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No Vengeance for 'Revenge Porn' Victims: Unraveling Why this Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize It

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**NO VENGEANCE FOR ‘REVENGE PORN’
VICTIMS: UNRAVELING WHY THIS LATEST
FEMALE-CENTRIC, INTIMATE-PARTNER
OFFENSE IS STILL LEGAL, AND WHY WE
SHOULD CRIMINALIZE IT**

*Sarah Bloom**

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* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2011, University of Pennsylvania. This Note would not have been possible without the patience and insightful comments from my advisor, Professor John Pfaff. I also want to thank my friend Zoe, who directed me to this crazy topic, my Fordham friends, who were always eager to discuss revenge porn, and my boyfriend Mike. This Note is for my mother and grandmother, who always fight for the female underdog, especially when faced with legal adversity.

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INTRODUCTION

Annmarie's long distance boyfriend, Joey¹, had been pressuring her for months to take nude photographs.² He missed her, he claimed, and wanted to admire her beauty while they were apart.³ Joey swore they would stay on a CD, hidden in a drawer in his room, and he

1. "Joey's" name has been changed.

2. Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face this*, GUARDIAN (Nov. 19, 2013, 7:30 AM), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

3. Anne Flaherty, *'Revenge Porn' Victims Press for New Laws*, L.A. DIALY NEWS (Nov. 15, 2013), <http://www.dailynews.com/general-news/20131115/revenge-porn-victims-press-for-new-laws>.

would be the only one ever to see them.⁴ However, in February 2010, the day after Joey and Annmarie broke up, he called her in a rage.⁵ He accused her of sleeping with three other men, and based the allegation on information obtained from her Facebook page.⁶ Annmarie denied the accusations and tried to reason with him, but Joey refused to believe her.⁷

Joey threatened to start an eBay auction for the CD of the eighty-eight naked images of Annmarie that he had previously sworn to keep private.⁸ He also informed her that he would send the link to all her friends, family, and co-workers at the college where she was employed.⁹ “I will destroy you,” he promised.¹⁰ Annmarie called the police that very night.¹¹ The police told Annmarie that there was nothing they could do to protect her because no crime had been committed.¹²

The next day, Joey kept his promise and the auction went live.¹³ The eBay posting was titled “(Name of [Annmarie’s] college)MD English Professor Nude Photos!”¹⁴ Annmarie also discovered that Joey had posted the eBay links on five of her college’s Facebook pages.¹⁵ She received messages from friends, her ex-husband, and a former babysitter alerting her of the auction.¹⁶ Annmarie reported Joey on Yahoo! and Facebook.¹⁷ She even contacted the police again, but the officer reiterated there was nothing they could do.¹⁸ Frustrated, Annmarie decided to go to the police station with printouts of the auction website.¹⁹ The officers there snickered at the pictures and looked amused at her problem.²⁰

4. *Id.*

5. Chiarini, *supra* note 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Ironically, Annmarie was informed of the auction from three emails stating, “Joseph Mann thought you might like this item on eBay[.]” *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (“I stood by fighting tears while three officers looked over the auction printouts I brought and snickered. The blond one who finally came over to talk to

For the next year, Annmarie lived in perpetual fear.²¹ She would often wake up in the middle of the night in a panic.²² Then, in September 2011, her worst fears came true when she Googled her name and found that a profile had been created for her on a porn website.²³ The title was “HOT FOR TEACHER? WELL, COME GET IT!” and included her full name, city where she lived, and the college where she worked.²⁴ An individual that Annmarie had never met was even chatting with online strangers purporting to be her.²⁵ The photographs had been up for two weeks, and had already been viewed 4000 times.²⁶ She later discovered that copies of the CD were mailed to both her son’s Catholic school kindergarten teacher and the head of her department at the college where she was employed.²⁷

Annmarie went to the police again, who said there was nothing they could do until an actual crime had been committed.²⁸ One even looked amused at her problem.²⁹ She feared going outside, because her full name accompanied the photographs, and she worried she might be stalked.³⁰ She called her college and requested medical leave that day, but her request was denied.³¹ Two days after she discovered her photographs on the porn website, she attempted to end her own life.³² Fortunately, she was not successful.³³ Two weeks later, she brought her case to a state trooper.³⁴ The state trooper was sympathetic to her case, but once again said there was nothing he could do because there were no laws in place to protect victims like

me seemed amused. It was my first experience with overt victim blaming. And because it came from someone charged to protect and serve, it drove my shame and embarrassment to a paralyzing level.”). This response to victims is not uncommon. See discussion *infra* Part I.E.

21. See Chiarini, *supra* note 2.

22. See *id.* Annmarie recalls that to get back to sleep she would have to compulsively search her name on Google, eBay, and Facebook three times each. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Flaherty, *supra* note 3.

27. *Id.*

28. Chiarini, *supra* note 2.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (“Because of the permanence of the internet, and lack of legislation, this torture was never going to end. I seriously contemplated ending my life. I would have been successful if it weren’t for three things, my dog needed to be let out, my mom called, and the pills I took weren’t fatal.”).

33. *Id.*

34. *Id.*

her.³⁵ Annmarie described this moment as the turning point, which pushed her to become an advocate for anti-revenge porn legislation.³⁶ “Well then, I’m going to change the laws,” she vowed.³⁷ Annmarie then joined the ranks of women fighting a dangerous offense: revenge porn.

The term “revenge porn,” also referred to as “nonconsensual pornography”³⁸ or “involuntary pornography,”³⁹ is the distribution of sexually explicit images of an individual where at least one of the individuals depicted did not consent to the dissemination.⁴⁰ Revenge porn gets its name from scorned ex-boyfriends or ex-husbands⁴¹ posting pictures of their former girlfriends or wives in order to “get back at” or humiliate them in retaliation for ending the relationship.⁴² Although revenge porn gets its name because the perpetrators are often ex-partners, it can also be used to describe other types of relationships, as the definition can encompass any type of non-consensual distribution of intimate photographs, such as postings by a roommate or a classmate using these pictures to bully another.⁴³ Usually, the sexual photos were originally taken or obtained with the

35. *Id.*

36. *See id.*

37. *Id.*

38. *See, e.g.,* Mary Ann Franks, *Drafting an Effective ‘Revenge Porn’ Law: A Guide for Legislators*, END REVENGE PORN [hereinafter Franks, *A Quick Guide*], http://www.endrevengeporn.org/?page_id=656 (last visited Feb. 14, 2014).

39. *See, e.g.,* Lorelei Laird, *Victims are Taking on ‘Revenge Porn’ Websites*, A.B.A. J. (Nov. 1, 2013, 3:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/.

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

41. I will refer to victims in this Note with female pronouns and posters with male pronouns because according to a recent study by the Cyber Civil Rights Initiative, over eighty percent of revenge porn victims are female. Danielle Keats Citron, *Revenge Porn: A Pernicious Form of Cyber Gender Harassment*, BALTIMORE SUN, Dec. 15, 2013, http://articles.baltimoresun.com/2013-12-15/news/bs-ed-cyber-gender-harassment-20131214_1_cyber-civil-rights-initiative-nude-images-harassment; *see also infra* note 54 (discussing how cyberharassment, including revenge porn, is a predominately female problem); *infra* note 55 (noting exceptions).

42. Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on Websites for Posting Photos They Didn’t Consent to*, A.B.A. J., Nov. 2013, at 44, 46. Although revenge porn gets its name from ex-partners, it can also be used to describe other types of relationships since the definition itself can encompass any type of non-consensual distribution of intimate photos. *Id.*

43. *See infra* note 247 (discussing the recent case of the college student who streamed a private encounter of his roommate kissing another male student); *see also infra* notes 73–81 and accompanying text (examining the tragic consequences of students sharing others’ nude photos in the school bullying context).

consent of the subject, in the context of an intimate relationship.⁴⁴ Women may also find themselves victims of revenge porn because of someone hacking into their phone or computer and then posting the private pictures they find online.⁴⁵ The photographs are often posted with identifying personal information, such as the victim's full name, address, workplace, and Facebook page.⁴⁶

Today, sharing compromising photos with a partner is far from uncommon.⁴⁷ A recent study found that fifty percent of respondents had shared "intimate photos" with a partner, and one in ten of those respondents had been threatened by an ex who said they would post those pictures online.⁴⁸ Sixty percent of those threatening partners carried out their threats.⁴⁹ Despite common awareness that celebrities often have their compromising photographs posted without permission, ninety-four percent of Americans still believe that their risqué photographs are safe in the hands of their current partners.⁵⁰ The National Campaign to Prevent Teen & Unplanned Pregnancy found in 2008 that thirty-six percent of young adult women and thirty-one percent of young adult men had sent another person a nude or semi-nude image of themselves.⁵¹ The same study determined that out of the respondents who had sent sexually suggestive content to another, the overwhelming majority of them had sent it to a boyfriend or girlfriend.⁵² Even though women and

44. See Franks, *A Quick Guide*, *supra* note 38; *infra* notes 47–48 and accompanying text.

45. See Maureen O'Connor, *The Crusading Sisterhood of Revenge-Porn Victims*, CUT (Aug. 29, 2013, 8:00 AM), <http://nymag.com/thecut/2013/08/crusading-sisterhood-of-revenge-porn-victims.html>.

46. See Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES, Sept. 23, 2013, <http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html>.

47. See *infra* note 48 and accompanying text.

48. See Press Release, McAfee, *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online* (Feb. 4, 2013), *available at* <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx>; see also Tara Culp-Ressler, *Maryland Is the Latest State to Try to Ban 'Revenge Porn'*, THINK PROGRESS (Oct. 31, 2013, 10:57 AM), <http://thinkprogress.org/health/2013/10/31/2866381/maryland-revenge-porn/>.

49. Press Release, McAfee, *supra* note 48.

50. *Id.*

51. THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, *SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1* (2008), *available at* http://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech_summary.pdf (showing that thirty-six percent of women, and thirty-one percent of men had sent a nude or semi-nude image of themselves).

52. *Id.* at 2. Eighty-three percent of young adult women and seventy-five percent of young adult men who have sent or posted sexually suggestive content say they have sent/posted this content to a boyfriend/girlfriend. *Id.* Those who were not

men appear to be sending these pictures in roughly equal numbers, women are far more likely to be pressured to send these pictures, and they are much more likely to be victims of revenge porn.⁵³ Victims of online harassment, which includes revenge porn, are overwhelmingly female,⁵⁴ while those who run revenge porn websites are predominately young males.⁵⁵

Why do these women send these compromising photographs at all? Sometimes it is just a way of flirting.⁵⁶ More often, women send them to show their interest in the partnership.⁵⁷ Some men coax their girlfriends to send them sexual photographs of themselves to prove her trust in him.⁵⁸ In this scenario, the woman is caught in a difficult emotional position, for if she does not send a picture, it could be perceived as a sign that she does not truly trust or love her partner.⁵⁹

Part I of this Note examines the effect of revenge porn on its victims and how society has historically treated predominately female-felt crimes inflicted by romantic partners. First, this section examines the tangible and abstract effects that victims of revenge porn experience, and discusses the unique consequences and problems for victims of online harassment. Next, Part I contextualizes revenge porn in society's historical treatment of crimes

sending it to their boyfriend or girlfriend were sending the pictures to someone they just wanted to "hook up" with or someone they only knew online. *Id.*

53. See Nancy Willard, *Sexting & Youth: Achieving a Rational Response*, 6 J. SOC. SCI. 542, 546 (2010), available at thescipub.com/pdf/10.3844/jssp.2010.542.562.

54. See *supra* note 41 and accompanying text. Sixty to seventy percent of online harassment (including revenge porn) victims are women. Laird, *supra* note 39, at 43. Eighty percent of cyberstalking victims are women. WORKING TO HALT ONLINE ABUSE, 2012 CYBERSTALKING STATISTICS (2012), <http://www.haltabuse.org/resources/stats/2012Statistics.pdf>.

55. Laird, *supra* note 39, at 43. Males were identified through interviews and court documents. There are, of course, exceptions to this rule. A woman was also arrested in New Jersey for allegedly posting nude photos of her ex-boyfriend online. Rob Spahr, *Howell Woman Arrested for Posting Nude Photos of Boyfriend Online*, NJ.COM (Oct. 18, 2013), http://www.nj.com/monmouth/index.ssf/2013/10/howell_woman_arrested_for_allegedly_posting_nude_photos_of_ex-boyfriend_online_report_says.html.

56. Ellen Goodman, *It's Not About Sex; Sexting Is Really About Trust, and the Violation Thereof*, PITTSBURGH POST-GAZETTE (Apr. 24, 2009, 12:00 AM), <http://www.post-gazette.com/Op-Ed/2009/04/24/Ellen-Goodman-It-s-not-about-sex/stories/200904240216#ixzz2kqX5Y8xi>.

57. See Willard, *supra* note 53, at 543–44 (discussing teens).

58. See Goode, *supra* note 46. "He said if I didn't want to send them to him, that meant that I didn't trust him, which meant that I didn't love him," one victim said. *Id.*

59. See Goodman, *supra* note 56 ("[One reason these women share these sexualized pictures] is a way of brokering trust, a guy saying, 'You don't trust me? You won't send me a naked picture?' A brokered trust leads to broken trust when those photos are sent into the ether.").

against women committed by a romantic partner. Last, this section examines the phenomenon of victim blaming towards women who are targeted by revenge porn, and the dangerous societal ramifications of such blaming behavior.

Part II of this Note analyzes the current legal remedies available to revenge porn victims. First, this Part details why victims cannot reach out to websites for assistance. It then examines the current legal options available to victims if they want to sue the online poster, outlining both the criminal and civil remedies available. Additionally, it examines the practical and legal problems victims face if they wish to pursue a civil claim against their poster. This section proceeds to outline the general criminal statutes that may be utilized in some instances against disseminators of revenge porn. This section concludes by detailing the current laws directly addressing this type of behavior and the possible problems with specific anti-revenge porn legislation.

Part III of this Note discusses why a specific statute targeted at revenge porn is needed, and why it should be classified as a serious sexual offense. This section begins by outlining why a statute directly targeted at revenge porn is needed, rather than utilizing general criminal statutes. Next, it proposes that lawmakers should treat revenge porn as a type of sexual misconduct because of its similarity to other sexual offenses. This section then moves on to explain the effect of classifying revenge porn as a sexual offense, and proposes how classifying revenge porn as a sexual offense could allow for advantageous evidentiary treatment under relevant rape shield statutes and laws which allow victims to operate under an alias in court documents.

I. THE DEVASTATING IMPACT OF REVENGE PORN AND THE CONTEXT OF CYBERHARASSMENT AND INTIMATE PARTNER CRIMES

A. Tangible Consequences of Revenge Porn

There are three main types of tangible effects victims of revenge porn experience. First, their online photographs can cause problems in their careers and in the workplace. Second, these women become more vulnerable to suicide. Lastly, victims often experience threats by third parties and their ex-partners. Each of these effects illustrates that revenge porn can devastate every corner of a woman's life.

