

# Two Steps Forward, One Step Back: Gaps in the Violence Against Women Act

Sebrina Thomas\*

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\* J.D., May 2025, The George Washington University Law School; Senior Production Editor, Federal Communications Law Journal, Volume 77; B.S. May 2021, Legal Studies, University of Central Florida. Thank you to the entire FCLJ staff for their dedication and hard work, without which this publication would not have been possible. My heartfelt gratitude also goes to the late Professor Lucarelli for all of his invaluable guidance, and my family and close friends for their continuous support and encouragement.

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## I. INTRODUCTION

What if one day, when living your life as you normally do—like walking your dog in the morning, or stopping at a coffee shop, or visiting the bank to deposit a check—your life completely changes in an instant? It is not because your car suddenly gets a flat tire, or you forgot about a meeting you had for work. Instead, it's because intimate images of yourself have been shared online for the world to see. You have no idea who would share these photos and why they would do so, especially without your consent or even knowledge. You ask yourself: who would intentionally share your intimate images? Who would share your photos for the world to see? Who would do this to a person? Who would do this to *you*?

You begin to realize that your body, your entire being, is now visible for the entire world and you cannot do anything about it. You realize the people closest to you such as your parents, siblings, friends, co-workers, neighbors, and complete strangers can now see a part of you they should never see without your consent. You become consumed with regret for even taking the photos in the first place. Then you wonder, how will your friends and family view you? What will they think of you? What if you want to get a new job and the employer sees this? What if the girls whispering behind you at the coffee shop this morning were murmuring about your pictures and you just didn't know?

Although society would prefer to look away or feign indifference to this experience many women face, the harm women endure is not something to ignore, nor is it out of the ordinary. Up to 1 in 5 adults are victims of revenge porn.<sup>1</sup> Victims have reported that their intimate photos were released by a current or previous romantic partner without their permission.<sup>2</sup> Victims have stated that their photos were released by a complete stranger or by someone close to them—a friend, family member, or co-worker.<sup>3</sup> Victims of sextortion are blackmailed, threatened, or coerced in sending intimate images and videos of themselves.<sup>4</sup> It has been estimated by the Internet Crime Complaint Center, a division in the FBI dedicated to investigating cybercrimes, “that they [have] received over 18,000 sextortion-related complaints nationally.”<sup>5</sup> Studies “illustrate the disturbing trend of sextortion,” including that “half of sextortion victims are threatened several times per day, with 1 in 4 receiving

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1. Conor Walsh, *Revenge Porn: The Latest Research and Law Enforcement Efforts*, TRAINING INST. ON STRANGULATION PREVENTION (May 30, 2023), <https://www.strangulationtraininginstitute.com/revenge-porn-the-latest-research-and-law-enforcement-efforts/> [<https://perma.cc/P92L-6KSR>].

2. *See id.*

3. *See id.*

4. *See* FBI, INTERNET CRIME REPORT (2021), [https://www.ic3.gov/Media/PDF/AnnualReport/2021\\_IC3Report.pdf](https://www.ic3.gov/Media/PDF/AnnualReport/2021_IC3Report.pdf), at 12; *see also* *The Rise of 'Sextortion' on Social Media and How to Protect Youth*, LINEWIZE (Feb. 3, 2023) [hereinafter *Rise of Sextortion*], <https://www.linewize.com/blog/the-rise-of-sextortion-on-social-media#:~:text=Approximately%205%25%20of%20students%20reported,13%20or%20young%20when%20threatened> [<https://perma.cc/5YWF-KHFK>].

5. *See* *Rise of Sextortion*, *supra* note 4.

between 10 and 19 threats per days.”<sup>6</sup> Additionally, it has been reported that “almost *half* of [perpetrators] follow through on their threats if the victim does not comply” (emphasis added).<sup>7</sup>

Once faced with image-based abuse, victims experience a plethora of effects such as feeling shame or embarrassment, so much so that some do not report the incident.<sup>8</sup> Victims also experience a “decline in [their] mental health and wellbeing” where they become “increasingly secretive with [their] digital devices” and have “[s]udden and unexplained personality changes or mood swings.”<sup>9</sup> The FBI has reported that “more than a dozen sextortion victims were reported to have [lost their lives to] suicide.”<sup>10</sup>

Domestic violence no longer appears solely through its traditional forms such as physical or verbal abuse. Rather, domestic violence has transformed due to the advancement in technology which has led to the birth of image-based abuse.<sup>11</sup> Image-based abuse is the use of technology such as phones, computers, surveillance, and deepfake technology to facilitate domestic violence.<sup>12</sup> It is important to recognize that image-based abuse does not have a heavy bulk of research behind it due to underreporting.<sup>13</sup> However, it is clear that the structures in place to protect women from domestic violence have not sufficiently kept pace with today’s current state of technology. As technology advances so should the laws covering domestic violence. Who is Congress really punishing? Is it punishing the perpetrators who release a woman’s intimate images without their consent? Or the victims themselves by not establishing a stronger statutory framework that victims can use to receive justice for the horrific acts carried out against them?

This Note will focus on technological abuse through a general lens as it pertains to women. Technological abuse can be further complicated and exacerbated “due to race and ethnicity, age, sexual orientation, religion, gender identity/expression, socioeconomic status . . . disability, and [immigration] status.”<sup>14</sup> The intersectionality of these factors, being a victim

6. *Id.*

7. *Id.*

8. Walsh, *supra* note 1.

9. Rise of Sextortion, *supra* note 4.

10. Press Release, U.S. Att’y’s Off., S. Dist. of Ind., FBI and Partners Issue National Public Safety Alert on Sextortion Schemes (Jan. 19, 2023) (on file with author), <https://www.justice.gov/usao-sdin/pr/fbi-and-partners-issue-national-public-safety-alert-sextortion-schemes> [<https://perma.cc/WT4Q-XSDF>].

11. Walsh, *supra* note 1.

12. *See generally About Abuse*, WOMENSLAW.ORG, <https://www.womenslaw.org/about-abuse/abuse-using-technology/ways-abusers-misuse-technology> [<https://perma.cc/JUX5-3WKQ>] (last updated Sept. 30, 2024) (choose “Ways Survivors and Abusers Misuse Technology”; then choose “Abuse Involving Texts, Photos, and Videos”; then choose “Abuse Involving Nude/Sexual Image”; then choose “Definitions and basic information”).

13. *Id.*

14. UNESCO, “YOUR OPINION DOESN’T MATTER, ANYWAY”: EXPOSING TECHNOLOGY-FACILITATED GENDER-BASED VIOLENCE IN AN ERA OF GENERATIVE AI 11 (2023), [https://unesdoc.unesco.org/in/documentViewer.xhtml?v=2.1.196&id=p:usmarcdef\\_0000387483&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach\\_import\\_2ef6fbfd-84e7-475e-a70e-c6e574f0645a%3F\\_%3D387483eng.pdf&locale=en&multi=true&ark=/ark:/48223/pf0000387483/PDF/387483eng.pdf](https://unesdoc.unesco.org/in/documentViewer.xhtml?v=2.1.196&id=p:usmarcdef_0000387483&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach_import_2ef6fbfd-84e7-475e-a70e-c6e574f0645a%3F_%3D387483eng.pdf&locale=en&multi=true&ark=/ark:/48223/pf0000387483/PDF/387483eng.pdf) [<https://perma.cc/HNA7-PKYG>].

of image-based abuse and domestic violence as a whole deserves and requires its own discussion. This Note argues that the legal framework in place for protecting victims of domestic violence is inadequate because it has not kept pace with today's technology and the evolution of domestic violence with technology. Ultimately, the current legislation is not serving Congress' intended purpose of protecting women. Congress has made steps forward in accounting for the victims who experience domestic violence through technology.<sup>15</sup> However, the remedies available to victims of image-based abuse are insufficient. Accordingly, to effectively protect women from domestic violence, Congress should adopt legislation similar to the proposed Stopping Harmful Image Exploitation and Limiting Distribution Act of 2023 ("SHIELD Act") or the Preventing Deepfakes of Intimate Images Act ("PDII Act") to help resolve the unsatisfactory legal frameworks covering domestic violence on the federal level.<sup>16</sup>

Part II.A will provide factual background on what domestic violence is, how it has evolved as technology has advanced, and what revenge porn, sextortion, and image-based abuse with deepfake technology (collectively referred to as "image-based abuse") encompass. Part II.B will provide background on the current legal frameworks in place that cover image-based abuse on both the federal and state level. Part II.B.1 will provide background on the Violence Against Women Act ("VAWA"). Part II.C will discuss recent federal reform efforts on image-based abuse. Part II.D will provide background on current state legislation that covers image-based abuse. Part III will discuss the gaps left by Congress in addressing image-based abuse through the VAWA and what should be done to fill in the gaps. Finally, Part IV will conclude this analysis.

