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Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction

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Cover Page Footnote

Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Joanna Bomfim, Emma Morehart, Sarah Papadelias and Linda Riedemann of the University of Florida for their excellent help with this article.

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Clay Calvert*

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*“Revenge is a kind of wild justice;
which the more man’s nature runs to,
the more ought law to weed it out.”¹*

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Joanna Bomfim, Emma Morehart, Sarah Papadelias and Linda Riedemann of the University of Florida for their excellent help with this article.

¹ FRANCIS BACON, OF REVENGE (1625), *reprinted in* 3 THE HARVARD CLASSICS 15, 15 (Charles W. Eliot ed., 1909), *available at* <http://www.bartleby.com/3/1/4.html>.

Seemingly heeding Sir Francis Bacon's centuries-old advice, legislative bodies across the United States today are scrambling to weed out an apparently burgeoning speech phenomenon colloquially known as "revenge porn."² While those efforts are the focus of this Article, it helps to first take a few steps back to better understand the complicated task lawmakers now confront.

I. HURTFUL TRUTHS AND THE FIRST AMENDMENT

A fitting starting point is the notion that the truth hurts, which Professor Frederick Schauer recently dubbed a "venerable maxim."³ Yet laws suppressing or punishing publication of even hurtful truths are troubling from a First Amendment⁴ perspective.⁵ For example, a truthful statement that hurts one's reputation generally is not actionable in defamation law.⁶ Furthermore, speech that hurts due simply to the disgust or offense it causes also generally receives constitutional protection.⁷

² See *infra* notes 19–34 and accompanying text (describing revenge porn).

³ Frederick Schauer, *Is It Better to be Safe Than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 313 (2009).

⁴ The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁵ See Sandra F. Chance & Christina M. Locke, *When Even the Truth Isn't Good Enough: Judicial Inconsistency in False Light Cases Threatens Free Speech*, 9 FIRST AMEND. L. REV. 546, 571 (2011) (asserting that "sometimes the truth hurts. But that is no excuse to trample on America's longstanding commitment to a free press.").

⁶ See, e.g., *Lerman v. Turner*, No. 10-CV-2169, 2013 U.S. Dist. LEXIS 118479, at *57 (N.D. Ill. Aug. 21, 2013) (noting that "[t]ruth is an absolute defense to a defamation action," and adding that to prevail on the defense of truth, "defendants need only show that the statement at issue is substantially true, i.e., that the 'gist' or 'sting' of the statement is true" (citations omitted)); *Gordon v. Boyles*, 99 P.3d 75, 81 (Colo. App. 2004) (opining that "[t]ruth is a complete defense to defamation. However, absolute truth is not required; instead, a defendant need only show substantial truth . . .").

⁷ See *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (opining that "disgust is not a valid basis for restricting expression"); *Cohen v. California*, 403 U.S. 15, 24–25 (1971) (noting that one consequence of freedom of expression "may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve," and adding that "the State has

But when the hurtful truth is neither political in nature nor related to a matter of public concern—the types of speech considered most privileged by the U.S. Supreme Court⁸—the First Amendment speech protections diminish significantly. As the Court opined in 2011 in the Westboro Baptist Church funeral-protest case *Snyder v. Phelps*, “where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”⁹ Chief Justice John Roberts added for the *Snyder* majority that, “restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest.”¹⁰ Thus, a plaintiff may recover damages under the tort of public disclosure of truthful private facts¹¹ if those facts are *not* of legitimate public concern.¹²

Additionally, when the hurtful speech takes the form of images rather than words, its ability to harm can be significantly more powerful. Chief Justice Roberts observed in 2012 that “every schoolchild knows [that] a picture is worth a thousand words.”¹³ In turn, when hurtful images are posted online, the chances for harm are exacerbated by what Alex Kozinski, chief judge of the U.S. Court of Appeals for the Ninth Circuit, recently called “the

no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”)

⁸ See *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011) (describing the importance of speech about matters of public concern); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 329, 340 (2010) (describing political speech as “central to the meaning and purpose of the First Amendment,” and asserting that “political speech must prevail against laws that would suppress it, whether by design or inadvertence”).

⁹ *Phelps*, 131 S. Ct. at 1215.

¹⁰ *Id.*

¹¹ See Erwin Chemerinsky, *In Defense of Truth*, 41 CASE W. RES. L. REV. 745, 753 (1991) (noting that “truth is not a defense to the public disclosure tort which exists to deter and remedy invasions to privacy from the publication of true information”).

¹² See Patricia Sanchez Abril, “A Simple, Human Measure of Privacy”: *Public Disclosure of Private Facts in the World of Tiger Woods*, 10 CONN. PUB. INT. L.J. 385, 385 (2011) (public disclosure of private facts is “a civil cause of action redressing the widespread dissemination of truthful, but shameful, personal information”). The four basic elements of the public disclosure tort include: “(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is *not of legitimate public concern*.” *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 478 (Cal. 1998) (emphasis added).

¹³ *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012) (Roberts, C.J., concurring).

viral nature of the Internet.”¹⁴ Indeed, “because photographs have greater impact on people than do written words, their capacity to shock exceeds that of language.”¹⁵

It is into this complex constitutional space that revenge porn falls. That is because the truthful, yet simultaneously hurtful, facts that largely comprise such speech takes the form of images that: (a) are of decidedly little to no public concern; (b) may be exceedingly shameful and embarrassing; and (c) carry the potential to destroy job prospects, damage personal relationships and cause emotional and reputational harm.¹⁶ So, what precisely is revenge porn or, more dramatically dubbed, cyber rape?¹⁷

II. DEFINITIONAL DIFFICULTIES

Unlike obscenity,¹⁸ revenge porn lacks an agreed upon legal definition, but it nonetheless constitutes a disturbing niche of the

¹⁴ Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1155 (9th Cir. 2012) (case involving fears of gruesome autopsy images, rather than sexually explicit ones, being posted on the Internet).

¹⁵ Jennifer E. Brown, *News Photographs and the Pornography of Grief*, 2 J. MASS MEDIA ETHICS 75, 75 (1987).

¹⁶ See Robert Kirk Walker, Note, *The Right to be Forgotten*, 64 HASTINGS L.J. 257, 259 (2012) (describing a hypothetical revenge porn scenario and asserting that the practice can lead to “lost job opportunities, strained personal relationships, reputational harm, damaged mental health, and so on”); Nathan Koppel, *Women in Texas Suing a Porn Site*, WALL ST. J. ONLINE (Jan. 22, 2013), <http://online.wsj.com/news/articles/SB10001424127887323301104578258203530565638> (last visited Oct. 24, 2013) (quoting San Francisco-based attorney Erica Johnstone, who has represented several victims of revenge porn websites, for the proposition that “the emotional toll on women can be devastating”).

¹⁷ During one television news interview, the attorney representing multiple plaintiffs in a lawsuit filed against a revenge porn site called Texxxan.com stated that:

Revenge porn has been turned to *cyber rape*, because they take photos of women for the purpose of dehumanizing them, for the purpose of degrading them, and they go even further. If they know the names, they’ll post the names. They almost always post the names. If they have the address, they’ll post the address.

Nightline: XXX Revenge; Revenge Porn (ABC television broadcast Jan. 31, 2013) (emphasis added).

¹⁸ See *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth a three-part test for obscenity).

