

**IT'S TIME FOR REVENGE PORN TO GET A TASTE OF ITS OWN  
MEDICINE: AN ARGUMENT FOR THE FEDERAL  
CRIMINALIZATION OF REVENGE PORN**

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**I. INTRODUCTION**

[1] Throughout history, pornography and technology have enjoyed a symbiotic relationship, each playing a significant role in the growth and widespread success of the other. From the VCR and camcorders to the Polaroid camera and the Internet, the pornography industry has always accelerated the growth of new technologies, paving the way for these new services to be introduced into mainstream society.<sup>1</sup> Most of these new technologies were appealing to creators and consumers of pornography because the new technologies brought an increased sense of privacy.<sup>2</sup> For example, much of the success of the Polaroid camera is said to come from the fact that people felt they could take explicit photos without having to go to the store to get the film developed.<sup>3</sup> Similarly, pornography and the

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<sup>1</sup> See Jonathan Coopersmith, *Pornography, Technology and Progress*, 4 ICON 94 (1998), available at <http://berlin.robinperrey.com/imgpo/pornography-technology-and-progress.pdf>.

<sup>2</sup> See *id.*

<sup>3</sup> See Christopher Bonanos, *Before Sexting, There Was Polaroid*, ATLANTIC (Oct. 1, 2012, 12:38 PM), <http://www.theatlantic.com/technology/archive/2012/10/before-sexting-there-was-polaroid/263082/>

promise of privacy helped drive the success of cable TV and the VCR.<sup>4</sup> As Peter Johnson writes,

Videotape first emerged as a cheap and efficient alternative to film (later kinescope) for TV production. Its development for *home use* owes its birth to Sony and Betamax but its *maturity to porn*.<sup>5</sup>

Correspondingly, with the introduction of these new technologies the porn industry has continually been able to grow and push the limits. With the launch of the VCR, the porn industry gained a new audience of people willing to watch their films; “[i]nstead of travelling to a disreputable store, viewers could watch films at their convenience at home.”<sup>6</sup> This audience has only continued to grow with the introduction of revolutionary technologies, especially the Internet, which have made pornography easy and cheap to produce by lowering the barriers to entry and transaction costs.<sup>7</sup> As Coopersmith states, “[e]ssentially, cyberporn has become an economist’s ideal free good: pornography is easily accessible, incurs minimum transaction costs, and enjoys a large demand.”<sup>8</sup> Thus, the relationship between technology and pornography has existed for some time now and the bond between the two seems unbreakable.

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<sup>4</sup> Coopersmith, *supra* note 1, at 102 (“Film did not die—7852 new pornographic films appeared in 1996 compared with 471 Hollywood films—but consumption had moved from adult theatres and sex stores to the more private environments provided by cable TV and the VCR.”).

<sup>5</sup> Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 FED. COMM. L.J. 217, 222 (1996) (emphasis added).

<sup>6</sup> Coopersmith, *supra* note 1, at 104.

<sup>7</sup> *Id.* “The Internet offers nearly free access to pornography uninhibited by previous barriers of time and space.” *Id.* at 110.

<sup>8</sup> *Id.* at 110-11.

[2] While this historical interdependence has clearly been mutually beneficial for the porn industry and new technologies, there has been collateral damage. For example, the Internet has significantly exacerbated the distribution and viewing of child pornography, and the cell phone started a “sexting” craze among teens and adults.<sup>9</sup> In recent years, this collateral damage has come in the form of harassment, humiliation, invasion of privacy, and loss of reputation with the rise of revenge porn. With the growth and normalization of the camera/video phone and modern ease with which individuals can now create, manage, and navigate websites, has come the revenge porn phenomenon. Just like Polaroid cameras, camera phones have given individuals a sense of privacy, making them feel comfortable taking and sending explicit pictures and videos.<sup>10</sup> A survey conducted by Match.com in 2012 found that out of 5,000 adults, 57% of men and 45% of women had received an explicit photo on their phone and 38% of men and 35% of women had sent one.<sup>11</sup> Unfortunately, the sense of privacy encouraging this behavior is false, because unlike Polaroid photographs, these pictures and videos can easily be uploaded to a revenge porn website by an ex-lover, “friend,” hacker, or anyone else who happens to come upon them. Once this happens, those seemingly

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<sup>9</sup> See Katie Gant, Note, *Crying Over the Cache: Why Technology Has Compromised the Uniform Application of Child Pornography Laws*, 81 *FORDHAM L. REV.* 319, 326 (2012) (noting that “[w]ith the advent of [I]nternet technology, child pornography became a new monster”); Nicole A. Poltash, Note, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 *RICH. J.L. & TECH.* 14, ¶ 5 (2013), <http://jolt.richmond.edu/v19i4/article14.pdf>.

<sup>10</sup> See Coopersmith, *supra* note 1, at 106 (“In an example of the true democratisation of technology, the development of the Polaroid instant camera and the camcorder allowed people to produce their own pornography free from anyone else seeing their work.”).

<sup>11</sup> *More on Sexting and Texting from SIA* 3, UPTODATE (Feb. 5, 2013), <http://blog.match.com/2013/02/05/more-on-sexting-and-texting-from-sia-3/>.

“private” pictures he or she probably thought only their boyfriend or girlfriend would view are then available for *the world* to see.

[3] Currently, the act of posting revenge porn is a crime in only fourteen states—Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Maryland, New Jersey, New York, Pennsylvania, Utah, Virginia, and Wisconsin.<sup>12</sup> However, over the past year, as victims of revenge porn increasingly advocate for laws criminalizing revenge porn, many more states are considering such legislation.<sup>13</sup> Legal scholars differ in their opinions on the best way to deal with revenge porn. Some argue a criminal law is unnecessary as victims are already able to file civil suits against those who posted the pictures based on claims such as copyright infringement, intentional infliction of emotional distress, or defamation.<sup>14</sup> Others argue revenge porn should be treated like other forms of online

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<sup>12</sup> See Michelle Dean, *The Case for Making Revenge Porn a Federal Crime*, GAWKER (Mar. 27, 2014, 2:45 PM), <http://gawker.com/the-case-for-making-revenge-porn-a-federal-crime-1552861507>; *State ‘Revenge Porn’ Legislation*, NAT’L CONF. ST. LEGIS., <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx> (last visited Oct. 15, 2014). Alaska and Texas also have statutes already on the books that may be broad enough to cover revenge porn situations. See Dean, *supra*. This will be discussed further below.

<sup>13</sup> *Id.* (noting that bills had been introduced or are pending in at least twenty seven states, the District of Columbia, and Puerto Rico in 2014).

<sup>14</sup> See *Doe v. Hofstetter*, No. 11-CV-02209-DME-MJW, 2012 U.S. Dist. LEXIS 82320 (D. Colo. June 13, 2012) (holding that defendant was guilty of intentional infliction of emotional distress, defamation, and public disclosure of private fact after he posted ex-girlfriend’s nude photographs on twenty-three adult websites with her contact information); Lorelei Laird, *Victims Are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent to*, ABA J. (Nov. 1, 2013, 4:30 AM), [http://www.abajournal.com/mobile/mag\\_article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c/](http://www.abajournal.com/mobile/mag_article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/) (noting that victims of revenge porn own the copyright of their photos were self-portraits and can send takedown notices under the Digital Millennium Copyright Act).

sexual harassment and many contend that there should be an amendment to § 230 of the Communications Decency Act (“CDA”) to allow victims to go after the revenge porn websites.<sup>15</sup>

[4] This comment analyzes the various potential legal approaches to dealing with revenge porn and posits that a federal law criminalizing the dissemination of revenge porn is necessary to combat this growing trend. Part II provides background information on revenge porn and further analyzes how the successful relationship between technology and pornography led to the rise of revenge porn. Part III analyzes the different civil remedies currently available to revenge porn victims and argues these are not practicable solutions. Part IV discusses the current state laws criminalizing revenge porn and the legal challenges faced by those affected by revenge porn and legislators seeking to tackle this problem. Finally, Part V proposes that a federal law criminalizing revenge porn is the best solution to this unsettling new movement.