The first tangible consequence that victims can experience is trouble in the workplace. These nude photographs can damage a

woman's reputation in the office, when they are sent to co-workers and employers.⁶⁰ The pictures are also often reposted on dozens, if not hundreds, of websites, which floods Google searches when an individual's name is searched.⁶¹ This is not only highly embarrassing to a victim,⁶² but can also negatively impact her future career. Employers frequently rely on online searches to research potential candidates.⁶³ A woman's reputation is often so damaged that she may be forced to change her name.⁶⁴ Sometimes even this measure is not enough, as demonstrated by the story of now anti-revenge porn activist Holly Jacobs, founder of EndRevengePorn.com.⁶⁵ Jacobs' harasser discovered her changed name and simply re-posted the photographs, linking them to her new name.⁶⁶

The impact of revenge porn for women in the workplace is also felt offline. One victim lost her job after a co-worker brought in naked pictures of her into the office.⁶⁷ Another woman lost sales from her online handbag business after the defendant allegedly posted pornography pictures of her and statements that she was "sexually lustful and promiscuous."⁶⁸ In the case of Holly Jacobs, an anonymous tipster emailed the human resources department at the university she worked claiming "a professor is masturbating for her students and putting it online."⁶⁹ The school called Jacobs into the dean's office, and the embarrassing incident ultimately led her to quit

60. See WITHOUT MY CONSENT FAQs, <http://www.withoutmyconsent.org/faq> (last visited Feb. 14, 2014).

61. See Danielle Citron, *Revenge Porn and the Uphill Battle to Sue Site Operators*, CONCURRING OPINIONS (Jan. 25, 2013) [hereinafter Citron, *Uphill Battle*], <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-sue-site-operators.html#sthash.oKcr1WfS.dpuf>.

62. See *id.*

63. See Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 386 (2009) [hereinafter Citron, *Law's Expressive Value*] ("Employers may decline to interview or hire targeted women not because they believe the malicious postings but because it is simply easier to hire individuals who don't come with such baggage. Moreover, candidates with impressive online reputations are more attractive to employers than those who lack them. Indeed, an online presence is crucial to obtaining work in certain fields.").

64. See Goode, *supra* note 46.

65. See *id.*

66. *Id.* (quoting Danielle Citron) ("It's just an easy way to make people unemployable, undatable and potentially at physical risk.").

67. See Second Amended Complaint, *Lester v. Mineta*, No. C-04-3074 SI, 2006 WL 1042226 (N.D. Cal. Mar. 3, 2006).

68. *Leser v. Penido*, 879 N.Y.S.2d 107, 108 (N.Y. App. Div. 2009)

69. Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, OBSERVER (May 1, 2013) [hereinafter Roy, *A Victim Speaks*], <http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>.

her job.⁷⁰ Whether it is from damaged reputations, lost customers, or actual loss of employment, these sexual online pictures can destroy a woman's career.

The second tangible consequence of revenge porn is increased vulnerability to suicide. According to a study from the Cyber Civil Rights Initiative, forty-seven percent of revenge porn victims have contemplated suicide.⁷¹ This is especially felt in teenage and younger victims of revenge porn, who can be more fragile and susceptible to bullying.⁷² Tragically, online harassment and sharing sexual photographs have caused some young teenage girls to commit suicide.⁷³

A horrific example of suicide sparked by revenge porn was the case of Audrie Potts. After getting drunk and passing out at a party the summer before her sophomore year of high school, three boys from Audrie Pott's class drew on her with sharpies, took off her clothes and took sexually explicit pictures of her.⁷⁴ The pictures were posted online, and Audrie was relentlessly tormented by her classmates and former friends once school started.⁷⁵ About a week after classes begun, she hung herself in the school bathroom.⁷⁶

What happened to Jessica Logan is another tragic example of the impact school bullying and revenge pornography. After a break up, eighteen-year-old Jessica Logan's ex-boyfriend began forwarding the naked pictures she had sent him during their relationship to other classmates.⁷⁷ Several of the girls who received the pictures began viciously tormenting Jessica calling her a "slut" and a "whore."⁷⁸

70. *See id.*

71. *See* Charlotte Laws, *I've Been Called the "Erin Brockovic" for Revenge Porn, and for the First Time Ever, Here is My Entire Uncensored Story of Death Threats, Anonymity and the FBI*, XOJANE (Nov. 21, 2013), <http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn>.

72. *See infra* notes 74–81 and accompanying text.

73. *See infra* notes 74–81 and accompanying text.

74. Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013), <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917>.

75. *Id.*

76. *Id.*

77. Jamie L. Williams, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017, 1029 (2012).

78. Sherry Capps Cannon, *Omg! "Sexting": First Amendment Right or Felony?*, 38 S.U. L. REV. 293, 294 (2011).

Jessica sunk into depression, and feared going to school.⁷⁹ She started skipping class, and when she did go to school, other students whispered about her as the girl who took the scandalous picture.⁸⁰ Shortly after her high school graduation, she took her own life.⁸¹

Last, victims of revenge porn can become targets of threats of physical harm. Women whose photographs are posted on these websites are emailed or even physically stalked by men who view their pictures.⁸² This danger is facilitated by the fact that very personal information often accompanies the victim's photographs.⁸³ Hunter Moore, revenge porn entrepreneur and founder of now non-operational popular revenge porn website IsAnyoneUp.com, planned to expand this exposure.⁸⁴ He expressed plans to create a website called HunterMoore.TV, which would feature victims' nude photographs on a map.⁸⁵ Moore later denied these statements and his plans may now be halted due to a federal indictment.⁸⁶ Women who experience online harassment are more likely to be victims of sexual violence,⁸⁷ and this readily available personal information easily assists these disturbing crimes.

Another way these women can be threatened is by the men who possess these damaging pictures. One victim was repeatedly blackmailed by her ex-boyfriend who owned a video of them having sex.⁸⁸ He forced her on multiple occasions to engage in sexual intercourse in exchange for refraining from posting the video online

79. Mike Celizic, *Her Teen Committed Suicide Over 'Sexting'*, TODAY (Mar. 6, 2009, 9:26 AM), http://www.today.com/id/29546030/ns/today-parenting_and_family/t/her-teen-committed-suicide-over-sexting/#.U1LPYuzDNw.

80. *See id.*

81. Cannon, *supra* note 78 at 294–95 (“As a result of this tragedy, Jessica Logan’s parents have gone public and launched a campaign ‘to warn teens of the harassment, humiliation and bullying that can occur when that photo gets forwarded.’”).

82. Citron, *Uphill Battle*, *supra* note 61; *see also* Goode, *supra* note 46 (discussing how one woman was stalked by a man who sat outside her house in his car).

83. *See supra* note 42 and accompanying text.

84. Jessica Roy, *Revenge-Porn King Hunter Moore Indicted on Federal Charges*, TIME (Jan. 23, 2014), <http://newsfeed.time.com/2014/01/23/revenge-porn-king-hunter-moore-indicted-by-fbi/>; Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web’s Vilest Entrepreneur Ever Be Stopped?*, OBSERVER (Dec. 4, 2012, 7:46 PM) [hereinafter Roy, *Battle*], <http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/>.

85. Roy, *Battle*, *supra* note 84.

86. *Id.*; *see infra* notes 197–99 and accompanying text for further details on Moore’s federal indictment.

87. WITHOUT MY CONSENT FAQs, *supra* note 60.

88. *People v. Cavazos*, No. A124274, 2010 Cal. App. Unpub. LEXIS 3420 (Cal. Ct. App. May 11, 2010).

or sending it to her friends and family.⁸⁹ Another woman was threatened by her former lover with a sexual video of her and another boyfriend, which he had stolen from her car.⁹⁰ He threatened that if she did not make a sexual video with him, he would email the video to her employer, and post it on pornographic websites.⁹¹ Yet another victim's ex-boyfriend threatened that if she did not respond to his email in three days, he would post naked pictures of her online, contact her employer, and send the photographs to her daughter's father.⁹² This online activity can affect a woman's offline safety, from self-infliction as well as outside parties.