“vast and untamed world of amateur erotica”¹⁹ that gained mainstream media attention in 2013 on programs such as the *Today Show*.²⁰ Revenge porn typically consists of sexually explicit photos or videos that are uploaded on the Internet by former paramours—spurned ones, in particular, as the word “revenge” connotes—without permission of the individuals depicted in them and sometimes accompanied by identifying information, such as names, addresses and Facebook accounts.²¹

As a *New York Times* article explained in September 2013, “[r]evenge porn sites feature explicit photos posted by ex-boyfriends, ex-husbands and ex-lovers, often accompanied by disparaging descriptions and identifying details, like where the women live and work, as well as links to their Facebook pages. The sites, which are proliferating, are largely immune to criminal pursuit.”²² Websites, some of which no longer exist, that allegedly trade or traded in revenge pornography include *Is Anyone Up?*,²³ *Texxxan.com*,²⁴ and *PinkMeth*.²⁵

¹⁹ Todd Martens, *Pop Music; Rockers and Fans, Fully Exposed; Is Anyone Up? Posts Nude Images of Musicians, Often Without Permission*, L.A. TIMES, Dec. 4, 2011, at E1.

²⁰ See *Today Show* (NBC television news broadcast May 3, 2013), available at <http://www.today.com/news/revenge-porn-victim-fights-back-i-was-terrified-6C9761188> (covering a revenge porn lawsuit filed by Holly Jacobs).

²¹ See Caille Millner, ‘Revenge Porn’—Shame for Cruelty and Profit, S.F. CHRON., Feb. 10, 2013, at E6 (describing *Texxxan.com* as typical of revenge porn sites because “it allowed users, often disgruntled ex-boyfriends, to post nude photos of women, along with detailed personal information, without the women’s permission”); J. Craig Anderson, *Go Daddy Sued Over Revenge-Porn Site*, USA TODAY (Feb. 6, 2013), <http://www.usatoday.com/story/news/nation/2013/02/06/go-daddy-sued-over-revenge-porn-site/1897695> (last visited Oct. 24, 2013) (describing revenge porn as “an obscure Internet pornography niche that often involves jilted ex-boyfriends posting nude or semi-nude cellphone pictures of their former girlfriends, with each photo usually accompanied by personal information such as the woman’s name and city of residence”).

²² Erica Goode, *Once Scorned, but on Revenge Sites, Twice Hurt*, N.Y. TIMES, Sept. 24, 2013, at A11.

²³ See generally Andrea Domanick, *Despicable Me: Q&A with Is Anyone Up?’s Hunter Moore*, LAS VEGAS WKLY (Jan. 20, 2012), <http://www.lasvegasweekly.com/ae/2012/jan/20/is-anyone-up-hunter-moore> (last visited Oct. 24, 2013) (describing *Is Anyone Up?* as a “revenge porn” site “devoted to the nude photographs submitted anonymously” and where “[t]he photos are often posted along with stills of the subject’s social networking profile and other personal information”).

²⁴ See generally Erin Mulvaney, *Courts—Two Websites Sued over ‘Revenge Porn,’* HOUS. CHRON., Jan. 19, 2013, at B2 (describing *Texxxan.com* as a revenge porn site and providing an overview of the class-action lawsuit filed against it in January 2013).

In the context of early law journal articles on the subject, revenge porn is defined only loosely and variously as: “a practice where ex-boyfriends and husbands post to the web sexually explicit photographs and videos”²⁶ of former girlfriends and wives; or a trend “in which males post naked pictures of their ex-girlfriends online to websites such as PinkMeth.”²⁷

In many instances, the images were originally taken voluntarily by or with the consent of the individual-turned-victim depicted therein, but then are nonconsensually forwarded to revenge porn sites by disgruntled ex-lovers or former sexual partners.²⁸ Thus, in terms of the earlier discussion on hurtful truths,²⁹ much of revenge porn involves truthful speech—the images are accurate, unaltered depictions of a sordid sexual reality the victim wants to hide from the world—that hurts upon its widespread dissemination.

In such cases, revenge porn arguably constitutes one of the potentially negative consequences of a broader form of sexual communication known as sexting.³⁰ Sexting “usually refers to the use of a mobile/cell phone camera to transmit a sexually suggestive

²⁵ See generally Beth Rankin, *Women Battle Illicit Beholders*, BEAUMONT ENTERPRISE (Tex.), Jan. 20, 2013, at A1 (reporting that “[t]he website PinkMeth.com—which solicited hackers to illegally obtain photos of women—is no longer online after one of its victims sued”).

²⁶ Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 227 (2011).

²⁷ Nicole A. Poltash, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH. 14, 41 (2013).

²⁸ See James Temple, *Limiting Intimate Posts Used as Revenge*, S.F. CHRON., Aug. 28, 2013, at C1 (noting that “the content used in revenge porn is often created by the victim”).

²⁹ See *supra* notes 3–15 and accompanying text.

³⁰ Sexting, a portmanteau that combines the words sex and texting, “is the term coined to describe the activity of sending nude, semi-nude, or sexually explicit depictions in electronic messages, most commonly through cellular phones.” Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98, 99 (2010). Unlike obscenity, however, the term sexting “lacks an established test or definition created by the United States Supreme Court that can be mirrored by state statutes.” Clay Calvert et al., *Playing Legislative Catch-Up in 2010 with a Growing, High-Tech Phenomenon: Evolving Statutory Approaches for Addressing Teen Sexting*, 11 U. PITT. J. TECH. L. & POL’Y 1, 9 (2010). Several states have adopted statutes addressing sexting by minors, and these statutes provide their own definitions of sexting. See, e.g., FLA. STAT. § 847.0141 (2013); LA. REV. STAT. ANN. § 14:81.1.1 (2013); S.D. CODIFIED LAWS § 26-10-33 (2013).

or explicit photograph (or videos). These images generally depict a nude or semi-nude body or body part and are sent via short-message service (SMS), Internet, and/or another digital delivery means”³¹ A 2013 article concludes that sexting among young adults “is a prevalent behavior,”³² thus seemingly giving rise to a vast pool of images that can be posted on revenge porn sites by jilted beaus. Such nonconsensual forwarding of what initially were consensually sexted images has been dubbed “downstream sexting.”³³

In other instances of revenge porn, however, the individual depicted may not even be aware the images are being captured in the first place. For instance, Professor Ann Bartow defines revenge pornography in the disjunctive—using “or” rather than the conjunctive “and”—as “pornography in which at least one of the subjects was unaware that sexual acts were being fixed in a tangible medium of expression *or* was unaware of or opposed to the work’s distribution, usually over the Internet.”³⁴ In cases where the victim was unaware the images were even being taken, the emotional harm would seem compounded and, in turn, blaming the victim here makes little sense because she is, in brief, blameless in the creation of the images.

III. IT’S COMPLICATED: FROM CDA TO CP TO DMCA

In addition to these definitional difficulties, one of the most troubling problems with revenge porn today is how to punish its perpetrators and compensate its victims. The problem of civil remedies is complicated by section 230 of the Communications Decency Act (hereinafter “CDA”), which generally shields interactive computer services (the operators of the revenge porn

³¹ Richard Chalfen, *Sexting as Adolescent Social Communication: A Call for Attention*, 4 J. CHILDREN & MEDIA 350, 350 (2010).

³² Deborah Gordon-Messer et al., *Sexting Among Young Adults*, 52 J. ADOLESCENT HEALTH 301, 304 (2013).

³³ Calvert, *supra* note 30, at 39 (describing “the pernicious type of *downstream sexting* that occurs when a couple breaks up and the spurned teen lover sends out his ex-girlfriend’s photograph to others as a form of revenge”) (emphasis added).

³⁴ Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 44 (2012) (emphasis added).

sites) from civil liability for content posted by third parties (disgruntled former sexual partners).³⁵ The fact is that “most revenge porn sites are driven by submissions from users.”³⁶

On the other hand, one federal appellate court held in 2008 that CDA immunity is lost if the website “contributes materially to the alleged illegality of the conduct”³⁷ and “elicits the allegedly illegal content and makes aggressive use of it in conducting its business.”³⁸ Furthermore, in 2012, a federal district court ruled in *Jones v. Dirty World Entertainment Recordings, L.L.C.*³⁹ that the operators of a website called “the dirty.com” that posted content that was “not only offensive but tortious”⁴⁰ lost CDA immunity. That was due, in part, to “the very name of the site,” which “in and of itself encourages the posting only of ‘dirt,’ that is material which is potentially defamatory or an invasion of the subject’s privacy,”⁴¹ and because the operators “specifically encouraged development of what is offensive about the content of the site.”⁴²

The study of revenge porn is further complicated when the image posted happens to be of a minor, constituting child pornography,⁴³ and not complying with the federal statute requiring age-verification and record-keeping regarding the

³⁵ See 47 U.S.C. § 230 (2012); see also *Backpage.com v. Cooper*, 939 F. Supp. 2d 805, 822 (M.D. Tenn. 2013) (observing that “section 230 of the CDA prohibits state laws from imposing liability on interactive computer services for third-party content, even if the content is unlawful and the website had reason to know of the unlawfulness”).