## **II. BACKGROUND INFORMATION ON REVENGE PORN AND ITS RISE TO RECOGNITION**

[5] As stated above, technology and pornography have lived symbiotically with each other for quite some time. The introduction of the Internet made access to pornography easier and widened the audience by allowing people to view pornography in the comforts of their own home. Moreover, the Internet and other new technologies, such as the Smartphone, have made it easy and more appealing for people to create and distribute Do-It-Yourself (“DIY”) pornography. Below I will first

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<sup>15</sup> See, e.g., Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 687-88 (2012); Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html>.

provide background information on revenge porn and explain what this trend is all about. Then, I will analyze how technological progress helped lead to the rise in revenge porn.

### A. What Is Revenge Porn?

[6] Revenge porn is a nude picture or video that is publicly shared on the Internet, usually by an ex-lover, for the purpose of humiliation.<sup>16</sup> Despite the relatively recent media attention, revenge porn has been around for years. As far back as 2000, an Italian researcher identified a new genre of pornography where explicit pictures of ex-girlfriends were being shared in Usenet groups.<sup>17</sup> Later, in 2008, the first websites and blogs completely dedicated to this type of porn started to pop up.<sup>18</sup> Then in 2010, the first person went to prison for posting revenge porn in New Zealand.<sup>19</sup> This person was Joshua Ashby and he was found guilty of distributing an “indecent model or object” to the public when he posted a picture of his naked ex-girlfriend on Facebook.<sup>20</sup> That same year, Hunter Moore established one of the most popular revenge porn sites, IsAnyoneUp.com.<sup>21</sup>

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<sup>16</sup> See, e.g., *Revenge Porn*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=revenge%20porn> (last visited June. 8, 2014).

<sup>17</sup> Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 21, 2013), <http://nymag.com/news/features/sex/revenge-porn-2013-7/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Jonathan Barrett & Luke Strongman, *The Internet, the Law, and Privacy in New Zealand: Dignity with Liberty?*, 6 INT’L J. OF COMM. 127, 136 (2012).

<sup>21</sup> See Tsoulis-Reay, *supra* note 17.

[7] Normally on revenge porn websites, the explicit images or videos are posted on the site and submitted with the victim's name, a link to his or her Facebook, and other personal information.<sup>22</sup> Citing Cyber Civil Rights Statistics on Revenge Porn from 2013, Danielle Keats Citron and Mary Anne Franks, law professors and anti-revenge porn advocates, stated, "[i]n a study of 1,244 individuals, over 50% reported that their naked photos appeared next to their full name and social network profile; over 20% reported that their e[-]mail addresses and telephone numbers appeared next to their naked photos."<sup>23</sup> On IsAnyoneUp.com, each submission to the website usually included a depiction of the man or woman's Facebook or Twitter thumbnail, pictures of them clothed, and pictures of them "exposing their genitalia, or even in some cases, engaging in sexual acts."<sup>24</sup> Another revenge porn website, MyEx.com, also includes first and last names and links to social media information along with the images posted. This site also charges victims upwards of \$500 to remove the photographs.<sup>25</sup> Posting personal information along with these images threatens the victim's safety, enabling strangers to stalk and harass them. Although the name "revenge porn" comes from the idea that these photos are posted by jilted ex-lovers, sometimes the pictures are reportedly acquired "through hacking, theft by repair people or false personal ads."<sup>26</sup>

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<sup>22</sup> See, e.g., Laird, *supra* note 14.

<sup>23</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350-51 (2014) (citation omitted).

<sup>24</sup> *Is Anyone Up?*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Is\\_Anyone\\_Up%3F](http://en.wikipedia.org/wiki/Is_Anyone_Up%3F) (last visited June 8, 2014).

<sup>25</sup> Matt Markovich, *Revenge Porn Websites Taking Advantage of Weak Privacy Laws*, KOMO NEWS (Nov. 21, 2013, 11:53PM), <http://www.komonews.com/news/local/Privacy-Laws-Weak-at-Protecting-Nude-Photos-on-Revenge-Porn-Websites-232935541.html>.

<sup>26</sup> Laird, *supra* note 14 (noting that even revenge porn sites "have been accused of hacking victims' computers or fishing for photos with false personal ads").

## B. Internet + Smartphones + DIY Porn = Revenge Porn

[8] In 1995, when Congress took its first stab at regulating the Internet with the introduction of the CDA as part of the Telecommunications Act amendments,<sup>27</sup> less than 0.4% of the world's population was using the Internet.<sup>28</sup> Then, only two years after the CDA was passed, the Supreme Court held sections 223(a) and 223(d) unconstitutional in *Reno v. ACLU*,<sup>29</sup> essentially leaving the immature Internet “free to develop without government regulation of pornography.”<sup>30</sup> With the ability to freely experiment and develop during this time of very little regulation, technology and pornography's relationship thrived.

[9] The Internet allowed the porn industry to bypass zoning laws, age restrictions, and postal regulations, while pornography aided the Internet's quick development by constantly pushing the limits of new technologies.<sup>31</sup> For example, “[i]n 2001, Blaise Cronin and Elisabeth Davenport stated, ‘It is universally acknowledged by information technology experts that the adult entertainment industry has been at the leading edge in terms of building high-performance Web sites with state-of-the-art features and

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<sup>27</sup> Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560, 561 (1996).

<sup>28</sup> Cheryl B. Preston, *What Ifs and Other Alternative Intellectual Property and Cyberlaw Story: The Internet and Pornography: What If Congress and the Supreme Court Had Been Comprised of Techies in 1995-1997?*, 2008 MICH. ST. L. REV. 61, 62 (2008).

<sup>29</sup> *Reno v. ACLU (Reno I)*, 521 U.S. 844 (1997) (holding that §§ 223(a) and 223(d) were overbroad and abridged the freedom of speech protected by the First Amendment).

<sup>30</sup> See Preston, *supra* note 28, at 64.

<sup>31</sup> See *id.* at 74.



functionality.”<sup>32</sup> So, with little government regulation over the past decade, the Internet and pornography have consistently matured and prospered.

[10] New and improved technologies allowing pornographers to provide images and videos quicker, cheaper, and more efficiently have certainly turned pornography into a booming business.<sup>33</sup> In 2006, there were about 4.2 million pornographic websites and the annual pornography revenue in the United States was over \$13 billion.<sup>34</sup> Additionally, easy access to these websites has increased the amount of viewers.<sup>35</sup> The user-friendly nature of pornography on the Internet “means that many who would never have sought it out before consume it regularly.”<sup>36</sup> Unfortunately, this class of people is likely largely made up of curious children, who have explicit, hard-core porn available at their fingertips, quite literally.<sup>37</sup> The widespread use of Smartphones in recent years has made pornography even easier to access and has become the primary way people view pornography. According to statistics report from PornHub, the majority of porn in the United States is now viewed using

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<sup>32</sup> Jonathan Coopersmith, *Does Your Mother Know What You Really Do? The Changing Nature and Image of Computer-Based Pornography*, 22 HIST. & TECH. 1, 2 (2006).

<sup>33</sup> Shannon Creasy, Note and Comment, *Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller’s “Contemporary Community Standards”*, 26 GA. ST. U.L. REV. 1029, 1031 (2010).

<sup>34</sup> *See id.*

<sup>35</sup> *See* Preston, *supra* note 28, at 83 (reporting that in one month during 2005, over seventy-one million people—forty-two percent of the Internet audience—viewed Internet pornography).

<sup>36</sup> *See* Preston, *supra* note 28, at 85.

