenges to employer grooming codes that proscribe hairstyles, such as dreadlocks, associated with certain racial and ethnic groups, pointing to the immutable/mutable distinction and concluding that because it is possible for racial minorities to comply with the rule, it is not the same as a status-based exclusion.").

161. *Cf.* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

employee meets the requirements of the "revenge porn status" statutory definition.

Fifth, employers may also object that while it is unfair for victims of revenge porn like Mr. Adame and Ms. Dozier to lose their jobs, it is equally unfair for employers to bear the increased costs of keeping them employed. These costs may come from lost viewership from those who object to Mr. Adame or a customer boycott from those who object to Ms. Dozier after the revelation of their intimate media. The question of when an employer's costs should be relevant to an employment discrimination claim is one of longstanding debate.[162]

In Title VII cases challenging disparate treatment based on sex, religion, or national origin, an employer may justify using such a factor when it is "a bona fide occupational qualification [("BFOQ")] reasonably necessary to the normal operation of that particular business or enterprise . . . ."[163] While the Supreme Court has not entirely shut the door on whether increased costs alone can serve as a BFOQ,[164] costs clearly play a role in almost any BFOQ.[165] But to the extent these costs stem from alleged customer preference, as the previous examples do, "courts have uniformly rejected asserted BFOQs . . . , usually citing the fact that these biases are exactly the type of discrimination that Title VII was designed to eliminate."[166] As the Fifth Circuit reasoned in *Diaz v. Pan Am. World Airways, Inc.*, allowing customer prejudices to justify discrimination would be "totally anomalous" and counter to Title VII's purpose of overcoming such prejudices.[167]

Any similar BFOQ defense in the revenge porn context should be rejected for similar reasons: allowing costs to justify discrimination would undermine the underlying goal of erasing prejudice around revenge porn

162. *See, e.g.*, Ernest F. Lidge III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 ARK. L. REV. 1 (2005) (examining whether financial burdens can justify employment discrimination).

163. 42 U.S.C. § 2000e–2(e)(1) (2018).

164. *See* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 210-11 (1991) ("We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.").

165. *See* Lidge, *supra* note 162, at 17-20.

166. *Id.* at 11 (quoting 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 11.02(3) (2d ed. 1999)).

167. 442 F.2d 385, 389 (5th Cir. 1971).

and intimate media. However, a similar defense may be more compelling in disparate impact cases.[168] The Ninth Circuit has held that cost considerations can form the basis of a business necessity defense in a disparate impact case.[169] Therefore, it may be reasonable to allow costs to play at least some role in defending a disparate impact claim. Customer preferences, however, should not be allowed to dictate policies with a disparate impact on a protected class any more than they should dictate one requiring disparate treatment; the purpose of Title VII and antidiscrimination law is to overcome them.

Other scholars argue that certain revenge porn laws may entrench traditional beliefs around sexuality and "reinforce the inherent shamefulness of sex."[170] While leaders of the anti-revenge porn movement have disavowed any motivation to stigmatize sexual expression,[171] case law has repeatedly used language in revenge porn cases that seem to "conflate sex with shame."[172] The challenge of balancing societal attitudes toward sexuality with the goal of encouraging a more idealized and accepting

168. Lidge, *supra* note 162, at 30 ("[In a disparate impact case, an] employer [should not] have to show that the challenged policy is absolutely necessary for the business's survival. The employer should only have to prove that the challenged practice achieves a significant cost saving.").

169. Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1495 (9th Cir. 1983). For a more in-depth discussion of the role of business costs in disparate impact claims, see Lidge, *supra* note 162, at 24-41.

170. Gilden, *supra* note 7, at 854; *see also* Brenda Dvoskin, *Speaking Back to Sexual Privacy Invasions*, 99 WASH. L. REV. 69-71 (2024) (discussing the tension between destigmatizing sexuality and emphasizing the harm from nonconsensual pornography).