## II. BACKGROUND

### A. *What is Domestic Violence?*

Domestic violence, otherwise known as intimate partner violence, is "a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner."<sup>17</sup> To be classified as domestic violence, actions must be performed by a person who is either "a current or former spouse . . . intimate partner of the victim, or person similarly situated to a spouse of the victim."<sup>18</sup> Moreover, domestic violence may be performed by someone who "is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner . . . shares a child in common with the victim . . . or

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15. See 15 U.S.C. § 6851 (creating a civil cause of action relating to the disclosure of intimate images).

16. The Stopping Harmful Image Exploitation and Limiting Distribution Act of 2023, S. 412, 118th Cong. (2023); Preventing Deepfakes of Intimate Images Act, H.R. 3106, 118th Cong. (2023).

17. *What Is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> [https://perma.cc/6JDJ-D7CV] (last visited Jan. 25, 2024).

18. 34 U.S.C. § 12291(a)(12)(A).

commits [these acts] against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.”<sup>19</sup> The acts carried out against a victim can include “behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound.”<sup>20</sup>

Domestic violence can encapsulate a broader degree of abusive conduct than many might initially recognize or realize. Many may primarily think of domestic violence in the forms of physical, verbal, emotional, or sexual abuse. This is a rational belief as domestic violence encompasses “the use of or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological . . . .” and economic abuse.<sup>21</sup> However, by virtue of today’s prevalent use of technology, domestic violence can also take the form of technological abuse.<sup>22</sup>

Technological abuse, also known as image-based abuse, is domestic violence facilitated through technology and has occurred since as early as the 1980s, but “did not become widespread [or prevalent] until around 2010.”<sup>23</sup> Technological abuse is performed when the “act or pattern of behavior that occurs within domestic violence . . . occurs using any form of technology, including but not limited to: internet enabled devices, online spaces and platforms, computers, mobile devices, cameras and imaging programs, apps, location tracking devices, communication technologies, or any other emerging technologies.”<sup>24</sup> These acts are executed as a means to coerce, stalk, or harass another person and can take many forms including sending abusive texts, spying on someone through the tracking system on their device, and sharing intimate photos or videos of someone without their consent.<sup>25</sup>

Sharing intimate photos or videos of an individual without their consent is called image-based sexual abuse, otherwise termed as revenge porn or nonconsensual pornography.<sup>26</sup> The photos are disseminated without the victim’s consent or permission and commonly show the victim engaged in a sexual act and/or nudity.<sup>27</sup> Additionally, the photos may be taken without the

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19. 34 U.S.C § 12291(a)(12)(B)-(D).

20. *About the Office on Violence Against Women*, U.S. DEP’T JUST., OFF. ON VIOLENCE AGAINST WOMEN (Dec. 6, 2023), <https://www.justice.gov/ovw/domestic-violence> [<https://perma.cc/YF95-MZJA>].

21. 34 U.S.C § 12291(a)(12).

22. *See id.*

23. Chance Carter, *An Update on the Legal Landscape of Revenge Porn*, NAT’L ASSOC. ATT’Y GEN. (Nov. 16, 2021), <https://www.naag.org/attorney-general-journal/an-update-on-the-legal-landscape-of-revenge-porn> [<https://perma.cc/6JRK-EXRW>]. *See generally* 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/TU9K-LTU4>].

24. 34 U.S.C. § 12291(a)(40).

25. *See Technology-Facilitated Abuse*, SAFE STEPS, <https://www.safesteps.org.au/understanding-family-violence/types-of-abuse/technological-facilitated-abuse/> [<https://perma.cc/3GFM-JFF4>] (last visited Nov. 11, 2023).

26. *See Image-based Sexual Abuse: An Introduction*, END CYBER ABUSE, <https://endcyberabuse.org/law-intro/> [<https://perma.cc/R3KS-HDC8>] (last visited Nov. 11, 2023) [hereinafter *Image-based Sexual Abuse*].

27. *See id.*

victim's knowledge, shared without the victim's consent, or both.<sup>28</sup> When posted—either on websites that host nonconsensual porn, social media, email, text, or other messaging services—the photos can include the victim's name or other identifying information such as their phone number, email, or social media links.<sup>29</sup> Up to 1 in 5 adults are victims of revenge porn.<sup>30</sup> Victims experience a range of symptoms and effects such as changes in sleep and eating patterns, nightmares, post-traumatic stress disorder, depression, anxiety, trust concerns, and suicidal thoughts.<sup>31</sup>

Revenge porn addresses the actual dissemination of intimate photos without the victim's consent.<sup>32</sup> However, there can be situations where the abuser does not disseminate the photos at all, but rather attempts or threatens to expose or distribute them unless the victim complies with their demands.<sup>33</sup> This is called sexual extortion or "sextortion."<sup>34</sup> Sextortion can take on different forms, specifically with how the perpetrators gain access to the victim's intimate photos.<sup>35</sup> For example, the perpetrator may hack into the victim's electronic devices and access their stored photos and webcams.<sup>36</sup> The perpetrator may take a nonconsensual recording of the victim, or a former or current intimate partner may take photos of the victim with their consent, but then subsequently threaten to disseminate them.<sup>37</sup> Through online dating scams the perpetrator may lure, groom, and sexually extort their victims by using social media or instant messaging platforms such as Instagram, X, or WhatsApp.<sup>38</sup> Once the perpetrator has possession of the intimate images, they may return "with additional demands and threaten to disseminate content to friends and family if the victim doesn't comply."<sup>39</sup>

As mentioned, in revenge porn and sextortion schemes, the victim may be unaware that the photos were taken because the photos are obtained "through theft, hacking, hidden cameras, or recorded sexual abuse" or through deepfake technology.<sup>40</sup> Deepfake technology "uses a form of artificial intelligence called deep learning to make images of fake events" and can

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28. *See id.*

29. *See Carter, supra* note 23.

30. *See Walsh, supra* note 1.

31. *See* Kristen Zaleski, *The Long Trauma of Revenge Porn*, OXFORD U. PRESS BLOG (Sept. 22, 2019), <https://blog.oup.com/2019/09/the-long-trauma-of-revenge-porn/> [<https://perma.cc/DK99-6TMC>].

32. *See* Image-based Sexual Abuse, *supra* note 26.

33. *See* Asia A. Eaton et al., *The Relationship Between Sextortion During COVID-19 and Pre-pandemic Intimate Partner Violence: A Large Study of Victimization Among Diverse U.S. Men and Women*, VICTIMS & OFFENDERS (Jan. 30, 2022), <https://doi.org/10.1080/15564886.2021.2022057> [<https://perma.cc/H5JY-8AAZ>].

34. *Id.*

35. *See id.* at 2-3.

36. *See id.*

37. *See id.*

38. *See* Rise of Sextortion, *supra* note 4.

