

REWRITING ARIZONA'S REVENGE PORN STATUTE TO FILL THE GAP IN SEX CRIME PUNISHMENT

Hayden Hilliard*

ABSTRACT

As it currently stands in Arizona, revenge porn is a crime that is both under-deterred and under-punished. Nonconsensual pornography, more widely known as “revenge porn,” is when a person discloses or distributes sexual images of another person without their consent. Without any changes in the legal landscape, this sex crime will continue to rise unchallenged, especially as technological innovations increase over time. Thus, this Comment argues that the statute criminalizing revenge porn in Arizona needs to be amended in order to increase punishment, fill gaps in criminal liability, and more effectively deter future perpetration.

To achieve this end, this Comment demonstrates that Arizona can amend its statute on revenge porn by borrowing provisions from sexual assault laws, child pornography laws, and revenge porn laws from other states. By borrowing provisions from these analogous crimes, the punishment for perpetration of revenge porn will better fit the crime.

Other scholars have written about this topic in terms of federal criminalization, First Amendment discourse, and civil liabilities. However, this Comment takes a new approach by working to address underlying problems in the current statutory framework, and rectifying those problems by introducing new terms to the statute that will round out the state's approach to the crime.

Without an adaptive and modern approach to the problem, the issues involved with the crime of revenge porn will only get worse as time moves on. By adopting more powerful and comprehensive provisions now, Arizona could be the trendsetter for a national movement to criminalize and deter revenge porn.

* J.D. Candidate, 2019, Sandra Day O'Connor College of Law, Arizona State University. Special thanks to Professor Jessica Berch for her unwavering support and insightful feedback, as well as the members of the *Arizona State Law Journal* who provided editing assistance.

I. INTRODUCTION

More and more often, women are stumbling across their own nude images on various websites, posted without their permission, and without their knowledge.¹ Many women have come forward, sharing their personal stories, finding images taken several years ago, posted by past lovers who were long forgotten.² One of the primary web services offering this lewd content is Anonymous Image Board, or Anon-IB.³ Websites like Anon-IB not only allow the public to post nude images without the depicted person's consent, but also facilitate solicitation for images of certain people, known as "wins."⁴ Anon-IB recently attracted widespread attention due to the discovery of specialized internet threads targeting and displaying nude images of female military members, taken by their male peers and posted online.⁵ Scandals like these⁶ serve as a public service announcement, bringing national attention to the creeping yet incessant issue of nonconsensual pornography, commonly referred to as "revenge porn."⁷ A study by the Cyber Civil Rights Initiative (CCRI) published during the summer of 2017⁸ highlighted the actual incidence of revenge porn among

1. Gabrielle Fonrouge, *Inside the Twisted Revenge Porn Site That's Ruining Women's Lives*, N.Y. POST (Sept. 22, 2017, 12:14 AM), <https://nypost.com/2017/09/22/revenge-porn-site-leaves-trail-of-innocent-victims/> [<https://perma.cc/8PL9-WGUN>].

2. *Id.*

3. *Id.*

4. *Id.*

5. See David Martin, *Marines Nude Photo Scandal Expands to All Branches of Military*, CBS NEWS (Mar. 10, 2017, 11:30 AM), <https://www.cbsnews.com/news/marines-nude-photo-scandal-expands-to-military-wide-explicit-message-board/> [<https://perma.cc/2TTJ-DCZX>].

6. The military scandal, originally brought to light in March of 2017, has only expanded. *Id.*; see also Joe Difazio, *Revenge Porn Site Users Connected to Government IP Addresses: Report*, INT'L BUS. TIMES (Jan. 26, 2018, 11:24 AM), <http://www.ibtimes.com/revenge-porn-site-users-connected-government-ip-addresses-report-2640394> [<https://perma.cc/UAW3-BSPZ>] (citing recent investigations that indicate revenge porn sites have been accessed from United State government IP addresses in the Senate, Navy, and Executive Branch).

7. "Revenge porn" means "the distribution of sexually graphic images of individuals without their consent." See *Frequently Asked Questions*, CYBER C.R. INITIATIVE (last visited Jan. 26, 2019), <https://www.cybercivilrights.org/faqs/> [<https://perma.cc/S5JC-3AEE>]. Revenge does not need to be a motivating factor, and it encompasses both images obtained without consent (like video voyeurism), and images previously obtained with consent, in the context of a prior relationship. *Id.* Also, while this Comment agrees with the commendable efforts of those who wish to avoid this misnomer, the term is used in this Comment for the sake of uniformity with other legal analyses on the topic. See, e.g., Clare McGlynn, *Call "Revenge Porn" What It Is: Sexual Abuse*, VOX (July 10, 2017, 10:28 AM), <https://www.vox.com/first-person/2017/7/8/15934434/rob-kardashian-blac-chyna-revenge-porn-abuse> [<https://perma.cc/KW7Z-J4DV>].

8. ASIA A. EATON ET AL., CYBER CIVIL RIGHTS INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION (2017),

those surveyed. One in eight participants indicated she or he was the victim of or received a threat of revenge porn.⁹ Furthermore, women were over 1.5 times more likely than men to be the targets of revenge porn.¹⁰ Sadly, the trend regarding incidence of sex crimes against women is nothing new.¹¹

The CCRI study also highlighted two other intriguing aspects to these attacks. First, the study found that among those who admitted to perpetrating the crime, almost eighty percent reported that his or her primary motive was not intent to harm the victim. The most common motives were (1) the discloser was just sharing with friends, and thus lacked any intent to harm the victim, (2) the image was fun or funny to share, (3) the image related to beauty, gloating, or made the discloser feel good, and (4) for likes on social media.¹²

Second, those who perpetrated the crime also received a list of deterrents and were able to select which deterrents would have stopped them from perpetuating the crime.¹³ The most commonly selected prohibitive factors were all criminal sanctions, with a general trend of increased deterrence with increased punishment.¹⁴

The highlights of this study underpin this Comment's argument: states without statutes criminalizing revenge porn need them, and states like Arizona, which currently have revenge porn statutes, need to up the ante on how severely these crimes receive punishment. This Comment argues that despite Arizona's commendable efforts in criminalizing revenge porn, the statute falls short because it lacks the necessary severity of punishment, which is ultimately a requirement for successful deterrence. The statute will more effectively deter perpetration of the crime by borrowing provisions from criminal statutes punishing the crimes of sexual assault and child

<https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [<https://perma.cc/84CZ-3G9E>].

9. *Id.* at 11.

10. *Id.* at 12.

11. The Centers for Disease Control and Prevention recently estimated that the incidence of sexual assault perpetrated against women is nearly 1 in 5. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING SEXUAL VIOLENCE 1 (2017), <https://www.cdc.gov/violenceprevention/pdf/sv-factsheet.pdf> [<https://perma.cc/L4D5-3VHG>].

12. *See* EATON ET AL., *supra* note 8, at 19. Only eleven percent of participants stated that they shared the photo as some form of retaliation. *Id.*

13. *Id.* at 22.

14. The only irregularity to this general trend may be that the most commonly selected prohibitive factor was placement on a registry for sex offenders, which was chosen by sixty percent of the perpetrators, as compared to the fifty-five percent who selected imprisonment as a prohibitive factor. *Id.* While this is also considered a criminal sanction, it may not be the most severe, though that is an entirely subjective analysis.

pornography. Specifically, four borrowed concepts are necessary to augment the statute: (1) the classification of the crime must be changed to increase the sentence; (2) there must be express provisions allowing for increasing punishment based on aggravating factors; (3) the requisite mens rea of the crime must be lowered to increase conviction rates; and (4) miscellaneous other provisions must be added that further the premise of this Comment. By adding these provisions, the new statute will not only increase deterrence, but will also serve general policy objectives of the statute and will better match the impetus that guides the theoretical justification for punishment.¹⁵

This Comment presumes¹⁶ that criminal statutes are the most effective way to deter perpetration of this particular crime. However, this presumption is open to debate, and plenty of law review articles have explored the use of tort recovery¹⁷ and intellectual property law¹⁸ as means of fostering resolution of these issues. Civil means of recovery have their own substantial issues,¹⁹ which is why the criminal process may allow for a

15. See discussion *infra* Part II.D.

16. However, this presumption is based in logic, not just convenience. The CCRI's study revealed that most powerful deterrent for participants was criminal sanctions. See EATON ET AL., *supra* note 8, at 22. By applying the logic of the study, it seems most fitting for this Comment to focus on criminal statutes rather than civil remedies or otherwise.

