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**Revenge Pornography:**  
***Defining a Modern Sex Crime Through State Legislation***

by Nicole M. Garibaldi\*

**Introduction**

In 2014, a highly publicized scandal involved nude photographs of dozens of celebrities – all of whom were women – which were virtually hacked from their computers and shared across the Internet without consent; Jennifer Lawrence, an academy award-winning American actress, was one of those exploited celebrities.<sup>1</sup> In a November 2014 interview with *Vanity Fair*, Lawrence explained that after her pictures were stolen and circulated, she felt like “a piece of meat that [was] being passed around for a profit.”<sup>2</sup>

For other victims of this non-consensual distribution, the consequences can take an even graver toll. In 2010, Amanda Todd, then thirteen, would occasionally chat through her web-cam with a flirtatious man she met online.<sup>3</sup> A year into their courtship she flashed her chest to him, at his request.<sup>4</sup> Unbeknownst to her at the time, the man took a picture of her breasts.<sup>5</sup> He would later ask her to flash him again, but she refused.<sup>6</sup> In retaliation, he found her classmates on Facebook and sent them the photograph of her breasts.<sup>7</sup> For the next two years, the man’s

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<sup>1</sup> Catherine Buni and Soraya Chemaly, *The Unsafety Net: How Social Media Turned Against Women*, THE ATLANTIC, Oct. 9, 2014, available at <http://www.theatlantic.com/technology/archive/2014/10/the-unsafety-net-how-social-media-turned-against-women/381261/>.

<sup>2</sup> Sam Kashner, *Both Huntress and Prey*, VANITY FAIR, Nov. 2014, at 160 available at <http://www.vanityfair.com/vf-hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy>.

<sup>3</sup> Christina NG, *Bullied Teen Amanda Todd's Death Under Investigation*, ABC NEWS: NIGHTLINE, Oct. 16, 2012, available at <http://abcnews.go.com/US/bullied-teen-amanda-todds-death-investigation/story?id=17489034>.

<sup>4</sup> *Id.*

<sup>5</sup> Michelle Dean, *The Story of Amanda Todd*, THE NEW YORKER, Oct. 18, 2012, available at <http://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

retaliatory behavior continued and Amanda and her mother were unable to stop anonymous users from continuing to post that image on sexually explicit web-sites.<sup>8</sup> The subsequent bullying that occurred online and in school sent Amanda into a deep depression and she began experimenting with drugs, alcohol, cutting, and even tried to commit suicide.<sup>9</sup> In October 2012, Amanda committed suicide after posting a YouTube video that explained the harassment she endured and, as a result, the choice she felt she ultimately had to make in order to escape the cascading consequences of that man's revenge.<sup>10</sup>

Jennifer and Amanda are just two of countless individuals, typically younger women, who fall victim to callous perpetrators of revenge pornography.<sup>11</sup> The term "revenge pornography" can be used synonymously with "involuntary pornography" and "non-consensual pornography," but will be referred to generally as "revenge porn" throughout this Note. The danger of revenge porn is that it is an increasingly omnipresent societal infliction that lacks a firm legal definition. Commonly, revenge porn occurs when "spurned former lovers post sexualized pictures of their ex-wives and ex-girlfriends on a public forum so that others can leer at and demean them."<sup>12</sup> The concept of revenge porn, however, encompass all forms of non-consensual pornography including images taken without a victim's knowledge, images that are

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<sup>8</sup> *Id.*

<sup>9</sup> Christina NG, *supra* note 3.

<sup>10</sup> Buni and Chemaly, *supra* note 1.

<sup>11</sup> Lorelei Laird, *Victims are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, A.B.A.J. (Nov. 1, 2013), available at

[http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=tech\\_monthly](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly).

<sup>12</sup> David Gray et. al., *Symposium on Cybercrime: Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 794 (2013).

hacked from a personal computer, and images sent in confidence to a lover that are later uploaded to the Internet once the relationship has soured.<sup>13</sup>

In her *Vanity Fair* interview, Jennifer Lawrence expressed the emotions she experienced as a victim of the revenge porn epidemic. In addition to anger aimed at the hacker, she also harbors frustration about the way the hacking incident was reported in the media, stating, “[i]t’s not a scandal. It is a sex crime. It is a sexual violation. It’s disgusting. The law needs to be changed, and we need to change.”<sup>14</sup> Legal protection against revenge porn is currently a disjointed and conflicting body of law across the states. Some jurisdictions utilize traditional tort law to combat the issue while others apply existing federal statutes like the Communications Decency Act or the Digital Millennium Copyright Act to capture the issue under copyright theories.<sup>15</sup> Several states have taken the initiative to draft and enact specific legislation deliberately targeting revenge porn.<sup>16</sup>

Part I of this Note outlines the relevant social and legal circumstances surrounding the rapid emergence of revenge porn in our society. Part II analyzes legislation, both old and new, that is used to address, punish, and remedy revenge porn. This analysis first examines existing civil legislation, such as tort and copyright law, and explains why these causes of action are severely inadequate when utilized in a revenge porn context. Next, the analysis surveys and critiques recent state efforts to draft legislation aimed directly at the contours of revenge porn, focusing particularly on New Jersey, California, and Illinois. Part III presents the major

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<sup>13</sup> Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U.J. OF INTEL. PROP. & ENT. LAW 422, 424 (Spring 2014).

<sup>14</sup> Kashner, *supra* note 2, at 160.

<sup>15</sup> See Danielle Keats Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 357-61 (Summer 2014).

<sup>16</sup> *Id.* at 371-75.

concerns and counterarguments involved in drafting new revenge porn legislation, including First Amendment concerns, definitional difficulties, penalties, and effective remedies.

**Part I:**  
**The Inception of Revenge Porn and the Ill-Equipped Legal System**

This introductory section will explore the significant social precursors to the inception of revenge porn. The prevalence of the Internet in modern day society and the web-based capabilities of today's cellphones have created a handheld portal for access and anonymity – a fertile platform for the instant transmission of data, specifically risqué material.<sup>17</sup> The novelty of this form of transmission transcends most legal boundaries that currently exist. Thus, this section will explain the present legal framework that is commonly utilized to address revenge porn and will conclude with an introduction of the state-based initiative to draft new legislation in efforts to effectively stifle this modern societal dilemma.<sup>18</sup>

**A) The Social Nature of the Internet**

The genesis of revenge porn aligns with the proliferation of the Internet in our daily existence. Ease of access and relative anonymity have assisted the development of an ideal environment in which revenge porn can thrive. This environment is so fertile, in part, because the exponential evolution of technology has left in its wake a legal void.<sup>19</sup> In other words, the slow-moving wheels of justice cannot keep up with the novel problems created by technology.<sup>20</sup>

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<sup>17</sup> AARON SCHWABACH, INTERNET AND THE LAW: TECHNOLOGY, SOCIETY, AND COMPROMISES 146 (2nd ed. 2014) (“Because the Internet is not a broadcast medium, it is entitled to the highest level of First Amendment protection”).

<sup>18</sup> See Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html>.

<sup>19</sup> Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECHNOLOGY REVIEW (Apr. 15, 2014), <http://www.technologyreview.com/view/526401/laws-and-ethics-cant-keep-pace-with-technology/>.

<sup>20</sup> *Id.*

Yet, technology has become so embedded in our society that in the summer of 2014, the Supreme Court of the United States granted certiorari to twin Fourth Amendment cases concerning warrantless searches of cell phones.<sup>21</sup> In his majority opinion, Chief Justice John Roberts took judicial notice that "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'"<sup>22</sup> As Chief Justice Roberts was alluding to, an overwhelming majority of Americans own cell phones that serve as vast databases of personal information and provide instant access to the Internet, colloquially known today as "smart phones."<sup>23</sup>

According to a recent Pew Research poll, nine percent of adult cell phone owners have sent a "sext" (sexual text message) of themselves to someone else.<sup>24</sup> This is a three percent increase from the six percent of cell phone owners who claimed to do this in 2012.<sup>25</sup> Twenty percent of cell phone owners have received a sext of someone else they know on their phone, up from fifteen percent in 2012.<sup>26</sup> *Cosmopolitan*, a popular international women's magazine, conducted a survey of 850 readers in the fall of 2014 — ninety-nine percent female, with an average age of twenty-one — about taking naked pictures of themselves.<sup>27</sup> Eighty-nine percent admitted to have taken nude photos of themselves at some point.<sup>28</sup> Of those readers polled, only

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<sup>21</sup> *Riley v. California*, 134 S. Ct. 2473 (2014).

<sup>22</sup> *Id.* at 2494-95.