<sup>37</sup> *See* Preston, *supra* note 28, at 85.

smartphones.<sup>38</sup> The website reported that 52% of its content was being viewed on mobile devices, a 10% increase from 2012, when it was reported only 47% of the website's content was being viewed on smartphones.<sup>39</sup>

[11] Not only have the Internet and smartphones increased access for viewers, but both have also made it easy for amateur pornographers to distribute their work and encourage people to engage in "DIY porn."<sup>40</sup> Dr. Gail Salts, an Associate Professor of Psychiatry at New York Presbyterian Hospital, stated,

What's new is technology at a very cheap cost, which allows you to do it and merchandize it in a greater way. . . . You can do it yourself. You can do it with a flip-cam. You can do it with your phone and you can put it up with no effort.<sup>41</sup>

Thus, not only have advanced technologies made access to pornography very simple and increased the number of pornography consumers, they have also fostered more user-generated pornographic content.

[12] I argue that the rise in revenge porn is a culmination of these technological advancements, easy accessibility, and the DIY porn trend,

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<sup>38</sup> See Alex Saltarin, *US Leads Smartphone Porn-watching Countries List*, TECH TIMES (Dec.24, 2013, 11:21 AM), <http://www.techtimes.com/articles/2229/20131224/us-leads-smartphone-porn-watching-countries-list.htm>.

<sup>39</sup> See *id.*

<sup>40</sup> See Lauren Effron, *The Appeal of Amateur Porn*, ABC NEWS (Oct. 14, 2011, 3:37 PM), <http://abcnews.go.com/blogs/health/2011/10/14/the-appeal-of-amateur-porn/>.

<sup>41</sup> *Id.*

which are all a result of the lifelong partnership between technology and pornography. The Internet and smartphones have made it extremely easy to create explicit photographs, send them to others, and upload them to websites. Moreover, an increased sense of privacy and anonymity has encouraged more people to engage in this behavior. All of these factors had a role in creating the perfect storm for revenge porn to catch on and begin ruining the lives of many victims.<sup>42</sup>

### C. The Negative Effects of Revenge Porn

[13] While technology and pornography likely will continue to benefit from their advantageous relationship and look onwards to the next big development, the negative impact their recent revenge porn progeny has on its victims is significant and profound. Holly Jacobs, a Florida woman who is now a strong advocate of strengthening laws against revenge porn and who founded the website End Revenge Porn, has been significantly affected by revenge porn.<sup>43</sup> Jacobs found out from a friend that nude photos she had sent to her ex-boyfriend had been posted on her Facebook and then later to hundreds of revenge porn websites.<sup>44</sup> Even more disturbing was that her name, e-mail address, and place of business were posted along with the pictures.<sup>45</sup> As a result of victims' personal information being posted with their pictures, 49% of the victims of

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<sup>42</sup> Obviously, there are other factors that aided in the rise of revenge porn such as the actual spitefulness of the jilted ex-lovers that decide to post the images, but this comment will not go into this aspect of the trend.

<sup>43</sup> See Patt Morrison, 'Revenge Porn' May Soon Be a Crime in California, L.A. TIMES (Aug. 26, 2013, 11:46 AM), <http://www.latimes.com/opinion/opinion-la/la-ol-revenge-porn-should-it-be-a-crime-20130826,0,2875247.story>.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

revenge porn have said they have been harassed or stalked online by users who saw their material.<sup>46</sup> Victims are extremely fearful of stalkers and often struggle with anxiety and panic attacks.<sup>47</sup> More than 80% of revenge porn victims have experienced severe emotional distress.<sup>48</sup> Unfortunately, researchers have found that this anxiety felt by victims of cyber harassment gets worse over time.<sup>49</sup> In fact, some victims have committed suicide.<sup>50</sup>

[14] This extreme anxiety is exacerbated by the detrimental effects revenge porn has on victims' professional lives. A simple search of a revenge porn victim's name on the Internet quickly reveals these explicit pictures, costing many of them their jobs and preventing others from finding work.<sup>51</sup> Moreover, once these images are on the Internet, it is next to impossible to have them removed.<sup>52</sup> Another victim speaking under the pseudonym, Sarah, detailed her efforts to get her explicit photos removed from hundreds of revenge porn websites.<sup>53</sup> Sarah could not afford filing a

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<sup>46</sup> Natalie Webb, *Revenge Porn by the Numbers*, END REVENGE PORN (Jan. 3, 2014), <http://www.endrevengeporn.org/revenge-porn-infographic/>.

<sup>47</sup> See Citron & Franks, *supra* note 23, at 351.

<sup>48</sup> See *id.*.

<sup>49</sup> See *id.*.

<sup>50</sup> Mary Anne Franks, *Criminalizing Revenge Porn: A Quick Guide*, END REVENGE PORN, <http://www.endrevengeporn.org/guide-to-legislation/> (last visited Apr. 26, 2014).

<sup>51</sup> See Citron & Franks, *supra* note 23, at 352.

<sup>52</sup> See, e.g., Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web's Vilest Entrepreneur, Be Stopped?*, BETABEAT (Dec. 4, 2012, 7:46 PM), <http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/>.

<sup>53</sup> See *id.*

civil suit, so she filed a Digital Millennium Copyright Act (“DMCA”) takedown request, stating that her ex-boyfriend was engaging in copyright infringement.<sup>54</sup> However, many of the websites hosting her pictures were located in foreign countries, and thus outside the United States’ jurisdiction.<sup>55</sup> Sarah was unable to get the photos removed from the Internet, and ultimately changed her name.<sup>56</sup>

#### **D. A Brief Look at a Few Revenge Porn Websites and Their Notorious Operators**

[15] The extremely popular revenge porn website mentioned above, IsAnyoneUp.com, was run by Hunter Moore. The site received 30 million page views a month and featured thousands of nude pictures.<sup>57</sup> Moore stated he received 10,000 image submissions in three months and his site was generating \$8,000 in advertising revenue per month.<sup>58</sup> Not only did this site solicit for naked photos, but additionally the submission form asked for the person’s name, link to their Facebook or Twitter page, and other personal information.<sup>59</sup> Moore shut down IsAnyoneUp.com in April

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<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See* Memphis Barker, “Revenge Porn” Is No Longer a Niche Activity Which Victimises Only Celebrities—The Law Must Intervene, INDEP. (May 19, 2013), <http://www.independent.co.uk/voices/comment/revenge-porn-is-no-longer-a-niche-activity-which-victimises-only-celebrities--the-law-must-intervene-8622574.html>.

<sup>58</sup> Kashmir Hill, *Revenge Porn with a Facebook Twist*, FORBES (July 6, 2011, 4:54 PM), <http://www.forbes.com/sites/kashmirhill/2011/07/06/revenge-porn-with-a-facebook-twist/>.

<sup>59</sup> *See id.*

2012 due to legal pressures involving child pornography.<sup>60</sup> Interestingly enough, Moore ultimately sold the website to James McGigney, owner of Bullyville, an anti-bullying site.<sup>61</sup> However, Moore quickly launched a new site, HunterMoore.TV, which he bragged would still allow people to submit naked photos of exes but would also include “mapping stuff” allowing users to stalk those pictured.<sup>62</sup> Although Moore later denied this statement and claimed HunterMoore.TV would not feature this “mapping stuff,” the idea is not too far off from his work in the past.<sup>63</sup>

[16] Moore confidently argues he is shielded from liability by § 230 of the CDA, an issue that will be discussed further below.<sup>64</sup> While § 230 of the CDA does state that websites are not liable for content submitted by their users, it does not protect Moore from liability for federal criminal charges, such as conspiracy. In fact, in late January of 2014, Moore and

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<sup>60</sup> See Adrian Chen, *Internet’s Sleaziest Pornographer Calls It Quits: ‘I’m Done with Looking at Little Kids Naked All Day’*, GAWKER (Apr. 19, 2012, 4:50 PM), <http://gawker.com/5903486/internets-sleaziest-pornographer-calls-it-quits-im-done-with-looking-at-little-kids-naked-all-day/all>. In a phone interview, Moore talked about how the influx of child pornography submissions became too much with which for him to deal. See also Drew Guarini, *Hunter Moore, Is Anyone Up Founder, Says New Website Will Be ‘Scariest on the Internet’*, HUFFINGTON POST (Aug. 24, 2012, 12:26 PM), [http://www.huffingtonpost.com/2012/08/23/hated-internet-star-hunte\\_n\\_1826061.html](http://www.huffingtonpost.com/2012/08/23/hated-internet-star-hunte_n_1826061.html).