39. *Id.*

40. *Frequently Asked Questions*, CYBER C.R. INITIATIVE, <https://cybercivilrights.org/faqs/> [<https://perma.cc/U48M-RRVR>] (choose from the dropdown "Shouldn't people just stop creating or sharing intimate pictures of themselves?") (last visited Jan. 25, 2024) [hereinafter *Cyber Civil Rights FAQ*].

further exacerbate the growth of image-based abuse.<sup>41</sup> Individuals who have never taken intimate images can become victims of image-based abuse as a result of this technology because the perpetrator can use images and videos victims have posted on their personal pages and morph them to create pornographic content without their consent.<sup>42</sup> Deepfake technology has even become a weapon used in politics to create and spread false information under the guise of trusted sources.<sup>43</sup> As a result, there is a growing fear that deepfake technology will become a new weapon for perpetrators of revenge porn and sextortion because it can and will expand the amount of potential victims of image-based abuse.<sup>44</sup>

### B. *The Current Legal Frameworks on Image-Based Abuse*

Technological abuse is an ever-growing problem with no signs of slowing down.<sup>45</sup> On the federal level, a statutory framework that has been implemented with the goal of combatting domestic violence and violent acts against women is the VAWA.<sup>46</sup> States and territories of the United States have adopted statutes in order to address technology-facilitated domestic violence and to provide victims with causes of actions for the cybercrimes of revenge porn and/or sextortion.<sup>47</sup> Currently, there is no federal law on deepfake

41. Ian Sample, *What Are Deepfakes – and How Can You Spot Them?*, GUARDIAN (Jan. 13, 2020), <https://www.theguardian.com/technology/2020/jan/13/what-are-deepfakes-and-how-can-you-spot-them> [<https://perma.cc/N3BG-54BU>].

42. See Chenxi Wang, *Deepfakes, Revenge Porn, and the Impact on Women*, FORBES (Nov. 1, 2019), <https://www.forbes.com/sites/chenxiwang/2019/11/01/deepfakes-revenge-porn-and-the-impact-on-women/?sh=157312081f53> [<https://perma.cc/7L4P-348L>]; see also Nandini Comar, *The Rise of Revenge Porn*, GARBO (Oct. 29, 2021), <https://www.garbo.io/blog/revenge-porn> [<https://perma.cc/LT8D-7DFB>]; see also Kate Conger & John Yoon, *Explicit Deepfake Images of Taylor Swift Elude Safeguards and Swamp Social Media*, N.Y. TIMES (Jan. 26, 2024), <https://www.nytimes.com/2024/01/26/arts/music/taylor-swift-ai-fake-images.html> [<https://perma.cc/Q972-X8PK>] (making deepfake technology, and more generally, A.I. tools has become “widely popular but have made it easier and cheaper than ever to create . . . deepfakes, which portray people doing or saying things they have never done”).

43. Nick Barney & Ivy Wigmore, *What is Generative AI? Everything You Need to Know*, TECHTARGET, <https://www.techtarget.com/whatis/definition/deepfake> [<https://perma.cc/5KFQ-B8SP>] (last visited Jan. 26, 2024); see also Kevin Collier & Scott Wong, *Fake Biden Robocall Telling Democrats Not to Vote is Likely an AI-Generated Deepfake*, NBC NEWS (Jan. 22, 2024), <https://www.nbcnews.com/tech/misinformation/joe-biden-new-hampshire-robocall-fake-voice-deep-ai-primary-rcna135120> [<https://perma.cc/TC97-C3WN>] (creating a pre-recorded message from a “fake President Joe Biden” that told New Hampshire voters not to vote).

44. Wang, *supra* note 42.

45. See, e.g., *Image Based Abuse*, JOYFUL HEART FOUND. (citing *The Issue*, MY IMAGE MY CHOICE, <https://myimagemychoice.org> [<https://perma.cc/46UC-JQNQ>] (last visited Nov. 3, 2024)) <https://www.joyfulheartfoundation.org/learn/image-based-abuse> [<https://perma.cc/BWU5-3JA2>] (last visited Nov. 3, 2024) (increasing by 1,780% increase compared with 2019, there were 276,149 deepfake images online with a total number of 4,219,974,115 views as of January 2024).

46. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong. (1994).

47. See, e.g., D.C. CODE § 22-3053 (2024).

technology in the context of domestic violence, however some states, such as Illinois, have adopted legislation that addresses this new and growing concern.<sup>48</sup>

## 1. The Violence Against Women Act

Prior to 1994, there was an apparent rise in violent crime, specifically violent acts against women.<sup>49</sup> These violent acts included sexual assault, domestic violence, dating violence, and stalking.<sup>50</sup> There was a need for “criminal provisions and key grant programs that [would] improve the criminal and civil justice system.”<sup>51</sup> Additionally, domestic violence was not accounted for once “abusers would cross state lines to avoid prosecution.”<sup>52</sup> Historically, the family sphere has been viewed as a private institution, thus law enforcement was reluctant to interfere with cases of domestic violence in the interest of maintaining family privacy.<sup>53</sup> For example, prior to the VAWA’s enactment, it was not required nor encouraged for law enforcement to adhere to protection orders filed in “other states, tribes, and territories.”<sup>54</sup> These problems did not go unnoticed by Congress which led to the introduction of the VAWA.

### *a. The VAWA’s Development from 1994 to Present*

Finalized proposals authored by then-Senator of Delaware, Joseph Biden, and Colorado representative, Patricia Schroeder, led to the VAWA’s incorporation into the U.S. Code: the Violent Crime Control and Law

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48. Cassandre Coyer, *States Are Targeting Deepfake Pornography – But Not in a Uniform Way*, ALM LAW (Aug. 10, 2023), <https://www.law.com/legaltechnews/2023/08/10/states-are-targeting-deepfake-pornography-but-not-in-a-uniform-way/> [<https://perma.cc/T5HB-J233>] (allowing victims of “digitally manipulated pornographic content” to sue for damages).

49. See *About the Office on Violence Against Women*, U.S. DEP’T JUST., OFF. ON VIOLENCE AGAINST WOMEN, <https://www.justice.gov/file/29836/download> [<https://perma.cc/J2ET-NHSJ>] (last visited Jan. 25, 2024).

50. See *id.*

51. FACT SHEET: VIOLENCE AGAINST WOMEN ACT II, CLINTON WHITE HOUSE ARCHIVE, [https://clintonwhitehouse3.archives.gov/women/violence\\_factsheet.html](https://clintonwhitehouse3.archives.gov/women/violence_factsheet.html) [<https://perma.cc/A2FD-2V2Z>] (last visited Jan. 23, 2024).

52. Tara Law, *The Violence Against Women Act Was Signed 25 Years Ago. Here’s How the Law Changed American Culture*, TIME (Sept. 12, 2019), <https://time.com/5675029/violence-against-women-act-history-biden/> [<https://perma.cc/WTP5-PFUW>].

53. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that the private realm of family life cannot be entered by a State, notwithstanding certain exceptions); see generally LISA N. SACO, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 1 (2019), [https://www.everycrsreport.com/files/20190423\\_R45410\\_672f9e33bc12ac7ff52d47a8e6bd974d96e92f02.pdf](https://www.everycrsreport.com/files/20190423_R45410_672f9e33bc12ac7ff52d47a8e6bd974d96e92f02.pdf) [<https://perma.cc/Y4DP-A3KP>].