B. Abstract Consequences of Revenge Pornography Online and Offline

Victims of revenge porn also experience an intangible loss in their online and offline lives. Mary Anne Franks, an Associate Professor at the University of Miami School of Law, discusses the loss of liberty many women who are victims of cyberharassment experience after being targeted.⁹³ Online, a woman's freedom is restricted when she is forced to avoid certain websites, change email accounts, and withdraw from online communities.⁹⁴ Franks discusses how the idea of the Internet as a community is particularly attractive for women, who feel more physically and sexually vulnerable in the outside world than men.⁹⁵ Women are empowered to create their own online existence, but when damaging information about them is posted online, it robs them of this freedom to construct their own online identity.⁹⁶ By presenting a woman in a sexual light she did not choose, it conveys the message that she is a toy for the sexual amusement of others.⁹⁷ A victim is no longer afforded protections of an anonymous presence as

89. *Id.*

90. *Serrano v. Butler*, No. C 06-04433 JW, 2010 U.S. Dist. LEXIS 137617 (N.D. Cal. Dec. 20, 2010).

91. *Id.*

92. *S.B. v. Duffy*, No. A-4495-07T1, 2009 N.J. Super. Unpub. LEXIS 2334 (N.J. Super. Ct. App. Div. May 12, 2009).

93. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 246 (2011) [hereinafter Franks, *Unwilling Avatars*].

94. *Id.*

95. *Id.* at 228.

96. *Id.* at 251–52.

97. See ROBIN WEST, *CARING FOR SOCIAL JUSTICE* 103 (1997) (discussing harassment on the street).

this forced, constructed representation profoundly invades her private space and ability to dictate how she presents herself to others.⁹⁸

This intangible loss of liberty is felt offline as well because the harassing activity forces victims to change how they interact with society.⁹⁹ Women feel a fundamental violation of their trust in another, which damages their future relationships.¹⁰⁰ They are fired or quit their jobs because of the harassment.¹⁰¹ These women fear being in public places where they could be recognized¹⁰² or physically stalked.¹⁰³ Although revenge porn does not physically harm the victim, its effects invade the body as the victim becomes “chilled, humiliated, dirty, and above all, *exposed*.”¹⁰⁴

C. The Unique Problem of Cyberharassment

While revenge porn is a fairly recent phenomenon, cyberharassment has existed for almost as long as the Internet.¹⁰⁵ In 1993, journalist Julian Dibbel chronicled a cyber-rape he witnessed in an online community.¹⁰⁶ One user forced several other users’ avatars to perform vulgar sexual acts through a subprogram that allowed him to control their actions.¹⁰⁷ The cyber-rape produced “powerful feelings” which reached outside of the virtual world, and the offending user’s account was later deleted from the program.¹⁰⁸

Now, cyberharassment can target actual individuals, rather than avatars. Franks notes that cyberharassment has the potential to be

98. See *id.* (discussing invasion of privacy on a woman’s private sphere on a public street).

99. See Franks, *Unwilling Avatars*, *supra* note 93, at 246; see also *supra* Part I.A. (discussing how women are forced to change their behavior in the workplace and can become fearful of others).

100. See Laird, *supra* note 39, at 50. “What I really want is to be free to trust a man again,” said one revenge porn victim. *Id.*

101. See *supra* notes 67–70 and accompanying text.

102. See *supra* text accompanying note 30 (describing how Annmarie refrained from going outside after her pictures were released).

103. See Goode, *supra* note 46.

104. See WEST, *supra* note 97, at 103 (discussing the invasion of privacy felt by a woman experiencing sexual harassment on the street). See *infra* Part I.C. for discussion on how online harassment can be more damaging than harassment offline.

105. Franks, *Unwilling Avatars*, *supra* note 93, at 243.

106. Julian Dibbel, *A Rape in Cyberspace*, VILLAGE VOICE (Oct. 18, 2005), <http://www.villagevoice.com/2005-10-18/specials/a-rape-in-cyberspace/>.

107. *Id.*

108. One of the users whose character was violated posted a public statement about the event and recalls writing it while “posttraumatic tears were streaming down her face.” *Id.*

more damaging than harassment offline for four reasons.¹⁰⁹ The first is the veil of anonymity.¹¹⁰ Anonymity makes it easier for harassers to target their victims, and almost impossible for victims seeking redress to track down their attackers.¹¹¹ The second reason cyberharassment may be more dangerous than offline harassment is amplification.¹¹² Unlike cat-callers on the street or noxious co-workers, online harassers can quickly and easily find a large audience to witness their harassment, and this audience may even take part in the abuse.¹¹³ This is particularly prevalent in revenge porn cases, where these women often find their pictures reposted dozens or hundreds of times to pornographic websites and social media.¹¹⁴

The third reason is permanence.¹¹⁵ Offline, a hard copy of an offensive picture can be torn down or thrown away. Contrarily, once information is posted online, it is very difficult for victims of revenge porn to get it taken down.¹¹⁶ Compounded with the fact that these pictures may be on hundreds of websites, victims could spend the rest of their lives scrubbing the web without ever being completely erased. The final reason that Franks cites in support of the danger of cyberharassment is virtual captivity and publicity.¹¹⁷ Victims of offline harassment may be able to escape their attackers by changing their location, for example, by leaving the workplace. Revenge porn victims are afforded no such luxury, as the offending pictures can follow them to many corners of the web. Also, unlike offline sexual harassment, a victim's naked pictures can be viewed by anyone. This list can include family, clients, or co-workers, and the photographs may be accessed from anywhere that has an Internet connection.¹¹⁸

D. Society's Historical Treatment of Intimate Partner Crimes

The calamitous effect of revenge porn is something that is predominately experienced by women and inflicted by their former partners.¹¹⁹ Police often ignore or ridicule them.¹²⁰ Commentators

109. Franks, *Unwilling Avatars*, *supra* note 93, at 255–56.

110. *Id.*

111. *Id.*

112. *Id.* at 256.

113. *Id.*

114. *See supra* note 61 and accompanying text.

115. *See* Franks, *Unwilling Avatars*, *supra* note 93, at 256.

116. *See id.* *See infra* Part II.A. for an in depth discussion on the difficulty of removing these photos without the assistance of these websites.

117. *See* Franks, *Unwilling Avatars*, *supra* note 93, at 256.

118. *See id.*

119. *See supra* note 54 and accompanying text.

blame them for the misfortune that befell them.¹²¹ Unfortunately, society's dismissal of female suffering inflicted by their partners is nothing new. These crimes are frequently treated less seriously than other offenses,¹²² and they are usually accompanied by unique evidentiary barriers that make prosecution burdensome and conviction difficult.¹²³

Danielle Keats Citron, professor at the University of Miami School of Law, discusses how society has historically disregarded harm suffered by women, especially when the crime was committed by their romantic partner.¹²⁴ When rape was first classified as a crime, it was prosecuted most harshly when it was committed by a stranger and when it was coupled with actual violence.¹²⁵ Citron posits that this was because this kind of rape most resembled harms to which men could relate.¹²⁶ Comparatively, when rapes were committed by husbands or boyfriends, they were "underregulated."¹²⁷

The law has also lagged behind in other areas of harm originating from male romantic partners. Marital rape was still legal in New York State until 1984, when the Court of Appeals, not the legislature, found the exception unconstitutional and abolished it.¹²⁸ Until the

120. *See supra* text accompanying note 20.