<sup>61</sup> See Roy, *supra* note 52.

<sup>62</sup> See Abby Rogers, *The Guy Behind Two “Revenge Porn” Sites Says the Government Protects His Work*, BUS. INSIDER (Nov. 29, 2012, 4:43 PM), <http://www.businessinsider.com/isanyoneupcom-naked-pictures-are-back-2012-11>.

<sup>63</sup> See Roy, *supra* note 52.

<sup>64</sup> See Rogers, *supra* note 62.

alleged accomplice, Charles Evens, were indicted on fifteen counts.<sup>65</sup> These counts included conspiracy, seven counts of unauthorized access to a protected computer to obtain information, and seven counts of aggravated identity theft.<sup>66</sup> According to the indictment, Moore paid Evans several times to hack into victims' e-mail accounts and steal naked pictures in order to post on his website, IsAnyoneUp.com.<sup>67</sup> If he is convicted, Moore faces up to five years for the conspiracy charge and computer hacking counts, and up to two years for aggravated identity theft.<sup>68</sup>

[17] Another fellow revenge porn proprietor, Kevin Christopher Bollaert was arrested on thirty-one counts of conspiracy, identity theft, and extortion in California for his role in creating the website, ugotposted.com.<sup>69</sup> The site is no longer operating, but when it was, Bollaert took it a step further by charging victims from \$250 to \$350 to remove the images through another website, changemyreputation.com.<sup>70</sup> Also, Bollaert went as far as to *require* that the victim be identified by

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<sup>65</sup> See Jessica Roy, *Revenge-Porn King Hunter Moore Indicted on Federal Charges*, TIME (Jan. 23, 2014), <http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/>.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See Kashmir Hill, *How Revenge Porn King Hunter Moore Was Taken Down*, FORBES (Jan. 24, 2014, 11:17 AM), <http://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/>.

<sup>69</sup> See The Associated Press, *California: Man Is Charged in 'Revenge Porn' Case*, N.Y. TIMES (Dec. 10, 2013), [http://www.nytimes.com/2013/12/11/us/california-man-is-charged-in-revenge-porn-case.html?\\_r=0](http://www.nytimes.com/2013/12/11/us/california-man-is-charged-in-revenge-porn-case.html?_r=0).

<sup>70</sup> See *id.*; "Revenge Porn" Website Gets Calif. Man Charged with Extortion, CBS NEWS (Dec. 11, 2013, 4:49 PM), <http://www.cbsnews.com/news/calif-man-charged-with-extortion-through-revenge-porn-website/>.

name, age, and other information.<sup>71</sup> Additionally, a federal district court judge in Ohio ordered Bollaert and his co-founder of ugotposted.com, Eric Chason, to pay a woman \$385,000 for posting explicit photos of her on the website without her consent. The woman filed suit in May 2013 after discovering explicit pictures of herself as a minor had been distributed on ugotposted.com without her knowledge or consent.<sup>72</sup> The default judgment against Chason and Bollaert included \$150,000 for several child pornography counts, \$10,000 for a right of publicity count, and \$75,000 in punitive damages.<sup>73</sup>

### III. POTENTIAL CIVIL REMEDIES AVAILABLE TO REVENGE PORN VICTIMS<sup>74</sup>

[18] Some legal scholars argue there is no need for criminal statutes because victims are already able to file civil suits against the people who posted their pictures.<sup>75</sup> For example, tort laws such as intentional infliction of emotional distress, public disclosure of private information,

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<sup>71</sup> See Don Thompson, *Court Date Set for Kevin Bollaert in Revenge Porn Website Case*, HUFFINGTON POST (Dec. 12, 2013, 2:15 AM), [http://www.huffingtonpost.com/2013/12/12/kevin-bollaert-revenge-porn\\_n\\_4432097.html](http://www.huffingtonpost.com/2013/12/12/kevin-bollaert-revenge-porn_n_4432097.html).

<sup>72</sup> See *id.*

<sup>73</sup> Joe Silver, “Revenge Porn” Site Creators Hit With \$385,000 Judgment, ARS TECHNICA (Mar. 19, 2014, 1:48 PM), <http://arstechnica.com/tech-policy/2014/03/revenge-porn-site-creators-hit-with-385000-judgment/>.

<sup>74</sup> Citron and Franks also give a detailed analysis of the insufficiency of civil actions in addressing revenge porn. See Citron & Franks, *supra* note 23, at 357–61.

<sup>75</sup> See Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), <http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/>; Laird, *supra* note 14.



defamation, or invasion of privacy may be available for some victims of revenge porn.<sup>76</sup> Aside from the fact that these lawsuits are expensive and do not deter people from posting the images, § 230 of the CDA shields revenge porn websites from tort liability.<sup>77</sup>

[19] One way around § 230 of the CDA is for the victim to sue the website for copyright infringement. However, this option is available only if the person *took* the photograph or video. If the person took the photograph or video, then he or she owns the copyright and can send a takedown notice to the website under the DMCA.<sup>78</sup> If the website refuses to comply with the takedown notice, then the person is able to sue the website for copyright infringement. While these civil remedies are accessible to some revenge porn victims, they are expensive, inconsistent, inefficient, and do very little to discourage people from posting revenge porn in the first place.

#### A. Tort Law Is Not the Best Answer

[20] As stated, some victims are able to file civil suits under existing privacy law or torts such as intentional infliction of emotional distress, defamation, or public disclosure of private information.<sup>79</sup> Some people argue that the tort of intentional infliction of emotional distress should be used to deal with revenge porn and other forms of online harassment

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<sup>76</sup> See Jeong, *supra* note 75.

<sup>77</sup> See 47 U.S.C. § 230 (2006); Dean, *supra* note 12.

<sup>78</sup> See Digital Millennium Copyright Act, 17 U.S.C. § 512 (2012).

<sup>79</sup> See *Doe v. Hofstetter*, No. 11-CV-02209-DME-MJW, 2012 U.S. Dist. LEXIS 82320 (D. Colo. June 13, 2012).

because of its flexibility.<sup>80</sup> Further, the common law tort of intentional infliction of emotional distress “reflects a desire to impose liability on both the first creator of the harm and the entity that enabled the harm.”<sup>81</sup> Alternatively, there are several common law torts that are derived from the right to privacy and potentially available to victims of revenge porn: appropriation, false light, disclosure or wrongful publication of private facts, and intrusion.<sup>82</sup> There is also defamation, which requires the plaintiff to show the defendant made a false and defamatory statement that harmed the plaintiff’s reputation.<sup>83</sup>

[21] All of the above mentioned civil remedies are inadequate. First of all, filing and litigating a civil suit takes lots of time and money that many victims of revenge porn do not have. Revenge porn victims are most often private individuals who are not equipped with the necessary financial resources to litigate one of these suits.<sup>84</sup> Additionally, it is very difficult to prove who actually posts revenge porn because people can easily submit photographs and videos anonymously.<sup>85</sup> As discussed above, sometimes unknown hackers are the ones who submit these images. While posters of

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<sup>80</sup> See, e.g., Daniel Zharkovsky, “If Man Will Strike, Strike Through the Mask”: Striking Through Section 230 Defenses Using the Tort of Intentional Infliction of Emotional Distress, 44 COLUM. J. L. & SOC. PROBS. 193, 227 (2010).

<sup>81</sup> See *id.* at 228.

<sup>82</sup> See Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1006 (2009).

<sup>83</sup> See *id.* at 1007 (citing RESTATEMENT (SECOND) OF TORTS §§ 558–59 (1977)).

<sup>84</sup> See *id.* at 1008-09.