54. *Id.*

Enforcement Act of 1994.<sup>55</sup> The Act brought forth tougher penalties for offenders of domestic violence and, in part, created programs “to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women . . . .”<sup>56</sup> Since 1994, the VAWA has been reauthorized four times: in 2000, 2005, 2013, and most recently in 2022.<sup>57</sup> Reauthorization entails changes to a particular act, in this case the VAWA, in which the Act is subject to additions and deletions.<sup>58</sup> The 2000 and 2005 reauthorizations contained no mention of technological abuse or the dissemination of intimate images.<sup>59</sup> The 2013 reauthorization arguably “close[d] critical gaps in services and justice” and acknowledged the role technology plays with domestic violence.<sup>60</sup> In regard to violent crimes on school campuses, the reauthorization stated that sexual assault and stalking can be committed through the use of technology.<sup>61</sup> Ultimately, despite the inclusion of technology, there was still no mention of the unlawful dissemination of or threat to disseminate intimate images.<sup>62</sup> The VAWA was reauthorized in 2022 and provided survivors of domestic violence with resources such as housing and legal assistance.<sup>63</sup> The 2022 reauthorization updated and expanded several provisions including the increase in funding for culturally specific resources. Most notably, in this context, it included an acknowledgment of online harassment, abuse, and combats cybercrimes.<sup>64</sup>

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55. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1976 (1994); see also David M. Heger, *The Violence Against Women Act of 1994*, NAT’L VIOLENCE AGAINST WOMEN PREVENTION RSCH. CTR., [https://mainwebv.musc.edu/vawprevention/policy/vawa.shtml#:~:text \[https://perma.cc/XU26-BP2B\]](https://mainwebv.musc.edu/vawprevention/policy/vawa.shtml#:~:text=[https://perma.cc/XU26-BP2B]) (last updated Dec. 7, 2000).

56. *About the Office on Violence Against Women*, U.S. DEP’T JUST., OFF. ON VIOLENCE AGAINST WOMEN, <https://www.justice.gov/ovw/stop-violence-against-women-formula-grant-program> [https://perma.cc/G5W6-AZ7V] (last visited Jan. 25, 2024).

57. See, e.g., Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 49 (2022).

58. See *What is Reauthorization?*, DC ADVOC. PARTNERS, <https://dcpartners.iel.org/wp-content/uploads/2021/09/What-is-Reauthorization-session-6.pdf> [https://perma.cc/V7WD-E2V5] (last visited Jan. 23, 2024).

59. See Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. (2000); see also Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402, 109th Cong. (2005).

60. *VAWA 2013 Reauthorization*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/content/vawa-2013-reauthorization/> [https://perma.cc/CPV2-S7U7] (last visited Nov. 4, 2024); see also Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 303(2)(A)(ii) (2013).

61. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 87 (2013) (codified at § 303(2)(b)(A) (2013)).

62. See *id.* § 303.

63. Statement, The White House, Fact Sheet: Biden-Harris Administration Celebrates the Twenty-Ninth Anniversary of the Violence Against Women Act (Sept. 13, 2023) (on file with author) [hereinafter 2023 White House VAWA Fact Sheet], <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/13/fact-sheet-biden-harris-administration-celebrates-the-twenty-ninth-anniversary-of-the-violence-against-women-act/> [https://perma.cc/DY4W-WZED].

64. See *id.*

b. *Revenge Porn in the VAWA*

The 2022 reauthorization added provisions concerning image-based abuse “to address cybercrime and the nonconsensual dissemination of intimate pictures.”<sup>65</sup> Under Title 15 U.S.C. § 6851(b)(1)(A), a victim of nonconsensual pornography has a right to a civil action.<sup>66</sup> The statute states that “an individual whose intimate visual depiction is disclosed . . . without the consent of the individual, where such disclosure was made by a person who knows that, or recklessly disregards whether, the individual has not consented to such disclosure, may bring a *civil* action against that person in an appropriate district court” (emphasis added).<sup>67</sup> A victim can recover actual or liquidated damages in the amount of \$150,000.<sup>68</sup> Under the court’s discretion, a victim may attain “a temporary restraining order, a preliminary injunction, or a permanent injunction ordering the defendant to cease display or disclosure of the visual depiction.”<sup>69</sup> The statute further acknowledges that victims to nonconsensual pornography can be children; therefore, “in the case of an individual who is under 18 years of age . . . the legal guardian of the individual . . . may assume the identifiable individual’s rights.”<sup>70</sup> Finally, the victim may be provided a pseudonym in order to maintain their confidentiality through injunctive relief granted by the court.<sup>71</sup>

Ultimately, victims of nonconsensual pornography are now able to pursue civil actions against perpetrators; however, neither the VAWA or any other federal legislation qualify revenge porn as a federal crime. For revenge porn to be prosecuted on the federal level, other avenues must be taken, such as through the stalking or harassment laws, depending on the facts and conduct of the case.<sup>72</sup>

c. *The VAWA Makes No Mention of Sextortion*

Despite there being a federal civil remedy for revenge porn—the actual dissemination and disclosure of intimate images—the VAWA does not address sextortion—the *threat* to disseminate or disclose intimate images.<sup>73</sup> In fact, there is no mention of sextortion at all.<sup>74</sup> A victim of sextortion is unable to turn to the VAWA for a cause of action, nor can they turn to another

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65. EMILY J. HANSON, CONG. RSCH. SERV., R47570, THE 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 2 (2023), <https://crsreports.congress.gov/product/pdf/R/R47570/2> [<https://perma.cc/P4SD-X32W>]; see also 2023 White House VAWA Fact Sheet, *supra* note 63.

66. See generally 15 U.S.C. § 6851(b)(1)(A).

67. *Id.*

68. *Id.* § 6851(b)(3)(A)(i).

69. *Id.* § 6581(b)(3)(A)(ii).

70. *Id.* § 6581(b)(1)(B).

71. *Id.* § 6581(b)(3)(B).

72. See Janet Portman, *Revenge Porn: Laws + Penalties*, CRIMINALDEFENSELAWYER, <https://www.criminaldefenselawyer.com/resources/revenge-porn-laws-penalties.htm> [<https://perma.cc/Q6JP-H7YY>] (last updated Oct. 18, 2023).

73. See Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 49 (2022).

74. See generally *id.*

federal law that *specifically* addresses “sextortion.”<sup>75</sup> To successfully prosecute sextortion cases that do not involve children, other federal statutes must be utilized as there’s no “on-point federal law that covers the sexual elements of sextortion.”<sup>76</sup> Different facts will lead prosecutors to different statutes which results in “different penalties” that require different elements to be proven.<sup>77</sup> Hence, the prosecution of sextortion cases is inconsistent.<sup>78</sup>

Generally with sextortion cases, prosecutors may turn to the federal interstate extortion statute which provides four possible avenues for extortion victims.<sup>79</sup> Seemingly, out of the four avenues, victims of sextortion can only go through one avenue: the perpetrator being fined, imprisoned for not more than two years, or both.<sup>80</sup> If the victim has experienced highly targeted attacks, a prosecutor may turn to the federal stalking law, which sentences a perpetrator up to five years in prison and a fine depending on the severity of the crime.<sup>81</sup> Some cases may even involve a perpetrator who hacked into the victim’s social media accounts, thus leading a prosecutor to “the Computer Fraud and Abuse Act, the identity theft law, or both.”<sup>82</sup>

*d. The VAWA Makes No Mention of Image-Based Abuse Created with Deepfake Technology*

The VAWA does not address image-based abuse perpetrated with deep fake technology nor does it provide any protections for those who experience the disclosure of fake intimate images created with deepfake technology.<sup>83</sup> Like with “general” revenge porn and sextortion, revenge porn and sextortion via deepfake technology will likely have to be prosecuted with other federal statutes if the facts of the case allow it, *i.e.*, laws covering extortion, identity

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75. *Sextortion – Should It Be a Federal Crime?*, HG.ORG, <https://www.hg.org/legal-articles/sextortion-should-it-be-a-federal-crime-53756> [<https://perma.cc/UX3P-LZAH>] (last visited Jan. 23, 2024).

76. Benjamin Wittes et al., *Sextortion: Cybersecurity, Teenagers, and Remote Sexual Assault*, CTR. FOR TECH. INNOVATION BROOKINGS INST. (May 11, 2016), <https://www.brookings.edu/articles/sextortion-cybersecurity-teenagers-and-remote-sexual-assault/> [<https://perma.cc/LL63-TVP4>].