<sup>23</sup> Pew Research Center, *Mobile Technology Fact Sheet* (Jan. 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

<sup>24</sup> Amanda Lenhart and Maeve Duggan, *Couples, the Internet, and Social Media: How American Couples Use Digital Technology to Manage Life, Logistics, and Emotional Intimacy Within Their Relationships* (Feb. 11, 2014) PEW RESEARCH INTERNET PROJECT, <http://www.pewinternet.org/2014/02/11/couples-the-internet-and-social-media/> (results in this report are based on data from telephone interviews conducted by Princeton Survey Research Associates International from April 17 to May 19, 2013, among a sample of 2,252 adults, age 18 and older).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Emma Barker, *Cosmo Survey: 9 out of 10 Millennial Women Take Naked Photos* (Sept. 3, 2014), <http://www.cosmopolitan.com/sex-love/advice/a30675/ninety-percent-millennial-women-take-nude-photos-cosmo-survey/>.

<sup>28</sup> *Id.*

fourteen percent regretted taking the pictures and eighty-two percent of readers said they would do it again.<sup>29</sup> These statistics represent the vast potential for private photographs to end up in the hands of malicious individuals and consequentially, in the purview of any individual with Internet access. Even if the individual does not personally distribute the photo to others, the sophistication of modern hackers fosters the persistence of the revenge porn problem.

Revenge porn is a unique social dilemma because, “[t]he damage caused by revenge porn is inextricably tied to the nature of the Internet.”<sup>30</sup> The ability to irreparably damage someone’s life can exist in a handheld device, requiring only the click of a few buttons.<sup>31</sup> One upload, available on a single web-site for only a short period of time, could result in a lifelong ripple of consequences for the victim of the upload.<sup>32</sup> The potential harms span emotional distress, job loss, ruined reputation, subsequent harassment from strangers, and most obviously, general exploitation.<sup>33</sup> Not only do the harms cover a wide spectrum, but so too do the victims; revenge porn victimizes individuals from every sector of the socioeconomic spectrum, from non-descript teenagers to international celebrities.<sup>34</sup> Further, because revenge porn is a byproduct of the Internet and social media, “the public, law enforcement, and the judiciary sometimes struggle to understand the mechanics of the conduct and the devastation it can cause.”<sup>35</sup> The novelty of revenge porn, therefore, often inadvertently leads to victim-blaming, victim-shaming, lack of

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<sup>29</sup> *Id.*

<sup>30</sup> Levendowski, *supra* note 13, at 426.

<sup>31</sup> Lauren Saccone, *How Your Cell Phone Is Ruining Your Life*, PAZOO (Aug. 20, 2014), <http://pazoo.com/health/tech-support-cell-phone-ruining-life>.

<sup>32</sup> Stephen Carlisle, *Unintended Consequences: How the DMCA Made the Distribution of Stolen Celebrity Photos All Too Easy*, THE NOVA SOUTHEASTERN UNIVERSITY OFFICE OF COPYRIGHT (Sept. 11, 2014), <http://copyright.nova.edu/dmca-stolen-celebrity-photos/>.

<sup>33</sup> Citron and Franks, *supra* note 15, at 351.

<sup>34</sup> See generally Emma Clare, “*Porn Stars*” *Against Their Will*, D2 MAGAZINE, Feb. 19, 2015, available at <http://www.dn.no/d2/2015/02/19/1048/Revenge-porn/porn-stars-against-their-will>.

<sup>35</sup> Citron and Franks, *supra* note 15, at 347.

resource devotion, and a noticeable deterioration of societal values as “sexual courting” becomes an accepted aspect of life.<sup>36</sup>

## B) The Existing Legal Landscape

While many laws exist that touch upon harms caused through technological means, most of these statutes are outside the scope of practical causes of action for revenge porn victims. For instance, crimes such as identify theft, wrongful disclosure, and voyeurism essentially criminalize the intentional taking or revealing of an individual’s intimate information without that individual’s consent.<sup>37</sup> Similarly, the criminalization of child pornography and the distribution of such material also focuses on the non-consensual nature of the conduct as one of the cornerstones for its illegality.<sup>38</sup> A federal cyber-stalking statute bans as a felony the use of any “interactive computer service” to engage in a “course of conduct” intended to harass or intimidate someone in another state and cause that person to suffer “substantial emotional distress.”<sup>39</sup> State harassment laws contain similar provisions and also generally require a “course” or “pattern” of repeated conduct aimed directly at the victims.<sup>40</sup> These laws, however, are outside the scope of this Note. Rather, this Note examines tort and copyright bases for recovery which have proven to be the more common (albeit problematic) routes revenge porn victims utilize in seeking a remedy to their harms.

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<sup>36</sup> Clare, *supra* note 34.

<sup>37</sup> See generally 18 U.S.C. § 1028; 42 U.S.C. § 1320d-6; 18 U.S.C. § 1801.

<sup>38</sup> See *United States v. Ferber*, 458 U.S. 747 (1982).

<sup>39</sup> 18 U.S.C § 2261A(2) (2012)(Under the statute, defendants can be punished for up to five years in jail and fined \$250,000).

<sup>40</sup> Peter Followill, *Harassment and Cyberbullying as Crimes*, CRIMINALDEFENSE LAWYER.COM, <http://www.criminaldefenselawyer.com/crime-penalties/federal/Harassment.htm>.



Revenge porn can be, and commonly has been, addressed by the law of torts; victims have previously brought tort claims and won.<sup>41</sup> After all, revenge porn and traditional torts such as harassment or invasion of privacy inflict seemingly similar harms.<sup>42</sup> Victims of both violations suffer repercussions in their professional and personal lives and subsequently live a life full of fear, anxiety, shame, and depression.<sup>43</sup> Revenge porn plaintiffs have relied on tort-based causes of action ranging from intentional infliction of emotional distress to violations of the victim's "right of privacy."<sup>44</sup> The tort of intentional infliction of emotional distress is comprised of four well-defined elements: (1) the defendant must act intentionally or recklessly; (2) the defendant's conduct must be extreme and outrageous; and (3) the conduct must be the cause of, (4) severe emotional distress.<sup>45</sup> Thus, victims must be able to prove the intent of the perpetrator, some subjective degree of offensiveness, as well as complex and intangible causal links between the conduct and the distress experienced by the victim. The ability to meet these burdens of proof also presupposes that the victim is able to establish his or her emotional distress through sufficient proof in a court of law. Interestingly, intentional infliction of emotional distress is "the only intentional tort involving harm to a person that does *not* share a criminal counterpart."<sup>46</sup>

Conversely, choosing to utilize the broad "right to privacy" as a cause of action involves the consideration of four separate and distinct privacy torts, which often coincide.<sup>47</sup> Privacy torts

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<sup>41</sup> Citron and Franks, *supra* note 15, at 357.

<sup>42</sup> Clare, *supra* note 34.

<sup>43</sup> *Id.*

<sup>44</sup> RESTATEMENT (SECOND) OF TORTS § 46 (1997); RESTATEMENT (SECOND) OF TORTS § 652A (1997).

<sup>45</sup> *Elements of the Tort of Intentional Infliction of Emotional Distress*, LEGAL INFORMATION INSTITUTE, [http://www.law.cornell.edu/wex/intentional\\_infliction\\_of\\_emotional\\_distress](http://www.law.cornell.edu/wex/intentional_infliction_of_emotional_distress) (last visited Mar. 8, 2015).

<sup>46</sup> Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 673, 691 (Spring 2014)(emphasis in original).

<sup>47</sup> See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

(specifically, false light, misappropriation, invasion of privacy, and public disclosure of private fact) are often cited separately or together to provide a cause of action for victims of revenge porn. False light is generally inapposite in revenge porn cases because it requires that publicity of the image attribute false beliefs, characteristics, or conduct to the victim.<sup>48</sup> For the vast majority of victims, the very harm of revenge porn lies in the fact that the image speaks for itself and speaks with a tone of literal and figurative stripped-down accuracy.<sup>49</sup> The exception to this generality is the individual who becomes a victim of revenge porn that is created through digitally generated or manipulated images, in which case the image is entirely false and the tort of false light may be a potentially feasible cause of action.<sup>50</sup> Misappropriation is the appropriation of a person's name or likeness by another.<sup>51</sup> However, misappropriation applies only when the name or likeness has been used to benefit the appropriator. In other words, if the offender obtains no tangible value, there is no tort.<sup>52</sup>

Additionally, victims relying on invasion of privacy and/or public disclosure of private fact will face major procedural hurdles in order to succeed on their claim.<sup>53</sup> Allegations of violation of privacy or public disclosure include immense hardships of proving causation and intent.<sup>54</sup> As a general rule, privacy torts are premised on the idea that the plaintiff had a reasonable expectation of privacy that was unreasonably violated.<sup>55</sup> This premise is troublesome in the majority of revenge porn cases that involve contextual consent where "reasonableness" is

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<sup>48</sup> RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977).

<sup>49</sup> Levendowski, *supra* note 13, at 434-35.

<sup>50</sup> See David McAfee, *Facebook Hit With \$123M 'Revenge Porn' Suit Over Fake Pics*, LAW360.COM (July 29, 2014, 8:10 PM), <http://www.law360.com/articles/562254/facebook-hit-with-123m-revenge-porn-suit-over-fake-pics>.

<sup>51</sup> RESTATEMENT (SECOND) OF TORTS § 652C (1977).