17. Most of the scholarly work addressing revenge porn has expressed a preference for criminal liabilities over tort liabilities. See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Sarah Bloom, Note, *No Vengeance for 'Revenge Porn' Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense Is Still Legal, and Why We Should Criminalize It*, 42 FORDHAM URB. L.J. 233 (2014); Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247 (2015). Some scholars, however, have presented tort recovery as the superior method. See, e.g., Juan M. Acevedo Garcia, *Intentional Infliction of Emotional Distress Torts as the Best Legal Option for Victims: When Cyberbullying Conduct Falls Through the Cracks of the U.S. Criminal Law System*, 85 REV. JURÍDICA U. P.R. 127 (2016). For a rebuttal to this endorsement of tort law, see discussion *infra* note 19.

18. For an excellent piece discussing this recovery method, see Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422 (2014).

19. One need look no further than a first-year torts class to find the uncertainties of tort recovery. Recovery by tort suffers from the following limitations: (1) bringing claims can often be more financially burdensome on the victim, (2) emotional damages (which are more likely in revenge porn cases) are harder to compensate, (3) causation is often hard to prove, and (4) committing torts may be financially justified for those who can pay out losses. As for the intellectual property route, claims arising under that method focus only on civil damages and injunctive relief. See Levendowski, *supra* note 18, at 444–45. Again, website owners and internet users who lack the funds necessary to pay out a civil judgment will be under-deterred from posting the images.

more satisfactory justice for the victim. Therefore, this Comment does not discuss these methods of administrating justice.²⁰

Part II discusses Arizona's current laws on revenge porn, sexual assault, and child pornography. Part II also discusses other state provisions criminalizing revenge porn, theories of punishment, and theories of consent. Part III argues for the necessary statutory additions and explains why each piece matters in terms of supplementing or replacing the current statute. Part III also contains a draft of the suggested statute in its entirety. Part IV concludes.

II. BACKGROUND

To better understand the premise of this Comment, it is necessary to establish a working knowledge of the Arizona criminal statutes on revenge porn, sexual assault, and child pornography. This Comment references other state statutes to serve as context for determining where Arizona's law falls in terms of deterrence. Brief overviews on theories of punishment and theories of consent follow the discussion of the three statutes to ensure the proposed statute follows the policy objectives behind criminalization of revenge porn.

A. *Revenge Porn Statutes in Arizona and Other States*

Arizona, like many other states, has only recently responded to the issue of revenge porn.²¹ States have risen to the challenge as the primary combatants of revenge porn while federal legislators²² and private companies²³ have failed to grapple with the issue.

20. There have also been papers discussing a similar approach discussed in this Comment, but as a means of combating teenage sexting, which in all reality may fall more closely aligned with the crime of child pornography instead of revenge porn due to the age of the victim. This is outside the scope of this Comment. *See, e.g.,* Mitchell Osterday, *Protecting Minors from Themselves: Expanding Revenge Porn Laws to Protect the Most Vulnerable*, 49 IND. L. REV. 555 (2015).

21. In fact, all the thirty-nine states and D.C. that have revenge porn statutes on the books either passed legislation or amended their revenge porn statutes between 2013 and 2018. *See State Revenge Porn Laws*, C.A. GOLDBERG, <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> [<https://perma.cc/3BDU-8S9U>] (last updated Apr. 16, 2018).

22. While many scholars have advanced the position that there is a definitive need for federal legislation about revenge porn, no such plan has come to fruition. *See, e.g.,* Aubrey Burris, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325 (2014); Taylor Linkous, *It's Time*

1. Arizona's Statute

Arizona enacted its current statute in 2016,²⁴ after the federal courts held the first attempt²⁵ in 2014 to be invalid on First Amendment grounds.²⁶ The statute is organized into four subsections: subsection A lays out the framework for the crime, subsection B details exceptions, subsection C prescribes punishment, and subsection D contains relevant definitions.²⁷

Subsection A of the Arizona statute describes the necessary mens rea, as well as the essential elements required for conviction. Under the Act, a person must “intentionally disclose” the image to be guilty of the crime.²⁸ Subsection A also states that the victim must be recognizable from the image itself, or from information displayed in conjunction with the image.²⁹ There are also three additional requirements for conviction: (1) the person

for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn, 20 RICH. J.L. & TECH. 1 (2014).

23. Twitter has recently taken upon themselves to regulate their own space through new governance techniques, though it is unclear whether other major media platforms will follow. See Jonathan Vanian, *Twitter Wants to Crack Down on Revenge Porn*, FORTUNE (Oct. 27, 2017), <http://fortune.com/2017/10/27/nudity-revenge-porn-twitter/> [<https://perma.cc/UN8A-ZLTK>].

24. H.B. 2001, 52d Leg., 2d Reg. Sess. (Ariz. 2015), <https://www.azleg.gov/legtext/52leg/2r/bills/hb2001p.htm> [<https://perma.cc/77KB-5W4M>].

25. H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014), <https://www.azleg.gov/legtext/51leg/2r/bills/hb2515p.htm> [<https://perma.cc/45YB-3L9Y>]. The first attempt at the bill had similar provisions as the current text. The main criticism of the bill was that it was overbroad in its reach because it did not limit its application to those who were recognizable by the photo. *Id.* The ACLU sued because artists, writers, and distributors of art and literature were concerned that this would subject them to liability for using photos depicting nudity or sexual acts of anonymous people in the name of art, with the most notable example being use of the photo depicting the “Napalm Girl” who was nude but ultimately not identifiable by the image alone. See *Bookstores, Publishers, News Media, Librarians, and Photographers Charge Law Violates Freedom of Speech*, ACLU (Sept. 23, 2014), <https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images> [<https://perma.cc/9C9R-3Q82>]. Notable differences between the two bills include: (1) the second bill only applies to those recognizable by the image or context surrounding the image; (2) the second bill adds the consent exception to the text; (3) the second bill adds the aggravation component to electronic disclosures and a provision criminalizing threat of revenge porn; and (4) the second bill adds concrete definitions. See Ariz. H.B. 2001.

26. See *Antigone Books L.L.C. v. Brnovich*, No. 2:14-cv-02100-SRB (D. Ariz. July 10, 2015); see also Lee Rowland, *VICTORY! Federal Judge Deep-Sixes Arizona's Ridiculously Overbroad 'Nude Photo' Law*, ACLU (July 10, 2015), <https://www.aclu.org/blog/free-speech/internet-speech/victory-federal-judge-deep-sixes-arizonas-ridiculously-overbroad> [<https://perma.cc/T9FY-48TL>].

27. ARIZ. REV. STAT. ANN. § 13-1425 (2018).

28. *Id.* § 13-1425(A).

29. *Id.*

in the image must be nude or engaged in specific sexual activities,³⁰ (2) the victim must have a reasonable expectation of privacy,³¹ and (3) the image must be disclosed with intent to “harm, harass, intimidate, threaten or coerce the depicted person.”³²

Subsection B lists five exceptions to the statute. The first two involve what this Comment calls practical exceptions, which are the reporting of unlawful conduct³³ and the “[l]awful and common practices of law enforcement, criminal reporting, legal proceedings or medical treatment.”³⁴ The third exception allows for disclosure if the exposure is voluntary in a public or commercial setting.³⁵ The fourth exception is specifically crafted to exempt interactive computer services³⁶ and information services³⁷ “with regard to content wholly provided by another party.”³⁸ This exception is an attempt to shield third-party websites that distribute these materials from any liability.³⁹ The fifth and final exception is a catchall that exempts any images disclosed with the permission of the depicted person.⁴⁰

30. *Id.* § 13-1425(A)(1).

31. *Id.* § 13-1425(A)(2). Paragraph 2 of this subsection also explicitly states that disclosure of the image to another person using an electronic device does not alone undo the reasonable expectation of privacy. *Id.*

32. *Id.* § 13-1425(A)(3).

33. *Id.* § 13-1425(B)(1). An example in this case would be if someone takes the images to proper authorities in order to report the crime. Even though they are distributing the images in a sense, they are not deserving of liability because they are reporting a crime.