77. *Id.*

78. *Id.*

79. *See* 18 U.S.C. § 875.

80. *See id.* § 875(d).

81. *See* 18 U.S.C. § 2261A; *see also* Wittes et al., *supra* note 75 (addressing sextortion cases leads prosecutors to potentially turn to stalking statutes when the perpetrator is highly targeting the victim such as when a former partner who cannot walk away let go of the relationship or “someone with pathological obsession with a particular victim”); *see* 18 U.S.C. § 2661(b)(5).

82. Wittes et al., *supra* note 76; *see also* 18 U.S.C. § 1030; *see also* 18 U.S.C. § 1028A.

83. *See* Press Release, Congressman Joseph Morelle, Congressman Joe Morelle Authors Legislation to Make AI-Generated Deepfakes Illegal (May 5, 2023) (on file with author), <https://morelle.house.gov/media/press-releases/congressman-joe-morelle-authors-legislation-make-ai-generated-deepfakes> [<https://perma.cc/6BRM-C5GL>].

theft, and stalking.<sup>84</sup> Additionally, a perpetrator can be sued “using a variety of legal theories” such as defamation, false light claims, and violation of publicity rights.<sup>85</sup>

### C. Current Federal Reform Efforts Addressing Image-Based Abuse

Legislators have noticed that Congress has effectively left gaps in its current statutory framework. The VAWA has fallen flat in fulfilling its object and purpose of combatting violent acts against women by failing to provide adequate remedies for victims of image-based abuse. To address this failure, some legislators have proposed bills to combat the new means of technological abuse. Two recent examples of bills that attempted to fill in the gaps left by Congress were proposed by U.S. Senators Amy Klobuchar and John Cornyn (the SHIELD Act), and Congressman Joseph Morelle (the PDII Act).<sup>86</sup>

#### 1. Understanding the Stopping Harmful Image Exploitation and Limiting Distribution Act of 2023

The growing issue of image-based sexual abuse has not gone unnoticed. There have been repeated efforts on the federal level to “establish . . . federal criminal liability for [perpetrators] who distribute others’ private or explicit images online without consent.”<sup>87</sup> In 2023, U.S. Senators Amy Klobuchar and John Cornyn introduced bipartisan legislation to address and combat this prevailing issue of image-based sexual abuse: the SHIELD Act.<sup>88</sup> The SHIELD Act would have complemented the VAWA and provided criminal penalties for revenge porn.<sup>89</sup> If the SHIELD Act had been adopted, an individual who knowingly mailed or distributed an intimate visual depiction of another individual “using any means or facility of interstate or foreign commerce or affecting interstate or foreign commerce” would’ve been in violation of the Act.<sup>90</sup> Additionally, it would’ve been unlawful to mail or distribute an intimate visual depiction of an individual with knowledge of or reckless disregard for the lack of consent of the individual to the distribution<sup>91</sup>

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84. See generally Adam Dodge et al., *Using Fake Video Technology to Perpetuate Intimate Partner Abuse*, DOMESTIC VIOLENCE ADVISORY, [https://www.cpedv.org/sites/main/files/webform/deepfake\\_domestic\\_violence\\_advisory.pdf](https://www.cpedv.org/sites/main/files/webform/deepfake_domestic_violence_advisory.pdf) [<https://perma.cc/PK7B-ZZDY>] (last visited Jan. 25, 2024).

85. *Id.* at 7.

86. See News Release, Sen. Amy Klobuchar, Klobuchar, Cornyn Introduce Bipartisan Legislation to Address Online Exploitation of Private Images (Feb. 28, 2023) <https://www.klobuchar.senate.gov/public/index.cfm/2023/2/klobuchar-cornyn-introduce-bipartisan-legislation-to-address-online-exploitation-of-private-images> [<https://perma.cc/7JNQ-F5CK>]; see also Morelle, *supra* note 83.

87. Klobuchar, *supra* note 86; see also S. 412. See generally H.R. 3106.

88. Klobuchar, *supra* note 86; see also S. 412.

89. See S. 412 § 1802(c)(1).

90. *Id.* § 1802(b)(1).

91. See *id.* § 1802(b)(1)(A).

where the content “was not voluntarily exposed by the individual in a public or commercial setting”<sup>92</sup> or where the content “is not a matter of public concern.”<sup>93</sup> In the case that the person depicted consented to the *creation* of the depiction, it could not have been said that they also consented to the *distribution* of the depiction.<sup>94</sup> As a result, the individual who mailed or distributed the depiction would have been subject to a fine, “imprisoned not more than 5 years, or both.”<sup>95</sup> Restitution would have also been available as a reparation for the victim.<sup>96</sup>

Additionally, the SHIELD Act would have provided a criminal remedy in addition to existing civil remedies to victims of sextortion.<sup>97</sup> Any person who threatened to commit an offense under the Act—knowingly mailing or distributing an intimate visual depiction of an individual—would’ve faced a fine, imprisonment of no more than 5 years, or both.<sup>98</sup> Furthermore, violators of the SHIELD Act would have faced civil forfeiture in which any distributed material, interest in property, and personal property “used, or intended to be used . . . to commit or to facilitate the commission of such violation” would have been required to be forfeited to the government.<sup>99</sup>

## 2. Understanding the Preventing Deepfakes of Intimate Images Act

Another form of legislation that has been introduced to provide adequate remedies for victims of image-based abuse is the PDII Act.<sup>100</sup> Congressman Joseph Morelle, a representative for New York, authored the PDII Act to “protect the right to privacy online amid a rise of artificial intelligence and digitally-manipulated content.”<sup>101</sup> Congressman Morelle stated that “it’s critical we take proactive steps to combat the spread of disinformation and protect individuals from compromising situations online.”<sup>102</sup> The PDII Act would have added a section to the VAWA discussing the disclosure of intimate images.<sup>103</sup>

Currently, the VAWA has one section that discusses the disclosure of intimate images.<sup>104</sup> The section defines a “depicted individual” as “an individual whose body appears in whole or in part in an intimate visual depiction and who is identifiable . . . .”<sup>105</sup> The PDII Act would have added a separate section following Section 1309 of the VAWA, to address the

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92. *Id.* § 1802(b)(1)(B).

93. *Id.* § 1802(b)(1)(C).

94. *See id.* § 1802(b).

95. 170 CONG. REC. S4338-39 (daily ed. July 10, 2024) (statement of Sen. Peter Welch).

96. *See* S. 412 § 1802(c)(3).

97. *See id.* § 1802(e); *see* 170 Cong. Rec. S 4338-39 (2024).

98. *See* 170 Cong. Rec. S 4338-39 (2024).

99. *See* S. 412 § 1802(c)(2); *see also* 18 U.S.C. § 981.

100. H.R. 3106.

101. Morelle, *supra* note 83.

102. *Id.*

103. *See* H.R. 3106 § 2.

104. *See* Consolidated Appropriations Act, H.R. 2471, 117th Cong. § 1309 (2022).

105. *Id.* § 1309(a)(3).

“disclosure of intimate digital depictions.”<sup>106</sup> This section would have supplemented the definition of a “depicted individual,” adding that a depicted individual as it relates to this section, is “an individual who, as a result of digitization or by means of digital manipulation, appears in whole or in part in an intimate digital depiction and who is identifiable.”<sup>107</sup>

Like the VAWA’s section on the disclosure of intimate images, an individual whose intimate digital depictions have been disclosed without their consent may bring a civil action under the PDII Act.<sup>108</sup> However, under the PDII Act, the perpetrator would be subject to a fine or imprisonment of not more than 2 years.<sup>109</sup> The PDII also would have addressed the growing issue with deepfake technology as it pertains to politics, providing for a criminal action where a perpetrator could have faced a fine and/or 10 years of imprisonment if the violation could be “reasonably expected to affect the conduct of any administrative, legislative, or judicial proceeding of a Federal, State, local, or Tribal government agency, including the administration of an election or the conduct of foreign relations; or facilitate violence.”<sup>110</sup>

#### *D. Current State Legislation Targeting Image-Based Abuse*

As previously stated, victims of revenge porn and sextortion do not currently have a criminal remedy, and victims of sextortion do not have a civil cause of action on the federal level. Similarly, victims of image-based abuse derived from deepfake technology do not have a civil or criminal remedy on the federal level. Slowly but surely, states have been working towards implementing statutes to address the inadequacies of remedies on the federal law by providing victims of image-based abuse with a civil and/or criminal remedy.