121. *See infra* Part I.E.

122. *See infra* notes 124–29 and accompanying text.

123. *See infra* notes 133–35 and accompanying text.

124. *See* Citron, *Law's Expressive Value*, *supra* note 63, at 376.

125. *Id.* at 392.

126. *Id.*

127. *Id.* (citing WEST, *supra* note 97). This issue is complex, and there may be other explanations for why violent rapes were prosecuted more aggressively than those committed by a partner. For example, the violence used could be a clear indication of non-consent, which could lead to more successful convictions. Susan Estrich argues that this utmost resistance requirement operated as a substitute for the mens rea requirement, because it would put the defendant on notice that the victim did not consent. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1099 (1986). If this utmost resistance was not proven, at most, the defendant would be guilty of reckless rape (if he recognized the risk of non-consent and disregarded it) or negligent rape (if he did not recognize the risk of non-consent but a reasonable man would have). *See id.* at 1117 n.86. *See generally* Cynthia Ann Wicktom, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 400–01 (1988) (discussing how prosecutors had difficulty proving the victim's non-consent which made them hesitant to bring cases in the first place and also made juries reluctant to find defendants guilty). In addition, men may also have been more empathetic to those "date rape" defendants whose situations may seem more ambiguous than those committed by strangers.

128. *People v. Liberta*, 64 N.Y.2d 152, 163–64 (1984) ("We find that there is no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to

mid-1800s, the American legal system recognized the right of husbands to discipline their wives using physical force, a right derived from English common law.¹²⁹ The term “sexual harassment” did not even exist until the 1970s, even though the activity existed well before then.¹³⁰ When the term was first introduced, judges, employers, and even victims regarded it as “universal ‘natural’ behavior.”¹³¹ The victims of these offenses experienced a double harm as a result of the crime. The first was the harm of the actual offense, and the second was the harm in not having a law in place to vindicate the wrongdoing.¹³²

When statutes did provide redress for victims of gender specific crimes, the requirements for prosecution were far more burdensome than for crimes that targeted men and women equally.¹³³ In the nineteenth century, a rape conviction required both witness corroboration and that the prosecution prove the “utmost” physical resistance by the victim.¹³⁴ Other crimes such as theft, by contrast, had no such requirements.¹³⁵ If a robber demanded that a man give over his wallet, the man did not have to provide a witness and prove he did not fight back to the fullest in order to show he did not consent to the theft.¹³⁶

The marital rape exemption is another example of society’s unequal treatment of crimes committed by a romantic partner. Today, although the marital rape exemption has been abolished nationwide, half of all states still differentiate between marital and “stranger” rape.¹³⁷ These states have heightened evidentiary requirements to prove marital rape, and authorize lower sentences for

marriage or are simply unable to withstand even the slightest scrutiny. We therefore declare the marital exemption for rape in the New York statute to be unconstitutional.”).

129. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 309 (5th ed. 2013); see also Citron, *Law’s Expressive Value*, *supra* note 63, at 376.

130. Citron, *Law’s Expressive Value*, *supra* note 63, at 376.

131. *Id.* at 393.

132. See WEST, *supra* note 97, at 96.

133. Citron, *Law’s Expressive Value*, *supra* note 63, at 392–93.

134. *Id.* at 392; see also *infra* note 375.

135. Citron, *Law’s Expressive Value*, *supra* note 63, at 392.

136. *Id.* at 392–93.

137. Emily J. Sack, *Is Domestic Violence A Crime?: Intimate Partner Rape As Allegory*, 24 ST. JOHN’S J. LEGAL COMMENT. 535, 554 (2010).

rape committed by a spouse.¹³⁸ This demonstrates that society still does not consider sexual assault by a spouse as serious as when it is committed by a stranger.¹³⁹ In reality, sexual assaults committed in a marriage are likely the most violent, the most psychologically damaging, and are subject to more repeated attacks than rapes committed by a stranger.¹⁴⁰

The law has historically disregarded these intimate partner crimes, in part, because of the belief that a woman could have mitigated the harm.¹⁴¹ Even in the mid-1980s, judges were unsympathetic to victims of domestic violence because of the commonly held belief that they could have left their husband.¹⁴² At every stage of prosecution,

138. See WEISBERG & APPLETON, *supra* note 129, at 330; see also Sack, *supra* note 137 at 554; *supra* note 127 (noting other possible explanations for this different treatment).

139. As one commentator notes:

Unlike [the states that] do not recognize any difference between marital and nonmarital rape, states that require additional elements of proof continue to promote the classical idea that rape in marriage is not as bad as rape outside of marriage and that women who are subject to marital rape are ‘second class victims not worthy of equal protection.’

Jessica Klarfeld, Note, *A Striking Disconnect: Marital Rape Law’s Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1834 (2011) (noting other burdens for marital rape prosecution in some states such as shorter reporting time windows, exceptions if the victim was incapacitated or helpless, and more discretion for judicial dismissal).

140. *Id.* at 1828 (“Women who are raped in marriage likely suffer more psychological damage because the rape results in a sense of betrayal, the destruction of the marriage, and the possibility that such rape will continue over many years. Women will also likely suffer greater physical consequences, for they are more likely to resist the force of their husbands than that of a stranger.”).

141. Citron, *Law’s Expressive Value*, *supra* note 63, at 393.

142. See, e.g., *New York Task Force on Women in the Courts Public Hearing* 123 (May 7, 1985) (New York City) (testimony of Richard D. Huttner). Judge Richard D. Huttner, the Administrative Judge of the New York City Family Court, remembered the reactions of some of his colleagues to domestic violence victims:

I don’t feel sorry for them. Why don’t they just get up and leave? They have been taking these beatings all these years and now they want me to intercede. All they have to do is get out of the house. It is as simple as that. What do they want from me?

Id. A study published in 1988 found that more than seventy percent of domestic violence victims actually did try to leave home in response to their husband’s violence at least one time, but successful separation failed due to inadequate resources (shelters, social services) as well as family, friends, and neighbors who did not assist these women. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 61 (1991) (citing EDWARD GONDOLF & ELLEN FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 77–78 (1988)). “[T]he assumption that the woman’s first separation should be permanent ignores the real dangers that the man will seek actively—and sometimes violently—to end the separation.” *Id.* at 62. Mahoney came

members of the legal system would try to disprove rape victims' claims based on myths that "women motivated by revenge, blackmail, jealousy, guilt, or embarrassment falsely claim rape after consenting to sex, that women fantasize about being raped, that only 'bad' women are raped, and that women provoke rape through their appearance and behavior."¹⁴³ The fact that rape laws used to require that the victim resist to the fullest demonstrates that society thought that if a woman did not do everything in her power to fight off her assailant, she was not entitled to redress.¹⁴⁴ Even now, some judges continue to place blame upon the victims in domestic violence¹⁴⁵ and rape cases.¹⁴⁶

E. Revenge Porn as the Latest Arena for Victim Blaming

Women who are targeted by revenge porn are merely the latest group of victims who are blamed for their unfortunate circumstances. These victims find a lack of sympathy in commentators who hold them solely responsible for their misfortunes. Critics advise women to simply abstain from taking these compromising photographs if they do not want to see themselves on these websites. Eric Goldman, a professor at Santa Clara University School of Law, stated:

up with the term "separation assault," describing a husband's violence that is in particular response to when his wife would try to leave, emphasizing that these women actually did try to leave, but were unsuccessful because of their violent partners. *Id.* at 65–66.

143. Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 148–49 (2001) (internal citations omitted). A 1980 study of 1056 jurors found that although almost all jurors (ninety-six percent) believed a woman could be raped against her will, the majority (sixty-six percent) found that rape was elicited by the victim's behavior or appearance. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of A Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1047–48 (1991) (citing HUBERT S. FIELD & LEIGH B. BIENEN, JURORS AND RAPE 3, 54 (1980)). Thirty-four percent of the surveyed jurors thought that a woman should be responsible for preventing her own rape, and eleven percent responded that a rape victim was "asking for it" when she was raped. *Id.*

144. See *infra* note 375; *supra* note 134 and accompanying text.

145. See Citron, *Law's Expressive Value*, *supra* note 63, at 410 (citing FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 386 (2009)) ("Despite clear changes in the law, some judges continued to marginalize domestic victims because victims could just 'get up and leave.'").

146. See Alan Wagmeister, *Judge Apologizes for Comments*, KULR8.COM (Aug 28, 2013), <http://www.kulr8.com/story/23283360/judge-apologizes-for-comments>. The judge presiding over a case of a fourteen-year-old girl who was raped by her teacher and later committed suicide said that the victim was "older than her chronological age" and was "as much in control of the situation" as the teacher. *Id.* The judge later apologized for his comments. *Id.*

Still, for individuals who would prefer not to be a revenge porn victim or otherwise have intimate depictions of themselves publicly disclosed, the advice will be simple: don't take nude photos or videos. Even if you never share them with anyone, these depictions seem to have a surprising capacity to leak out (for example, there are numerous stories of IT technicians or criminal hackers obtaining photos and videos). If you decide to take nude photos or videos, never share them with anyone else. Effectively, when you do, you are gambling that person will not betray your trust for the rest of their lives. The reality is that most people aren't that trustworthy; or even if they are, it's hard to know that in advance.¹⁴⁷

Responding to this type of criticism, Franks points out that this is just another restriction placed on women:¹⁴⁸

Revenge porn is primarily produced and consumed by men and primarily targets women. Revenge porn belongs to that class of activities that includes rape, domestic violence, and sexual harassment – that is, the class of activities overwhelmingly (though of course not solely) perpetrated by men and directed overwhelmingly (again, not solely) at women. Like those activities, one major effect of revenge porn is to limit women's freedom to live their lives: it punishes women and girls for engaging in activities that their male counterparts regularly undertake with minimal negative (and often positive) consequences.¹⁴⁹

If a person gives his keys to a mechanic so that the mechanic can fix his car, that does not give the mechanic a permanent license to now use that man's car anytime he sees fit.¹⁵⁰ Franks reasons that because society does not see consent as absolute in other contexts of the law, the legal system should also not view consent in revenge porn contexts as absolute.¹⁵¹ Commentators do not normally blame victims of automobile theft if they trusted a valet or mechanic to only use their car keys for a limited use.¹⁵² Comparatively, it follows that

147. Eric Goldman, *What Should We Do About Revenge Porn Sites like Texxxan?*, FORBES (Jan. 28, 2013) [hereinafter Goldman, *Revenge Porn Sites like Texxxan*], <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/>.

148. Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb 1, 2013) [hereinafter Franks, *Victim Blaming*], <http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html#sthash.NuP1KP4J.dpuf>.

149. *Id.*

150. *See id.* (comparing an example of identity theft and consent to using one's credit card).

151. *See id.*

152. *Id.*

revenge porn victims should not be ostracized for sending a picture to their partner to only be viewed by that person in the context of the relationship.¹⁵³

II. THE PROBLEM OF INADEQUATE LEGAL REDRESS FOR VICTIMS OF REVENGE PORN

In 2009, Holly Jacobs' ex-boyfriend posted the naked pictures she had sent him during their relationship on a litany of revenge porn websites, accompanied by her name, email address, and specific details about where she worked and her PhD program.¹⁵⁴ When Jacobs discovered the photographs, she went to her local police department.¹⁵⁵ The police informed her that there was nothing she could do because she was over eighteen, and sent her to a state attorney's office.¹⁵⁶ The state's attorney refused to take her case.¹⁵⁷ Therefore, Holly took it upon herself to get the images taken down by filing Digital Millennium Copy Right Act (DMCA) takedown requests.¹⁵⁸ She "worked like a dog" but finally got nearly all of the pictures taken down.¹⁵⁹ Her efforts proved to be futile however, when two weeks later, the photographs were right back up on other pornographic websites.¹⁶⁰

Holly's story illustrates that once a photograph is posted online, it is nearly impossible to get it completely expunged from the Internet, even when the woman is the copyright owner of the photographs.¹⁶¹ And when victims try to go to the police, they are laughed at,¹⁶² not taken seriously,¹⁶³ or told there is nothing law enforcement can do if the victim is not a minor, which makes child pornography statutes not applicable.¹⁶⁴ In Annmarie's case, the police told her that she had to

153. *Id.*

154. Holly Jacobs, *A Message From Our Founder, Dr. Holly Jacobs*, CYBER C.R. INITIATIVE (Oct. 6, 2013), http://www.cybercivilrights.org/a_message_from_our_founder_dr_holly_jacobs.

155. Roy, *A Victim Speaks*, *supra* note 69.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Generally, the creator of the work owns the copyright. *See* 17 U.S.C. § 201(a) (2012); Univ. of Tex. Libraries, *Who Owns What?*, COPYRIGHT CRASH COURSE, <http://copyright.lib.utexas.edu/whoowns.html>.

162. *See supra* note 20 and accompanying text.

163. *See supra* text accompanying note 12.

164. *See supra* note 154 and accompanying text. This Note specifically addresses recourse for a victim over eighteen. When the victim is under eighteen, the state is

wait until a crime has actually been committed in order to intervene.¹⁶⁵

A. Websites Have No Incentive to Prevent Harm or Assist Victims

Victims cannot rely on cooperation from websites if they wish to get their photographs removed. Revenge porn websites have no incentive to regulate or police the activities of its users because they are legally immunized from liability due to Section 230 of the Communications Decency Act (Section 230), which does not punish websites for the content of its posters.¹⁶⁶ Section 230 was passed in response to the debate over the competing interests of websites supervising the activity of their users balanced against the fear of being held legally liable for the third party speech.¹⁶⁷ Ultimately, Congress prioritized the growth of the Internet over potential liability for website operators through its passage of Internet provider immunization under Section 230.¹⁶⁸

Section 230 has been read by courts to confer broad immunity to websites from the actions of its users,¹⁶⁹ although this immunity is not

able to charge the defendant with child pornography statutes. *See* Willard, *supra* note 53, at 545 (discussing the prosecution of a Wisconsin teen who posted pictures of his ex-girlfriend. He was charged with “criminal libel, possession of child pornography, sexual exploitation of a child and causing mental harm to a child” and ultimately pled guilty to causing mental harm to a child). *See id.* at 546–47, for various cases where teenagers were charged with child pornography for disseminating nude or semi-nude images of another teen.

165. Chiarini, *supra* note 2.

166. 47 U.S.C. § 230(c)(1) (2012) (“No 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.”).

167. Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 530–31 (2013).

168. *Id.* at 531.