34. *Id.* § 13-1425(B)(2). This exception would include images taken and disseminated for medical purposes, and also images distributed in connection with a legal proceeding, such as evidence during trial.

35. *Id.* § 13-1425(B)(3). The third exception may be a bit more controversial, but is otherwise necessary. Disclosure in a public or commercial setting could easily include a model who poses nude for an art class. These images will eventually be sold or displayed, but the artists are not deserving of criminal liability. However, this exception may provide a loophole for people who post images without the consent of exotic dancers. While they have willingly disrobed in a commercial setting, that does not mean they have also consented to having images taken and dispersed. Perhaps an exception to this exception is warranted, but that lies outside the scope of this Comment.

36. Arizona borrows the definition of “interactive computer service” from 47 U.S.C. § 230(f)(2) (2018).

37. Arizona’s definition of “information service” comes from 47 U.S.C. § 153.

38. ARIZ. REV. STAT. ANN. § 13-1425(B)(4).

39. *See infra* note 69.

40. § 13-1425(B)(5). This section seems largely redundant, because if a person consents to distribution, then they likely no longer have a reasonable expectation of privacy. However, whether lawmakers choose to strike an otherwise redundant provision is not the concern of this Comment.

Subsection C lays out the framework for punishment.⁴¹ Arizona classifies its crimes in varying levels of misdemeanor and felony, with six classes of felonies and three classes of misdemeanors.⁴² Statutes punishing misdemeanors have prescribed limits on the maximum number of years a person can be sentenced,⁴³ and felonies have a range of sentencing structures allowing for discretion based on mitigating or aggravating circumstances that warrant smaller or larger punishments.⁴⁴ At a base level, the crime of revenge porn is classified as a class five felony,⁴⁵ which means that the sentencing for a first-time offender ranges from six months to 2.5 years.⁴⁶ However, if the perpetrator discloses the image by electronic means, the felony is now class four.⁴⁷ The corresponding sentence increases to a range from one year to 3.75 years.⁴⁸ Arizona's statute also contains a provision that punishes those who threaten to disclose an image that would otherwise violate the statute, but fail to follow through with that threat.⁴⁹ This threat imposes a class one misdemeanor on the perpetrator,⁵⁰ which is punishable for up to six months of imprisonment.⁵¹

Section D sets forth the definitions unique to the statute. Definitions relevant to this Comment include the following: “disclose;”⁵² “disclosed by electronic means;”⁵³ “harm;”⁵⁴ “image;”⁵⁵ “reasonable expectation of privacy;”⁵⁶ “specific sexual activities;”⁵⁷ and “state of nudity.”⁵⁸

41. This section severely undercuts the complexity of the Arizona code's punishment and sentencing systems. However, for the sake of brevity, only a high-level overview is given.

42. ARIZ. REV. STAT. ANN. § 13-601 (2018).

43. *Id.* § 13-707.

44. *Id.* § 13-702. However, this statute only applies to first time perpetrators of felonies. There are separate governing statutes for sentencing for repeat offenders. *Id.* § 13-703. The general trend is to increase punishment length for perpetration of more crimes. *Id.*

45. *Id.* § 13-1425(C).

46. *Id.* § 13-702(D).

47. *Id.* § 13-1425(C)(1).

48. *Id.* § 13-702(D).

49. *Id.* § 13-1425(C)(2). It is noteworthy that this provision is fairly unique to Arizona. The analysis section focuses on changes to make to Arizona's statute, which is why it does not receive attention in the discussion. However, it is a creative solution to increase deterrence, where Arizona is the trendsetter, rather than the state needing to change. Other states could enhance their current statutes by borrowing this particular section.

50. *Id.*

51. *Id.* § 13-707.

52. “‘Disclose’ means display, distribute, publish, advertise or offer.” *Id.* § 13-1425(D)(1).

53. “‘Disclosed by electronic means’ means delivery to an e-mail address, mobile device, tablet or other electronic device and includes disclosure on a website.” *Id.* § 13-1425(D)(2).

54. “‘Harm’ means physical injury, financial injury or serious emotional distress.” *Id.* § 13-1425(D)(3).

In summary, the Arizona statute has three basic elements: (1) nudity or sexual activity, (2) a reasonable expectation of privacy, and (3) an intent to harm or harass. In some respects, Arizona's statute is tougher than statutes in other states.⁵⁹ Several states criminalize revenge porn as a misdemeanor only, such as California⁶⁰ and New Mexico.⁶¹ In fact, at least twenty-two of the thirty-eight states that have revenge porn laws start with a misdemeanor for punishment.⁶² However, there is still room for substantial improvement in Arizona's statute.

2. Other States

A summary of revenge porn laws in the United States shows the lack of consensus on how this crime should be handled and punished.⁶³ Arizona's statute shares plenty of the more common provisions with other states'

55. "Image" means a photograph, videotape, film or digital recording." *Id.* § 13-1425(D)(4).

56. "Reasonable expectation of privacy" means the person exhibits an actual expectation of privacy and the expectation is reasonable." *Id.* § 13-1425(D)(5).

57. This definition borrows from another title. *Id.* § 13-1425(D)(6). This term can mean any of the following: (a) "[h]uman genitals in a state of sexual stimulation or arousal[.]" (b) "[s]ex acts, normal or perverted, actual or simulated, including acts of human masturbation, sexual intercourse, oral copulation or sodomy[.]" (c) "[f]ondling or other erotic touching of the human genitals, pubic region, buttocks, anus or female breast[.]" and (d) "[e]xcretory functions as part of or in connection with any of the activities" under this paragraph. ARIZ. REV. STAT. ANN. § 11-811(D)(18).

58. This definition also borrows from another title. § 13-1425(D)(7). Nudity encompasses: (a) "[a] human anus, genitals, the pubic region or a female breast below a point immediately above the top of the areola" and "[a] state of dress that fails to opaquely cover a human anus, genitals, or a female breast below a point immediately above the top of the areola." § 11-811(D)(14).

59. See generally *41 States + DC Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [https://perma.cc/8PEE-85DQ] (last visited Jan. 23, 2019). See also David Schwartz, *Arizona Governor Signs Legislation to Discourage 'Revenge Porn,'* REUTERS (Apr. 30, 2014, 5:53 PM), <https://www.reuters.com/article/us-usa-arizona-revengeporn/arizona-governor-signs-legislation-to-discourage-revenge-porn-idUSBREA4000T20140501> [https://perma.cc/J3RS-SFRW] (calling the Arizona statute "one of the harshest such measures in the nation"). It should be known that this op-ed piece is referring to the first revenge porn bill, but the material punishment provisions are essentially the same. See generally H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014), <https://www.azleg.gov/legtext/51leg/2r/bills/hb2515p.htm> [https://perma.cc/45YB-3L9Y].

60. CAL. PENAL CODE § 647(j)(4) (West 2018).

61. N.M. STAT. ANN. § 30-37A-1 (2018). Also, there are nine states that have no explicit revenge porn statutes at all. See *41 States + DC Now Have Revenge Porn Laws*, *supra* note 59.

62. See *41 States + DC Now Have Revenge Porn Laws*, *supra* note 59.

63. *Id.*

statutes. For instance, Nevada,⁶⁴ Hawaii,⁶⁵ and a handful of other states also begin with a felony as the baseline punishment, and most states upgrade the punishment for recidivism.⁶⁶ Arizona's explicit exception for third-party internet services is also common.⁶⁷ This is likely a direct provision to ensure compliance with the federal Communications Decency Act,⁶⁸ which protects the overall policy of internet development in the United States and shields website providers from certain liabilities.⁶⁹

One can easily be bogged down with the minutia of differences among the revenge porn statutes nationwide. However, there are several states with unique provisions that deserve mention. For example, Colorado keeps two revenge porn statutes in its criminal code—one for perpetrators interested in harassment,⁷⁰ and one for perpetrators more geared towards pecuniary gain.⁷¹ This closes any loopholes that may allow perpetrators to escape criminal liability based on their intent.⁷² Delaware's statute contains explicit aggravating factors that will increase punishment for committing the crime.⁷³ The aggravating factors mentioned are: (1) when the actor knowingly obtains the image without consent of the person depicted; (2) when the actor knowingly disseminates the image for a profit; (3) when the

64. NEV. REV. STAT. §§ 200.765–.790 (2017).

65. HAW. REV. STAT. § 711-1110.9 (2018).

66. See 41 States + DC Now Have Revenge Porn Laws, *supra* note 59.

67. See, e.g., HAW. REV. STAT. § 711-1110.9(1)(b)(ii); N.M. STAT. ANN. § 30-37A-1(D)(1); TEX. PENAL CODE ANN. § 21.16(f)(3) (2017).