³⁶ Tracy Clark-Flory, *Criminalizing “Revenge Porn,”* SALON (Apr. 6, 2013), http://www.salon.com/2013/04/07/criminalizing_revenge_porn (last visited Oct. 24, 2013).

³⁷ *Fair Hous. Council San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1168 (9th Cir. 2008).

³⁸ *Id.* at 1172.

³⁹ 840 F. Supp. 2d 1008 (E.D. Ky. 2012).

⁴⁰ *Id.* at 1011.

⁴¹ *Id.* at 1012.

⁴² *Id.*

⁴³ The U.S. Supreme Court has held that “a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment” and that “the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.” *United States v. Williams*, 553 U.S. 285, 288 (2008) (citing *New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 495 U.S. 103 (1990)).

production of sexually explicit images.⁴⁴ Child pornography involving real minors, of course, is one of the few categories of speech not protected by the First Amendment,⁴⁵ and its creation, dissemination, and possession is prohibited by federal statutes.⁴⁶ This is important because, by its terms, section 230 of the CDA has no effect on the enforcement of federal criminal statutes, including both obscenity and child pornography.⁴⁷ Thus, the operators of revenge porn sites are subject to criminal prosecution if the images posted by others are either obscene or child pornographic. Yet, this may be of little consolation to the victims of revenge porn seeking civil redress because courts have held that section 230 precludes civil liability even when federal child pornography statutes allegedly are violated.⁴⁸

The muddle does not stop there. Consider this complicating twist that further exacerbates the difficulty of easily addressing the revenge porn problem: What if the photo in question was voluntarily taken by (and owned by) the victim and then stolen

⁴⁴ See 18 U.S.C. § 2257 (2012) (setting forth the age-verification and record-keeping requirements for producers of movies and other visual content involving “actual sexually explicit conduct”). The statute recently was upheld by a federal district court in the face of a First Amendment challenge. *Free Speech Coal. v. Holder*, 957 F. Supp. 2d 564, 609 (E.D. Pa. 2013).

⁴⁵ See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (identifying child pornography, along with other types of unprotected speech, including obscenity, defamation, fraud, fighting words, true threats, expression integral to criminal conduct, and advocacy intended, and likely, to incite imminent lawless action); see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–246 (2002) (opining that “[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children”).

⁴⁶ See 18 U.S.C. §§ 2251–52A (2012).

⁴⁷ See 47 U.S.C. § 230(e)(1) (2012). As one court interpreted this section, “nothing in the CDA shall be construed to impair the enforcement of certain federal statutes governing obscenity and the sexual exploitation of children” and that “federal criminal statutes will trump the CDA.” *Voicenet Commc’ns, Inc. v. Corbett*, No. 04-1318, 2006 U.S. Dist. LEXIS 61916, at *13 (E.D. Pa. Aug. 30, 2006). *But cf.* *Backpage.com v. McKenna*, 881 F. Supp. 2d 1262, 1275 (W.D. Wash. 2012) (noting that the CDA provides immunity to internet service providers from inconsistent state criminal laws).

⁴⁸ See *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *12 (E.D. Tex. Dec. 27, 2006) (concluding that section 230 does not “allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws”); see also *M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1055 (E.D. Mo. 2011) (citing favorably the outcome in *Bates* described above in this footnote).

from her phone or computer by an ex-boyfriend, after which he posted it online? Initially, the person who took the photograph still holds the copyright to it, even if it was voluntarily sent to a boyfriend or lover.⁴⁹ In turn, the CDA might not protect the revenge porn site from civil liability for federal copyright⁵⁰ violations because “[c]ourts have in general interpreted the CDA not to grant immunity from liability for claims that allege violations of traditional intellectual property rights, such as claims for trademark or copyright infringement.”⁵¹ That is because section 230 specifically provides that it shall have “[n]o effect on intellectual property law,”⁵² and one federal appellate court has held, as used therein, “the term ‘intellectual property’ to mean ‘federal intellectual property.’”⁵³

Under the provisions of the Digital Millennium Copyright Act (DMCA),⁵⁴ the operator of the revenge porn site could be absolved of liability for copyright infringement if, upon notification of the claimed infringement, it “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”⁵⁵ Of course, “[t]he effectiveness of this technique in the hands of a private individual

⁴⁹ See John Annese, ‘Revenge Porn’ Poses a Legal Puzzle, STATEN ISLAND ADVANCE (Jan. 6, 2013), http://www.silive.com/news/index.ssf/2013/01/revenge_porn_poses_a_legal_puz.html (noting that “[t]he person who took the photo retains the copyright on that photo, even if that person sends it to someone else, a boyfriend, for example,” and quoting Erica Johnstone, an attorney and co-founder of Without My Consent, for the proposition that “[t]he copyright doesn’t transfer”).

⁵⁰ Photographs are subject to federal copyright protection. 17 U.S.C. § 102(a)(5) (2012) (noting that “pictorial” works are works of authorship). See *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012) (observing that “[p]hotos are generally viewed as creative, aesthetic expressions of a scene or image and have long been the subject of copyright”); see also Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 715 (2012) (asserting that “there is almost no lower bound on copyrightability of photographs,” and adding that “only a (successful) photographic attempt to reproduce an existing two-dimensional work will be considered to add so little originality to the world as to be uncopyrightable”).

⁵¹ Liisa Thomas & Robert Newman, *Social Networking and Blogging: The New Legal Frontier*, 9 J. MARSHALL REV. INTELL. PROP. L. 500, 510 (2009).

⁵² 47 U.S.C. § 230(e)(2) (2012).

⁵³ *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1119 (9th Cir. 2007).

⁵⁴ 17 U.S.C. § 512.

⁵⁵ *Id.* § 512(c)(1)(C).

will depend on the extent to which the individual actually holds copyright in damaging text and images about her.”⁵⁶

IV. ENTER THE LAWMAKERS

Revenge porn, as should now be clear, falls into an exceedingly complex, if not tangled, web of both federal statutes—some criminal, some not—and state tort and criminal laws. This Article focuses on the emerging legislative efforts to make revenge porn a crime. In particular, it examines and critiques four such efforts in New Jersey, California, Florida and New York.

Before doing so, it is important to understand that, to the extent the sexual images that comprise revenge porn are neither obscene nor child pornographic,⁵⁷ they do receive First Amendment protection. Furthermore, it is highly unlikely, in the aftermath of recent Supreme Court decisions such as *United States v. Stevens*,⁵⁸ *Brown v. Entertainment Merchants Association*⁵⁹ and *United States v. Alvarez*,⁶⁰ that the Court will identify revenge porn as a new category of unprotected expression. In that trio of cases, the Court rejected the invitation to carve out new categories of unprotected expression for, respectively, depictions of animal cruelty,⁶¹ violent

⁵⁶ Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1143 (2011).

⁵⁷ Obscenity and child pornography are not protected by the First Amendment. *See* *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”); *New York v. Ferber*, 458 U.S. 747, 763 (1982) (holding that “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions”).

⁵⁸ 559 U.S. 460 (2010).

⁵⁹ 131 S. Ct. 2729 (2011).

⁶⁰ 132 S. Ct. 2537 (2012).