<sup>52</sup> *Id.*

<sup>53</sup> Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT. L. REV. 247, 254 (2015).

<sup>54</sup> *A Primer on Invasion of Privacy*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/photographers-guide-privacy/primer-invasion-privacy> (last visited Mar. 8, 2015).

<sup>55</sup> See Prosser, *supra* note 47.

often a vigorously contested issue. In those instances, an individual may send his or her lover a sexually explicit picture with an implied condition that it remain private (*e.g.*, “for your eyes only”).<sup>56</sup> Courts have struggled with the issue of whether those contextually consenting senders have a reasonable expectation of privacy in the images they have shared with another.<sup>57</sup> This may be due, in part, to the public’s difficulty in recognizing the significance of implied confidences in certain sexual contexts.<sup>58</sup> Furthermore, this expectation of privacy may be deemed unreasonable due to the “morally questionable” content and a lack of sympathy from the disapproving public.<sup>59</sup> Despite the fact that individual determinations of morality generally do not provide appropriate foundations for legislation, context and social norms will largely determine the “reasonableness” of the victim’s privacy expectations after they have shared intimate images with another individual.<sup>60</sup> Relying on a privacy cause of action with such subjective components leaves victims with uncertain and commonly unfavorable odds of success. In summation, success for the revenge porn victim utilizing tort law is largely “limited to those injured by the fault of others, who can afford the financial and emotional cost of initiating and maintaining civil suits, and are able to prove their case on a balance of probabilities.”<sup>61</sup>

For the large majority of victims who take sexually explicit images of themselves that are later non-consensually disseminated, copyright law can be a more successful path of recourse.<sup>62</sup>

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<sup>56</sup> Levendowski, *supra* note 13, at 436.

<sup>57</sup> *Id.*

<sup>58</sup> Citron and Franks, *supra* note 15, at 354.

<sup>59</sup> See generally, Helen Nissenbaum, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY AND THE INTEGRITY OF SOCIAL LIFE* (2010).

<sup>60</sup> Citron and Franks, *supra* note 15, at n.70.

<sup>61</sup> Elizabeth Adjin-Tettey, *Sexual Wrongdoing: Do the Remedies Reflect the Wrong*, *FEMINIST PERSPECTIVES ON TORT LAW* 179, 180 (Janice Richardson & Erika Rackley eds., 2012).

<sup>62</sup> Lisa Autz, *Fighting 'Revenge Porn'*, *BTRREAD* (Feb. 20, 2015), <http://www.breakthru.com/btrtoday/read/articles/friday-selfie-week> (“Up to 80 percent of revenge porn victims took the graphic photo themselves.”).

The Communications Decency Act of 1996 (“CDA”) was promulgated in an effort to regulate both indecent and obscene material available on the Internet.<sup>63</sup> The statute imposes criminal sanctions on anyone who “uses any interactive computer service to display... any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”<sup>64</sup> Significantly, claimants relying on the CDA will face the extraordinarily subjective threshold of offensiveness “as measured by contemporary community standards.” Another major pitfall of relying on the CDA for relief is seeded in the provision that, “[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>65</sup> Section 230 of the CDA, therefore, shelters web-site owners and operators from liability stemming from any otherwise unlawful material submitted by others. Thus, while the uploader may face the possibility of repercussions for their initial upload of the image, those that perpetuate the dissemination and provide a venue for the uploading in the first instance remain untouchable by the CDA since the material is uploaded by “another...provider.”<sup>66</sup> Furthermore, the statute trumps any civil and criminal state laws, which renders it a supremely protective federal immunity.<sup>67</sup>

Some claimants relying on copyright law have also tried to utilize the Digital Millennium Copyright Act (“DMCA”). Enacted in 1998, the DMCA was intended to trail technological

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<sup>63</sup> 47 U.S.C. § 230(a),(b) (2014).

<sup>64</sup> 47 U.S.C. § 223(d) (2014).

<sup>65</sup> 47 U.S.C. §230(c)(1) (2012).

<sup>66</sup> Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CAL. L. REV. 1303, 1313–15 (2014)(Explaining the three elements of Section 230 immunity and why internet service providers often and easily meet all three and receive immunity.)

<sup>67</sup> 47 U.S.C. § 230(e)(3) (2012)(“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

advances and pursue copyright infringement activity across the Internet.<sup>68</sup> Relying on this cause of action assumes that the victim in the image was also the photographer of the image, most commonly known as a “selfie.” If this is the case, the photographer, as creator and owner of the photograph, is entitled to exclusive rights regarding that photograph including, but not limited to, the right to reproduce the image and the right to disseminate it.<sup>69</sup> Unfortunately, like the CDA, no substantial penalty exists for owners and operators of revenge porn web-sites which results in the image quickly appearing, disappearing, and then re-appearing across many different web-sites.<sup>70</sup> These operators may be protected from liability for copyright infringement through a statutory “no harm, no foul” framework.<sup>71</sup> If, upon notice of the alleged infringement, the operator “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity,” then the operator evades any further meaningful consequences for his or her actions.<sup>72</sup>

Demonstrably, existing civil law can only superficially address, remedy and/or deter revenge porn in a practical, real world context. Although not yet embraced on the national scale as a solution to the problem, framing the issue through a criminal law lens helps to “conceptualize the non-consensual publication of someone’s sexually explicit images as a form of sexual abuse.”<sup>73</sup> While a federal law criminalizing revenge porn would be the most effective and uniform resolution due to the Internet’s primary role in facilitating crimes across state

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<sup>68</sup> Methaya Sirichit, *Catching the Conscience: An Analysis of the Knowledge Theory Under § 512(c)’s Safe Harbor & the Role of Willful Blindness in the Finding of Red Flags*, 23 ALB. L.J. SCI. & TECH. 85, 94 (2013).

<sup>69</sup> 17 U.S.C. § 106 (The owner of copyright has the exclusive rights to reproduce the work, make a derivative of the work, distribute copies of the work, publicly perform the work, publicly display the work, or authorize others to do the same).

<sup>70</sup> Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, JOLTDIGEST (May 28, 2013), <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters>.

<sup>71</sup> *Id.*

<sup>72</sup> 17 U.S.C. §512(b)(2)(E).

<sup>73</sup> Citron and Franks, *supra* note 15, at 347.

borders, states are arguably the best laboratories to begin experimenting with new legislation.<sup>74</sup> At the time of this writing, seventeen states currently have revenge porn laws on their books.<sup>75</sup> These recently enacted criminal statutes generally make it a crime to take or disseminate images of a sexual nature without consent from the subject of the image.<sup>76</sup> Just as the scope of coverage varies from state to state, so too do the criminal classifications with some states classifying the conduct as a misdemeanor while other states label it as a felony.<sup>77</sup> As of April 2015, bills were introduced, or are pending, in at least twenty other states.<sup>78</sup>

**Part II:**  
**Why Existing Civil Laws Fail to Adequately Meet Challenges Presented by Revenge Porn**

As the background discourse demonstrates, civil law at present is generally inadequate as a legal platform for victims of revenge porn to stand upon. One obvious and major obstacle is that pursuing an individual civil cause of action is extraordinarily expensive and most ordinary victims lack the necessary resources to bring civil suit, whether those resources be financial, legal, or even emotional. Furthermore, plaintiffs in civil court generally must use their real names in documents submitted to the court and these documents are often available to the public, potentially creating additional unwanted publicity.<sup>79</sup> Even in the best case scenario where a victim is able to effectively prove a claim, civil judgments may be unable to order the permanent

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<sup>74</sup> Franks, *supra* note 16; Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, AEI ONLINE (March 31, 2001)(<http://www.aei.org/article/politics-and-public-opinion/elections/laboratories-of-democracy/>).

<sup>75</sup> *States with Revenge Porn Criminal Laws* (upd. Apr.7, 2015) <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *States with Revenge Porn Criminal Laws* (upd. Apr.7, 2015) <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>.

<sup>79</sup> Citron and Franks, *supra* note 15, at 358.

and total removal of the photograph from the Internet at large.<sup>80</sup> Monetary damages, assuming all evidentiary burdens are successfully met by the plaintiff, are unlikely to be forthcoming as most perpetrators of revenge porn are spiteful individuals that lack deep pockets.<sup>81</sup> Using the civil system to combat revenge porn, such as through privacy torts or copyright claims, fails to accomplish the most common goal sought after by victims: the removal of the image(s) and the deterrence of future perpetrators.<sup>82</sup> Most forms of civil post-judgment relief are a mere slap on the wrist to an offender who intentionally caused long-lasting harm to the victim and they do little to prevent the image from popping up on another site in perpetuation of the harm.