68. 47 U.S.C. § 230 (2018).

69. *Id.* For a detailed analysis on the relationship between the Communications Decency Act and the concept of revenge porn, see Layla Goldnick, Note, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 CARDOZO J.L. & GENDER 583 (2015). While this Comment agrees that this limitation on liability of website operators is sometimes bad policy, it is outside the scope of this Comment. However, many scholars have taken it upon themselves to offer meaningful criticisms and solutions to this policy issue. See Amanda L. Cecil, Note, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513 (2014); Zak Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CALIF. L. REV. 1303 (2014).

70. COLO. REV. STAT. § 18-7-107 (2018).

71. *Id.* § 18-7-108. However, Colorado still punishes these two separate provisions the same, and the two have the same elements, differing only in motive. See *id.*; *id.* § 18-7-107.

72. See, e.g., EATON ET AL., *supra* note 8, at 19.

73. DEL. CODE ANN. tit. 11, § 1335(a)(9)(c) (2018). Arizona's revenge porn statute does not explicitly list aggravating factors, but there are blanket aggravating factors that apply to the entire criminal code. See ARIZ. REV. STAT. ANN. § 13-701(D) (2018). The statute lists twenty-six aggravating factors. *Id.* Only the relevant provisions are considered in the analysis below. See *infra* discussion Part III.A.2.

actor knowingly operates a website dedicated to distributing such images covered by the statute; (4) when the actor knowingly distributes the materials with intent to harass or harm and that a reasonable person would suffer mental or emotional harms; and (5) when the actor pairs the image with personally identifiable information.⁷⁴ Furthermore, the identifiable information includes either the person's face, first and last name, or first initial and last name, paired with one of the following: (1) a home or other physical address, including street name or city name; (2) an email address; (3) a phone number; (4) geolocation data;⁷⁵ and (5) any other identifier that allows physical or online identifying or contact of the person.⁷⁶

States have furthered creative efforts by offering alternative forms of relief. When Minnesota created its revenge porn statute, it also added the crime to a statutory list of “[q]ualified domestic violence-related crime[s].”⁷⁷ Because revenge porn qualifies as one of these crimes, offenders previously convicted of perpetrating revenge porn are subject to aggravation and increased sentencing for assault, stalking, and other related crimes.⁷⁸ This provision also entitles victims to notice when offenders are released.⁷⁹ North Carolina's statute offers criminal punishment for the perpetrator of the crime, but also expressly provides for a civil cause of action⁸⁰ as well as injunctive relief in the form of destruction of the image.⁸¹ Both provisions are also allowed in conjunction with other penalties, meaning use of a civil action or destruction of the image will not preclude the victim from seeking criminal remedies.⁸² The revenge porn statutes of the United States vary drastically from state to state. Again, Arizona remains among the tougher of the states. However, other states demonstrate creativity in the statutes mentioned above.

74. DEL. CODE ANN. tit. 11 § 1335(a)(9)(c).

75. Geolocation data is not defined in this part of the code. However, a different title in the Delaware code states that geolocation data is “information that is, in whole or part, generated by, derived from, or obtained by the operation of an electronic device that can be used to identify the past, present, or future location of an electronic device, an individual, or both.” DEL. CODE ANN. tit. 14, § 8102A(5).

76. DEL. CODE ANN. tit. 11 § 1335(a)(9)(a)(2).

77. MINN. STAT. § 609.02 (2018). Arizona likewise has a similar provision. *See* ARIZ. REV. STAT. ANN. § 13-3601.

78. *See, e.g.*, MINN. STAT. §§ 609.748, 609.749, 609.2242 (2016).

79. *Id.* § 611A.06 (2018).

80. N.C. GEN. STAT. § 14-190.5A(g) (2018). This may not be entirely necessary in statute, assuming the jurisdiction has a common law tort claim available.

81. *Id.* § 14-190.5A(e).

82. *Id.* § 14-190.5A(f).

B. Arizona's Sexual Assault Statute

The history behind sexual assault⁸³ laws is much lengthier than the history of revenge porn laws.⁸⁴ Much like state revenge porn laws, state laws on sexual assault are distributed across a wide spectrum, with variations from state to state.⁸⁵ Ignoring the ancillary components of sexual assault statutes,⁸⁶ most state statutes have a similar definition for sexual assault: sexual contact without consent.⁸⁷ The differences among state statutes are primarily the result of varied definitions of sexual contact⁸⁸ and consent.⁸⁹

83. Many states, including Arizona, use the term “sexual assault” instead of “rape.” This Comment uses “sexual assault” for consistency with the current statute. Although it varies by state, most states follow the definition that rape is one type of sexual assault, and that not all sexual assault is rape. See *Sexual Assault*, RAINN, <https://www.rainn.org/articles/sexual-assault> [<https://perma.cc/2339-F9FP>] (last visited Mar. 1, 2019).

84. See Estelle B. Freedman, Opinion, *Women's Long Battle to Define Rape*, WASH. POST (Aug. 24, 2012), https://www.washingtonpost.com/opinions/womens-long-battle-to-define-rape/2012/08/24/aa960280-ed34-11e1-a80b-9f898562d010_story.html [<https://perma.cc/KW27-MP7Y>] (discussing how the legal definition of rape in the United States has evolved over centuries).

85. See, e.g., *State Law Database*, RAINN, <https://apps.rainn.org/policy/index.cfm> [<https://perma.cc/Wp3M-3LB6>] (last visited Mar. 1, 2019).

86. That is, provisions such as aggravating and mitigating factors, mens rea, and otherwise.

87. See, e.g., ARIZ. REV. STAT. ANN. § 13-1406 (2018) (“sexual intercourse or oral sexual contact with any person without consent of such person”); CAL. PENAL CODE § 261 (2018) (defined as “an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances” followed by a list of circumstances similar to the Arizona code); COLO. REV. STAT. § 18-3-402 (2018) (“knowingly inflicts sexual intrusion or sexual penetration on a victim”); TEX. PENAL CODE ANN. § 22.011 (2017) (“causes the penetration of the anus or sexual organ of another person by any means, without that person’s consent”).

88. For example, Arizona’s statute includes both oral contact and sexual intercourse in its statute on sexual assault. ARIZ. REV. STAT. ANN. § 13-1406(A). California only uses the term sexual intercourse in defining sexual assault and houses the term oral copulation in a separate statute outside the context of sexual assault. See CAL. PENAL CODE § 261; CAL. PENAL CODE § 28 (2019).

89. For instance, many states provide exceptions for minors who have sex with adults, within certain age limitations. Texas condones sexual intercourse between a person who is age fourteen or older and an adult who is not more than three years older than that person. § 22.011(e). Colorado allows sexual intercourse between a person who is younger than age fifteen and an adult who is not more than four years older than the person. COLO. REV. STAT. § 18-3-402(1)(d).

In Arizona, committing sexual assault constitutes a class two felony at its baseline level,⁹⁰ with opportunity for aggravating factors to increase punishment.⁹¹ The required mens rea for the crime is satisfied when the person acts intentionally or knowingly.⁹² Another unique provision of the statute is that it contains explicit aggravating factors for the crime,⁹³ as opposed to only general aggravating factors⁹⁴ that apply to the whole code. The aggravating factors include: (1) if the victim was less than fifteen years of age,⁹⁵ (2) if the sexual assault involved the use of date-rape drugs without the victim's knowledge,⁹⁶ (3) if there was intentional or knowing infliction of serious physical injury,⁹⁷ and (4) if the perpetrator was at least eighteen years old and the victim was twelve years old or younger.⁹⁸

The statute also proscribes its own governing rules on presumptive sentences for sexual assault,⁹⁹ rather than following the requirements of section 13-703. The final relevant provision found in the sexual assault laws of Arizona is that perpetrators must serve sentences for sexual assault consecutive to other sexual assault sentences handed down.¹⁰⁰ This is like the consecutive term provisions that Arizona doles out for multiple sentences at the same time,¹⁰¹ except that it allows for consecutive terms handed down "at *any* time."¹⁰²

However, much like revenge porn statutes, sexual assault laws are not without their difficulties.¹⁰³ The primary issue with Arizona statutes

90. ARIZ. REV. STAT. ANN. § 13-1406(B). Sexual assault has presumptive sentencing, which is described below. Otherwise, a class two felony is sentenced between three years and twelve and a half years. *Id.* § 13-702(D).