##### 1. State Legislation on Revenge Porn

Forty-nine states plus the District of Columbia (“D.C.”), Puerto Rico, and Guam have criminalized revenge porn.<sup>111</sup> The only state that has not enacted a statute to criminalize revenge porn is South Carolina.<sup>112</sup> In the District of Columbia, it is unlawful “for a person to knowingly publish one or more sexual images of another identified or identifiable person, whether obtained directly from the person or from a third party or other source, when: (1) [t]he person depicted did not consent to the publication of the sexual image; (2) [t]he person publishing the sexual image knew or consciously disregarded a substantial and unjustifiable risk that the person depicted did

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106. H.R. 3106 § 1309A.

107. *Id.* § 1309A(a)(2).

108. *See id.* § 1309A(b)(1).

109. *See id.* § 1309A(d).

110. *Id.* § 2252D(2)(b)(2).

111. *See Nonconsensual Distribution of Intimate Images*, CYBER C.R. INITIATIVE, <https://cybercivilrights.org/nonconsensual-distribution-of-intimate-images/> [<https://perma.cc/VSQ3-25HB>] (last visited Nov. 4, 2024).

112. *Id.*

not consent to the publication; and (3) [t]he person published the sexual image with the intent to harm the person depicted or to receive financial gain.”<sup>113</sup> If found in violation of this code, the perpetrator would be found guilty of a felony and can be fined, imprisoned for no more than 3 years, or both.<sup>114</sup> In Texas, if the perpetrator disseminates images with the intent to cause harm; is aware that the person depicted had a reasonable expectation that the images would remain private; the disclosure of the images actually causes harm; or the images reveal the identity of the depicted person; then they have committed a state jail felony.<sup>115</sup> Thus, different states have set forth different frameworks in order to combat revenge porn.

## 2. State Legislation on Sextortion

As to sextortion, currently, twenty-eight states and D.C. have enacted sextortion laws.<sup>116</sup> In spite of not having a statute that criminalizes revenge porn, South Carolina does have a statute that criminalizes sextortion.<sup>117</sup> In South Carolina, an individual who “intentionally and maliciously threatens to release, exhibit, or distribute a private image of another in order to compel or attempt to compel the victim to do any act or refrain from doing any act against [their] will, with the intent to obtain additional private images or anything else of value,” must be imprisoned.<sup>118</sup> The length of imprisonment depends on whether the act was a first offense or not.<sup>119</sup> Florida has a more general statute that addresses threats and extortion;<sup>120</sup> A person commits a second degree felony if they “either verbally or by written or printed communication, maliciously threatens” to accuse someone of another crime or offense; threatens an injury to another; or to expose or disgrace another with the intent to extort money or any act.<sup>121</sup> States including New Mexico, North Carolina, and Massachusetts are silent on sexual extortion.<sup>122</sup>

## 3. State Legislation Addressing Image-Based Abuse Facilitated by Deepfake Technology

The use of deepfake technology for facilitating domestic violence is a relatively new phenomenon. Despite its newer occurrence, states such as Texas and Virginia have begun to enact state legislation addressing the

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113. See *Sextortion Laws*, CYBER CIV. RTS. INITIATIVE, <https://cybercivilrights.org/sextortion-laws/> [<https://perma.cc/2Y54-QNT2>] (last visited Nov. 12, 2023).

114. *Id.* § 22-3053(b).

115. See TEX. PENAL CODE ANN. § 21.16(b) (West 2019); see also TEX. PENAL CODE ANN. § 12.35 (West 2023) (being guilty of a state jail felony can lead to an individual to receive a term of confinement in a state jail for not more than 2 years or less than 180 days).

116. See *Sextortion Laws*, *supra* note 122.

117. See *id.*

118. S.C. CODE ANN. § 16-15-430 (2023).

119. See *id.*

120. See generally FLA. STAT. § 836.05 (2023).

121. *Id.* § 836.05(1).

122. See *Sextortion Laws*, *supra* note 122.

growing concerns on image-based abuse created with deepfake technology.<sup>123</sup> The Texas Penal Code has a section covering the “Unlawful Production or Distribution of Certain Sexually Explicit Videos.”<sup>124</sup> It states that it is a misdemeanor if a person “knowingly produces or distributes by electronic means a deep fake video that appears to depict the person with the person’s intimate parts exposed or engaged in sexual conduct.”<sup>125</sup> Virginia has similar legislation which states that it is a misdemeanor if a person who intends “to coerce, harass, or intimidate, maliciously disseminates or sells” a video or image that depicts a person’s intimate parts without their consent or authorization.<sup>126</sup> This misdemeanor also covers a perpetrator who has released intimate images of a person “whose image was used in creating, adapting, or modifying a [video or image] with the intent to depict an actual person and who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic;”<sup>127</sup> therefore covering the concern of deepfake technology.

### III. ANALYSIS

Who is Congress really punishing? Before 1994, it was clear that women were confronted with violent acts such as domestic violence, sexual assault, and stalking, without any defense.<sup>128</sup> Thirty years later, women are still defenseless against image-based abuse because the structures in place that are supposed to protect women from domestic violence have not sufficiently kept pace with modern technology. Congress may have made two steps forward in including technological abuse as a form of domestic violence, but it has made a step back with the VAWA’s failure to address sextortion or image-based abuse created through deepfake technology.<sup>129</sup> States have attempted to fill in these gaps, however, with only some states addressing image-based abuse and their differing laws, there is an overall lack of consistency for victims. Legislators have also attempted to fill in the gaps with the SHIELD and PDII Acts, both which were never passed. Technology will continue to “evolve and permeate our society” and it will not stop.<sup>130</sup> Therefore, Congress must make a change to provide a uniform law that all victims of image-based abuse can turn to.

Part A will discuss the need for the VAWA to evolve with the current age of the Internet and why Congress should seriously consider updating the VAWA to include the appropriate civil and criminal remedies for victims of image-based abuse. Part B will cover why Congress should consider adopting legislation that contains language similar to the SHIELD and PDII Acts. Finally, at the conclusion of this section it will become clear that the language

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123. See Coyer, *supra* note 48.

124. TEX. PENAL CODE ANN. § 21.165 (West 2023).

125. *Id.* § 21.165(b)-(c).

126. VA. CODE ANN. § 18.2-386.2 (West 2024).

127. *Id.*

128. See U.S. DEP’T JUST., OFF. ON VIOLENCE AGAINST WOMEN, *supra* note 49.

129. See 2023 White House VAWA Fact Sheet, *supra* note 63.

130. Morelle, *supra* note 83; see also Klobuchar, *supra* note 86.

of current statutory frameworks does not encompass what women are currently experiencing today. Therefore, adopting language and/or provisions from both Acts will complement the VAWA, allowing the statute to meet its goal of protecting woman from violent acts such as domestic violence.