169. *See* Barrett v. Rosenthal, 40 Cal. 4th 33, 39 (Cal. 2006) (“[Section 230] ha[s] been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.”). The California Supreme Court further expressed it was restricted in its decision: “We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.” *Id.* at 40; *see also* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) (“[Section] 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1).”); Zeran v. Am. Online, Inc., 129 F.3d

absolute.¹⁷⁰ Websites also have no legal obligation to assist parties in identifying the offending poster.¹⁷¹ This is problematic because it is difficult for one user to track another down by herself over the Internet,¹⁷² and websites are in the best position to mitigate the harm.¹⁷³ Websites also have no monetary incentive to aid victims. Revenge porn websites, like any business, are interested in establishing practices that deliver what their customers want.¹⁷⁴ These websites are thus economically incentivized to not regulate postings, and to not assist victims because this allows them to continue profiting from advertising revenues.¹⁷⁵

Takedown services, which are websites that advertise their ability to get a woman's intimate photographs removed from a pornographic web page if she pays them a fee, are also incentivized to foster this kind of online behavior because it gives them more potential clients.¹⁷⁶ Similar to revenge porn websites, they are encouraged to oppose any legal proposals that would dry up business¹⁷⁷ as these lucrative takedown services charge about \$250 per photo.¹⁷⁸ One revenge porn website, Is Anybody Down, realized a way to maximize profitability by running ads for a takedown service next to its website's revenge porn photographs.¹⁷⁹ It was later discovered that the revenge porn website was likely run by the same owner as the takedown service.¹⁸⁰

327, 332 (4th Cir. 1997) (holding that the plaintiff's claim was barred against AOL under Section 230, because Internet Service Providers are exempt from liability for actions of a third party).

170. See *infra* notes 182–83 and accompanying text.

171. Bartow, *supra* note 40, at 45.

172. Choi, *supra* note 167, at 530 (“The Internet’s architectural protocols do not provide an easy way for one user to identify other users.”).

173. Citron, *Uphill Battle*, *supra* note 61.

174. Cf. Bartow, *supra* note 40, at 45.

175. See *id.*

176. Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & Gender 383, 391 (2009).

177. *Id.* at 392.

178. See Jessica Roy, *We Will Take Down This Photo of Revenge Porn Proprietor Craig Brittain if he Pays Us \$250*, OBSERVER (Feb. 6, 2013, 4:05 PM), <http://betabeat.com/2013/02/we-will-take-down-this-photo-of-revenge-porn-proprietor-craig-brittain-if-he-pays-us-250/>.

179. See *infra* note 180.

180. See, e.g., *Victims of Revenge Porn Mount Class Action Suit Against GoDaddy and Texxxan.com*, OBSERVER (Jan. 1, 2013 10:58 AM), <http://betabeat.com/2013/01/victims-of-revenge-porn-mount-class-action-suit-against-godaddy-and-texxxan-com/>. “[Is Anybody Down]’s Takedown Hammer claims to be operated by a New York-based lawyer named David Blade, III, but no such name appears in the New York State Unified Court System’s attorney database.” *Id.* “Las

Critics of Section 230 say that failure to amend the law to exclude revenge porn websites from immunity illustrates society's dismissive attitude towards the harm suffered by victims.¹⁸¹ Even though the purpose of Section 230 is to foster free speech, there are still exceptions to the rule providing First Amendment protection to website operators.¹⁸² If a website is alerted that it is hosting copyrighted material or child pornography, it is legally mandated to take it down once notified.¹⁸³ Commentators opine that by obligating websites to respond to copyright claims but not revenge porn victims, society is expressing that it does not care about this type of suffering as much.¹⁸⁴ On the other hand, revenge porn websites were not prevalent when Section 230 was enacted, and the current Congress's failure to pass and amend bills may be explained by bipartisan conflict rather than lack of concern about the issue.

However, some revenge porn websites have been successfully sued on a variety of state and federal law claims. Holly Toups, along with other victims, sued revenge porn website Texxxan.com and its host, GoDaddy under state law.¹⁸⁵ A Texas plaintiff obtained a successful injunction against PinkMeth.com, a pornographic website, in Texas state court.¹⁸⁶ Website Yougotposted.com has also been sued for distribution of child pornography¹⁸⁷ and violation of the Copyright Act in federal court.¹⁸⁸ This success demonstrates that there may be some legal recourse for victims of revenge porn.

Vegas attorney Marc Randazza and other bloggers established that "Blade" did not exist and was likely the same person who ran IsAnybodyDown. Both sites are now offline." Laird, *supra* note 39, at 47.

181. Danielle Citron, *The Importance of Section 230 Immunity for Most*, CONCURRING OPINIONS (Jan. 25, 2013), <http://www.concurringopinions.com/archives/2013/01/the-importance-of-section-230-immunity-for-most.html>.

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

183. *Id.*

184. *Id.*; see also Citron, *Uphill Battle*, *supra* note 61.

185. See Plaintiffs' Original Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction, Toups v. GoDaddy.com, No. D130018-C, 2013 WL 271500 (Tex. Dist. Jan. 18, 2013) (suing for, inter alia, intentional infliction of emotional distress, intrusion upon seclusion, and public disclosure of private facts).

186. Conklin v. Katz Global Media, Register of Actions, No. 2012-61554-393, available at <http://justice1.dentoncounty.com/PublicAccessDC/CaseDetail.aspx?CaseID=2083916>.

187. Complaint, Talley v. Chanson, No. 3:13CV01238, 2013 WL 2443985 at *1 (S.D. Cal. May 28, 2013).

188. Complaint, Middleton v. Bollaert, No. 13-11968-cv, 2013 WL 2107327 (E.D. Mich. May 2, 2013).

B. Legal Options Available in Actions Against a Revenge Porn Poster

1. *Difficulty of Securing Successful Civil Victories*

There are two main civil options for victims to pursue against the unauthorized posters of their explicit images.¹⁸⁹ Victims can opt to recover through copyright law, where they may be able to successfully have her image removed from the offending website. The victim may also choose to pursue a claim through her state's tort law by suing for intentional infliction of emotional distress or an invasion of privacy cause of action.

The first way victims of revenge porn can recover is through federal copyright law under the DMCA. A person who is the legal holder of a copyright can commence action when another infringes upon their exclusive right by filing notice on the alleged infringer or with the court.¹⁹⁰ In revenge porn contexts, a woman can only bring a copyright claim when she was the one who originally took the picture or video, which would make her the copyright owner.¹⁹¹ If a victim wants to get the photograph taken down through the DMCA, another condition must be met: the website server must be in the United States.¹⁹² But even if a woman is successful in getting one photograph taken down, it can still be reposted to dozens of other websites, and the victim could spend the rest of her life filing DMCA requests without ever having the image fully expunged from the web.¹⁹³

Victims of revenge porn can also sue under their respective state's tort law, as Holly Toups did in her suit against Texxxan.com and GoDaddy.¹⁹⁴ They can allege an invasion of privacy based upon the theory of "intrusion upon seclusion."¹⁹⁵ To prevail in this case, the

189. Even though posters usually ruin their victims' reputations, defamation is not an available legal avenue for victims because truth is always an absolute defense to these claims, and the victims are the ones in the photos. *Substantial Truth*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/substantial-truth> (last updated July 22, 2008).

190. 17 U.S.C. § 501(b) (2012).

191. Generally, the creator of the work owns the copyright. See 17 U.S.C. § 201(a) (2012); Univ. of Tex. Libraries, *supra* note 161; see also Franks, *A Quick Guide*, *supra* note 38.

192. See Laird, *supra* note 39, at 49 ("[F]oreign websites don't care about DMCA takedown notices. Indeed, several sites have reportedly moved to overseas hosts to avoid legal consequences in the U.S."). Websites sometimes ignore takedown requests because they do not fear liability. See *supra* Part II.A.