⁶¹ *See Stevens*, 559 U.S. at 472. Chief Justice John Roberts opined for the majority:

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them.

Id.

images aimed at children⁶² and any and all false statements.⁶³ The Court seems willing to recognize a new category of unprotected expression only where the speech historically has been unprotected but not yet addressed by the Court.⁶⁴ As Justice Anthony Kennedy wrote for the plurality in *Alvarez*, “[b]efore exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with ‘persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.’”⁶⁵ Revenge porn, of course, is a new form of expression for which there is no historical lack of protection. This means, in turn, that state governmental entities will bear the burden of proving their revenge porn criminal statutes pass constitutional muster.⁶⁶

New Jersey and California were the only states until late March 2014 to have adopted such laws, while Florida considered but failed to enact a revenge porn statute in 2013 and New York was actively considering one in 2014. Other states also were debating legislation in 2014, and on March 31, 2014, Virginia became only the third state to adopt a law targeting revenge porn when Governor Terry McAuliffe signed House Bill 326.⁶⁷

⁶² See *Brown*, 131 S. Ct. at 2735–38. In *Brown*, which struck down a California law restricting minors’ ability to purchase violent video games, Justice Antonin Scalia wrote for the majority that California “wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children. That is unprecedented and mistaken.” *Id.* at 2735.

⁶³ See *Alvarez*, 132 S. Ct. at 2545. Justice Anthony Kennedy wrote for the plurality that “[t]he Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.” *Id.* Kennedy added that “[t]he Government has not demonstrated that false statements generally should constitute a new category of unprotected speech.” *Id.* at 2547.

⁶⁴ See *Stevens*, 559 U.S. at 472.

⁶⁵ *Alvarez*, 132 S. Ct. at 2547 (quoting *Brown*, 131 S. Ct. at 2734).

⁶⁶ See *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (opining that “[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people,” and asserting that “[t]o guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality”).

⁶⁷ See Ariel Hart et al., *Legislative Briefs*, ATLANTA J.-CONST., Mar. 11, 2014, at 2B (reporting that the Georgia Senate unanimously passed House Bill 838 criminalizing revenge porn, and noting that “Georgia is one of more than a dozen states that have

A. New Jersey

In September 2013, New Jersey was the only state with a statute that would seem to criminalize most forms of revenge porn.⁶⁸ As Professor Danielle Keats Citron noted in a CNN commentary, “in all but one state, New Jersey, turning people into objects of pornography without their permission is legal.”⁶⁹ The Garden State law provides, in pertinent part, that:

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.⁷⁰

Professor John A. Humbach of Pace University School of Law recently observed that “[t]his statute is a content-based regulation of expression because it prohibits disclosures involving only certain kinds of content (intimate exposure, sexual penetration, or

considered such legislation this year”); *see also* H.B. 326 (Va. 2014), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?141+sum+HB326> (providing a history of the bill and noting that it was signed into law on March 31, 2014). The Virginia revenge porn law provides, in relevant part:

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.

H.B. 326 (Va. 2014), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0399>.

⁶⁸ *See* Arthur Weinreb, *California Enacts Senate Bill 255: Distributing Photos After Breakup Now Illegal*, DECODEDSCIENCE (Oct. 3, 2013), <http://www.decodedscience.com/california-enacts-new-law-revenge-porn/37652>.

⁶⁹ Danielle Keats Citron, *‘Revenge Porn’ Should Be a Crime*, CNN (Aug. 29, 2013), <http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html>.

⁷⁰ N.J. STAT. ANN. § 2C:14-9(c) (West 2013). The term “disclose” as used in this section “means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer.” *Id.*

sexual contact)”⁷¹ and thus is subject to the strict scrutiny standard of judicial review.⁷² 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.⁷³

In revenge porn cases, the ostensible compelling interest would seem to be a combination of the reputational, emotional and financial interests harmed by the unwanted posting of a sexually explicit image. Professor Citron suggests the New Jersey law is, indeed, constitutional, writing in the earlier mentioned CNN commentary that:

[A] narrowly crafted criminal statute like New Jersey’s can be reconciled with our commitment to free speech. First Amendment protections are less rigorous for purely private matters because the threat of liability would not risk chilling the meaningful exchange of ideas. Listeners and speakers have no legitimate interest in nude photos or sex tapes published without the subjects’ permission. That online users can claim a prurient interest in viewing sexual images does not transform them into a matter of legitimate public concern.⁷⁴

UCLA Professor Eugene Volokh, although not specifically addressing New Jersey’s law, concurs that “a suitably clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there’s good reason to think that the subject did not consent to publication of such pictures, would

⁷¹ John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 22 (2012).

⁷² *Id.* at 22–23.

⁷³ See *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (asserting that under strict scrutiny, a content-based regulation on speech is unconstitutional “unless it is justified by a compelling government interest and is narrowly drawn to serve that interest”); *Pleasant Grove City v. Summun*, 555 U.S. 460, 469 (2009) (opining that “any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest”).

⁷⁴ Citron, *supra* note 69.

likely be upheld by the courts.”⁷⁵ Volokh adds that “courts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value.”⁷⁶

The New Jersey statute, in fact, played a role in the criminal prosecution of Dharun Ravi, a Rutgers University student convicted and sentenced to thirty days in jail in 2012 for recording on a webcam his roommate, Tyler Clementi, having sex with another male and then encouraging others to watch.⁷⁷ Specifically, Ravi “watched live-streamed images of Clementi” and “then wrote about it on Twitter and invited followers to watch a second encounter.”⁷⁸ Shortly after finding out about it, Clementi, who was eighteen years old, committed suicide by jumping off the George Washington Bridge.⁷⁹ Count three of the indictment against Ravi provided, in relevant part:

Dharun Ravi, on or about September 19, 2010, in the Township of Piscataway, in the County of Middlesex . . . knowing that he was not licensed or privileged to do so, disclosed a photograph, film, videotape, recording or other reproduction of the image of T.C. [Tyler Clementi] and/or M.B. whose intimate parts were exposed or who were engaged in an act of sexual penetration or sexual contact without the consent of T.C. and/or M.B., contrary to the provisions of N.J.S.A. 2C:14-9(c), and against the peace of this State, the Government and dignity of the same.⁸⁰

⁷⁵ Eugene Volokh, *Florida “Revenge Porn” Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013), <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill>.

⁷⁶ *Id.*

⁷⁷ See Kate Zernike, *30-Day Term for Spying on Roommate at Rutgers*, N.Y. TIMES, May 22, 2012, at A1.

⁷⁸ Rebecca D. O’Brien & Karen Sudol, *Ravi Freed After 20 Days*, RECORD (Bergen County, N.J.), June 20, 2012, at L1.

⁷⁹ Kate Zernike, *Son’s Suicide Leads to Aid for Students*, N.Y. TIMES, Feb. 2, 2013, at A18.

⁸⁰ Indictment of Dharun Ravi at 2, *New Jersey v. Ravi*, File No. 10002681, Indictment No. 11-04-00596, Second Grand Jury, March 2011 Stated Session (N.J. Sup. Ct., Apr. 20, 2011), available at <http://cnninsession.files.wordpress.com/2012/02/ravi-indict.pdf>.

Ravi was convicted of all of the charges against him,⁸¹ including the section of the New Jersey Code of Criminal Justice addressing revenge porn.⁸² His notice of appeal did not challenge the constitutionality of the revenge porn provision.⁸³

The New Jersey statute, it should be noted, took effect in 2004, long before the concept of revenge porn rose to public attention.⁸⁴ Specifically, the legislative history of Senate Bill 2366, which was introduced in 2003 during the 210th legislative session, reveals that it initially was aimed at video voyeurism.⁸⁵

B. California

In October 2013, California Governor Jerry Brown signed a bill⁸⁶ targeting revenge porn, making it the second state to have legislation targeting this nefarious form of content.⁸⁷ When Senate Bill 255 was signed into law, its sponsor, Republican Senator Anthony Cannella, asserted that “[t]oo many have had their lives upended because of an action of another that they trusted.”⁸⁸ In

⁸¹ Kate Zernike, *Judge Defends Penalty in Rutgers Spying Case, Saying It Fits Crime*, N.Y. TIMES, May 31, 2012, at A22.