<sup>85</sup> See *id.* at 1010.

revenge porn are able to remain anonymous, taking civil action means revenge porn victims likely will have to face more unwanted publicity.<sup>86</sup>

[22] Moreover, for all of the money spent litigating such a suit, there is little reward. Most of the time, people who post revenge porn will not be able to pay damages, even if revenge porn victims successfully litigate one of these cases.<sup>87</sup> Even more concerning, the reality is that once these pictures are posted to a revenge porn website, even if the victim is able to legally force the user or website to take them down, the pictures are likely to spread all over the Internet and could easily pop back up again at any time.<sup>88</sup> As Nancy Kim states, “[t]here is no combination injury in the offline world because there is no other method of distribution that is as inexpensive, accessible, widespread, and difficult—if not impossible—to retrieve.”<sup>89</sup> Further, a civil suit may allow the victim to receive damages and could lead to the picture being taken down, but it does little to prevent this type of thing from happening in the future. Thus, a civil suit is extremely costly, barely fixes the damage caused by revenge porn, and does not discourage people or websites from posting these images in the first place.

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<sup>86</sup> See Citron & Franks, *supra* note 23, at 358.

<sup>87</sup> See Kim, *supra* note 82, at 1008. “On the Internet, however, widespread distribution is available to those without substantial financial resources. Consequently, even where a plaintiff prevails in a civil action against an online harasser, the odds are high that the plaintiff will not be able to recover significant damages.” *Id.*

<sup>88</sup> See Derek E. Bambauer, *Exposed* 98 MINN. L. REV. (forthcoming 2014) (manuscript at 4-5) (on file with Univ. of Ariz. James E. Rogers College of Law, Discussion Paper No. 13-39), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2315583](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2315583).

<sup>89</sup> See Kim, *supra* note 82, at 1010.

## B. Section 230 of the CDA

[23] Civil remedies also are inadequate for a revenge porn victim because the actual websites posting their explicit photographs are likely protected from liability under § 230 of the CDA. Section 230 protects website operators from liability stemming from its users' posts, stating "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>90</sup> Section 230 was written as a way to combat novel legal issues arising from the widespread use of the Internet.<sup>91</sup> While part of the CDA was struck down as unconstitutional, the defenses provided in § 230 endured.<sup>92</sup>

[24] There are two defenses available for websites under § 230. The first is one I have briefly touched on, which protects websites from being held liable as publishers of the content posted by their users, as long as the websites did not create it.<sup>93</sup> The second defense protects providers of interactive computer services from liability on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider considers obscene, lewd, harassing, or otherwise objectionable."<sup>94</sup> Section 230 of the CDA further states that the law will not have an effect on other federal criminal statutes, but "[n]o cause of

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<sup>90</sup> See 47 U.S.C. §230(c)(1) (2006).

<sup>91</sup> See Zharkovsky, *supra* note 80, at 198. "One such problem concerned whether a proprietor of an online message board could be liable for defamatory statements posted on the board, even though the statements were made by an independent third party." *Id.* at 197.

<sup>92</sup> See *id.* at 198-99.

<sup>93</sup> 47 U.S.C. § 230(c)(1).

<sup>94</sup> 47 U.S.C. § 230(c)(2)(A).

action may be brought and no liability may be imposed *under any State or local law* that is inconsistent with this section.”<sup>95</sup> Thus, criminal liability for such actions imposed under federal law is not covered by the CDA’s protections, but websites likely are immune from the torts previously discussed above.

[25] While most of the cases applying § 230 of the CDA have held websites immune from liability, the Ninth Circuit recently held a website liable for the illegality of hosted content because it helped create the content.<sup>96</sup> In this case, the Fair Housing Councils of San Fernando Valley and San Diego brought action against Roommates.com alleging the website violated the Fair Housing Act and state laws.<sup>97</sup> The part of the website alleged to offend the Fair Housing Act and state laws was information provided by subscribers in response to questions written by Roommate.com.<sup>98</sup> Thus, the court held this part of the website was actually developed by Roommate.com: “Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.”<sup>99</sup> This case may be applicable to revenge porn websites. While many of the websites claim they are shielded from civil liability by § 230, revenge porn victims could use *Fair Housing Council* to argue these revenge porn websites are more

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<sup>95</sup> 47 U.S.C. § 230(e)(1)-(3) (emphasis added).

<sup>96</sup> See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174-75 (9th Cir. 2008) (en banc).

<sup>97</sup> See *id.* at 1162.

<sup>98</sup> See *id.* at 1164.

<sup>99</sup> See *id.* at 1166.

than “passive transmitter[s] of information provided by others” and are actually developers of content not entitled to protection under § 230.<sup>100</sup>

[26] Section 230 of the CDA likely shields revenge porn websites from civil liability, thus proving another reason civil law is an inadequate solution for victims. However, with the recent decision by the Ninth Circuit in *Fair Housing. Council*, courts may be more willing to find revenge porn websites are developers of the content on their sites and not protected by § 230.

### C. Copyright Law Is Not the Best Remedy

[27] Some victims have opted for sending takedown notices to the websites under copyright law.<sup>101</sup> If the picture posted was a “selfie,” then the victim owns the copyright and he or she can send takedown notices to the revenge porn websites under the DMCA.<sup>102</sup> If the website refuses to remove the image, the person can then sue the website for copyright infringement. Revenge porn websites are not shielded from liability for these copyright infringement claims because § 230 has an exception for copyright infringement which allows victims to hold websites liable for republishing their copyrighted photographs.<sup>103</sup> However, in order to receive statutory damages for this tort, a victim must register their copyright within ninety days of when it is published.<sup>104</sup> Although a victim may not receive damages, sending DMCA takedown notices is relatively

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<sup>100</sup> *See id.*

<sup>101</sup> *See Laird, supra* note 14.

<sup>102</sup> *See* 17 U.S.C. § 512; Laird, *supra* note 14.

<sup>103</sup> 47 U.S.C. § 230(e)(2).

<sup>104</sup> *See Laird, supra* note 14.

simple, and may be successful in getting an injunction against websites for posting the images online.<sup>105</sup>

[28] While sending these takedown notices is less costly because it does not require a lawyer, copyright law suffers from similar inadequacies as tort law. The reality is, copyright law does not discourage people from engaging in this activity, especially when most of the time the person posting the pictures does not end up having to pay the victim damages. Once images are posted to one website, they rapidly spread across the Internet. So, while a victim may be successful at issuing a takedown notice for one website, she may “encounter the ‘whack-a-mole’ problem” where “[a]s soon as copyrighted content is removed from one place, it pops up in another.”<sup>106</sup> Further, this legal avenue is only available to people who took the sexually explicit photograph or video of themselves.

[29] Thus, while there are currently existing laws that victims may use to sue the person who posted their picture, get an injunction, and possibly receive damages; these solutions are costly, not very effective, and none of them really get at the heart of the problem.

#### **IV. CURRENT CRIMINAL LAWS AVAILABLE AND THE LEGAL CHALLENGES TO CRIMINALIZING REVENGE PORN**

[30] While some victims have been successful in winning civil suits and some operators of these websites have been charged for federal crimes such as conspiracy and child pornography, there is still a legal grey area

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<sup>105</sup> *See id.*

<sup>106</sup> Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC (Feb. 4, 2014, 1:03PM), <http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>.

concerning whether the act of posting and distributing revenge porn should be a crime. Federal and state cyberstalking laws might be an option for some revenge porn victims, but they are not ideal. Also, some states already have laws seemingly broad enough to reach distributors of revenge porn. However, many judges are reluctant to arbitrarily stretch laws past their plain language—regardless of how lewd or morally reprehensible an action may be. This is illustrated by Massachusetts’ highest court’s recent holding that “upskirting” is legal as long as the person being photographed is not nude or partially nude.<sup>107</sup> This understandable unwillingness of judges to broaden statutes beyond their plain language further highlights the need for specific laws targeting revenge porn. A few states have recently introduced and passed legislation specifically aimed at criminalizing revenge porn. I will analyze these statutes and also discuss the legal challenges legislators face in drafting these laws.