#### (A) Tort Law as a Toothless Cause of Action for Revenge Porn Victims

Relying on tort law is unlikely to provide a meaningful remedy for revenge porn victims. Revenge porn relies on the immense, world-wide Internet audience to successfully humiliate, embarrass, or financially exploit the victim. The magnitude of publication and re-publication of non-consensual, sexually explicit images makes total, complete and permanent removal of the images nearly impossible, even if so ordered by a court. An additional roadblock created by the nature of the Internet is that it is exceedingly difficult to identify and later prove who the offender actually is during legal proceedings because of the anonymity associated with the underbelly of the Internet. At best, this can lead to a complete sidetrack of the trial as courts grapple with intricate technological aspects involved in the case, such as e-Discovery.<sup>83</sup> At worst, it can ultimately prevent a victim from bringing suit in the first instance if they cannot

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<sup>80</sup> Mitchell A. Matorin, *In the Real World, Revenge Porn is Far Worse Than Making it Illegal*, TPM (Oct. 18, 2013, 6:00 AM), <http://talkingpointsmemo.com/cafe/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn> (Explaining that civil litigation “won’t remove photos from the Internet or Google”).

<sup>81</sup> Franks, *supra* note 18.

<sup>82</sup> Kitchen, *supra* note 53, at 251.

<sup>83</sup> Mary Pat Gallagher, *Hearing Ordered Over Expert in Tweeted Nude Video Case*, NEW JERSEY LAW JOURNAL (Sept. 15, 2014) available at, <http://www.njlawjournal.com/id=1202670058774/Hearing-Ordered-Over-Expert-in-Tweeted-Nude-Video-Case#ixzz3J5Zv06gS> (The three-judge panel in *State v. Brown* remanded the case for a hearing on whether an expert witness is needed or a detective’s testimony will suffice).

identify, locate, or serve the perpetrator. Civil tort remedies contain many other deficiencies as well: many defendants are “judgment-proof,” meaning they lack the financial resources to satisfy the judgment, so victims may never end up collecting on their award; injunctions prohibiting defendants from further publication of the image do not address the image as it may continue to appear on other web-sites; and there is no tort-based remedy for the vast reputational, emotional, and social harm already inflicted by such intimate exploitation.<sup>84</sup> Even if victims successfully prevail in their case, civil tort remedies do little to impact the problem on the larger, societal scale.

Relying on specific torts such as intentional infliction of emotional distress or violation of privacy is particularly problematic. Both torts involve high evidentiary burdens, requiring the victim to prove subjective elements such as the “extreme and outrageous” nature of the defendant’s conduct or the tangible benefits received by the defendant. While this may be easier to prove when offenders charge extortionate fees for the removal of photos or when offenders receive advertising revenue, it does nothing to combat or deter the true revenge porn offender – the individual who posts solely to humiliate or extract revenge from the victim. Furthermore, to successfully bring either an invasion of privacy or public disclosure of private fact claim, victims must be able to prove they had “a reasonable expectation of privacy” in the image(s).<sup>85</sup> The “reasonable expectation” is a highly subjective threshold and is a direct byproduct of societal expectations and norms. This is a troubling standard when one considers the increasing prevalence of private, nude images in today’s society as a means of virtual, sexual flirting. In fact, no courts have yet directly addressed the issue of whether revenge porn victims have a

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<sup>84</sup> Franks, *supra* note 18.

<sup>85</sup> Kristin M. Beasley, *Up-Skirt and Other Dirt: Why Cell Phone Cameras and Other Technologies Require a New Approach to Protecting Personal Privacy in Public Places*, 31 S. ILL. U. L. J. 69, 93 (2006) (“A plaintiff’s ability to recover on an invasion of privacy tort is premised on her having had a reasonable expectation of privacy.”).



reasonable expectation of privacy in the images they have shared.<sup>86</sup> Victims of revenge porn often face further humiliation and shame when they are confronted with the widely-held belief that a reasonable person does not protect private images by sharing them with others, particularly when shared through electronic means.

Therefore, the issue of revenge porn oftentimes presents a contextual consent dilemma based on the victim's consensual sending of the image as contextualized by an implied understanding that the images will remain private after transmission. Some argue that an individual's consensual sharing of these images with another individual should be taken as *carte blanche* consent to share them with other third parties, irrespective of any context in which they were initially shared.<sup>87</sup> Courts and society alike may refuse to recognize the contextual nature of consent due to moral or social disapproval of the intimate photographs.<sup>88</sup> Because social norms will determine whether a sexually explicit image is considered an act of courtship or an act of revenge porn, "reasonable expectations" of privacy become highly context-specific.<sup>89</sup> However, the contextual nature of consent has been a consistently accepted foundation of privacy law; an individual may share intimate information with her doctor, but choose not to share such information with her employer. Likewise, informing loved ones of an HIV-positive status does not simultaneously render reasonable expectations of privacy in that information void. Providing a merchant with personal banking or identifying information does not give the merchant an

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<sup>86</sup> Levendowski, *supra* note 13, at 436.

<sup>87</sup> Callie Millner, *Public Humiliation over Private Photos*, SFGATE.COM (Feb. 10, 2013, 3:21 PM) (<http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php>)(Quoting revenge porn site operator as saying, "When you take a nude photograph of yourself and you send it to this other person, or when you allow someone to take a nude photograph of you, by your very actions you have reduced your expectation of privacy.").

<sup>88</sup> *Multimedia Wmaz v. Kubach*, 212 Ga. App. 707 (1994)(Noting that the protection afforded an individual's right to privacy may be waived or withdrawn to whatever degree and in whatever connection his life has ceased to be private).

<sup>89</sup> "[F]inely calibrated systems of social norms, or rules, govern the flow of personal information in distinct social contexts (e.g., education, health care, and politics)." Nissenbaum, *supra* note 59, at 2-3.

inherent right to further disseminate such data. Thus, consent remains largely situational when it comes to an individual's private information. Revenge porn victims share intimate images of themselves with others based on the principle that the photographs will remain confidential. Sharing intimate information, whether a sexual "selfie," social security number, or HIV status, with a particular confidant does amount to a simultaneous waiver of that individual's privacy expectation in the shared information.<sup>90</sup>

### (B) The Communications Decency Act

Some argue that the solution to the revenge porn problem is to specifically amend Section 230 of the CDA to "deprive web-sites of legal protection for conduct that constitutes the posting of revenge porn."<sup>91</sup> Revenge porn web-sites typically act as host sites that allow Internet users to upload content and/or make comments on previously posted content. Since revenge porn web-sites, as entities, generally do not produce their own content and all of the images and commentary are provided by third party uploaders, the web-site and its owner or operator are commonly protected from liability by Section 230.<sup>92</sup> Congress appears to have carved out this safe haven to strike a balance with First Amendment protections while also recognizing that many host sites cannot realistically monitor (or maintain responsibility for) the thousands of pieces of digital information that pass through their site on a fairly frequent basis.<sup>93</sup> While the legislature may not have foreseen the advent of revenge porn, it was careful to make sure certain web-sites would not be held liable for fostering freedom of expression in the form of otherwise

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<sup>90</sup> Citron and Franks, *supra* note 15, at 354-56.

<sup>91</sup> Casey Martinez, *An Argument for States to Outlaw 'Revenge Porn' and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims*, 14 PGH. J. TECH. L. & POL'Y 236, 246 (Spring 2014).

<sup>92</sup> See Eric Goldman, *California's New Law Shows It's Not Easy to Regulate Revenge Porn*, TECHNOLOGY & MARKETING BLOG (Oct. 16, 2013)([http://blog.ericgoldman.org/archives/2013/10/californias\\_new\\_1.htm](http://blog.ericgoldman.org/archives/2013/10/californias_new_1.htm)).

<sup>93</sup> *Id.*

distasteful postings. Amending Section 230 of the CDA, therefore, walks a dangerous line of overbroad content regulation and poses potential First Amendment violations.<sup>94</sup>

Section 230 currently provides some protection for those who take “selfies,” that is victims who themselves take the sexually-explicit self-portraits. In that sense, they are the legal owners of the image and are accorded the bundle of rights associated with copyright ownership.<sup>95</sup> To be sure, the language of Section 230 provides that the statute has “no effect on intellectual property law.”<sup>96</sup> Thus, victims of revenge porn who took the photo themselves still have a copyright infringement cause of action against those who violate their proprietary rights by disseminating their photograph without their consent. This is problematic, however, because host sites may attempt to argue they are exempt from copyright liability by way of the Digital Millennium Copyright Act’s safe harbor, effectively disrupting the chain of liability.

### (C) The Digital Millennium Copyright Act

Under the provisions of the Digital Millennium Copyright Act, the owner or operator of a revenge porn web-site could be absolved of liability for copyright infringement if he or she complies with Section 512’s “notice and takedown” procedures.<sup>97</sup> Essentially, if a victim complains of copyright infringement, all the web-site host has to do is promptly respond to the takedown request. In today’s fast and interconnected world, however, this leads to what is often called the “Whac-a-Mole” problem: “[t]he dynamic nature of the Internet means that as soon as infringing content is removed from one source, it ‘pops up’ elsewhere.”<sup>98</sup> Like the recent

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<sup>94</sup> *Id.*

<sup>95</sup> See 17 U.S.C. § 106 (The owner of copyright has the exclusive rights to reproduce the work, make a derivative of the work, distribute copies of the work, publicly perform the work, publicly display the work, or authorize others to do the same).