171. Citron, *supra* note 60, at 1898 ("The recognition that intimate activity and nudity can be viewed as discrediting and shameful--and result in discrimination--is not to suggest that intimate behaviors and nudity *are* discrediting and shameful. Intimate activities and naked bodies are not dirty. Because sexuality, gender, and the human body are central to identity formation and intimacy, we need the freedom to manage their boundaries.").

172. Gilden, *supra* note 7, at 855 ("Courts have referred to nude images as 'scarlet letters,' as leaving a 'digital stain,' and as 'haunting' victims. They repeatedly frame sex as 'the most private human conduct' and as being 'inherently' private; accordingly, 'the harm' of revenge porn 'largely speaks for itself.'" (internal citations omitted)).

attitude is complex.[173] However, antidiscrimination law is well-suited to address this tension by minimizing the economic consequences of revenge porn while limiting the stigmatization of public sexual expression, particularly for communities where public sexual expression is a foundational shared value.[174]

Finally, Gilden has highlighted yet another potential critique: "certain occupations—for example, teacher, police officer, judge—require a high moral standard in order to maintain the respect of the communities that may look up to them."[175] As an example, he discussed a 2022 case where the Kansas Supreme Court held that a judge should be publicly censured after sharing nude photos of himself on an online swingers' community, and another member's spouse sent the images to the state judicial commission.[176] Justice Stegall, concurring in the censure, wrote separately to remark on the private nature of the conduct at issue and the inappropriateness of regulating it as a matter of judicial conduct.[177] While Justice Stegall seemed to suggest that he believed the judge should have been removed by alternative but more democratic means (e.g., at the ballot box or in an impeachment proceeding),[178] Gilden offered a strong rebuttal to this "role model" argument:

173. *See* Dvoskin, *supra* note 170, at 78 ("[B]y incorporating the conventional view that posits that unwanted exposures transform victims into sexual objects and harm their dignity as the normative justification to punish invasions, [sexual privacy theory] reproduces that conventional view. That reproduction hinders its transformation. Therefore, on this point, it is important to coordinate the strategies on both sides of [changing social norms around sexuality and protecting sexual privacy].").

174. *See* Gilden, *supra* note 7, at 864 ("Members of sex-positive communities recognize that their professional goals could be derailed by other people's discomfort with what they happily are doing during their free time.").

175. *Id.*

176. *Id.*; *see In re* Clark, 502 P.3d 636 (Kan. 2022).

177. *Clark*, 502 P.3d at 643 (Stegall, J., concurring) ("[W]hile Judge Marty K. Clark's behavior was embarrassing, foolish, and grossly immoral, it was not a violation of any of our rules governing judicial conduct. Because—let us be clear—the behavior we are talking about consists entirely of the lawful, private, consensual sexual practices of Judge Clark.").

178. *Id.* at 648 ("Judge Clark could easily and correctly have been unseated by his constituents had they determined that his character was not of the kind they desired for their judges.").

> Even aside from the veiled racism and classism on display, the 'role model' concern is wildly out of sync with the actual practices of young people, who share intimate images and seek out pornography far more often than the adults in their community may wish. Perhaps, rather than treat the next generations as if they were, are, and always will be sexually innocent, they instead would benefit from having access to an adult who is unafraid of discussing their own journey of sexual discovery. In other words, perhaps they might benefit from talking more about sex in public.[179]

While there are a number of meaningful critiques of this proposed law, they are ultimately unpersuasive and do not outweigh the benefit to both revenge porn victims and broader society from eradicating this discrimination from the public sphere.

IV. THE NEXT BATTLEFIELD: "DEEPFAKE" AND AI REVENGE PORN

While this Note's proposed antidiscrimination statute intends to protect revenge porn victims regardless of the intimate media's format, it is worthwhile to consider a novel issue dominating discussions on combating revenge porn: "deepfakes," or AI-generated pornography.