⁸² See Notice of Appeal to Superior Court – Appellate Division, New Jersey v. Ravi, No. 11-04-00596-I (N.J. Sup. Ct., June 4, 2012) (noting that Ravi was “found guilty of 4 counts of Invasion of Privacy, N.J.S.A. 2C:14-9(a) & (c)”).

⁸³ *Id.*

⁸⁴ See S. 2366 210th Leg. (N.J. 2003), available at http://www.njleg.state.nj.us/2002/Bills/PL03/206_PDF.

⁸⁵ See http://www.njleg.state.nj.us/2002/Bills/S2500/2366_I1.PDF (setting forth Senate Bill 2366 as it was originally introduced); *Senate Committee Advance Bill Making Video Voyeurism a Crime*, SOUTH PLAINFIELD OBSERVER (N.J.), Dec. 5, 2003, at 2, available at <http://www.southplainfield.lib.nj.us/newspapers/Observer/2003/2003-12-05.pdf> (describing the bill, and identifying video voyeurism as “the practice of filming or photographing someone without their knowledge for the purpose of sexual gratification, when the person being filmed has a reasonable expectation of privacy”).

⁸⁶ S. 255, 2013–14 Sess. (Cal. 2013).

⁸⁷ See Patrick McGreevy & Anthony York, *California; Brown Signs Surplus House Bill*, L.A. TIMES, Oct. 2, 2013, at AA3 (reporting that Brown signed a bill that would “outlaw an Internet trend known as ‘revenge porn,’” and describing revenge porn as a practice “in which a person electronically distributes or posts on the Internet nude pictures of an ex-romantic partner after a breakup to shame the person in public”).

⁸⁸ Press Release, Anthony Cannella, State Senator, California’s 12th District, Cannella Legislation to Combat Revenge Porn Signed by Governor Brown (Oct. 1, 2013), available at <http://district12.cssrc.us/content/cannella-legislation-combat-revenge-porn-signed-governor-brown>.

contrast, the measure was opposed on First Amendment grounds by the American Civil Liberties Union.⁸⁹

As codified, California Penal Code § 647 now classifies the following conduct as a misdemeanor offense:

Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that 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.⁹⁰

The glaring problem with the California law is that “it contains a large loophole: it applies only if the individual who distributed the pictures was also the photographer. California’s law does not cover situations where someone took a self-portrait and shared it with a partner, who then uploaded it to the Internet.”⁹¹ In layperson language, the law would not apply to a sexual “selfie” where a person photographs “himself doing something ostensibly lewd and gives it to his significant other, and that person publicizes it.”⁹² As columnist David Whiting of the *Orange County Register* elaborated:

The law covers *some* revenge porn. But it only calls for prosecuting people who post photos they’ve taken themselves, a fraction of digital revenge.

⁸⁹ See Philip A. Janquart, *California Senate Stands Against Revenge Porn*, COURTHOUSE NEWS (Aug. 21, 2013), <http://www.courthousenews.com/2013/08/21/60479.htm> (quoting from an ACLU statement against the bill that provides that “[t]he posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected” and that “[t]he speech must constitute a true threat or violate another otherwise lawful criminal law, such as a stalking or harassment statute, in order to be made illegal. The provisions of this bill do not meet that standard.”).

⁹⁰ CAL. PENAL CODE § 647(j)(4)(A) (West 2013). The statute defines an intimate body part as “any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing.” *Id.* § 647(j)(4)(B).

⁹¹ Editorial, *Fighting Back Against Revenge Porn*, N.Y. TIMES, Oct. 13, 2013, at 10.

⁹² Joe Eskenazi, *Public Displays of Impotence: California’s “Revenge Porn” Law Isn’t Worth the Look*, S.F. WKLY (Oct. 16, 2013), <http://www.sfweekly.com/2013-10-16/news/revenge-porn-selfies-legal-loopholes>.

Sexting isn't covered, when one partner sends a photo to another person and the second party posts the photo. Also, omitted from the bill are photographs that some jackass shares with his lowlife buddies, who proceed to put the photo online.⁹³

The bottom line is that the California measure merely nibbles at one narrow slice of revenge porn, failing to address the seemingly much more common situation in which a woman voluntarily takes and sends a sexually explicit photo of herself to an individual who, in turn, posts it online without the woman's consent. Indeed, the bill's sponsor, Senator Cannella, conceded that the bill "is a great first step, but we need to do more."⁹⁴

Why did Cannella exclude self-taken photographs from the legislation? According to the *San Francisco Chronicle*, there was concern from other California lawmakers "that it could result in an increase in the already overcrowded prison population."⁹⁵ This over-crowding prisons justification seems somewhat weak because a first offense is merely a misdemeanor.⁹⁶ A misdemeanor in California only "is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both."⁹⁷ In other words, no one convicted is going to prison; instead, perpetrators may go to jail and for a very brief time at that.

California's law also differs significantly from the New Jersey statute by limiting its applicability only to situations in which the

⁹³ David Whiting, 'Revenge Porn' Law Won't Help Most Victims, ORANGE COUNTY REG. (Cal.) (Oct. 3, 2013, updated Oct. 7, 2013, 8:39 AM), <http://www.ocregister.com/articles/revenge-529413-porn-walsvick.html>.

⁹⁴ *All Tech Considered: Calif. Bans Jilted Lovers From Posting 'Revenge Porn' Online*, NAT'L PUB. RADIO BROAD. (Oct. 2, 2013), <http://www.npr.org/blogs/alltechconsidered/2013/10/02/228551353/calif-bans-jilted-lovers-from-posting-revenge-porn-online>.

⁹⁵ Melody Gutierrez, *Law Offers Some Hope to Victims of Revenge Porn*, S.F. CHRON. (Oct. 5, 2013), <http://www.sfgate.com/crime/article/Law-offers-hope-to-victims-of-revenge-porn-4872856.php>.

⁹⁶ See CAL. PENAL CODE § 647 (West 2013) (providing, in relevant part, that "every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor").

⁹⁷ *Id.* § 19.

defendant acted with “the intent to cause serious *emotional distress*, and the depicted person suffers serious *emotional distress*.”⁹⁸ The inclusion of these twin emotional distress requirements represents a nearly wholesale adoption of parts of the common law tort of intentional infliction of emotional distress (IIED).⁹⁹ Under the IIED tort, which is recognized in all fifty states with some minor variations,¹⁰⁰ a defendant faces potential liability for engaging in extreme and outrageous conduct with the intent of causing the plaintiff to suffer emotional distress and the plaintiff, indeed, does suffer severe emotional distress.¹⁰¹

This migration of IIED from the realm of tort liability to criminal law is highly significant because, as Professor Leslie Yalof Garfield observed just a few years ago:

IIED is the only intentional tort involving harm to a person that does *not* share a criminal counterpart. Every state has imposed criminal penalties for the intentional torts of assault, battery, and false imprisonment. It appears that the intentional infliction of emotional distress is accorded a lesser

⁹⁸ *Id.* § 647(j)(4)(A) (emphasis added).

⁹⁹ Compare *id.*, with RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹⁰⁰ See Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps*, 57 WAYNE L. REV. 473, 479–83 (2011) (observing that “[t]oday, IIED is recognized as a recoverable cause of action in all U.S. jurisdictions. As a state law claim, IIED claims vary from state to state”).