<sup>96</sup> 47 U.S.C. §230(e)(2) (2012).

<sup>97</sup> As defined by 17 U.S.C. section 512(k)(1)(A) or (B) (2012).

<sup>98</sup> Levendowski, *supra* note 13, at 436.

hacking of celebrity's personal images from Apple's iCloud, the images migrate from site to site, lasting long enough on one web-site to cause harm but staying posted for a short enough time to evade legal repercussions before migrating to a new host web-site.<sup>99</sup> Additionally burdensome to victims, they may inadvertently draw more attention to the image through takedown requests that may become public.<sup>100</sup> Then there are the added complexities of identifying the location of the revenge porn web-sites' servers, which may require a subpoena, and other complexities that arise in litigation, such as the need for expensive experts and other professionals that are capable of obtaining the locations and identities of the site operators.<sup>101</sup>

The fundamental flaw with depending on copyright law to address revenge porn is that privacy rights should not be interchangeable or synonymous with property rights. Relying on copyright law to remedy the severe consequences of revenge porn dangerously and incorrectly categorizes revenge porn as an issue of authorship and not a crime that has the potential to create long-lasting devastation. The CDA and DMCA offer only post-harm remedies that are entirely impotent and, in reality, actually serve as catalysts for increasing online popularity of the explicit content. Defining revenge porn alongside various torts or copyright violations vastly distorts the novelty of and detriment caused by revenge porn in today's society. Revenge porn may not always involve physical contact or financial exploitation, but it results in harms that affect society and social values at large. Because it is an intentional act designed to inflict malicious harm, the nation should begin to embrace the idea (as sixteen states already have) that revenge

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<sup>99</sup> See Erin Obourn, *Nude Photo Ban by Reddit, Google Won't Delete Damage*, MSN (Feb. 26, 2015), <http://www.msn.com/en-ca/news/techandscience/nude-photo-ban-by-reddit-google-wont-delete-damage/ar-BBhZhDH>.

<sup>100</sup> Increasing publicity for information by trying to suppress it is called the "Streisand Effect." See T.C., *What is the Streisand Effect?*, THE ECONOMIST (Apr. 15, 2013, 11:50 PM), available at <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>.

<sup>101</sup> Gallagher, *supra* note 83.

porn is an intimate violation of a sexual nature that should receive serious legislative consideration focused on criminalizing the conduct.

(D) The State-Based Effort to Outlaw Revenge Porn

Existing civil law fails to adequately respond to the maliciousness behind the perpetration of revenge porn and does little to alleviate or deter the harms it causes. As Jennifer Lawrence insinuated in her *Vanity Fair* interview, many victims of revenge porn perceive the act as a modern manifestation of sexual abuse. The only truly effective way to address revenge porn is by enacting new laws, specifically drafted, narrowly defined, and targeted directly at the issue. Until recently, victims of revenge porn were left helpless due to the dramatic flaws of the aforementioned civil laws. This began to change in the United States in the last decade with several states taking the initiative to criminalize revenge porn. New Jersey led the nation in 2004 as the first jurisdiction to criminalize non-consensual revenge pornography.<sup>102</sup> To date, seventeen states have laws expressly applicable to revenge porn including: Alaska, Arizona, California, Colorado, Delaware, Idaho, Illinois, Hawaii, Georgia, Maryland, New Jersey, New Mexico, Pennsylvania, Texas, Utah, Virginia, and Wisconsin.<sup>103</sup>

The statutes of Delaware, Georgia, Hawaii, and New Jersey place their anchor in tort law and tailor the traditional elements of privacy law to cater specifically to the unique contours of revenge porn.<sup>104</sup> Alaska, Colorado, and Maryland aligned their statutes closely with language

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<sup>102</sup> N.J.S.A. § 2C:14-9.

<sup>103</sup> *States with Revenge Porn Criminal Laws* (upd. Apr.7, 2015)(<http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>)(This web-site includes New Mexico's 2015 statute on its list, which is absent from the Cyber Civil Rights Initiative site); CYBER CIVIL RIGHTS INITIATIVE, *States With Revenge Porn Laws*, ENDREVENGEPOORN.ORG, <http://www.endrevengeporn.org/revenge-porn-laws/> (last visited Apr. 20, 2015).

<sup>104</sup> See 11 DEL. CODE ANN. § 1335 (Violation of privacy misdemeanor, felony if aggravating factors present); GA. CODE ANN. § 16-11-90 (Invasion of Privacy - Prohibition on nude or sexually explicit electronic transmissions); HAW. REV. STAT. § 711-1110.9 (Violation of privacy in the first degree felony); N.J.S.A. § 2C:14-9.

traditionally used to prohibit harassment.<sup>105</sup> Arizona boldly made revenge porn a separate, individual, and explicit sexual offense.<sup>106</sup> California took a lighter approach by classifying revenge porn as “disorderly conduct.”<sup>107</sup> Idaho’s statute pursues a more voyeurism-based route.<sup>108</sup> The most popular construction of recent revenge porn legislation includes language citing the “improper” or “unlawful” taking or disseminating of photographs of an “intimate” nature. This approach was embraced by the state legislatures of New Mexico, Pennsylvania, Texas, Utah, Virginia, and Wisconsin in drafting their own respective revenge porn laws.<sup>109</sup>

New Jersey’s law, enacted in 2004, was the first of state-enacted revenge porn statutes. One of the broader state statutes, the law makes it a third-degree crime to post or share a person’s nude or partially nude image without that person’s consent.<sup>110</sup> It prohibits the distribution of “sexually explicit” photographs and films by any person, “knowing that he is not licensed or privileged to do so” and without the subjects’ consent.<sup>111</sup> The crime carries a prison sentence ranging from three to five years.<sup>112</sup> New Jersey’s law was publically and successfully used to prosecute Dharun Ravi, a Rutgers University student who distributed secret web-cam footage of

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<sup>105</sup> See ALASKA STAT. § 11.61.120(a)(6) (Harassment - A person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person...publishes or distributes electronic or printed photographs, pictures, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act); COLO. REV. STAT. § 18-7-107 (Posting a private image for harassment misdemeanor); MD. CRIM. LAW CODE ANN. § 3-809 (Stalking and harassment).

<sup>106</sup> See ARIZ. REV. STAT. § 13-1425 (Sexual offense – unlawful distribution of private images)(It is unlawful to intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure).

<sup>107</sup> See CAL. PENAL CODE § 647(j)(4)(Disorderly Conduct misdemeanor); See also S.B. 1255, Reg. Sess. (CA. 2013-2014) (August 2014 expansion of law).

<sup>108</sup> See IDAHO CODE ANN. § 18-6609 (Crime of video voyeurism felony).

<sup>109</sup> See H.B. 142, 52 Leg., 1st Reg. Sess. (NM 2015)(Unauthorized distribution of sensitive images)(Effective July 1, 2015); 18 PA. CONS. STAT. § 3131 (Unlawful dissemination of intimate image); TEX. PENAL CODE § 21.15 (Improper photography or visual recording); UTAH CODE ANN. § 76-5b-203 (Distribution of intimate images misdemeanor); VA. CODE ANN. § 18.2-386.2 (Unlawful dissemination or sale of images of another misdemeanor); WIS. STAT. § 942.09 (Representations depicting nudity).

<sup>110</sup> New Jersey does not use the classifications of “felony” and “misdemeanor.” See N.J.S.A. § 2C:52-2.

<sup>111</sup> N.J.S.A. § 2C:14-9.

<sup>112</sup> N.J.S.A. § 2C:43-6.

his college roommate, Tyler Clementi, engaging in sexual activity.<sup>113</sup> This disclosure was made without Clementi's consent and ravaged such harm upon Clementi that he ultimately committed suicide.<sup>114</sup> The law has also been used to prosecute several men in the state who allegedly distributed revenge porn of their ex-girlfriends.<sup>115</sup> At least three non-consensual pornography convictions have resulted from New Jersey's revenge porn law to date.<sup>116</sup>

California recently passed a revenge porn statute in 2013. One of the narrowest state statutes enacted, the Californian legislature made it a misdemeanor to distribute nude or explicit photos or videos of someone without their consent, punishable up to six months in prison and a \$1,000 fine.<sup>117</sup> The California law requires that the defendant intended to cause the victim serious emotional distress, a mens rea requirement that is notably absent from New Jersey's statute.<sup>118</sup> California's law also demands that the state prove that the victim did, in fact, suffer serious emotional distress.<sup>119</sup> Causal burdens require that the victim prove he or she was not just upset but that he or she suffered serious, observable, and debilitating emotional distress as a direct result of the defendant's intentional conduct. As originally enacted, the statute only covered photographs or videos taken by someone else, leaving "selfies," hacked photos, and

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<sup>113</sup> Megan DeMarco and Ted Sherman, *Dharun Ravi Sentenced to Jail in Tyler Clementi Webcam Spying Case*, THE STAR-LEDGER, May 21, 2012, [http://www.nj.com/news/index.ssf/2012/05/dharun\\_ravi\\_sentenced\\_to\\_jail.html](http://www.nj.com/news/index.ssf/2012/05/dharun_ravi_sentenced_to_jail.html).