A. *Congress Should Reauthorize the VAWA to Include Appropriate Civil and Criminal Remedies to Combat the Growth of Image-Based Abuse*

The current statutory framework in place by Congress does not comport with today's reality that image-based abuse is an increasingly prolific way to facilitate domestic violence.<sup>131</sup> The VAWA must be reauthorized to provide adequate protections to victims of image-based abuse. The VAWA was created to combat violent acts against women; and back when it was first enacted, the violent acts toward women were primarily physical and verbal abuse such as sexual assault, domestic abuse, dating violence, and stalking—it is why the VAWA in 1994 focused on those particular acts.<sup>132</sup> Today, the VAWA has acknowledged that domestic violence does include technological abuse, but it is still missing essential provisions to protect women from how technological abuse is being effectuated.<sup>133</sup> There needs to be a criminal remedy for victims of revenge porn and a civil and criminal remedy for victims of sextortion and image-based abuse created with deepfake technology.

Again, the issue of technological abuse has not gone unnoticed. Legislators have attempted to combat this issue in the past with the SHIELD and PDII Acts.<sup>134</sup> Additionally, states have taken steps toward providing victims of image-based abuse with remedies such as section 21.16(b) of the Texas Penal Code, which provides a criminal remedy for victims of revenge porn.<sup>135</sup> Steps are not being made by Congress to include the proper remedies for victims in the VAWA or other Acts. Therefore, the present federal-level framework is not serving its intended purpose of protecting the women of *today*: victims of technology-facilitated domestic violence.

1. What the VAWA is Missing

The 2022 VAWA reauthorization is silent on providing victims of revenge porn with a *criminal* remedy. To combat the harms of image-based abuse and protect women from their abusers, the VAWA acknowledged the reality women face with having their intimate images used against them. The VAWA was changed to provide a *civil* remedy to victims of revenge porn in which they can receive actual or liquidated damages in the amount of

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131. See, e.g., JOYFUL HEART FOUND., *supra* note 45.

132. See Heger, *supra* note 55.

133. See 34 U.S.C. § 12291(a)(40).

134. See generally S. 412; see also H.R. 3106.

135. See e.g., TEX. PENAL CODE ANN. § 21.16(b) (West 2019); see also TEX. PENAL CODE ANN. § 12.35 (West 2023). See also Nonconsensual Distribution of Intimate Images, *supra* note 111.

\$150,000,<sup>136</sup> as well as a temporary restraining order, a preliminary injunction, or a permanent injunction.<sup>137</sup>

A civil remedy alone is not only inadequate for victims, but a perfunctory attempt to provide victims of image-based abuse with justice.<sup>138</sup> As said by Dr. Mary Anne Franks, President and Legislative & Tech Policy Director of the Cyber Civil Rights Initiative, “[c]ivil remedies should be a complement to criminal prohibition, not a substitute for it.”<sup>139</sup> This half-hearted attempt is evident when considered in light of the fact that conduct that affects people generally is criminalized while similar conduct that is traditionally targeted at women is not. For example, the dissemination of intimate images of an individual without their consent is not a federal crime, but credit card fraud is.<sup>140</sup> It is illegal to steal someone’s credit card, but it is not illegal to disseminate a person’s intimate images without their consent.<sup>141</sup> The attempt or threat to disseminate intimate images of an individual unless they provide more images or actual sexual contact is not a federal crime. But identity theft is.<sup>142</sup> It does not matter that the perpetrator wrongfully compromises a victim’s bodily autonomy and exposes them without their consent.<sup>143</sup> Women’s rights are consistently infringed upon without any consequences to the perpetrator.

This is not to say that civil remedies are entirely inadequate. However, providing only a civil remedy does not solve the problem. Victims should be afforded the opportunity to condemn their abusers and see them face prosecution for their actions. Providing a criminal remedy would also deter individuals from committing a true violation of an individual’s bodily autonomy.<sup>144</sup> There are many forms of conduct that are punished by criminal law such as “theft, drug possession, [and] destruction of property.”<sup>145</sup> Compare the harms created by these crimes with the harms created by revenge porn, sextortion, and the overall image-based abuse through deepfake technology. The harms experienced through image-based abuse, as a whole, are “far more severe, lasting, and irremediable.”<sup>146</sup>

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136. See Consolidated Appropriations Act, H.R. 2471, 117th Cong. § 1309(b)(3)(A)(i) (2022).

137. *Id.*

138. See generally Dr. Mary Anne Franks (@ma\_franks), X (Feb. 9, 2022, 8:32 PM), [https://x.com/ma\\_franks/status/1491585879693049862?s=20](https://x.com/ma_franks/status/1491585879693049862?s=20) [<https://perma.cc/6Z4C-C3YG>].

139. Dr. Mary Anne Franks (@ma\_franks), X (Feb. 9, 2022, 8:43 PM), [https://twitter.com/ma\\_franks/status/1491588667764359170](https://twitter.com/ma_franks/status/1491588667764359170) [<https://perma.cc/6WUE-SNQS>]; see also Mary Anne Franks, J.D., *D.Phil Bio*, CYBER C.R. INITIATIVE, <https://cybercivilrights.org/mary-anne-franks-j-d-d-phil/> [<https://perma.cc/G237-JNRV>].

140. See, e.g., Dr. Mary Anne Franks (@ma\_franks), X (Feb. 10, 2022, 2:43 AM), [https://twitter.com/ma\\_franks/status/1491588667764359170](https://twitter.com/ma_franks/status/1491588667764359170) [<https://perma.cc/RKX2-H6SD>].

141. See 18 U.S.C. § 1029 (criminalizing credit card fraud).

142. See 18 U.S.C. § 1028 (criminalizing fraud and related activity in connection with identification documents).

143. See *Image-based Sexual Abuse*, *supra* note 26.

144. See *The 2023 Shield (S. 412) Act: An Explainer*, CYBER C.R. INITIATIVE, <https://cybercivilrights.org/wp-content/uploads/2023/06/May-2023-CCRI-SHIELD-Explainer.pdf> [<https://perma.cc/JSY5-7PBW>] (last visited Nov. 11, 2023).

145. *Id.*

146. *Id.*

Again, the civil remedy provided in the VAWA only addresses the *actual* dissemination of images—revenge porn—not the attempt or threat of dissemination—sextortion, which will continue to grow with the prevalence of technology in our society.<sup>147</sup> A victim should not have to wait until their perpetrator actually disseminates the photos to then just be able to bring a civil action. But even just providing a civil remedy for victims of sextortion would be a step in the right direction, but again, not the *only* step that needs to be taken.<sup>148</sup>

The same can be said for image-based abuse victims whose images have been created by deepfake technology. There is no mention of nor remedies for revenge porn and sextortion creating with deepfake technology in federal legislation.<sup>149</sup> Deepfake technology is not an unfamiliar problem that only affects sexual abuse; it has also become a growing concern in the realm of politics.<sup>150</sup> However, image-based sexual abuse has also been exacerbated by deepfake technology.<sup>151</sup> Not acknowledging that these crimes can be done through fake images and videos would place many image-based abuse victims in the dark with no remedies to bring these appalling actions to light.

For now, to help victims of sextortion and image-based abuse made with deepfake technology see perpetrators face consequences for their actions, prosecutors must turn to other federal statutes such as the interstate statute, or statutes covering stalking, hacking, or identity theft.<sup>152</sup> The victims of these crimes should be afforded the opportunity to punish their abusers in the way they deem fit—whether by filing suit or by supporting criminal proceedings initiated by a prosecutor. Victims will continue to be unable to make this choice if Congress persists in making cursory attempts in providing them justice.

## 2. Congress Should Consider Incorporating Language Exhibited in the SHIELD and PDII Acts to Adequately Address Image-Based Abuse

The women of this country are ill-served by the lack of sufficient remedies for victims of image-based abuse. Congress has made it clear that it

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147. See, e.g., FBI, *Sextortion: A Growing Threat Preying Upon Our Nation's Teens*, FBI (Jan. 17, 2024), <https://www.fbi.gov/contact-us/field-offices/sacramento/news/sextortion-a-growing-threat-preying-upon-our-nations-teens> [<https://perma.cc/NH79-GJFJ>].