91. *Id.* § 13-1406(D).

92. *Id.* § 13-1406(A).

93. *Id.* §§ 13-1406(B), (D).

94. *Id.* § 13-701(D).

95. *Id.* § 13-1406(B).

96. The drugs specifically listed are flunitrazepam, gamma hydroxy butyrate, or ketamine hydrochloride. *Id.*

97. *Id.* § 13-1406(D).

98. *Id.*

99. *Id.* § 13-1406(B). A first-time offender has a presumptive sentence of seven years, with a minimum of 5.25 years and a maximum of fourteen years. *Id.* A defendant with one prior felony conviction serves a presumptive sentence of ten years, with a minimum of 7.5 years and a maximum of twenty-one years. *Id.* A person who has two or more prior felony convictions serves a presumptive sentence of 15.75 years, with a minimum of fourteen years and a maximum of twenty-eight years. *Id.*

100. *Id.* § 13-1406(C).

101. *Id.* § 13-711.

102. *Id.* § 13-1406(C) (emphasis added).

103. The legal literature on sexual assault laws is a vast chasm of information, which remains outside the scope of this Comment. For just a few of the common pitfalls of sexual

concerning sexual assault are the definitions of consent.¹⁰⁴ Nonetheless, aggravating factors, presumptive sentences, and consecutive sentencing distinctly characterize Arizona sexual assault laws.¹⁰⁵

C. Arizona's Child Pornography Statute

Arizona's statute on child pornography is like the statute on sexual assault with respect to its punishment scheme. The required mens rea for the crime is that it must be committed knowingly.¹⁰⁶ The actus reus, or physical act the perpetrator commits, falls into two general categories. The first class consists of perpetrators who engage in "[r]ecording, filming, photographing, developing or duplicating" the image.¹⁰⁷ The second class of perpetrators consists of those who engage in "[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging" the image.¹⁰⁸ Finally, this crime is presumptively punished as a class two felony.¹⁰⁹ If the minor depicted is less than the age of fifteen, a different statute takes over.¹¹⁰ In the Arizona statute, definitions for this

assault laws, see Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127 (1996); Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1 (2016); Emily Pedersen, *The New Rape: Proposal of a Comprehensive Rape Law Reform to Increase Rape Convictions in Cases of Acquaintance Rape*, 84 UMKC L. REV. 1111 (2016); Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1 (2015); Linda Jackson, Note, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183 (1994).

104. The definitions included in statute for consent are discussed in more detail below. See *infra* discussion Part III.C.4.

105. Again, the details among state statutes regarding sexual assault are much too numerous to warrant discussion in this Comment; only the relevant pieces of the Arizona statute are necessary for the premise of this Comment. However, see *State Law Database*, *supra* note 85, for a compiled list of state statutes to analyze the differences.

106. ARIZ. REV. STAT. ANN. § 13-3553(A) (2018).

107. *Id.* § 13-3553(A)(1).

108. *Id.* § 13-3553(A)(2).

109. *Id.* § 13-3553(C).

110. *Id.* The crime is now governed by ARIZ. REV. STAT. ANN. § 13-705, which imposes a presumptive sentence of seventeen years, instead of the regular ten years. *Id.* § 13-705(D); see *id.* §§ 13-701(D), -3553(C). There is a similar aggravating circumstance in the case of sexual assault, where the perpetrator is at least eighteen years and the minor is twelve years of age or younger, but its significance to the premise of this Comment did not warrant discussion above. *Id.* § 13-705(A).

chapter are also comprehensive. The prohibited imagery includes both exploitative exhibition¹¹¹ and other sexual conduct.¹¹²

Arizona's statute is concise, with only three subsections.¹¹³ However, the Arizona law is typical by its terms and definitions when compared to other state laws.¹¹⁴ Some states have chosen to include more comprehensive details in their statutes. In Utah, for example, there are several aggravating factors not present in Arizona law. First, it is a separate offense for each minor depicted in the child pornography.¹¹⁵ Second, it is a separate offense for every time the same minor appears in different images.¹¹⁶

D. Theories of Punishment

Criminal laws are ultimately geared to administer corrective justice, as well as to deter future crimes, especially those with serious or permanent consequences.¹¹⁷ The theory that governs this policy can take two different routes, however. The two general punishment theories include retributivism and utilitarianism.¹¹⁸ Interwoven into this conversation are the concepts of deterrence, incapacitation, rehabilitation, and retribution.¹¹⁹

111. This includes "the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purposes of sexual stimulation of the viewer." *Id.* § 13-3551(5).

112. This includes actual or simulated: (1) sexual intercourse, (2) penetration with an object, (3) bestiality, (4) masturbation, (5) sadomasochistic abuse, and (6) defecation or urination. *Id.* § 13-3551(10).

113. *Id.* § 13-3553.

114. See, e.g., CAL. PENAL CODE § 311.3 (2018); NEV. REV. STAT. § 200.725 (2018); N.M. STAT. ANN. § 30-6A-3 (2018).

115. UTAH CODE ANN. § 76-5b-201(3)(a) (2018).

116. *Id.* § 76-5b-201(3)(b).

117. This Comment operates under the assumption that increased punishment leads to increased deterrence of crimes. This is just that—an assumption. However, the depth of literature on the subject lends itself to a variety of positions that may justify this assumption. Similarly, based on the CCRI study cited above, the general trends reflect increased deterrence with increased sanction. See EATON ET AL., *supra* note 8, at 22. Otherwise, for more thorough discussion on this topic, see Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010) and Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

118. See Carl Emigholz, Note, *Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement*, 58 RUTGERS L. REV. 583, 597 (2006).

119. See Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 361 (1998).

A utilitarian, or consequentialist, theory justifies punishment on the basis that positive consequences can be attributed to the punishment.¹²⁰ The most common of these justifications is that apparent punishment deters others from committing the crime.¹²¹ Retributivism, however, operates under the assumption that the punishment is administered solely because the perpetrator deserves it, and does not consider the consequences of the punishment.¹²²

Woven into both concepts is *why* crimes warrant punishment. The primary reasons behind punishment include: (1) deterrence; (2) incapacitation; (3) rehabilitation; and (4) retribution.¹²³ Deterrence serves to prevent the public, and the individual punished, from committing the crime, mostly motivated by fear of punishment.¹²⁴ Incapacitation essentially punishes crimes by physically stopping people from committing them: simply put, people in jail cannot commit the crime again (most of the time, anyway).¹²⁵ Rehabilitation, which is much more prominent in the utilitarian theory, serves the purpose of changing behavior once incarcerated.¹²⁶ Retribution, an obvious component of retributivism, is almost a mutually exclusive concept to rehabilitation, and again simply focuses on punishment for the sake of punishment.¹²⁷ This Comment uses notions from both theories in its statutory construction and proposed solutions.¹²⁸

E. Definitions of Consent

A definition of consent is integral to this Comment's discussion on revenge porn. Arizona's statutory definitions make comprehensive provisions in some respects, but fall short in others.

Arizona's criminal code groups all sexual offenses together and explicitly provides general definitions that apply to the chapter.¹²⁹ One of these definitions is "without consent,"¹³⁰ which is present in the statute on

120. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 856 (2002).

121. *Id.* at 857.

122. *Id.* at 859.

123. See Nygaard, *supra* note 119, at 361.

124. *Id.*

125. *Id.* at 362.

126. *Id.* The author of this piece criticizes this American justice system as wholly void of any rehabilitation. *Id.*

127. *Id.* at 363.