<sup>114</sup> *Id.*

<sup>115</sup> Marueen O'Connor, *The Crusading Sisterhood of Revenge-Porn Victims*, NEW YORK MAGAZINE (Aug. 29, 2013) available at <http://nymag.com/thecut/2013/08/crusading-sisterhood-of-revenge-porn-victims.html>. See *State v. Parsons*, No. A-3856-10T3, 2011 N.J. Super. Unpub. LEXIS 2972 (N.J. Super. Ct. App. Div. Dec. 8, 2011). See also Michelangelo Conte, *Bayonne Man Charged with Posting Nude Photos of Ex-Girlfriend on Internet*, NJ.COM (Oct. 23, 2012, 5:59 PM) [http://nj.com/hudson/index.ssf/2012/10/bayonne\\_man\\_charged\\_with\\_posti.html](http://nj.com/hudson/index.ssf/2012/10/bayonne_man_charged_with_posti.html).

<sup>116</sup> Stacy Teicher Khadaroo, *Revenge Porn: With Arizona, 10 States Now Outlaw Such Postings*, THE CHRISTIAN SCIENCE MONITOR (May 1, 2013) (<http://www.csmonitor.com/USA/Politics/2014/0501/Revenge-porn-With-Arizona-10-states-now-outlaw-such-postings>) (as explained by Mary Anne Franks, a law professor at the University of Miami who has helped draft some of the state statutes in conjunction with Cyber Civil Rights Initiative).

<sup>117</sup> CAL. PENAL CODE. §§ 19, 19.2

<sup>118</sup> Citron and Franks, *supra* note 15, at 374.

<sup>119</sup> *Id.*

redistributors in legal purgatory.<sup>120</sup> In 2014, however, due to pressure from victims, advocates and the Cyber Civil Rights Initiative, the law was amended to include “selfies” in addition to images taken by someone other than the victim, as the law originally protected.<sup>121</sup> Nonetheless, with narrow coverage and weak penalties, advocates have criticized California’s law for not going far enough to provide meaningful remedy for victims.<sup>122</sup> Much of the criticism revolves around the element of intention which makes California’s law strikingly resemble the tort of intentional infliction of emotional distress and many of the tort’s evidentiary hurdles; in reality, a majority of revenge porn incidents will lack objective, hard evidence of the offender’s intent to cause grievous emotional harm. The victim must also prove that there was a mutual intent, at the time the pictures were taken or shared, to keep them private. This only amounts to another exceedingly difficult evidentiary burden the victim must carry in order to succeed on his or her claim. Even the bill’s sponsor, California Senator Anthony Cannella, conceded that the bill is “a great first step, but we need to do more.”<sup>123</sup>

One of the most recent revenge porn legislation to make headlines was passed by the Illinois legislature in the final days of 2014.<sup>124</sup> Widely heralded as the most exemplary revenge porn statute to date, the Illinois law incorporates several important and innovative

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<sup>120</sup> Hunter Schwarz, *California’s Revenge Porn Law, Which Notoriously Didn’t Include Selfies, Now Will*, WASHINGTON POST, available at <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/27/californias-revenge-porn-law-which-notoriously-didnt-include-selfies-now-will/>.

<sup>121</sup> CALIFORNIA LEGISLATIVE INFORMATION, [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB1255](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1255) (2013-2014).

<sup>122</sup> Schwarz, *supra* note 120.

<sup>123</sup> *All Tech Considered: Calif. Bans Jilted Lovers From Posting ‘Revenge Porn’ Online*, NAT’L PUB. RADIO BROAD. (Oct. 2, 2013), available at <http://www.npr.org/blogs/alltechconsidered/2013/10/02/228551353/calif-bans-jilted-lovers-from-posting-revenge-porn-online>.

<sup>124</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014) (Enacted Dec. 29, 2014); Barbara Herman, *Illinois Passes Revenge Porn Law with Teeth: ‘Other States Should Copy,’ Says Privacy Lawyer*, INTERNATIONAL BUSINESS TIMES (Jan. 6, 2015, 4:18 PM), <http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974>.



components.<sup>125</sup> Most fundamentally, and in contrast to California’s statute, the Illinois law does not include a required intent to cause the victim emotional distress and mandates only that the offender “intended to disseminate” the image without consent.<sup>126</sup> This not only lightens the victim’s burden of proof but also works to encompass all categories of perpetrators regardless of the motivation for their conduct, whether for profit, fame, entertainment, sexual gratification, or for any other senseless purpose.<sup>127</sup> The omission of an emotional distress requirement places emphasis on the victim’s harm as opposed to the offender’s motive, which should remain the focal point of any alleged act of revenge porn.

Like the recently amended language of California’s statute, the Illinois legislation also covers “selfies.” Furthermore, not only does it cover nude images, it exceeds any other state statute by covering images of broadly defined “intimate parts” and “sexual activity.”<sup>128</sup> By recognizing that not all intimate sexual acts involve nudity, the Illinois law applies to a far wider range of compromising images of a victim regardless of whether the victim is also nude.<sup>129</sup> Illinois also gave the law bite by making non-consensual pornography a felony, punishable by one to three years in prison.<sup>130</sup> Punishment also includes fines up to \$25,000, restitution to victims for any costs incurred, and the forfeiture of any profits that may have been derived from the non-consensual dissemination.<sup>131</sup> Significantly, Illinois made the unprecedented decision to punish second-hand redistributors.<sup>132</sup> The statute utilizes the conventional “reasonable person”

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<sup>125</sup> Holly Jacobs, *Seven Reasons Illinois is Leading the Fight Against Revenge Porn*, CYBER CIVIL RIGHTS INITIATIVE (Dec. 31, 2014), [http://www.cybercivilrights.org/seven\\_reasons\\_illinois\\_is\\_leading\\_the\\_fight\\_against\\_revenge\\_porn](http://www.cybercivilrights.org/seven_reasons_illinois_is_leading_the_fight_against_revenge_porn).

<sup>126</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

<sup>127</sup> Jacobs, *supra* note 125.

<sup>128</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

<sup>129</sup> Jacobs, *supra* note 125; Herman, *supra* note 124.

<sup>130</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

<sup>131</sup> *Id.*

<sup>132</sup> Herman, *supra* note 124.

standard, but does so in a more efficient manner. The law asks whether a reasonable person would know or understand that the person depicted in the image has not consented to its dissemination, as opposed to requiring the victim to prove a reasonable expectation of privacy according to the arbitrary standards of society at large.<sup>133</sup> Illinois, therefore, requires Internet users to “think before they click.”<sup>134</sup>

### **Part III:** **Relevant Considerations for Drafting New Legislation**

#### **(A) First Amendment Implications**

Some critics have argued that new criminal laws meant to combat revenge porn are likely to be overbroad, resulting in unintended consequences and constitutional violations.<sup>135</sup> One of the major arguments against the criminalization of revenge porn is that these laws violate First Amendment rights to freedom of expression and/or speech.<sup>136</sup> Those who believe that criminalizing the online publication of revenge porn violates the First Amendment cite recent Supreme Court decisions that have protected other types of unsavory speech.<sup>137</sup> However, in *Miller v. California*,<sup>138</sup> a Court majority held that material can be deemed “obscene” if, judged by relevant social standards, it appeals to the “prurient interest” in sex and depicts sexuality in a patently offensive manner, in addition to lacking “serious literary, artistic, political, or scientific

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<sup>133</sup> Jacobs, *supra* note 125.

<sup>134</sup> *Id.*

<sup>135</sup> Sarah Jeong, *Revenge Porn is Bad. Criminalizing it is Worse.*, WIRED (Oct. 28, 2013, 9:30AM), <http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/> (Explaining how an overbroad “revenge porn” law threatens free speech and risks being struck down on First Amendment grounds).

<sup>136</sup> See Anne Harrison, *Revenge Porn: Protected by the Constitution?*, J. GENDER RACE & JUST., available at, <http://jgrj.law.uiowa.edu/article/revenge-porn-protected-constitution>.

<sup>137</sup> Erin Fuchs, *Here’s What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUSINESS INSIDER (Oct. 1, 2013, 10:38 PM)(<http://www.businessinsider.in/Heres-What-The-Constitution-Says-About-Posting-Naked-Pictures-Of-Your-Ex-To-The-Internet/articleshow/23372070.cms> )(Quoting former Judge Andrew Napolitano “First Amendment protection should extend to revenge porn”).