¹⁰¹ Intentional infliction of emotional distress (IIED) typically “consists of four elements: (1) the defendant’s conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant’s conduct must cause the plaintiff emotional distress and (4) the distress must be severe.” Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL’Y 469, 476 (2000); see also Clay Calvert, *Tort Transformation in the Cultural Quicksand of Language and Values*, 39 LITIG. 30, 34 (Spring 2013) (asserting that “the tort’s four basic elements” are “(1) the defendant’s extreme and outrageous conduct; (2) the defendant’s intent to cause the plaintiff to suffer emotional distress, or at least the defendant’s reckless disregard of that result; (3) causation of harm; and (4) the plaintiff’s severe emotional distress”).

punitive status than the choice to threaten or use physical force against another.¹⁰²

California, however, has challenged this supposition with the passage of its revenge porn statute at the end of 2013, which makes it a misdemeanor to post identifiable nude pictures of someone else online without permission and “with the intent to cause serious emotional distress.”¹⁰³ Significantly, the Supreme Court has made it clear that IIED defendants cannot wrap themselves in the cloak of the First Amendment when the plaintiff is a private figure¹⁰⁴ and the speech does not involve a matter of public concern.¹⁰⁵ That is important and militates in favor of the California law’s constitutionality because the circumstances surrounding revenge porn typically do not involve matters of public concern—they involve sexual images intended for a private audience¹⁰⁶—and the victims typically are private individuals burned by former lovers.¹⁰⁷

Ultimately, California’s law might pass constitutional muster because it is very narrowly tailored in two ways. First, it applies only to cases in which the defendant is the individual who took the photograph of another person and who then posts it. Second, it applies only to cases in which the defendant posted the image with the intent of causing the plaintiff to suffer serious emotional distress and in which the plaintiff does, indeed, suffer such mental

¹⁰² Leslie Yalof Garfield, *The Case for a Criminal Law Theory of Intentional Infliction of Emotional Distress*, 5 AM. U. CRIM. L. BRIEF 33, 33 (2009) (emphasis added).

¹⁰³ CAL. PENAL CODE § 647 (West 2013) (emphasis added).

¹⁰⁴ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (providing First Amendment-based protection for a defendant in a case involving a public figure and, specifically, holding that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice’”).

¹⁰⁵ See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (refusing to impose liability for IIED even where the plaintiff is a private figure because the speech was about “a matter of public concern”).

¹⁰⁶ See, e.g., *Doe v. Hofstetter*, No. CIV.A.11-cv-02209-DME-MJW, 2012 WL 2319052, at *2 (D. Colo. June 13, 2012).

¹⁰⁷ See David Gray et al., *Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 794 (2013) (observing that revenge porn “entails spurned former lovers posting sexualized pictures of their ex-wives and ex-girlfriends on a public forum so that others can leer at and demean them”).

injury. Yet the narrowness of applying only to defendants who take photographs of others—not to sexual selfies, not to downstream senders and not to subsequent downloaders of the images¹⁰⁸—renders it relatively toothless.

C. Florida

Florida lawmakers in early 2013 considered, but did not approve, a bill that, as amended, would have criminalized as a third-degree felony the Internet posting of a photo or video:

of an individual which depicts nudity and contains any of the depicted individual's personal identification information . . . without first obtaining the depicted person's written consent unless the victim was photographed or videotaped in public and a lack of objection to the photography or videotaping could reasonably be implied by the victim's conduct.¹⁰⁹

In considering the measure, the Florida House of the Representatives' Staff Analysis addressed the need for the bill, noting both that “there are no criminal laws that specifically prohibit the posting of nude adult photos on the Internet”¹¹⁰ and that “[a] recent survey found that one in ten people have threatened to expose risqué photos of their ex-partners online, and that these threats were carried out nearly 60 percent of the time.”¹¹¹ But the same analysis also cautioned that “[t]o the extent that the bill

¹⁰⁸ See Eskenazi, *supra* note 92 (observing that “[t]hird-party websites, even ones designed to goad users into sharing their former paramours' steamy videos, are also untouched by California's new law. Nor are hackers who steal others' intimate material and subsequently disseminate it.”).

¹⁰⁹ H.B. 787, 2013 Session (Fla. 2013), available at <http://www.flsenate.gov/Session/Bill/2013/0787/BillText/Filed/PDF>; see also *CS/HB 787: Computer or Electronic Device Harassment*, FLORIDA SENATE, <http://www.flsenate.gov/Session/Bill/2013/0787> (last visited Apr. 11, 2014) (indicating that the bill died on the calendar in early 2013).

¹¹⁰ FLA. H.R. COMM. ON THE JUDICIARY, HB 787 STAFF ANALYSIS, H.B. 787, 2013 Session, at 1 (Mar. 27, 2013), available at <http://www.flsenate.gov/Session/Bill/2013/0787/Analyses/h0787a.CRJS.PDF>.

¹¹¹ *Id.*

regulates content of speech protected by the First Amendment, it could be challenged as being unconstitutional.”¹¹²

Regardless of such concerns, Representative Tom Goodson, the bill’s sponsor, vividly makes the case for the bill, explaining that “there is no purpose . . . for anyone to do this, other than for harassment, hatred or to hurt people, and it has driven some people to suicide.”¹¹³ Another Florida lawmaker, Senator David Simmons, adds that “[l]ives can be destroyed as a result of people doing things like this This bill goes a long way toward dealing with a very real problem that is only going to get worse.”¹¹⁴ University of Florida Professor Michelle Jacobs calls it an effort “to get ahead of the curve and deal with some of these issues that technology is producing.”¹¹⁵

The bill was supported by the Brevard County Sheriff’s Office.¹¹⁶ An agent for that office told an Orlando television station that:

We’ve had college students come forward that found out that images had been posted online. One of them, in particular, was applying for jobs as a teacher, and she is afraid to, because of these posting and fears someone may do an Internet search and it could ruin her career.¹¹⁷

The bill, however, ultimately died on a second reading calendar in May 2013.¹¹⁸

¹¹² *Id.* at 5.

¹¹³ Elaine Silvestrini, *Legislators Intend to Outlaw ‘Revenge Porn,’* TAMPA TRIBUNE (Apr. 17, 2013), <http://tbo.com/news/politics/legislators-intend-to-outlaw-revenge-porn-b82475546z1>.

¹¹⁴ *Id.*

¹¹⁵ Alex Harris, *Florida House Fights for Payback for Revenge-Porn Victims,* INDEPENDENT FLORIDA ALLIGATOR (Apr. 15, 2013), http://www.alligator.org/news/local/article_ae53d9de-a610-11e2-9ceb-001a4bcf887a.html.

¹¹⁶ See Holly Bristow, *‘Revenge Porn’ Bill Passed Florida House Committee,* FOX 35 NEWS ORLANDO (Apr. 4, 2013), <http://www.myfoxorlando.com/story/21824357/revenge-porn-bill-proposed-pass-florida-house-committee>.

¹¹⁷ *Id.*

¹¹⁸ See *CS/HB 787 - Computer or Electronic Device Harassment,* FLORIDA HOUSE OF REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=50026> (last visited Apr. 11, 2014) (stating that the bill “[d]ied on Second Reading Calendar on Friday, May 03, 2013 7:16 PM”).

D. New York

In October 2013, New York Assemblyman Edward Braunstein and Senator Joseph Griffo introduced a bill targeting revenge porn in the Empire State.¹¹⁹ In announcing the measure, Braunstein proclaimed that its passage “would make it clear that New Yorkers will not allow this type of harassment to continue. With the proliferation of cell phones and social networking, this problem will only get worse if we do not take immediate action.”¹²⁰

Senate Bill 5949, as introduced, provides in key part:

A person is guilty of non-consensual disclosure of sexually explicit images when he or she intentionally and knowingly discloses a 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 contact without such person’s consent, and under circumstances in which the person has a reasonable expectation of privacy. A person who has consented to the capture or possession of an image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that relationship.¹²¹

Significantly, the New York legislation was drafted with input from the scholarly community, namely that of Professor Mary Anne Franks of the University of Miami.¹²² She contends the “bill demonstrates that it is possible to clearly prohibit a narrow category of malicious conduct while respecting legitimate First Amendment concerns.”¹²³ Franks, a member of the board of

¹¹⁹ See Press Release, Assemblyman Edward C. Braunstein, Assemblyman Braunstein and Senator Griffo Announce “Revenge Porn” Legislation (Oct. 3, 2013), available at <http://assembly.state.ny.us/mem/Edward-C-Braunstein/story/54409> [hereinafter Braunstein Press Release].