### A. Federal and State Criminal Laws

[31] Federal and state cyberstalking laws may seem like the best approach to going after revenge porn distributors. Typically,

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<sup>107</sup> See Haimy Assefa, *Massachusetts Court Says ‘Upskirt’ Photos Are Legal*, CNN (Mar. 6, 2014, 7:33 AM), <http://www.cnn.com/2014/03/05/us/massachusetts-upskirt-photography/>. The Massachusetts court held it was legal to secretly photograph underneath a person’s clothing when the person is not nude or partially nude. *See id.* The court ruled,

In sum, we interpret the phrase, “a person who is . . . partially nude,” in the same way that the defendant does, namely, to mean a person who is partially clothed but who has one or more of the private parts of body exposed in plain view at the time that the putative defendant secretly photographs her.

Commonwealth v. Robertson, 5 N.E.3d 522, 528 (Mass. 2014).



cyberstalking requires the defendant to have “engaged in behavior or a pattern of conduct with the intent to alarm, abuse, or frighten the victim.”<sup>108</sup> The federal telecommunications statute, 47 U.S.C. § 223, that is aimed at cyberstalking, prohibits individuals from using any telecommunications to abuse, threaten, or harass any person without revealing their identity.<sup>109</sup> Federal cyberstalking law is attractive because it prevents revenge porn websites from hiding behind § 230 of the CDA’s shield of protection. Most states also have similar statutes prohibiting cyberstalking or cyber harassment.<sup>110</sup> Cyber harassment generally “involves patterns of online behavior that are intended to inflict substantial emotional distress and would cause a reasonable person to suffer substantial emotional distress.”<sup>111</sup> While some instances of revenge porn are included in this description, there may be substantial hurdles in proving a “pattern” of online behavior if the person only posted one picture and it may also be difficult to show the person posted it with the intent of causing emotional distress.<sup>112</sup> Thus, while cyberstalking laws may apply in some situations, a criminal law specifically targeting revenge porn situations is better equipped.

[32] As of 2013, the act of posting or distributing revenge porn was a crime in only two states: New Jersey and California.<sup>113</sup> Also, Alaska and

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<sup>108</sup> See Kim, *supra* note 81, at 1008.

<sup>109</sup> See 47 U.S.C. § 223 (2006).

<sup>110</sup> *State Cyberstalking and Cyberharassment Laws*, NAT’L CONF. ST. LEGIS. (Dec. 5, 2013), <http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx>.

<sup>111</sup> David Gray et. al., *Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 748 (2013).

<sup>112</sup> See Franks, *supra* note 50.

<sup>113</sup> *State ‘Revenge Porn’ Legislation*, *supra* note 12.

Texas currently have laws broad enough to apply to distribution of revenge porn; however, an appeals court declared the Texas law unconstitutional.<sup>114</sup> Fortunately, this legal issue has quickly captured much attention over the past year. In 2014, twenty-seven states, the District of Columbia, and Puerto Rico had legislation addressing revenge porn either introduced or pending, and twelve states enacted laws criminalizing the act of posting revenge porn: Arizona, Colorado, Delaware, Georgia, Hawaii, Idaho, Maryland, New York, Pennsylvania, Utah, Virginia, and Wisconsin.<sup>115</sup>

[33] New Jersey's Title 2C: 14-9 is an invasion of privacy law which was originally directed at people who secretly photograph or videotape another person while they are naked or engaged in sexual activity without their consent.<sup>116</sup> New Jersey's law was intended to cover "video voyeurs" and was used to prosecute Rutgers University student Dharun Ravi in 2010.<sup>117</sup> Ravi was found guilty under Title 2C: 14-9 after he secretly set up a webcam to spy on his roommate, Tyler Clementi and then live streamed the video.<sup>118</sup> Clementi, who was only eighteen years old, committed suicide after finding out the video had been live streamed.<sup>119</sup> The New Jersey statute reads:

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<sup>114</sup> *See id.*; Dean, *supra* note 12.

<sup>115</sup> *See generally* State 'Revenge Porn' Legislation, *supra* note 12.

<sup>116</sup> N.J. STAT. ANN. § 2C:14-9 (West 2014).

<sup>117</sup> *See* Suzanne Choney, 'Revenge Porn' Law in California Could Pave Way for Rest of Nation, NBC NEWS (Sept. 3, 2013, 4:34 PM), <http://www.nbcnews.com/tech/internet/revenge-porn-law-california-could-pave-way-rest-nation-f8C11022538>.

<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.<sup>120</sup>

Although the law was not drafted with the criminalization of revenge porn in mind, it was written broad enough so that it does apply to most revenge porn situations.

[34] In the fall of 2013, the California legislature passed SB 255, a revenge porn bill introduced by Senator Cannella.<sup>121</sup> Governor Jerry Brown signed the bill into law on October 1, 2013 and it went into effect immediately.<sup>122</sup> The law makes posting revenge porn a misdemeanor punishable by up to six months in jail and a \$1,000 fine.<sup>123</sup> It specifically provides that:

Except as provided in subdivision (I), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . Any person who photographs

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<sup>120</sup> N.J. STAT. ANN. § 2C:14-9(c).

<sup>121</sup> S. 255, 2013-2014 Reg. Sess. (Cal. 2013) (enacted as CAL. PENAL CODE § 647(j)(4)(A)).

<sup>122</sup> See *Jerry Brown Signs Anti-Revenge Porn Bill*, HUFFINGTON POST (Oct. 2, 2013, 10:18 AM), [http://www.huffingtonpost.com/2013/10/02/jerry-brown-revenge-porn\\_n\\_4030175.html](http://www.huffingtonpost.com/2013/10/02/jerry-brown-revenge-porn_n_4030175.html).

<sup>123</sup> See *id.*

or records by any means the image of the intimate body part of parts of another identifiable person, under circumstances where the parties agree or understand the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.<sup>124</sup>

As written, California's law does not include pictures the victim took of him or herself, often called a "selfie."<sup>125</sup> California's law contains other concerning loopholes, as well. For instance, it does not cover anyone who might redistribute the photograph or recording after it has already been taken by someone else because it covers only the person who makes the photograph or recording.<sup>126</sup> So, the law does not penalize people who steal explicit pictures from someone else's phones or hackers who obtain these photos by hacking into the victim's computer or phone.<sup>127</sup> These situations are not out of the ordinary; when it comes to legal possibilities, California's law likely will leave many revenge porn victims in the same helpless situation they were in before the bill was passed. However, Senator Canella introduced a new bill, SB 1255, which broadened the law to include selfies as well.<sup>128</sup>

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<sup>124</sup> § 647(j)(4)(A).

<sup>125</sup> *See id.*

<sup>126</sup> *See* § 647(j)(4)(A); Eric Goldman, *California's New Law Shows It's Not Easy To Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:03 PM), <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/>.

<sup>127</sup> *See* § 647(j)(4)(A); Goldman *supra* note 125.

<sup>128</sup> *See* S. 1255, 2013-2014 Reg. Sess. (Cal. 2014).