<sup>138</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

value.”<sup>139</sup> If labeled “obscene,” the material is not afforded First Amendment protections.<sup>140</sup> New Jersey’s statute, for instance, has been described as “a content-based regulation of expression because it prohibits disclosures involving only certain kinds of content (intimate exposure, sexual penetration, or sexual contact).”<sup>141</sup> With this perspective, New Jersey’s statute is subject to a strict scrutiny standard of judicial review.<sup>142</sup> Under strict scrutiny, a statute is constitutional only if it serves a compelling interest and regulates no more speech than is necessary to serve that interest.<sup>143</sup> In revenge porn circumstances the compelling interest is generally the reputational, emotional and financial well-being of the victim, and regulation should extend only to the non-consensual exploitation of the victim’s sexual privacy.<sup>144</sup> The argument embraced by this Note is that the First Amendment simply cannot function to suppress the interests of the victim in the name of sexual harassment.<sup>145</sup>

States must take care that, while broad legislation could make it easier to punish and deter revenge pornographers, it could also have unintended consequences on free speech values by criminalizing public interest content or by criminalizing those who are otherwise acting within lawful bounds by contributing some minutia of literary, artistic, political, or scientific value or discourse. While New Jersey has not yet suffered any substantiated legal challenges to its revenge porn statute, other states have not escaped denunciation.<sup>146</sup> Texas, for instance, has an “improper photography or visual recording” statute that makes it a crime to, among other things,

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 22 (2012).

<sup>142</sup> *Id.*

<sup>143</sup> Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1278–79 (June 2007).

<sup>144</sup> Calvert, *supra* note 46, at 686.

<sup>145</sup> Mary Anne Franks, *Free Speech Elitism: Harassment Is Not the Price 'We' Pay for Free Speech*, HUFF POST (Mar. 25, 2014, 5:59 AM), [http://www.huffingtonpost.com/mary-anne-franks/harassment-free-speech-women\\_b\\_4640459.html](http://www.huffingtonpost.com/mary-anne-franks/harassment-free-speech-women_b_4640459.html).

<sup>146</sup> Martínez, *supra* note 91, at 241.

photograph or record by electronic means an image of another person under certain circumstances.<sup>147</sup> Subsection (b)(1) of the statute makes such acts a crime if: (1) the person being photographed or recorded is not in a bathroom or private dressing room; (2) the photograph or recording of the person is made without that person's consent; and (3) the photograph or recording is made with the intent to arouse or gratify the sexual desire of any person.<sup>148</sup> In September 2014, the Texas Court of Criminal Appeals handed down a ruling that “to the extent that it proscribes taking photographs and recording visual images, Subsection (b)(1) of the statute is facially unconstitutional in violation of the freedom of speech guarantee of the First Amendment.”<sup>149</sup> The court believed that the provision was designed as a catch-all and that there were “narrower methods of reaching such situations that address more directly the substantial privacy interests at stake.”<sup>150</sup>

States would be wise to take note of Illinois' statute which is purposefully and narrowly tailored by not infringing on the reproduction of “voluntary exposure in public or commercial settings” or other images distributed for a “lawful public purpose.”<sup>151</sup> By carving out particular exceptions, the statute effectively addresses the privacy interests of the victim without acting as an unconstitutional, catch-all, drag net. Jeremy Waldron, an influential theorist, has supported the regulation of speech by utilizing some of the same philosophies as Illinois's statute. Waldron believes regulation should not be based entirely on content, but rather on the harm that the content inflicts on victims.<sup>152</sup> Although content-based regulation is generally unconstitutional

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<sup>147</sup> See Mike Masnick, *Texas Tosses Out Law Against Peeping Tom Photographs As A First Amendment Violation*, TECH DIRT (Sept. 19, 2014, 1:33 PM), <https://www.techdirt.com/articles/20140917/15593028555/texas-tosses-out-law-against-peeping-tom-photographs-as-first-amendment-violation.shtml>.

<sup>148</sup> TEX. PENAL CODE § 21.15.

<sup>149</sup> Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

<sup>150</sup> *Id.* at 349.

<sup>151</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014); Jacobs, *supra* note 125.

<sup>152</sup> See JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2014).

under the First Amendment, Waldron endorses the legal regulation of “hate speech,” which he believes has nothing to do with the motives of the speaker, and everything to do with the message conveyed and the damage that message does in a democratic society centered on equal citizenship.<sup>153</sup> This damage is primarily manifested as harm to human “dignity,” which represents one’s status as a member of society in good standing.<sup>154</sup> Waldron believes that “[t]he guarantee of dignity is what enables a person to walk down the street without fear of insult or humiliation...and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah.”<sup>155</sup> Thus, if legislators focus more on the damage caused by revenge porn, as opposed to the particular content or definition of revenge porn, they may be more likely to avoid First Amendment opposition. In other words, legislators should focus on framing legislation as protective, rather than restrictive.

Similarly, if the freedom of expression is believed to be premised on respect for the autonomy of individuals, this principle also gives rise to other fundamental, individual rights such as personal security, privacy, and equality.<sup>156</sup> With this perspective, it is easier to understand how the same standards that support the First Amendment’s freedom of expression also allow for the limitation of that freedom. Thus, the First Amendment’s freedom of speech should only be exercised with due regard for the fundamental rights of other individuals and the community as a whole.<sup>157</sup> Instead of pursuing a novel interpretation and application of the First Amendment, this rights-based theory founded on respect allows lawyers, judges, and legislators to balance broad First Amendment rights with narrow (but essential) individual rights by

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<sup>153</sup> See Brian Leiter, *Waldron on the Regulation of Hate Speech 2* (U. Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 398, July 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2101401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101401).

<sup>154</sup> Waldron, *supra* note 152, at 60.

<sup>155</sup> *Id.* at 220.

<sup>156</sup> STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY 2* (2008).

<sup>157</sup> *Id.* at 3.

implementing concepts that have been judiciously developed in other areas of law that have been discussed in this Note, such as torts, criminal law, and constitutional law.<sup>158</sup>

### (B) Exemptions, Definitions, and Intent

The American Civil Liberties Union aggressively challenged California's revenge porn statute by asserting that the law inhibited private expression and criminalized the distribution of content which may have protected social significance.<sup>159</sup> For example, Anthony Weiner, former U.S. congressman, sent a sexually explicit photo to a woman on Twitter, a social media platform.<sup>160</sup> After the picture went public, Weiner's political career and personal life took a steep dive.<sup>161</sup> Despite the fact that public distribution of the image technically constituted an act of revenge porn, Weiner's sexting photos arguably "provide crucial evidence of his dubious decision-making and recidivism, so any law that interfered with their disclosure may violate the First Amendment."<sup>162</sup> Interestingly, Twitter has since amended its online policies to ban the posting of intimate photos and videos taken without the person's permission.<sup>163</sup>

New laws aimed at addressing revenge porn should, therefore, contain exemptions or exceptions that create safe havens for those who disseminate content that concerns matters of public interest and importance, or that otherwise contain literary, artistic, political, or scientific value. For instance, New Jersey's statute carves out specific exemptions, including "(a) to law enforcement officers in connection with a criminal prosecution; (b) pursuant to subpoena or court order for use in a legal proceeding; or (c) to a co-worker, manager or supervisor acting

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<sup>158</sup> *Id.* at 4.

<sup>159</sup> Fuchs, *supra* note 137.

<sup>160</sup> Goldman, *supra* note 92.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Zach Miners, *Twitter Bans Revenge Porn and Stolen Nude Photos*, PCWORLD.COM (March 12, 2015, 5:33 AM), <http://www.pcworld.com/article/2895992/twitter-bans-stolen-nude-photos-and-revenge-porn.html>.

within the scope of his employment.”<sup>164</sup> New Jersey’s statute also exempts the adult film industry and other instances where individuals give consent to have their images distributed or published.<sup>165</sup> Likewise, the Illinois legislature drafted specific exceptions to its law which are meant to include images that are distributed in connection with the reporting of unlawful conduct, lawful criminal investigations, and images depicting voluntary exposure in public or commercial settings.<sup>166</sup> Exceptions such as these help to ensure that those involved in the otherwise lawful dissemination of nude or explicit content will not have to fear prosecution, including a journalist, for example, who publishes photographs of a topless protest.<sup>167</sup>

In addition to clear exemptions and/or exceptions, revenge porn legislation should provide distinct and specific definitions of certain fundamental terms. For instance, both New Jersey and California include narrow definitions of “sexually explicit” and “nude” as they pertain to the content at issue. The terms “disclosure” or “dissemination” also warrant a significant amount of focus. New Jersey, for example, provides a specific definition for “disclosure” which includes sixteen individual verbs which may be considered a form of disclosing the image.<sup>168</sup> Similarly, Illinois provides an enumerated list of activities that constitute “sexual activity” and includes a definition of physical attributes that would be considered “intimate parts.”<sup>169</sup>

Legislators must also exercise caution if they decide to require a particular mens rea as an element of the criminal statute.<sup>170</sup> For instance, California’s statute applies only “under

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<sup>164</sup> N.J.S.A. § 2C:14-9(e)(2).

<sup>165</sup> *Id.*

<sup>166</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

<sup>167</sup> Jacobs, *supra* note 125.

<sup>168</sup> N.J.S.A. § 2C:14-9(c)(Meaning to “sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, circulate, disseminate, present, exhibit, advertise or offer”).