¹²⁰ *Id.*

¹²¹ S. 5949, 2013–14 Reg. Sess. (N.Y. 2013), available at <http://assembly.state.ny.us/leg/?sh=printbill&bn=S05949&term=2013>.

¹²² See Braunstein Press Release, *supra* note 119.

¹²³ *Id.*

directors of the Cyber Civil Rights Initiative¹²⁴ that aims to raise “awareness about the issue of online harassment and empower[] the victims,”¹²⁵ has been vocal in the mainstream news media about what she considers to be a blame-the-victim mentality in heretofore holding back effective legislation.¹²⁶ And she told *Slate* magazine, “the real objection to cracking down on revenge porn is that ‘we’re still trivializing harm against women.’”¹²⁷ Furthermore, Franks was highly critical of California’s law, telling CNN “[i]t’s disturbing that the drafters apparently think that some victims of nonconsensual pornography are not worth protecting.”¹²⁸

So how does the New York legislation stack up? It certainly applies more broadly than California’s law because the New York measure: (1) is not limited to only images taken by the defendant; and (2) does not include the “emotional distress” requirements present in California’s law.¹²⁹

What is notable about the New York legislation is that it twice employs what might be considered the magic phrase of privacy rights in the United States, namely “a reasonable expectation of privacy.”¹³⁰ This language not only plays a key part in Fourth

¹²⁴ See *CCRI Board of Directors*, CYBER CIV. RTS. INITIATIVE, http://www.cybercivilrights.org/ccri_board_of_directors (last visited Oct. 24, 2013).

¹²⁵ *About Us*, CYBER CIV. RTS. INITIATIVE, <http://www.cybercivilrights.org/about> (last visited Oct. 24, 2013).

¹²⁶ See Goode, *supra* note 22 (reporting that “Professor Franks said that opposition to legislation often stems from a blame-the-victim attitude that holds women responsible for allowing photographs to be taken in the first place, an attitude similar in her view to blaming rape victims for what they wear or where they walk,” and directly quoting Franks for the proposition that “[t]he moment the story is that she voluntarily gave this to her boyfriend, all the sympathy disappears”).

¹²⁷ Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, SLATE (Sept. 25, 2013, 6:21 PM) http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html.

¹²⁸ Heather Kelly, *New California ‘Revenge Porn’ Law May Miss Some Victims*, CNNTECH, (Oct. 3, 2013, 6:32 AM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california>.

¹²⁹ See *supra* notes 98–107 and accompanying text (addressing the emotional distress components of California’s law).

¹³⁰ S.B. 5949, 236th Sess., Reg. Sess. (N.Y. 2013).

Amendment¹³¹ jurisprudence,¹³² but also in privacy torts such as intrusion into seclusion¹³³ and public disclosure of private facts.¹³⁴

The New York bill provides that “[a] person who has consented to the capture or possession of an image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that relationship.”¹³⁵ But claims simply amount to legislative bootstrapping of a privacy right; it does not mean that there is, in fact, such an expectation of privacy in reality. In fact, today there may *not* be a reasonable expectation of privacy that a sexual image taken consensually will not be disseminated later to others. Most strikingly, during a *Today* show interview in May 2013, Professor Franks admitted as much, stating “[a]nybody who thinks this isn’t

¹³¹ The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

¹³² See *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (discussing the reasonable expectation of privacy test in Fourth Amendment jurisprudence); *United States v. Jones*, 132 S. Ct. 945, 952 (2012) (asserting that the “reasonable-expectation-of-privacy test has been *added* to, not *substituted* for, the common-law trespassory test”) (emphasis in original); see also Humbach, *supra* note 71, at 32 (asserting that “[t]he concept of ‘reasonable expectation of privacy’ is most often associated with the jurisprudence of the Fourth Amendment”).

¹³³ See *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 232 (Cal. 1998) (noting that the intrusion “is proven only if the plaintiff had an *objectively reasonable expectation of seclusion or solitude* in the place, conversation or data source”) (emphasis added); *Taus v. Loftus*, 40 Cal. 4th 683, 730 (2007) (noting that, in the context of a tort claim for intrusion, the “initial question is whether the asserted facts demonstrate that Loftus intruded into a private place, conversation, or matter as to which *plaintiff possessed a reasonable expectation of privacy*”) (emphasis added); *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003) (noting that there must be an intrusion “into a ‘place’ in which there is a *reasonable expectation of privacy*”) (emphasis added).

¹³⁴ See Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 207, 2039 (2010) (Professor Lior Jacob Strahilevitz asserts that “tort law typically analyzes expectations of privacy through a probabilistic lens. If it is theoretically possible, but extraordinarily unlikely, that information shared with a few individuals will ultimately become widely known by the public, then privacy tort law usually discounts the theoretical possibility and holds that the data privacy subject maintains a reasonable expectation of privacy.”).

¹³⁵ *Id.*

going to happen to them is just resting on the illusion that people are good people and they are not.”¹³⁶ In other words, only a naïve person—not a reasonable person—would believe that the photos will remain private.

Indeed, scholarly research suggests many people already know of the disclosure risks associated with the consensual taking of sexually explicit images with a partner. A study published in 2013 in *Computers in Human Behavior* found that 26% of those surveyed who were in a committed relationship feared their romantic partner would forward the picture or video.¹³⁷ When the relationship was merely casual rather than committed, more than half of those surveyed—a whopping 53%—worried that their sexual images would be forwarded.¹³⁸ The study was based on a sample of more than 250 college students ranging in age from eighteen to twenty-six years.¹³⁹

Dissemination of sexted images beyond the confines of a private relationship is common among high school students. A study published in 2013 of more than 600 high school students found that “[a]bout a quarter of our participants (with more males than females) who received such a cell phone picture reported they had forwarded it to others.”¹⁴⁰ Media attention given to recent high-profile sexting cases such as those involving New York politician Anthony Weiner surely raises public awareness of the reality that images will be disclosed beyond the individual for whom they were originally intended.¹⁴¹

Consider the Snapchat app. Its premise is that “[u]sers take a photo or video and set an expiration time of one to 10 seconds.

¹³⁶ *Today Show: ‘Revenge Porn’ Victim: ‘My Life Was Ruined’* (NBC television broadcast May 3, 2013), available at <http://www.today.com/video/today/51760815#51760815> (Professor Franks’ comment quoted here appears on the video on this website at approximately at 1:46.).

¹³⁷ Michelle Drouin et al., *Let’s Talk About Sexting, Baby: Computer-Mediated Sexual Behaviors Among Young Adults*, 29 *COMPUTERS IN HUM. BEHAV.* A25, A29 (2013).

¹³⁸ *Id.*

¹³⁹ *Id.* at A27.

¹⁴⁰ Donald S. Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42 *ARCHIVES SEXUAL BEHAV.* 15, 19 (2013).

¹⁴¹ See generally Tara Parker-Pope, *Digital Flirting: Easy to Do, and Easy to Get Caught*, *N.Y. TIMES*, June 14, 2011, at D5 (referencing Weiner’s sexting).