128. Trying to strictly appease both camps is outside the scope of this Comment.

129. ARIZ. REV. STAT. ANN. § 13-1401 (2018).

130. *Id.* § 13-1401(A)(7).

sexual assault.¹³¹ Without consent is defined in the statute to include: (1) when the victim is coerced by use or threat of use of force against a person or property; (2) when the victim cannot consent because of “mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition” when this condition should be reasonably known by the perpetrator; (3) when the victim was intentionally deceived as to the nature of the act; and (4) when the victim was intentionally deceived to believe that the perpetrator was the victim’s spouse.¹³²

The statutory definitions in the criminal code only define “without consent,” without ever affirmatively defining what constitutes consent. More confusingly, however, the text of Arizona’s revenge porn statute uses the term “consent” instead of “without consent.”¹³³ Arizona also does not include any age limits in its definition of consent, though this may be because sexual assault of a minor resides in different statutes.¹³⁴ Age of consent has not been an entirely concrete issue for some time, with law makers,¹³⁵ social scientists,¹³⁶ and the public¹³⁷ displaying varying degrees of disagreement.

Looking beyond the text of the statute, it is also important to note that there is a push in the feminist community to advocate for affirmative consent, sometimes called “enthusiastic consent.”¹³⁸ Dissatisfied with the

131. *Id.* § 13-1406.

132. *Id.* § 13-1401(A)(7).

133. *Id.* § 13-1425(B)(5). This confusingly requires readers to reverse-generate a list of what behaviors they can and cannot do.

134. *See id.* §§ 13-1404, -1405, -1410.

135. *See* Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314 (2003) (stating that the age of consent is most commonly age sixteen, but ranges from age twelve to age eighteen).

136. *See* Gene G. Abel et al., *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT’L. J.L. & PSYCHIATRY 89, 94 (1984) (identifying four concrete issues involving informed consent between an adult and a child: understanding, awareness of sexual norms in the community, appreciation of consequences, and whether the child and adult are equally powerful so that there is no coercion).

137. *See, e.g.*, Ella Cockbain & Helen Brayley, *Child Sexual Abuse is Never Consensual, Whatever the Victim’s Behaviour*, GUARDIAN (Sept. 27, 2012, 11:37 AM), <https://www.theguardian.com/commentisfree/2012/sep/27/child-sexual-abuse-consensual-victim-behaviour> [<https://perma.cc/E5N4-6E8F>].

138. *See* Jaclyn Friedman, *Adults Hate ‘Yes Means Yes’ Laws. The College Students I Meet Love Them*, WASH. POST (Oct. 14, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/?utm_term=.9e9f3ae79b5e [<https://perma.cc/N4ZA-QRD2>]; Zhana Vrangalova, *Everything You Need to Know About Consent That You Never Learned in Sex Ed*, TEEN VOGUE (Apr. 18, 2016), <https://www.teenvogue.com/story/consent-how-to> [<https://perma.cc/3KGN-5U4U>].

loopholes, exceptions, and gray areas involved with the traditional mantra, “no means no,” activists for consent have turned to a “yes means yes” framework that defines consent as not only an affirmative answer, but an “enthusiastic” one in some cases.¹³⁹ State legislatures, including California’s, have taken it upon themselves to pass legislation that mandates affirmative consent policies in higher education.¹⁴⁰ In the alternative, universities are increasingly putting these policies into practice regardless of the state’s silence on the issue.¹⁴¹

III. ANALYSIS: NECESSARY STATUTORY ADDITIONS TO THE ARIZONA STATUTE

Revenge porn is a malicious and potent crime, which deserves a punishment regime to match. While current Arizona law has made significant strides to protect victims and punish perpetrators, there are several changes that will better ensure more effective punishment. By borrowing provisions from other states’ revenge porn statutes, Arizona’s sexual assault statute, and Arizona’s child pornography statute, this Comment makes the following recommendations. In Section A, this Comment argues that Arizona must increase the felony classification associated with revenge porn, and that more aggravating factors need explicit mention in statute. Section B maintains that Arizona should decrease the requisite mens rea, and expand the concept of intent. Section C highlights a series of miscellaneous changes to Arizona’s statute that will increase deterrence of this crime. Section D contains a model statute.¹⁴²

139. Friedman, *supra* note 138; Vrangalova, *supra* note 138.

140. See Emanuella Grinberg, *Schools Preach ‘Enthusiastic’ Yes in Sex Consent Education*, CNN (Sept. 29, 2014, 5:40 PM), <https://www.cnn.com/2014/09/03/living/affirmative-consent-school-policy/index.html> [<https://perma.cc/7PPL-5EEM>]. Commentators on the issue of defining consent have noted that these policies likely will have implications for criminal codes, even if those issues have yet to materialize. See, e.g., Noah Hilgert, *The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws*, 58 ARIZ. L. REV. 867, 898 (2016) (using affirmative consent policies at the university level to inform model changes to criminal statutes).

141. See, e.g., Student Health & Counseling Servs., *Consent and Communication*, U. CHI., <https://wellness.uchicago.edu/healthy-living/health-information/sexual-health/> [<https://perma.cc/GVK7-6MDW>] (last visited Mar. 1, 2019); *Consent*, COLUM., <https://sexualrespect.columbia.edu/consent> [<https://perma.cc/5E8R-BXGF>] (last visited Mar. 1, 2019); *Consent*, U. WYO., <http://www.uwyo.edu/reportit/learn-more/consent.html> [<https://perma.cc/DV2Q-DGA7>] (last visited Mar. 1, 2019).

142. The changes contemplated in the statute may be seen as overly harsh, but they are severable. If legislators seek to adopt any or part of this statute, they can of course pick and choose each section as they please.

A. *Felony Classification and Aggravating Factors*

The current statute needs to increase the felony classification to a class two felony instead of a class five felony,¹⁴³ and the statute needs explicit aggravating factors to increase punishment and provide effective notice.

1. Felony Classification

As it stands, the Arizona revenge porn statute prescribes two levels of felony punishment: the crime is a class five felony if committed, and a class four felony if the photo is disclosed by electronic means. In addition to these provisions, the statute imposes a misdemeanor punishment on anyone who threatens to disclose an image that would violate the statute, but ultimately fails to do so.

The addition of a misdemeanor punishment for the threat of the crime is a powerful provision, and cause to celebrate Arizona's statute as is.¹⁴⁴ However, the statute must upgrade the felony classification to better match the felony classifications of the Arizona sexual assault and child pornography laws. Both laws prescribe punishments at the class two felony level, which ranges in punishment from three years to twelve years. These laws punish so severely because they are a violation of consent, and in the most intimate nature. In the case of child pornography, people generally accept that children cannot consent to these images because they are children—their capacity and cognition are too underdeveloped to appreciate such severe considerations.¹⁴⁵ In the case of sexual assault, the lack of consent is even clearer. Why then, should the lack of consent in the context of revenge porn be any different? In all three cases, there is (1) a sex crime (2) committed against one's will. Thus, there should be (3) analogous punishment. In addition, people should not underestimate the severity of the crime: there can be lasting emotional, mental, and reputational effects that will impact the victim in ways similar to other sex crimes. Just because

143. Some would argue that making the revenge porn punishable to the same degree as sexual assault incentivizes people to simply commit the assault. However, that argument assumes that the motives and opportunities for the crimes are the same. Distributing nude images of another person without their consent does not even necessarily involve contact with that other person. Furthermore, many perpetrators of revenge porn who participated in the CCRI study indicated multiple motives other than gratification or intent to harm, which may be more common with sexual assault.

144. Some would argue that this comes closer to punishing thoughts rather than actions. However, to threaten implies some level of speaking or connotation, making the statute more limited in operation.

145. *See supra* discussion Part II.E.

there are typically no physical damages does not mean victims deserve a lower level of care and justice.¹⁴⁶

2. Aggravating Factors

Arizona's revenge porn statute would increase overall effectiveness if it borrowed aggravating factors from the analogous statutes of sexual assault and child pornography. Furthermore, the statute should explicitly include these aggravating factors, like the sexual assault laws of Arizona. Finally, other states offer up a series of creative and effective aggravating factors that will benefit the Arizona statute.

Arizona's sexual assault statute offers up four explicit aggravating factors for sexual assault: (1) when the victim is less than the age of eighteen, (2) if the perpetrator gave the victim date-rape drugs without the victim's knowledge, (3) if there is intentional or knowing infliction of serious physical injury, and (4) if the victim is less than age twelve while the perpetrator is age eighteen or older. The child pornography statute presumptively covers the first and fourth aggravating factor, seeing as it punishes both capturing and distributing lewd images of minors. It is also unlikely that anyone should experience serious physical injury while having their photo taken or disseminated.