The term "deepfake" is generally thought to have been coined in 2017 on a Reddit forum where a user shared images of adult actresses with the faces of various female celebrities; "deep" refers to the deep learning of the neural network models underlying the technology, and "fake" refers to the inauthenticity of the picture or video.[180] Although deepfakes have some lighthearted uses,[181] the original deepfakes were a form of nonconsensual pornography, and they continue to be a powerful tool for misogynist abuse online.[182] A 2019 report found that 96% of deepfakes involved simulating

179. Gilden, *supra* note 7, at 865-66; *see also* Dvoskin, *supra* note 170, at 86-88 (describing a case of revenge porn against Judge Lori Douglas of Canada's Court of Queen's Bench (Family Division)).

180. BRYAN LYON & MATT TORA, EXPLORING DEEPFAKES 3-13 (2023).

181. One popular deepfake was a video by "birbfakes" that imposed actor Steve Buscemi's face onto Jennifer Lawrence's body during an interview after the 2016 Golden Globe Awards. *See id.* The original video can be viewed at birbfakes, *Jennifer Lawrence-Buscemi on Her Favorite Housewives [Deepfake]*, YOUTUBE (Jan. 14, 2019) https://www.youtube.com/watch?v=r1jng79a5xc&ab_channel=birbfakes [https://perma.cc/LWE7-Y9KC].

182. *See, e.g.*, Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CAL. L. REV. 1753 (2019).

porn of female celebrities without their consent.[183] The *Washington Post* gives a few examples:

> [Actress Scarlett] Johansson has been superimposed into dozens of graphic sex scenes over the past year that have circulated across the Web: One video, falsely described as real "leaked" footage, has been watched on a major porn site more than 1.5 million times . . . One creator on the discussion board 8chan made an explicit four-minute deepfake featuring the face of a young German blogger who posts videos about makeup; thousands of images of her face had been extracted from a hair tutorial she had recorded in 2014 . . . Rana Ayyub, an investigative journalist in India, was alerted by a source to a deepfake sex video that showed her face on a young woman's body. The video was spreading by the thousands across Facebook, Twitter and WhatsApp, sometimes attached to rape threats or alongside her home address.[184]

Though the issue of "deepfake" revenge porn is not new, the rise of generative AI[185] has facilitated this content and raised its public prominence.[186] A particular point of inflection was in January 2024 when mass amounts of sexually explicit, AI-generated images of Taylor Swift were shared and reposted on X.com,[187] with one post in particular viewed over

183. Aja Romano, *Deepfakes Are a Real Political Threat. For Now, Though, They're Mainly Used to Degrade Women*, VOX (Oct. 7, 2019), https://www.vox.com/2019/10/7/20902215/deepfakes-usage-youtube-2019-deeptrace-research-report [https://perma.cc/6467-RFD2].

184. Drew Harwell, *Fake-Porn Videos Are Being Weaponized to Harass and Humiliate Women: 'Everybody is a Potential Target'*, WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target [https://perma.cc/9B2E-UJH9].

185. *What Is Generative AI?*, IBM, https://research.ibm.com/blog/what-is-generative-AI [https://perma.cc/36KC-67CB] ("Generative AI refers to deep-learning models that can generate high-quality text, images, and other content based on the data they were trained on.").

186. *See* Alex Pasternack, *GPT-Powered Deepfakes Are a 'Powder Keg,'* FAST CO. (Feb. 22, 2023), https://www.fastcompany.com/90853542/deepfakes-getting-smarter-thanks-to-gpt [https://perma.cc/S4BT-LY27].

187. Miles Klee, *Swifties Want a Massive Crackdown on AI-Generated Nudes. They Won't Get One*, ROLLING STONE (Jan. 25, 2024), https://www.rollingstone.com/culture/culture-features/taylor-swift-ai-

45 million times before being removed.[188] Swift's fans' call for regulation led several lawmakers to take notice. Senator Martin Heinrich (D-NM) posted on X that this episode was "precisely the risk we're facing with unregulated AI, and it's exactly why Congress needs to act to make sure this kind of stuff is illegal."[189] Congressman Tom Kean (R-NJ) pointed to his previously-introduced AI Labeling Act, a bill that would require labels and disclosures for AI-generated content or chatbots, as a partial solution.[190] Four legislators also introduced the Disrupt Explicit Forged Images and Non-Consensual Edits Act, or DEFIANCE Act, that would allow victims to sue creators and distributors of sexually explicit deepfakes without their consent under certain circumstances.[191] However, previous attempts to combat unauthorized and inauthentic AI-generated content have been controversial,[192] and a federal solution is unlikely to be enacted (much less effective) in the short term.[193]