[35] Idaho also passed House Bill 563 which amends provisions of Idaho's existing law relating to the crime of video voyeurism to include the act of sharing pictures or videos of an intimate or private nature shared without consent for purposes other than sexual gratification, including revenge, extortion, or humiliation.<sup>129</sup> Idaho's video voyeurism law now states:

A person is guilty of video voyeurism when . . . [h]e either intentionally or with reckless disregard disseminates, publishes or sells or conspires to disseminate, publish or sell any image or images of the intimate areas of another person or persons without the consent of such other person or persons and he knows or reasonably should have known that one (1) or both parties agreed or understood that the images should remain private.<sup>130</sup>

House Bill 563 was reported signed by the Governor on March 19, 2014 and went into effect on July 1, 2014.<sup>131</sup>

[36] Both Alaska and Texas have existing laws written broad enough to cover revenge porn situations. Alaska's existing cyber-harassment law is written broad enough to cover revenge porn situations and was used to charge Joshua P. Hoehne with second-degree harassment for downloading pictures from a former roommate's computer without permission and creating fake social media accounts for a woman and her sister containing

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<sup>129</sup> H.R. 563, 2014 2d Reg. Sess. (Id. 2014), *available at* <http://www.legislature.idaho.gov/legislation/2014/H0563.htm>.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

nude pictures of them and sexually explicit captions.<sup>132</sup> Texas's improper photography or visual recording law may be broad enough to include distributors of revenge porn; however, the Fourth Court of Appeals in San Antonio, Texas held the statute was unconstitutional in an opinion filed August 30, 2013.<sup>133</sup>

[37] While fourteen states and arguably Alaska have laws currently criminalizing revenge porn, twenty-seven states, the District of Columbia, and Puerto Rico have considered similar legislation over the past few years.<sup>134</sup> In 2013, Florida, the home state of Holly Jacobs,<sup>135</sup> tried and failed to pass a revenge porn law.<sup>136</sup> Florida Representative Tom Goodson sponsored House Bill 787, "Computer or Electronic Device Harassment," which would have made it illegal to post nude pictures of someone online *and tag* them with their personal information without their consent.<sup>137</sup> The wording of this bill would only make it illegal to post the nude picture if the person posting it also *tagged* the victim. Thus, the bill did not criminalize the act of posting the nude picture, generally. However, in

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<sup>132</sup> ALASKA STAT. § 11.61.120 (2013); Jerzy Shedlock, *Anchorage Man Charged with Harassment After Creating Fake Facebook Accounts*, ALASKA DISPATCH (Jan. 4, 2014), <http://www.alaskadispatch.com/article/20140104/anchorage-man-charged-harassment-after-creating-fake-facebook-accounts>.

<sup>133</sup> TEX. PENAL CODE ANN. § 21.15(b)(1) (West 2011); *ex parte* Thompson, 414 S.W.3d 872, 874 (Tex. App. 2013) (holding section 21.15(b)(1) of the Texas Penal Code unconstitutional for restricting protected speech by regulating an individual's right to photograph and to have certain thoughts).

<sup>134</sup> See *supra* text accompanying notes 112-114.

<sup>135</sup> See generally *supra* note 43 and accompanying text.

<sup>136</sup> See H.R. 787, 2013 Leg., Reg. Sess. (Fl. 2013), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=50026>.

<sup>137</sup> See *id.*

2014, Florida Senator David Simmons introduced another revenge porn bill, Senate Bill 532, which does not include this tagging requirement.<sup>138</sup> The bill unanimously passed the Senate, but unfortunately did not pass the House and died in committee on May 2, 2014.<sup>139</sup>

[38] In Virginia, Delegate Robert P. Bell introduced House Bill 326 which, in relevant part, provides:

Any person who, with the intent to coerce, harass, or intimidate, maliciously disseminates or sells any videographic or still image created by any means whatsoever that depicts another person who is totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast, where such person knows or has reason to know that he is not licensed or authorized to disseminate or sell such videographic or still image is guilty of a Class 1 misdemeanor. However, if a person uses services of an Internet service provider, an electronic mail service provider, or any other information service, system, or access software provider that provides or enables computer access by multiple users to a computer server in committing acts prohibited under this section, such provider shall not be held responsible for violating this section for content provided by another person.<sup>140</sup>

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<sup>138</sup> See S. 532, 2014 Leg., Reg. Sess. (Fl. 2014), available at <http://www.flsenate.gov/Session/Bill/2014/0532>.

<sup>139</sup> See *id.*

<sup>140</sup> H.R. 326, 2014 Leg. Reg. Sess. (Va. 2014), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?141+sum+HB326>.

House Bill 326 passed both the Senate and the House, was signed into law by Governor Terry McAuliffe on March 31, 2014, and became effective on July 1, 2014.<sup>141</sup> Other states that have proposed similar legislation in 2014 include Alabama, Arizona, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin.<sup>142</sup>

### **B. Challenges for Getting Criminal Revenge Porn Laws Passed**

[39] Revenge porn advocates and legislators face many challenges in getting criminal revenge porn laws passed. First, it is important these laws are not written too broadly, so they do not violate individuals' right to free speech under the First Amendment. On the other hand, it is difficult to write a law broad enough to encompass the majority of revenge porn victims that does not impose unnecessary hurdles regarding the burden of proof.

[40] Many of the state laws and introduced legislation criminalizing revenge porn have been criticized for being written too broadly and abridging free speech in violation of the First Amendment.<sup>143</sup> There was some opposition to California's anti-revenge porn law by the Electronic Frontier Foundation ("EFF") and the American Civil Liberties Union ("ACLU") when the law was in its early stages.<sup>144</sup> As an attorney for the EFF stated, "[f]requently, almost inevitably, statutes that try to do this type

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<sup>141</sup> *See id.*

<sup>142</sup> *See State 'Revenge Porn' Legislation, supra* note 12.

<sup>143</sup> *See Laird, supra* note 14.

<sup>144</sup> *See id.*



of thing overreach . . . [t]he concern is that they're going to shrink the universe of speech that's available online."<sup>145</sup> However, Mary Anne Franks argues that a carefully crafted revenge porn statute with certain exceptions for lawful activity does not offend the First Amendment.<sup>146</sup> Further, she notes that laws criminalizing cyber-stalking have not been found to violate the First Amendment, so a well-written law criminalizing revenge porn should not cause problems either.<sup>147</sup>

[41] Certain types of speech are not protected by the First Amendment and some speech can be regulated without violating the Constitution because it has the tendency to bring about serious harm which outweighs the right to freedom of speech.<sup>148</sup> The constitutionality of revenge porn laws might be a moot point as some may argue that revenge porn is obscene and should not even qualify as protected speech within the scope of the First Amendment. In *Miller v. California*, the guiding case on obscenity, the Court laid out the following test for determining whether material is obscene:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a

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<sup>145</sup> Steven Nelson, *Federal ‘Revenge Porn’ Bill Will Seek to Shrivelf Booming Internet Fad*, US NEWS (Mar. 26, 2014), <http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shrivelf-booming-internet-fad>; Dean, *supra* note 12.

<sup>146</sup> See Franks, *supra* note 50, at 2.

<sup>147</sup> See Dean, *supra* note 12.

<sup>148</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding the Federal Communications Commission could regulate “indecent speech” on the radio during hours when children are likely listening); *Cohen v. California*, 403 U.S. 15, 19 (1971). “[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses.” *Id.*

whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>149</sup>

The application of this test in cases involving modern Internet pornography has proven difficult and controversial because it is unclear how courts should identify contemporary community standards.<sup>150</sup> “Critics debate whether the courts should apply a national standard, a statewide standard, a standard based on smaller community units, an ‘average adult’ standard, or in Internet cases, a cyber-community standard.”<sup>151</sup> Regardless of the difficulty in applying the *Miller* test in the age of Internet pornography, revenge porn could arguably qualify as obscenity. Distributing sexually explicit pictures or videos of a person without their consent is “patently offensive” and many would argue revenge porn “lacks serious literary, artistic, political, or scientific value.”<sup>152</sup> Thus, revenge porn may be considered obscene unprotected speech.

[42] Even if revenge porn is not categorized as obscene, it may be considered “indecent” speech that is subject to a slightly lower scrutiny when being analyzed for constitutionality.<sup>153</sup> In *FCC v. Pacifica*, the Court held that the content of Pacifica’s radio broadcast was “‘vulgar,’ ‘offensive,’ and ‘shocking’” and noted that “content of that character is

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<sup>149</sup> *Miller v. California*, 413 U.S. 15, 24 (1973) (citation omitted).

<sup>150</sup> See Creasy, *supra* note 33 at 1033.