However, there is a need to explicitly mention the second factor. The notion that a perpetrator uses date-rape drugs implies a certain level of planning, which increases the culpability of the crime.¹⁴⁷ Thus, any use of such a drug warrants an increase in punishment. If a perpetrator gives their victim a date-rape drug, and then takes advantage of the situation to capture inappropriate lewd photos without the victim's consent, there is no reason that this act should not be punished analogously to others similarly situated.

Aside from the Arizona provisions that are helpful to the cause, several other state revenge porn statutes exhibit unique characteristics that lend themselves to adoption. For instance, Delaware mentions five specific aggravating factors in its statute, two of which are worth borrowing. First,

146. Indeed, this Comment operates under the presumption that emotional and reputational harms can be just as bad as physical harms. These harms are qualitatively different, and are difficult to compare side by side. Whatever the ultimate policy of the drafter may be, the intention of this Comment is to incite readers to think of revenge porn as something more culpable than other class four felony offenses. This Comment illustrates the severity of harm that ensues after revenge porn occurs. That is not to be taken lightly, and is deserving of *any* increase in felony status, even if it is not ultimately classified as a class two felony.

147. See *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) (linking premeditation and higher culpability).

there is aggravation when the actor knowingly distributes the materials with intent to harass or harm, and if a reasonable person would suffer mental or emotional damages. Second, there is aggravation where the actor also includes personally identifiable information in tandem with the image. The justification for the first relates to a skipped-over provision from the Arizona sexual assault statute: emotional damages.¹⁴⁸ Revenge porn is more likely to result in emotional damages than it is to result in severe physical injury. Thus, it makes more sense to include provisions such as these to adequately bring justice to victims who do not experience physical harms. As for the second provision, the personally identifiable information is more likely to result in a tarnished reputation, and can also result in people directly contacting the victim. For obvious reasons, these risks warrant a form of stricter punishment. A victim's damages for a leaked photo with no facial recognition are likely much less than damages for photos paired with unique identifying information.

Furthermore, the aggravating factors need explicit mention in statute because it more effectively puts people on notice as to what will be expected of them. These specific terms, however, are absent in the Arizona statute, which prescribes aggravating factors generally.

B. Decreasing the Mens Rea and Expanding Concepts of Intent

To effectively capture all perpetrators of the crime, the requisite mens rea for revenge porn must be decreased, and intent must expand beyond just intent to embarrass or harass.

1. Changing the Mens Rea to Recklessness

The mens rea currently prescribed offers up a standard much too high to bear: the perpetrator must have intentionally disclosed the image with intent to harass or harm. This is the highest possible mens rea required for a crime.¹⁴⁹ Ignoring the fact that lowering the standard mens rea will increase chances of conviction, there is sound policy in effectuating this change. Intent requires both knowledge of the act, paired with a desired result, namely intent to harass or harm the victim. This definition fails to capture

148. This alludes to the discussion above, where physical harms are unlikely to occur during perpetration of the act.

149. Although it is called "purpose" rather than intent, the Model Penal Code holds out an intentional act to be the most culpable. See MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST. 1962).

the perpetrator who *knowingly* distributes the image, meaning they are aware of their actions but perhaps did not consider the results as a motivation for the commission of the crime. This is not good enough. There are plenty of situations where recklessness serves as a better mens rea. For example, if a perpetrator stores an illegal image on his cloud service, there is a substantial risk that this may be shared with others—even if accidentally. The same mens rea would apply to an actor who perhaps threatens to hit send, and one who accidentally does so. Again, the statute would apply to a person who recklessly flashes the image in a public setting. Nevertheless, there are concerns of overreach. Perhaps a person may leave the image on his phone, only for a roommate or a child to post it accidentally (or intentionally). However, there must be a balance for these competing concerns. The latter hypothetical seems to be the rarity, but perhaps a middle ground is appropriate in this case. Thus, this Comment argues that a reckless intent constitutes a less culpable mens rea, and thus deserves a less severe punishment, here a class four felony, deserving of between one and four years sentencing.¹⁵⁰ Without belaboring the point, there are plenty of situations where an actor should reasonably know about substantial risks, and may fail to consider such risks in a reckless fashion. The statute must lower the mens rea component in order to effectively capture all perpetrators of the crime, and to encourage people to think twice about behaving recklessly in situations akin to the hypotheticals suggested.

2. Intent to Include Pecuniary Gain

Colorado's revenge porn statute, as well as Delaware's, contain specific provisions that address pecuniary gain as it relates to revenge porn. Arizona's, however, does not mention pecuniary gain. As it stands, the Arizona statute only punishes those who have an intent to harm, harass, or intimidate the victim. This completely disregards those whose intent is not to harm, but rather to profit. Based on the stories mentioned above, such as those involving Anon-IB's collection of "wins,"¹⁵¹ that likely may be a lucrative business: selling and bartering lewd images taken without consent. Therefore, punishing those motivated financially will help address this potential issue in Arizona. In turn, this will effectively close any loopholes

150. A prime example of this stratified classification is Arizona's law criminalizing child and vulnerable adult abuse. Under that statute, an intentional or knowing act is a class two felony, a reckless act is a class three felony, and a criminally negligent act is a class four felony. See ARIZ. REV. STAT. ANN. § 13-3623(A) (2018).

151. See *supra* discussion Part I.

which may allow perpetrators to escape liability based on motivation for profit rather than motivation to harm or harass.

C. Other Statutory Changes

These changes constitute minor but necessary additions to the statute that will ultimately serve to further deter the crime of revenge porn.

1. Consecutive Sentences

Arizona typically prescribes consecutive sentences for sentences handed down at the same time. However, the sexual assault statute allows for consecutive sentences to be served for terms handed down at *any* time, rather than *just* at the same time. The revenge porn statute must also contain this provision. A provision like this ultimately serves to deter recidivism, as it increases punishment length for those who likely to defect. Revenge porn, like sexual assault, deserves this addition for similar policy reasons: minimizing incidence of morally repugnant sex crimes.¹⁵²

2. Liability for Capturing the Image

Another downside of the Arizona law that needs rectification is that it only applies to those who ultimately disclose the image, leaving third parties responsible for snapping the photo unscathed (assuming those two perpetrators are not one and the same, which is likely the most common situation). Delaware includes obtainment of the images as a factor for aggravation, thus making the person capturing the image less culpable. While this Comment appreciates the premise, the more effective method would be to punish both parties equally. The only change necessary to the Arizona statute is to include capturing the image, rather than only including disclosure of the image. However, this Comment limits culpability to those

152. Again, this is an issue up to a drafter. After a 200-year sentence was handed down to an Arizona man for possession of child pornography, many have started to question the policy pros and cons of consecutive sentences. See Linda Greenhouse, *Justices Decline Case on 200-Year Sentence for Man Who Possessed Child Pornography*, N.Y. TIMES (Feb. 27, 2007), <https://www.nytimes.com/2007/02/27/washington/27scotus.html> [https://perma.cc/JV2Z-2RSZ]. This Comment simply argues that because the crimes are so analogous, this provision should apply.

who capture the image with a malevolent intent.¹⁵³ A situation could arise where a couple takes consensual lewd images of one another. If the image reached the internet, the person who took the photo would be culpable. This is not the intended result of this provision. Thus, the provision is limited to bad intents, such as taking the image without consent (like video voyeurism), or taking the image with consent—but with motive to disclose it in the future—without the consent to do so. Since these are equally culpable acts, the punishments should remain the same.

3. Explicit Provisions Punishing Per Victim and Per Photo

Utah has discovered and rectified a particular issue on which Arizona's statute is silent: multiple photos and multiple victims. In Utah, it is a separate charge for each child depicted in an image that violates its child pornography statute. Similarly, it is also a separate charge for every time the same minor appears in a different image. In Arizona, without such a provision, conviction may lead to the backward result where a perpetrator receives punishment for only one disclosure, even though that incident may contain multiple photos of the same victim, or photos containing groups of victims. In order to avoid that result, this Utah provision must be written into the Arizona Statute.

4. Redefining Consent

Another pitfall of the Arizona statute is its lackluster definition of consent. First, statutory definitions of consent for the criminal code only define “without consent,” which leaves the public to simply guess what *is* consent for purposes of the statute. Next, the current revenge porn statute uses the term “consent” rather than “without consent,” meaning it is undefined and even more vulnerable to a misinterpretation. Finally, the definition of “without consent” itself is incomplete.