148. See *id.* (discussing how a civil remedy, similar to the one provided for revenge porn, would be an important tool to protect against broader misuse of intimate images).

149. See generally Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 49 (2022).

150. See Barney & Wigmore, *supra* note 43; see also Collier & Wong, *supra* note 43.

151. See Wang, *supra* note 42; see also Natasha Singer, *Teen Girls Confront an Epidemic of Deepfake Nudes in Schools*, N.Y. TIMES (Apr. 8, 2024), <https://www.nytimes.com/2024/04/08/technology/deepfake-ai-nudes-westfield-high-school.html> [<https://perma.cc/RB9T-SYUA>] (“[u]sing artificial intelligence, middle and high school students have fabricated explicit images of female classmates and shared the doctored pictures.”).

152. Wittes et al., *supra* note 76.

has a goal in protecting women from violent acts.<sup>153</sup> However, domestic violence does not exclusively occur in the same ways as it did back in 1994. Now with the current Internet age, domestic violence can be perpetrated with the use of technology to obtain or create intimate images of a victim without their consent or knowledge. Congress needs to adapt its legislation to adequately protect the women of today. By not having clear and specific federal legislation covering revenge porn, sextortion, and image-based abuse facilitated with deepfake technology, Congress is placing a heavy burden on victims.

Congress has tried to make strides toward a change for women experiencing domestic violence, yet it continues to turn a blind eye when having to care for women who are experiencing technology-facilitated domestic violence. Addressing only a quarter of a problem only helps a quarter of the victims. Women who have their intimate images disseminated without their consent have a federal civil cause of action, but the perpetrator does not face criminal liability. Women who have threats placed above their heads that their intimate images will be disseminated without their consent unless they perform a certain act cannot seek redress in federal criminal or civil court. Women who have sexually explicit images or videos created with depictions of themselves are not victims of a federal crime.

Victims of revenge porn, sextortion, and image-based abuse facilitated with deepfake technology are forced to take alternative avenues if they want the perpetrator to face criminal or civil proceedings at the federal level. Victims hope that the facts of their case, the facts of their traumatic experience, is enough to fit under, for example, a blackmail or general extortion statute.<sup>154</sup> Why is Congress making it harder to prosecute these horrific crimes? Why are victims facing more challenges than the perpetrators of these crimes? As previously mentioned, these crimes are underreported, therefore victims would likely feel more empowered to report their abuse if they knew that a stronger, more concrete framework was in place to help them.

Prior to the VAWA's enactment, domestic violence was not accounted for once a domestic abuser crossed state lines.<sup>155</sup> Now, states are trying their best to lighten the burden on victims through legislation because states properly acknowledge that unlike before, these crimes now go even beyond physical boundaries with the Internet.<sup>156</sup> However, states cannot do all of the work, especially because it leads to inconsistencies in approaching image-based abuse crimes. A victim in one state may face a higher burden of proof, whereas a victim in another state will not.<sup>157</sup> The potential for victims to be

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153. See About the Office on Violence Against Women, *supra* note 49.

154. See David Russcol, *In Latest Violence Against Women Act Reauthorization, Congress Created a Remedy for Victims of Revenge Porn*, BOS. LAW. BLOG (Aug. 11, 2023), <https://www.bostonlawyerblog.com/in-latest-violence-against-women-act-reauthorization-congress-created-a-remedy-for-victims-of-revenge-porn/> [<https://perma.cc/A79N-WHVV>].

155. See, e.g., Wittes et al., *supra* note 76.

156. See Cyber Civil Rights FAQ, *supra* note 40.

157. Compare D.C. Code § 22-3053(a)(1) (2024), with TEX. PENAL CODE ANN. § 21.16(b) (West 2019).

treated differently because of where they live further proves why there needs to be a clear federal law that addresses and provides civil and criminal remedies for image-based abuse.

In light of this, Congress should seriously consider adopting legislation that has elements of both the SHIELD Act and the PDII Act. We need federal legislation to make these abhorrent behaviors actionable in a federal court of law. An ideal piece of legislation that would adequately cover revenge porn, sextortion, and image-based abuse facilitated with deepfake technology, would include language similar to what is used in both Acts.

The SHIELD Act, as a model, provides not only a criminal remedy for victims of revenge porn—something the VAWA lacks—but also a civil *and* criminal remedy for victims of sextortion.<sup>158</sup> Using language such as: “Any person who threatens to or does knowingly mail or distribute an intimate visual depiction of an individual would face a fine, imprisonment of no more than 5 years, or both,”<sup>159</sup> would address both revenge porn and sextortion, thereby filling in the gaps in the VAWA. Additionally, by including and recognizing sextortion as a crime and providing victims with a civil and criminal remedy under the VAWA, states will have an incentive to adopt laws like South Carolina’s.<sup>160</sup> A reauthorization to the VAWA should additionally include a criminal remedy for victims of revenge porn. A civil remedy alone is a subpar response to the growing prevalence of image-based abuse.

Additionally, Congress should consider adopting language that has been used in the PDII Act. In its next reauthorization, the VAWA can either include an entirely separate section, like the PDII Act does, or add onto Section 1309 of the Act to include language covering image-based abuse by deepfake technology.<sup>161</sup> The statute can state that to qualify as a “depicted individual,” the individual’s intimate images could be from the result of having been taken—either knowingly or unknowingly—or the images can be “a result of digitization or by means of digital manipulation.”<sup>162</sup> This language would address the developing issue of deepfake technology as a method of producing sexual content without a victim’s knowledge and/or consent.<sup>163</sup>

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158. *See* S. 412.

159. *See id.* (providing an example on language that could be used in future legislation to address revenge porn and sextortion).

160. *See* S.C. CODE ANN. § 16-15-430 (2023).

161. *See* H.R. 3106 § 1309A.

162. *Id.* § 1309A(a)(2).

163. Although a constitutional analysis of a proposed law of this type is outside the scope of this Note, it must be noted that this law would likely not implicate First Amendment concerns. This type of law should not be viewed as an infringement on a person’s First Amendment right, but rather a way to further a person’s right to privacy. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 349 (2014). Governments have a compelling interest in protecting the privacy of victims of image-based abuse. *See* John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 240 (2014). A law that would include revenge porn, sextortion, and image-based abuse facilitated with deepfake technology as federal crimes would deter individuals from committing these crimes, should pass constitutional muster, and most importantly, provide justice to victims who have been experienced a tremendous violation of their privacy.

#### IV. CONCLUSION

For the above reasons, Congress must make sufficient strides in providing victims of image-based abuse with adequate remedies. Many legislators and states have taken steps to further the goal of protecting women from domestic violence. Domestic violence no longer exclusively entails physical, mental, or emotional abuse. With the pervasiveness of technology and the Internet, domestic violence can now take the form of image-based abuse. Modern-day victims of domestic violence are faced with perpetrators who will disseminate intimate images or depicted intimate images of them without their consent and/or knowledge. These perpetrators have a reckless disregard for a victim's bodily autonomy and right to privacy. Prosecutors must turn to other avenues and other federal laws to bring justice to victims who have experienced irreparable harm.

This Note has attempted to uncover the concerns of the VAWA's halfhearted and incomplete attempt to address the issue of technological abuse. In not keeping pace with today's technology, its failure to criminalize revenge porn, sextortion, and image-based abuse with deepfake technology, and its lack of civil remedies for the latter two, Congress is not adequately meeting its goal of protecting women from violent acts. Many states have stepped up to the plate in allowing for criminal proceedings against perpetrators of these crimes. However, states alone cannot provide women with justice, especially when these crimes frequently cross state lines and go beyond physical boundaries with the Internet. If Congress wants to protect women from violent acts, then it needs to seriously consider adopting language that would cover the crimes discussed in this Note. If not, we must wonder: Who is Congress really punishing—the perpetrators of these crimes or their victims?