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generated-nudes-swifties-1234954487 [https://perma.cc/LQ59-KNS2]; Janus Rose, *Taylor Swift Is Living Every Woman's AI Porn Nightmare*, VICE (Jan. 25, 2024), https://www.vice.com/en/article/qjvajd/taylor-swift-is-living-every-womans-ai-porn-nightmare [https://perma.cc/8CB3-XTST].

188. Jess Weatherbed, *Trolls Have Flooded X with Graphic Taylor Swift AI Fakes*, VERGE (Jan. 25, 2024), https://www.theverge.com/2024/1/25/24050334/x-twitter-taylor-swift-ai-fake-images-trending [https://perma.cc/T5AX-RDSL].

189. Martin Heinrich (@SenatorHeinrich), X (Jan. 25, 2024, 3:06 PM), https://twitter.com/SenatorHeinrich/status/1750611124402172374 [https://perma.cc/8KME-KAEK].

190. Mike Deak, *Taylor Swift Artificial Intelligence Porn Images Spur NJ Congressman's Regulation Effort*, MYCENTRALJERSEY (Jan. 25, 2024), https://www.mycentraljersey.com/story/tech/2024/01/25/taylor-swift-artificial-intelligence-images-deepfake-porn/72353709007 [https://perma.cc/ULP4-VPU2].

191. Solcyré Burga, *How a New Bill Could Protect Against Deepfakes*, TIME (Jan. 31, 2024), https://time.com/6590711/deepfake-protection-federal-bill [https://perma.cc/3BB3-6FXS]; DEFIANCE Act of 2024, S. 3696, 118th Cong. (2024).

192. *See, e.g.*, Corynne McSherry, *The No AI Fraud Act Creates Far More Problems Than It Solves*, ELEC. FRONTIER FOUND. (Jan. 19, 2024), https://www.eff.org/deeplinks/2024/01/no-ai-fraud-act-creates-way-more-problems-it-solves [https://perma.cc/KKQ2-T3KY].

193. The "TAKE IT DOWN Act," which would, *inter alia*, criminalize the publication of nonconsensual pornography in interstate commerce, was passed by the U.S. Senate in February 2025. It has received renewed support from congressional

The difficulties in using traditional criminal and civil remedies to combat revenge porn are even greater with deepfakes. "Legal experts say deepfakes are often too untraceable to investigate and exist in a legal gray area: Built on public photos, they are effectively new creations, meaning they could be protected as free speech."[194] Section 230 of the Communication Decency Act shields content providers from liability for nearly all content posted on social media sites.[195] As Professor Franks noted, "[i]f you were the worst misogynist in the world, [deepfake technology] would allow you to accomplish whatever you wanted."[196] Until federal law

leaders, President Donald Trump, and First Lady Melania Trump, but has not passed the U.S. House of Representatives as of March 7, 2025. *See House Leaders Pledge to Advance 'Take It Down' Act at Sen. Cruz's Bipartisan Roundtable with First Lady Melania Trump*, U.S. SENATE COMM. ON COM., SCI., & TRANSP. (Mar. 3, 2025), https://www.commerce.senate.gov/2025/3/house-leaders-pledge-to-advance-take-it-down-act-at-sen-cruz-s-bipartisan-roundtable-with-first-lady-melania-trump [https://perma.cc/7C5N-VNUL]; Isa Gonzalez Montilla, *President Trump Backs the Take It Down Act to Combat Online Abuse*, KPRC 2 NEWS (Mar. 5, 2025, 8:40 PM), https://www.click2houston.com/news/local/2025/03/06/president-trump-backs-the-take-it-down-act-to-combat-online-abuse [https://perma.cc/M53P-G8JG]. The potential effectiveness and secondary consequences of this legislation are contested. *See, e.g.*, India McKinney, *The Senate Passed the TAKE IT DOWN Act, Threatening Free Expression and Due Process*, ELEC. FRONTIER FOUND. (Feb. 25, 2025), https://www.eff.org/deeplinks/2025/02/senate-passed-take-it-down-act-threatening-free-expression-and-due-process [https://perma.cc/49SJ-QLAQ] (arguing, *inter alia*, that the Act would lead to takedowns of any images involving intimate or sexual content and overuse of inaccurate automated filters).