<sup>169</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

<sup>170</sup> *See Smith v. California*, 361 U.S. 147, 152-155 (1959) (Ruling that the mens rea in an obscenity case must be “knowing” rather than mere negligence to protect against overbreadth concerns).

circumstances where the parties agree or understand the image shall remain private.”<sup>171</sup> While this theoretically appears to address the non-consensual nature of revenge porn, it may create an additional (and heavy) evidentiary burden on victims by requiring them to produce admissible evidence of a prior agreement. This intent requirement may also be so narrow as to exclude revenge porn web-site hosts with no privity to the original “confidentiality contract” between the sender and the receiver.

Illinois takes a unique approach to the mens rea requirement by placing the expectation of “reasonableness” on the offender as opposed to the victim. While some state statutes question whether the victim had a reasonable expectation of privacy in the image he or she shared, Illinois considers whether a reasonable offender would understand the image was to remain private.<sup>172</sup> Furthermore, as emphasized by Illinois’ law and espoused by Jeremy Waldron, the objective in criminalizing revenge porn should be focused on its overall detrimental impact on society; it should be irrelevant whether the person making the disclosure is motivated by a desire to humiliate the victim or by a desire to make money. States that are considering their own revenge porn legislation should consider Waldron’s ideology and evaluate the methodology of Illinois’s statute when deliberating a statutory mens rea. Furthermore, while in pursuit of an effective revenge porn law, state legislatures should continue to study the legislative and judicial decisions from states like Texas to gauge appropriate boundaries for new legislation concerning the rights of the individual versus the rights of society at large. Similarly, these states should study the lifeline of statutes like that of New York, where a revenge porn bill was passed by the state

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<sup>171</sup> CAL. PENAL CODE § 247.

<sup>172</sup> S.B. 1009, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).



senate, only to die in the assembly to determine the most effective way to get proposed bills enacted into law.<sup>173</sup>

### (C) Remedies

The most basic reason why non-criminal law strictures cannot properly address revenge porn is the ineffectiveness of available remedies. In the rare instance where a victim is able to afford the extraordinary costs of bringing civil suit, can emotionally bear the potential for further publicity of the matter, is able to properly locate and identify the offender, and successfully carries all evidentiary burdens at trial, the inadequacy of any civil judgment or award can be a devastating tragedy in light of the substantial expenditure made by the victim to get to that point. Monetary damages and injunctions are civil remedies that leave victims exposed, and the continuing prevalence of revenge porn demonstrates that civil law remedies do little to deter future violators. A simple Google search for “revenge porn” reveals a swelling number of web-site results evidencing the increasingly ubiquitous nature of revenge porn as each day passes.

In a tort context, an award of monetary damages may amount to an empty promise since in many cases the ordinary offender will not have the financial resources to satisfy the award. Even if the “judgment-proof” defendant faces injunctive consequences, the image has already been released into cyber-space. The defendant at issue may remove the image from the web-site, but this does nothing to prevent another web-site from republishing the image and it may, in fact, serve as a catalyst for other web-site hosts to post the image.<sup>174</sup> The inherent nature of the Internet and its ability to foster mass dissemination renders an injunction against a single

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<sup>173</sup> Majority Press, *Senate Passes Legislation Criminalizing "Revenge Porn"* (June 11, 2014) <http://www.nysenate.gov/press-release/senate-passes-legislation-criminalizing-revenge-porn>. *But see* 2015 Legis. Bill Hist. NY S.B. 610.

<sup>174</sup> T.C., *supra* note 100.

defendant a mere drop in the revenge porn bucket. In a copyright context, the liability buffer provided to internet service providers by Section 230 of the CDA may prevent a victim from ever reaching the remedy phase and the “notice and takedown” procedures of Section 512 of the DMCA have the same flaws and empty promises of the civil law injunction.

Most victims desire the same remedy; they want the material removed and the offender punished.<sup>175</sup> Victims of revenge porn experience harm each and every single time a person views or shares their intimate image(s). The most effective and practical method of prevention, enforcement, deterrence, and remedy of revenge porn is to impose criminal penalties on individuals that are involved in the promotion of revenge porn, whether through active participation or willful blindness. Thus, at a minimum, revenge porn must be conceptualized and treated as a crime and those that publish, disseminate, or otherwise deal in revenge porn must be conceptualized as criminals.

The majority of recently enacted revenge porn legislation classifies the crime as a misdemeanor.<sup>176</sup> While a lighter penalty may help the law flow through Congress more quickly, it may communicate the notion that any harm suffered by revenge porn victims is not severe. However, laws that classify revenge porn as a felony carry substantial jail time, massive fines and lifelong implications of being a felon. These legislative bills will likely face more scrutiny, slowing or preventing their enactment, and the penalties may be so severe as to be ineffective or potentially unconstitutional. Laws classifying revenge porn as a serious felony may clog already overcrowded prisons with non-violent offenders, mandate fines that will not be paid, or disenfranchise one-time foolish offenders acting in response to an immature, broken heart. At

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<sup>175</sup> Franks, *supra* note 18.

<sup>176</sup> See CYBER CIVIL RIGHTS INITIATIVE, *States With Revenge Porn Laws*, ENDREVENGEPORN.ORG, <http://www.endrevengeporn.org/revenge-porn-laws/> (last visited Apr. 20, 2015).

the time of this writing, New Mexico has enacted the most recent revenge porn legislation that appears to take a practical approach to penalties.<sup>177</sup> Effective July 1, 2015, New Mexico's statute provides that anyone who commits unauthorized distribution of sensitive images is guilty of a misdemeanor; however, upon a second or subsequent conviction, the offense will be classified as a fourth degree felony.<sup>178</sup> This type of tiered criminalization appears to appropriately address both the one-time immature offender as well as the malicious repeat offender, which amounts to an adequate instrument for deterrence without risking the costs of over criminalization. Although the degree of criminalization is a topic for another note, it should be apparent that the first step to properly addressing revenge porn is to address it as a crime.

**Conclusion:**  
**New Solutions Through New Perspectives**

“Humans are going to do sex stuff. And in this era, that means digital sex stuff.”<sup>179</sup> Abstinence and/or ignorance are not realistic solutions to effectively combat revenge porn. Additionally, as demonstrated, civil law and its application to revenge porn do not translate to practical solutions either. Society has already acknowledged that many forms of non-consensual conduct are criminal, unlawful or, at a minimum, socially unacceptable.<sup>180</sup> It is time for society as a whole to acknowledge that revenge porn belongs on the list of unacceptable behavior.<sup>181</sup> Revenge porn should be recognized as a modern manifestation of sexual violations and should, therefore, at a minimum, be criminalized. The overwhelming majority of jurisdictions still lack

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<sup>177</sup> H.B. 142, 52 Leg., 1st Reg. Sess. (NM 2015).

<sup>178</sup> *Id.*

<sup>179</sup> Kashmir Hill, *Please Stop Saying 'Celebs Shouldn't Have Taken Nude Photos In The First Place,'* FORBES.COM (Sept. 1, 2014, 5:51 PM) <http://www.forbes.com/sites/kashmirhill/2014/09/01/sext-abstinence-education-doesnt-work/>.

<sup>180</sup> See generally Nathan Brett, *Sexual Offenses and Consent*, 11 CAN. J.L. & JURIS. 69 (Jan. 1998); J. H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317 (Jan. 25, 1895).

<sup>181</sup> Franks, *supra* note 18.

revenge porn-specific legislation and rely on existing civil laws such as the tort of intentional infliction of emotional distress, violation of privacy, the CDA, or the DMCA that are ill-suited to properly address the revenge porn epidemic. The underlying commonality of these civil laws is their basis on the “reasonable expectations” or “current community standards” or “relevant social standards” of society at large. If we allow or accept revenge porn as an inevitable consequence of the technological revolution, we allow and accept the intrusion on and exploitation of our most private moments. Even though his sponsored bill in New York was destined for death before enactment, New York Assemblyman Edward Braunstein had the foresight to recognize that, “with the proliferation of cell phones and social networking, this problem will only get worse if we do not take immediate action.”<sup>182</sup> States should continue to devote the time, resources and careful consideration necessary to draft laws that directly address and sufficiently remedy the problem of revenge porn by utilizing specific definitions and meaningful penalties.<sup>183</sup> States must continue to act as “laboratories of democracy” in efforts to criminalize and thus, both punish and deter revenge pornographers and those who host and encourage the distribution of such material.<sup>184</sup>

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<sup>182</sup> Press Release, *Assemblyman Edward C. Braunstein, Assemblyman Braustein and Senator Griffo Announce “Revenge Porn” Legislation* (Oct. 3, 2013), available at <http://assembly.state.ny.us/mem/Edward-C-Braunstein/story/54409>.

<sup>183</sup> Mary Anne Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators* (Jan. 5, 2015) available at, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2468823](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823).

<sup>184</sup> See Greve, *supra* note 74. See also, Martinez, *supra* note 91.