The first two issues are an easy fix. One may be tempted to simply define the opposite of the Arizona statute, meaning to define “consent” rather than “without consent.” However, even the strongest definitions of enthusiastic consent are not a typical bright line rule that readers of the statute may be expecting. Therefore, it is best to define both. To supplement the definition of “without consent,” consent should have a definition

153. Under the model statute, this would be an affirmative defense (“I did take the picture, but did not have the requisite intent”), rather than a prosecutorial burden.

describing enthusiastic, or affirmative, consent, which is the prototype for those pushing for comprehensive consent reform.¹⁵⁴

Currently, without consent means: (1) when the use of force or threatened use of force against person or property coerces the victim, (2) when the victim cannot consent because of some impairment of cognitive capacity that should be reasonably known to the perpetrator, (3) when the victim is deceived as to the nature of the act, and (4) when the victim was misled to believe that the perpetrator was the victim's spouse. These four instances of lack of consent are sound on their own. The issue is that this list is incomplete. The list should also include: (5) when the perpetrator uses pressure tactics to manipulate the victim into reluctant agreement, (6) when the victim fails to give affirmative consent, and (7) when the victim changes his or her mind during any sexual act and the perpetrator fails to comply.¹⁵⁵

5. Sex Offender Registration and Civil Remedies

The final provisions involve experimental but arguably highly effective means of deterring revenge porn perpetration. The first is assignment to a sex offender registry. This idea comes from the CCRI study cited above, rather than any material provisions of other revenge porn laws. Participants in the study indicated that the most likely deterrent was official registration on a state sex offender registry. This fact likewise finds support upon sound policy: revenge porn is nothing more than a sex crime. As such, it must be punished like a sex crime. Arizona already registers perpetrators who commit sexual assault, child pornography, and a whole slew of sex crimes¹⁵⁶ that all involve the core violation of consent that is equally tenable to revenge porn.¹⁵⁷

154. See *supra* discussion Part II.E. See also *infra* discussion Part III.D for a proposed definition of consent that embodies enthusiastic consent.

155. These additions are some modern issues involving consent: people violating consent are no longer only rapists lurking in the dark—they are everyday people pushing the boundaries of intimate human interaction.

156. Some dishonorable mentions include: ARIZ. REV. STAT. ANN. § 13-3821(A)(3) (2018) (sexual abuse); § 13-3821(A)(7) (molestation); § 13-3821(A)(11) (child sex trafficking); and § 13-3821(A)(15) (indecent exposure).

157. There is strong scholarly discourse that opposes the imposition and use of sex offender registries. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071 (2012). Sex offender registry is not to be taken lightly. However, the severity can be diminished with a tiered system of offenses and registration periods. For instance, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (SORA), a federal act with registry implications, groups perpetrators into different groups with different required periods of registry based on

Despite any potential shortcomings, it is good policy to give victims as many recovery methods as possible. North Carolina has experimented in this realm, and expressly grants a civil cause of action. The statute also offers up destruction of the image as a form of injunctive relief.¹⁵⁸ Neither of these civil remedies precludes any form of criminal action, meaning the victim may still get justice under both remedies. Arizona should likewise adopt these provisions.

D. *The Proposed Statute*

Based on the above analyses and recommended changes, the statute should read:

A. It is unlawful for a person to intentionally or knowingly capture or disclose an image of another person who is identifiable from the image itself or from information displayed in connection with the image if all of the following apply:

1. The person in the image is depicted in a state of nudity or is engaged in specific sexual activities.
2. The depicted person has a reasonable expectation of privacy. Evidence that a person has sent an image to another person using an electronic device does not, on its own, remove the person's reasonable expectation of privacy for that image.
3. The image is captured or disclosed with the intent to harm, harass, intimidate, threaten or coerce the depicted person or with the intent of pecuniary gain.

B. This section does not apply to any of the following:

1. The reporting of unlawful conduct.
2. Lawful and common practices of law enforcement, criminal reporting, legal proceedings or medical treatment.

their offense. *See id.* at 1087; Violence Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (codified as amended at 42 U.S.C. § 14071 (2006)), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub L. 109-248, § 129, 120 Stat. 587, 600 (codified as amended in scattered sections of 18 and 42 U.S.C. (2018)).

158. Case law in North Carolina is still underdeveloped on the execution of destruction. Once an image enters the internet, it can often be hard to remove it entirely. That would likely be an issue left for the courts to develop as time moves on.

3. Images involving voluntary exposure in a public or commercial setting.¹⁵⁹

4. An interactive computer service, as defined in 47 United States Code section 230(f)(2), or an information service, as defined in 47 United States Code section 153, with regard to content wholly provided by another party.

5. Any disclosure that is made with the consent of the person who is depicted in the image.

C. A violation of this section is a class 2 felony, except that a violation of this section is a:

1. Class 1 misdemeanor if a person threatens to disclose but does not disclose an image that if disclosed would be a violation of this section.

2. Class 4 felony if a person recklessly discloses or captures an image in violation of this section.¹⁶⁰

D. The following actions may be considered aggravating factors when calculating sentencing:

1. Use of date-rape drugs such as but not limited to, flunitrazepam, gamma hydroxyl butyrate or ketamine hydrochloride to subdue or inhibit the victim at the time of capturing the image.

2. Whether the person knows that the depicted person will reasonably suffer emotional damages.

3. Including personally identifiable information in conjunction with the image, including:

(a) First and last name or first initial and last name.

(b) A home or other physical address, including street name or city name.

(c) An email address or other electronic username.

(d) A phone number.

159. Although this Comment does not contemplate this as an issue, this provision may have some problems. For instance, exotic dancers may consent to exposure in a commercial setting, but likely are not consenting to having images taken of them and disseminated. However, the subsection probably covers a nude model who poses for an art class, and properly so. The provision may be problematic, but also serves a valuable purpose. This may be another change for another time.

160. This Comment also argues that perpetration of revenge porn is deserving of placement on the sex offender registry. The statute should reflect this change, but in title 13, section 3821 of the Arizona Revised Statutes rather than section 1425.

- (e) Geolocation data.
 - (f) Any other identifier that allows physical or online identification or contact of the person depicted.
4. Capturing or distributing images with multiple depicted persons in violation of this section or multiple images of the same person in violation of this section.
- E. This section does not preclude availability of civil remedies.¹⁶¹
- F. For the purposes of this section:
- 1. “Capture” means to take digital or physical possession.
 - 2. “Consent” means affirmative, explicit, and voluntary agreement to participate in a sexual act or disclosure of a sexual act.¹⁶²
 - 3. “Disclose” means display, distribute, publish, advertise or offer.
 - 4. “Disclosed by electronic means” means delivery to an e-mail address, mobile device, tablet or other electronic device and includes disclosure on a website.
 - 5. “Harm” means physical injury, financial injury or serious emotional distress.
 - 6. “Image” means a photograph, videotape, film or digital recording.
 - 7. “Reasonable expectation of privacy” means the person exhibits an actual expectation of privacy and the expectation is reasonable.
 - 8. “Specific sexual activities” has the same meaning prescribed in section 11-811, subsection D, paragraph 18, subdivisions (a) and (b).
 - 9. “State of nudity” has the same meaning prescribed in section 11-811, subsection D, paragraph 14, subdivision (a).

161. This Comment argues that the civil statutes should also be amended to grant an express private right of action, and specify that there is equitable relief available in the form of destruction of the image. Because this statute is meant for the criminal code, the civil addition must be separate from this one.

162. This Comment referenced some additions to the definition of “without consent” above. Those changes should also be implemented in the statutory code, but are actually housed in title 13, section 1401 of the Arizona Revised Statutes instead of section 1425.

IV. CONCLUSION

Revenge porn is a serious sexual offense, but traditionally lacks appropriate state remedies to help rectify injury and bring justice to victims of the crime. States, including Arizona, have been experimenting with creative statutory provisions that would help deter revenge porn. Some provisions have been successful, and others lackluster. To find a more appropriate remedy, statutory provisions criminalizing sexual assault and child pornography can be replicated to supplement Arizona's current statute on revenge porn. In many ways, the crime of revenge porn parallels sexual assault and child pornography, making these criminal statutes the perfect models for building a new statute. With these borrowed provisions, as well as other creative positions taken by sister states, Arizona could more effectively deter this trending new crime and provide relief to its citizens.