Recipients are notified when they've received a 'snap' and must maintain physical contact with their smartphone screen as they're viewing it. A countdown timer shows how much time remains before the image self-destructs."¹⁴² Snapchat's popularity for sexting arguably lies in the fact that people believe the images they send will disappear within a few seconds, thus eliminating "lingering blackmail material."¹⁴³ Snapchat has a "bad reputation as a self-destructing sexting app for teens."¹⁴⁴ Snapchat makes it seem "like sexting with a virtual condom," in that it ostensibly will protect against the future forwarding and disclosure beyond the individual for whom a sexual selfie is intended.¹⁴⁵ This suggests that reasonable people are well aware of the dangers of sexual images being disclosed and forwarded and thus they turn to Snapchat as a supposed way to prevent that danger.

In fact, all of this collectively undermines, if not eviscerates, the notion that people have a *reasonable* expectation of privacy that their sexual images will not be disclosed beyond the confines of their relationship with a romantic partner. The current wave of news media attention now being paid to revenge porn sites in venues such as the *New York Times*,¹⁴⁶ *Los Angeles Times*¹⁴⁷ and the *Today* show¹⁴⁸ will further raise awareness of the realities of non-consensual disclosure. Arguably, only an *unreasonable* person would take the risk. Thus, New York's bill is flawed to include its "reasonable expectation of privacy" verbiage.

¹⁴² Andrea Chang, *A Picture of Growth; Fleeting Image App Snapchat May Be Start-up Star the L.A. Tech Scene Has Been Seeking*, L.A. TIMES, July 2, 2013, at B1.

¹⁴³ Aimee Lee Ball, *Learning to Snap Without the Chat*, N.Y. TIMES, June 30, 2013, at ST 12. The article quotes one teen interviewed for the proposition that "[a] lot of teens use it for sexting." *Id.*

¹⁴⁴ Helen A.S. Popkin, *Bloody Teen Fight over Sexting Won't Help Snapchat's Reputation*, NBC NEWS (Sept. 16, 2013), <http://www.nbcnews.com/technology/bloody-teen-fight-over-sexts-wont-help-snapchats-reputation-8C11167242>.

¹⁴⁵ See Aisha Sultan, *Dirty Laundry: Sexting with the NSA*, ST. LOUIS POST-DISPATCH (June 29, 2013), http://www.stltoday.com/lifestyles/relationships-and-special-occasion/ticle_57d0e6da-221a-58ad-9292-3616c898b7a6.html?print=true&cid=print.

¹⁴⁶ See, e.g., Goode, *supra* note 22, at A11; Editorial, *supra* note 91, at 10.

¹⁴⁷ See, e.g., McGreevy & York, *supra* note 87, at AA3.

¹⁴⁸ See, e.g., *Today Show*, *supra* note 20.

V. FURTHER CRITICISMS OF REVENGE PORN CRIMINALIZATION

Attorney Marc Randazza contends that one problem with criminal statutes targeting revenge porn is the vast volume of cases that would need to be filed to mitigate the problem.¹⁴⁹ In reference to California's legislation, Randazza stated, "Look at UGotPosted.com—there are probably 5,000 women and men on there. What are they going to do? Open up 5,000 criminal files? The legislator's ideas are great but he's not going to help anybody."¹⁵⁰ Put differently, the floodgates of prosecution would need to be opened up in order to deal with the problem of revenge porn. This, in turn, might well take away prosecutorial resources from other more serious crimes such as physical sexual assaults.

Another issue with criminalizing revenge porn—perhaps a more contentious one that somewhat borders on victim blaming but nonetheless strikes at the issue of self-responsibility—is that the necessity for legislation could largely be avoided if people simply stopped voluntarily sending nude photos of themselves to others. As one reader bluntly wrote to the *Tampa Tribune* in response to a story about efforts in the Sunshine State to criminalize revenge porn, "there is a huge rush to get 'revenge porn' outlawed when all you need to do to avoid this issue is don't send out naked photos! Truly this is just a sign of stupidity if you seriously believe that your naked photos will not be seen anywhere else on the Web."¹⁵¹ The Florida bill initially found some support,¹⁵² but ultimately, it did not make it out of the legislature.¹⁵³

¹⁴⁹ See Lila Gray, *Revenge Porn Site UGotPosted.com Accused of Violating 2257*, XBIZ.COM, (May 31, 2013), <http://newswire.xbiz.com/view.php?id=163381>

¹⁵⁰ *Id.*

¹⁵¹ Kathy Lane, Letter to the Editor, *Keep Your Clothes on*, TAMPA TRIB. (Apr. 22, 2013), <http://tbo.com/list/news-opinion-letters/letters-to-the-editor-b82481173z1>.

¹⁵² See *House Panel Votes To Ban 'Revenge Porn'*, THE FLORIDA CURRENT (Apr. 16, 2013), available at <http://www.thefloridacurrent.com/article.cfm?id=32467047> (reporting that the bill "unanimously cleared a House panel" and was advanced by the House Judiciary committee).

¹⁵³ See Scott Maxwell, *Health Care, Teacher Raises, 'Revenge Porn' in 50 Words or Fewer*, ORLANDO SENTINEL (May 11, 2013), available at orlandosentinel.com/news/opinion/os-scott-maxwell-medicaid-ethics-voting-20130511,0,6883584.column (addressing the Florida revenge porn bill and noting that "[s]ome legislators wanted to make it illegal to post nude pictures of ex-lovers on the Internet. But apparently those

Others question whether some laws already on the books could be used to target the individuals who upload the material to revenge porn sites.¹⁵⁴ Possible extant criminal laws that might be deployed include those targeting harassment, stalking and extortion.¹⁵⁵

VI. CONCLUSION

The current wave of media attention now being paid to revenge porn is somewhat reminiscent of the massive media interest given to sexting among teens just a few years ago.¹⁵⁶ Soon, almost everyone arguably will be aware of the risks they face when consensually taking sexually explicit photos and sharing them with a partner or paramour. Nonetheless, the desire to punish those individuals who burn ex-lovers on the Internet will likely remain forever. Call it a desire for legal revenge against the revenge porners.

This Article has attempted to explore the complicated legal nature of the issues surrounding revenge porn and to analyze some of the early attempts to criminalize it. More measures undoubtedly will come down the pike in the near future. Hopefully the drafters of those bills will take into account some of the criticisms offered here of the measure adopted in 2013 by California and the one now being considered by lawmakers in New York. Both are well intended, but this Article has identified flaws with each.

Ultimately, the news media's interest in revenge porn surely will fade as it becomes, for lack of a better phrase, old news. When it wanes, it is likely that legal attention to the issue will

legislators were outnumbered by those who wanted to keep it legal. Legislative analysts also questioned the constitutionality of this bill.”)

¹⁵⁴ See, e.g., Temple, *supra* note 28 (quoting Professor Eric Goldman for the assertion, in describing the California bill targeting revenge porn, “I’m unclear exactly how much ground the new law would cover that isn’t already covered by existing laws, such as antiharassment/antistalking laws,” and noting that some instances of revenge porn “can rise to the level of criminal offenses, including stalking and extortion”).

¹⁵⁵ See *id.*

¹⁵⁶ See Amy Adele Hasinoff, *Sexting as Media Production: Rethinking Social Media and Sexuality*, 15 *NEW MEDIA & SOC’Y* 449, 449 (2013) (noting that sexting has been “widely discussed” in the mass media in the United States since December 2008).

dissipate along with it, as lawmakers will no longer be able to associate themselves with or latch on to a high-profile issue that justifiably brings moral outrage. At that stage, it then will be left for individuals, not lawmakers, to protect themselves against those who practice for the sordid art of revenge porn. That will require a little bit of self-censorship in terms of refraining from taking and sharing sexual selfies.

Many current victims of revenge porn have paid, and will continue to pay, a high price in terms of reputational harm, lost job prospects and emotional injury. The truth that some of them voluntarily took and shared sexually explicit photos of themselves, wrongly and perhaps naïvely believing then-current lovers would never disseminate them to anyone else, certainly hurts. No one, after all, wants to feel like a fool. But as more people learn about their troubles, that wake-up call to reality might well reduce the creation of images upon which the propagators of revenge porn feed.