194. Harwell, *supra* note 184.

195. 47 U.S.C. § 230 (2018); *see* Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 460 (2018) ("Platforms have been protected from liability even though they republished content knowing it might violate the law, encouraged users to post illegal content, changed their design and policies to enable illegal activity, or sold dangerous products."). For an argument that § 230 should be amended to create a narrow carveout of this immunity for deepfake content, see Nicholas O'Donnell, *Have We No Decency? Section 230 and the Liability of Social Media Companies for Deepfake Videos*, 2021 U. ILL. L. REV. 701 (2021).

196. Harwell, *supra* note 184.

or technology companies[197] provide more robust solutions to limit the creation of deepfake porn, limiting the consequences of this content is the next best step.

Antidiscrimination law offers a compelling and more accessible alternative to criminalization, given the difficulties of prosecuting deepfake revenge porn. This Note's proposed statute does not require identifying a specific perpetrator or the exact method of creation or distribution. In the case of Ayyub, even without knowing who was responsible for the original unauthorized distribution of the deepfake, she would be able to seek protection from termination under this Note's proposed antidiscrimination law. The proposed law specifically incorporates the definition of deepfakes used by the DEFIANCE Act to ensure that victims of deepfake revenge porn are protected. Additionally, because new and altered deepfakes are often regenerated and reshared long after the original,[198] antidiscrimination law avoids potential concerns about statute of limitations-based disputes about when and where deepfakes were generated. While there is no easy solution to tackling this latest iteration of revenge porn, antidiscrimination law can and should be a critical tool in addressing it.

CONCLUSION

The widespread adoption of laws in the United States, both criminalizing revenge porn and providing a private right of action to its victims, should be applauded. These laws are critical in supporting victims and helping them seek justice. But they should not be a reason to ignore antidiscrimination law, both existing and new, as a potential source of redress. Like all forms of discrimination in the public sphere, "[s]exual-privacy invasions deprive individuals of their sense of belonging and the

197. Election-related concerns appear to be motivating companies to work harder to tackle at least certain forms of deepfakes. *See* Emmanuelle Saliba, *Tech Giants Come Together to Combat Deceptive Deepfakes Ahead of 2024 Elections*, ABC NEWS (Feb. 17, 2024), https://abcnews.go.com/Business/tech-giants-combat-deceptive-deepfakes-ahead-2024-elections/story?id=107296901 [https://perma.cc/2AXC-VU3A].

198. *See* Coralie Kraft, *Trolls Used Her Face to Make Fake Porn. There Was Nothing She Could Do*, N.Y. TIMES MAG. (July 31, 2024), https://www.nytimes.com/2024/07/31/magazine/sabrina-javellana-florida-politics-ai-porn.html [https://perma.cc/B9DS-634W] ("To her dismay, she discovered entirely new threads and images posted in October 2023 . . . almost three years after she discovered the first deepfakes.").

recognition of their equal citizenship."[199] Antidiscrimination law has long been a tool to empower disadvantaged communities and place them on equal footing in the public square, and it can do so here as well. Policies that punish victims of revenge porn simply for being subjects of sexual violence not only compound the harm suffered by victims but compound the disparate impact of the harm itself. In a rapidly evolving technological landscape, utilizing antidiscrimination law to combat revenge porn will offer victims greater security in housing, employment, and other areas as they navigate the aftermath of significant trauma.

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199. Citron, *supra* note 60, at 1891.