<sup>151</sup> See Creasy, *supra* note 33 at 1040.

<sup>152</sup> *Miller*, 413 U.S. at 24; Citron & Franks, *supra* note 23, at 35.

<sup>153</sup> *Pacifica*, 438 U.S. at 732.

not entitled to absolute constitutional protection under all circumstances.”<sup>154</sup> The Court held the FCC was able to regulate the broadcast for largely two reasons: (1) the indecent material was invading individuals in the privacy of their own home “where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder”; and (2) the broadcasting was easily accessible to children.<sup>155</sup> A similar argument may be made for revenge porn, as these websites are easily accessible to children. Although it might be difficult to argue these websites are confronting individuals in the privacy of their own home, they are seriously invading the privacy of those whose pictures are being distributed without their consent.

[43] On the other end of the spectrum, some scholars have criticized California’s law and the proposed law in Florida for being too narrow. As noted above, in its current form, California’s law does not cover “selfies” and there must be proof the person distributed the picture with the intent to cause serious emotional distress.<sup>156</sup> Many argue the law takes it too far by requiring the prosecution to prove the defendant intended to inflict serious emotional distress. Moreover, as previously discussed above, the California law does not reach third parties who did not take the explicit photograph or video themselves, but were still the ones to distribute it on the Internet.<sup>157</sup> Further, Florida’s proposed legislation would have continued to permit people to post nude photographs without the depicted person’s consent as long as she was not tagged with personal identifying

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<sup>154</sup> *Id.* at 747.

<sup>155</sup> *Id.* at 748; *see also* Rowan v. Post Office Dept., 397 U.S. 728 (1970).

<sup>156</sup> *See* Mark Melnicoe, *California Crackdown on ‘Revenge Porn’ in Brown’s Hands*, BLOOMBERG (Sep. 11, 2013, 2:55 PM), <http://www.bloomberg.com/news/2013-09-11/california-crackdown-on-revenge-porn-in-brown-s-hands.html>.

<sup>157</sup> *See supra* note 120-127 and accompanying text.

information.<sup>158</sup> It has proven difficult for many states to strike the right balance between proper protection for the victims of revenge porn and a law that does not improperly restrict free speech.

#### V. A FEDERAL LAW CRIMINALIZING REVENGE PORN IS NECESSARY

[44] The best way to attack revenge porn and prevent people from posting and distributing revenge porn is with a federal law criminalizing the act.<sup>159</sup> Clearly, the existing civil remedies and criminal laws are inefficient. Although it seems many states will continue to propose legislation criminalizing this activity, the most effectual way to put a stop to revenge porn would be for Congress to pass a uniform prohibition. A federal criminal statute would ensure that victims in states that fail to pass such legislation are protected.<sup>160</sup> Moreover, many revenge porn victims have trouble convincing law enforcement to help them, and a federal criminal law would make sure authorities understand this behavior is against the law and deserves attention.<sup>161</sup> Additionally, a federal statute criminalizing revenge porn would prevent revenge porn websites from hiding behind the shield of liability provided by § 230 of the CDA.

[45] Moreover, like most Internet activities, revenge porn often crosses jurisdictional boundaries and involves interstate or international

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<sup>158</sup> See H.R. 787, 2013 Leg., Reg. Sess. (Fl. 2013).

<sup>159</sup> Citron and Franks also conclude that the criminalization of revenge porn is necessary; however, I am arguing specifically for a *federal* law criminalizing revenge porn. See Citron & Franks, *supra* note 23, at 390.

<sup>160</sup> See Dean, *supra* note 12.

<sup>161</sup> See *id.*

communications.<sup>162</sup> As Kevin V. Ryan and Mark L. Krotoski state, “The Internet provides the means to communicate with or access computers around the world in real-time, twenty-four hours a day seven days a week. Taking advantage of the global reach of the Internet, perpetrators may be many time zones away in another jurisdiction or country.”<sup>163</sup> Thus, although state criminal laws may help in addressing revenge porn, because this activity often involves interstate and international communications and crosses jurisdictional boundaries, a federal law is necessary and would be a more effective solution.

[46] As discussed above, states have taken different approaches to the criminalization of revenge porn; some passing laws that are too narrow and others passing laws that are too broad. A carefully crafted, uniform federal law should remedy this issue. First, the law would need to be broad enough to cover both explicit pictures taken by another person and explicit “selfies.” This federal law should not make the same mistake as California in leaving out pictures a victim took of him or herself. Many revenge porn victims did take the pictures or videos of themselves, but did not consent to having them posted on the Internet for the world to access. Thus, this federal law should prohibit a person from knowingly posting and distributing an explicit photograph or video on the Internet without the depicted person’s consent. The intent requirement does not need to

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<sup>162</sup> See Robert L. Ullmann and David L. Ferrera, *Crime on the Internet*, 42 B.B.J. 4, 4 (1998) (stating most Internet crime involves interstate or international communications); Anne E. Hawley, *Taking Spam Out of Your Cyberspace Diet: Common Law Applied to Bulk Unsolicited Advertising Via Electronic Mail*, 66 UMKC L. REV. 381, 385 (1997) (discussing the inadequacy of state legislation in controlling spamming problems because Internet activities cross jurisdictional boundaries).

<sup>163</sup> Kevin V. Ryan & Mark L. Krotoski, Symposium, *Big Brother in the 21st Century?: Reforming the Electronic Communications Privacy Act: Caution Advised: Avoid Undermining the Legitimate Needs of Law Enforcement to Solve Crimes Involving the Internet in Amending the Electronic Communications Act*, 47 U.S. F. L. REV. 291, 291–92 (2012).

include intent to cause serious emotional distress, as long as the language clearly states the distributor knew or had reason to know the explicit images were meant to remain private. There is no need for the federal statute to include proof of a pattern of harassing behavior. However, in order to circumvent constitutional issues, the law likely should include a requirement of proof the victim suffered some emotional harm.

[47] In March 2014, California Representative Jackie Speier announced she was preparing to introduce federal legislation criminalizing the distribution of revenge porn.<sup>164</sup> Franks, who is helping Speier draft the legislation, has stated that the bill would look similar to this model statute:

Whoever knowingly discloses through the mails, or using any means of facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including a computer, an image of another, identifiable person whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the depicted person has not consented to such disclosure, shall be fined under this title or imprisoned not more than two years, or both.<sup>165</sup>

Representative Speier's announcement of her plan to introduce this legislation is a step in the right direction.

[48] A federal criminal ban on the distribution of revenge porn likely would serve as a deterrent and discourage people from posting these pictures in the first place. If a person knows he could potentially face jail time or a heavy fine, he likely would not be as quick to engage in such an activity. Further, being indicted on federal criminal charges rather than

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<sup>164</sup> See Nelson, *supra* note 137.

<sup>165</sup> See Franks, *supra* note 50, at 4.

being sued by one individual likely will carry more weight and be taken more seriously by people engaging in this vindictive behavior. Also, a federal law criminalizing this activity means victims are represented by the government. Thus, victims would not have to pay to litigate these lawsuits and would not have to face as much publicity as they would when bringing a civil suit. More importantly, a federal criminal ban on revenge porn would trump § 230 of the CDA, allowing victims to go after the big fish, the revenge porn websites. Thus, such a law would also discourage people from operating revenge porn websites, period; thus, truly getting at the heart of the problem.

## VI. CONCLUSION

[49] As technology and pornography continue to mature and push the limits, both consistently present judges, legislators, and legal advocates with difficult legal questions. The rapid growth of technology and pornography's recent creation, revenge porn, has brought detrimental effects for many and highlighted a great need for legal action. Although many states have begun to recognize the seriousness of this issue, and even though there are some existing civil laws that potentially address revenge porn, the most effective way to stop websites and users from posting revenge porn is for Congress to enact a federal criminal law. A carefully crafted federal law would protect victims, deter violators, and allow victims to go after the actual revenge porn websites themselves, without offending the First Amendment.