193. Laird, *supra* note 39, at 49.

194. See *supra* note 185 and accompanying text.

195. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

victim must prove that the poster intentionally intruded upon her private affairs, and that the intrusion would be highly offensive to a reasonable person.¹⁹⁶ Every state except North Dakota and Wyoming has its own intrusion upon seclusion tort, which incorporates these elements.¹⁹⁷ While most would find that having naked pictures posted of themselves online an invasion of privacy, the strong language of the statute (“intentionally” and “highly offensive”) are large obstacles that can be difficult to prove at trial.¹⁹⁸

Victims pursuing tort claims in response to revenge porn can also allege that revenge porn constitutes “public disclosure of private facts.”¹⁹⁹ To bring this type of claim successfully, the revenge porn victim must prove that the defendant publicized an element of her private life that would be highly offensive to a reasonable person and is not a legitimate public concern.²⁰⁰ This tort is disfavored in many states because of the concern for individuals’ First Amendment right to uncensored speech.²⁰¹ However, only Indiana and North Carolina have explicitly rejected recognizing the tort of public disclosure of private facts.²⁰²

Revenge porn victims suing in tort can also invoke the theory of “intentional infliction of emotional distress.”²⁰³ To prevail, the victim must establish that the defendant’s conduct was extreme and outrageous, and that he acted at least recklessly to cause her severe

196. According to the Second Restatement of Torts, a violator of Intrusion upon Seclusion is “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [and] is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” *Id.*

197. Tigran Palyan, Comment, *Common Law Privacy in a Not so Common World: Prospects for the Tort of Intrusion Upon Seclusion in Virtual Worlds*, 38 SW. U. L. REV. 167, 180 n.106 (2008) (citing *Hougum v. Valley Mem’l Homes*, 574 N.W.2d 812, 816 (N.D. 1998) and *Jewell v. N. Big Horn Hosp. Dist.*, 953 P.2d 135, 139 (Wyo. 1998)).

198. *See supra* note 196 and accompanying text.

199. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

200. According to the Second Restatement of Torts, a violator of public disclosure of private facts is “[o]ne who gives publicity to a matter concerning the private life of another [and] is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” *Id.*

201. 123 AM. JUR. *Trials* 433 § 7 (2012).

202. *Id.* (citing *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 693 (Ind. 1997) and *Hall v. Post*, 372 S.E.2d 711, 712 (N.C. 1988) in which both courts decline to adopt the tort of publicizing private facts).

203. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

emotional distress.²⁰⁴ Similar to the other tort claims, the statute imposes high burdens for the victim to overcome through its strong language, which may prevent revenge porn victims from successfully obtaining relief.

However, commencing any of these claims presents several problems for victims. The first is that filing a claim takes not only time, but also money. Women could accumulate tens of thousands of dollars in legal fees without ever seeing a result.²⁰⁵ Victims may also have a difficult time finding a lawyer to take their case, as one lawyer estimates there are only four or five in the country who take on revenge porn cases.²⁰⁶ Even if the victims were able to surmount these hurdles and begin legal proceedings, defendants often do not have enough money to make a lawsuit worth the expense.²⁰⁷

Women may also be reluctant to pursue civil redress because it may increase publicity surrounding the intimate photographs.²⁰⁸ Additionally, prosecution could renew the original rage in their ex to repost the pictures on different websites. The case may also attract new viewers to the embarrassing photos, which could deter victims from coming forward.

2. *Other Criminal Statutes Can Only Help in Limited Circumstances*

Beyond copyright and tort law, victims of revenge porn can try to get law enforcement to prosecute their offenders through several

204. According to the Second Restatement of Torts, a person guilty of outrageous conduct causing severe emotional distress is “(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another [and] is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” *Id.* However, a recent plaintiff in Texas obtained a \$500,000 judgment for emotional distress. Brian Rodgers, *Jury Awards \$500,000 in ‘Revenge Porn’ Lawsuit*, HOUS. CHRON. (Feb. 21, 2014), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php>.

205. Cale Guthrie Weissman, *Infographic: The Laws Are Imperfect, but Here’s What Revenge Porn Victims Can Do*, PANDODAILY (Oct. 8, 2013), <http://pando.com/2013/10/08/infographic-the-laws-are-imperfect-but-heres-what-revenge-porn-victims-can-do/>.

206. Laird, *supra* note 39, at 49 (quoting revenge porn lawyer Marc Randazza, “[N]ot too many lawyers do this work. ‘There are only about four or five of us in the whole country[.]’”).

207. *Id.* at 50.

208. Danielle Citron, *How to Make Revenge Porn a Crime*, SLATE (Nov. 7, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/making_revenge_porn_a_crime_without_trampling_free_speech.html.

criminal statutes. These statutes include cyberstalking statutes, cyberharassment statutes, blackmail statutes, and hacking statutes.

a. Cyberharassment and Cyberstalking Statutes

The first criminal avenue that may be utilized is cyberstalking or cyberharassment statutes.²⁰⁹ Federally, it is a crime to use interstate commerce to transmit an obscene image with the intent to “abuse, threaten, or harass another person.”²¹⁰ The federal cyberstalking statute also makes it a crime to use any electronic communication with the intent to harass someone, intimidate them, or place them under surveillance when their conduct causes substantial emotional distress to a person.²¹¹ All fifty states have adopted their own cyberstalking and/or cyberharassment statutes.²¹²

Cyberstalking or cyberharassment statutes may be inadequate for victims of revenge porn because the state often has to show that the photographs are part of a larger pattern indicative of the defendant’s willingness to stalk or harass her.²¹³ The prosecution would also be required to prove that the defendant posted the photographs with the *intent* to harass, abuse, or threaten the subject.²¹⁴ Defendants could easily claim they were motivated by other desires: fame, money, or fulfilling their own sexual fantasies.²¹⁵ Of course, juries may not

209. See *infra* notes 210–11 and accompanying text.

210. 47 U.S.C. § 223 (2012) (“(a) Prohibited acts generally Whoever— (1) in interstate or foreign communications— (A) by means of a telecommunications device knowingly— (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or child pornography, with intent to annoy, abuse, threaten, or harass another person.”).

211. 18 U.S.C. § 2261A (Supp. 2013) (“Whoever— (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that— (A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2261(b) of this title.”).

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

213. Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper* 4 (Cyber C.R. Initiative, 2013) [hereinafter Franks, *Working Paper*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537&download=yes.

214. See 18 U.S.C. § 2261A; 47 U.S.C. § 223.

215. Franks, *A Quick Guide*, *supra* note 38.

believe this argument. At the very least, proving intent would be difficult in this context compared with crimes which have a more objective manifestation of the defendant's intent.²¹⁶

b. Blackmail Statutes

The second criminal statute prosecutors can use against revenge porn posters is a blackmail statute, when the poster first threatens the victim. Like Annmarie, many victims of revenge porn are first threatened by their ex-boyfriend before he leaks her private photographs.²¹⁷ In one instance of blackmail, an Oklahoma State student videotaped himself and his nineteen-year-old girlfriend during sexual intercourse.²¹⁸ After she ended the relationship, he threatened to post the video online unless she agreed to continue to have sex with him.²¹⁹ She went to the police, and he was later charged with felony blackmail.²²⁰

Posters can be charged with blackmail at the federal²²¹ and state levels.²²² However, these statutes do not apply to users who did not first threaten their former lovers before posting the picture.²²³ And, as demonstrated by the story of Annmarie, even when girls do go to the police after being threatened, these statutes are not always utilized.²²⁴ Thus, blackmail statutes appear to be mostly ineffective at combating non-consensual pornography.

c. Anti-Hacking Statutes

The third criminal law that can be used against some revenge porn posters is an anti-hacking statute. As discussed in Part I, notorious revenge porn entrepreneur Hunter Moore was indicted at the end of

216. For example, prosecutors usually have an easier time proving that offenders of violent crimes intended to harm the victim.

217. See *supra* notes 88–92 and accompanying text.

218. Franks, *Unwilling Avatars*, *supra* note 93, at 239.

219. *Id.*

220. *Id.* The student later pled guilty to disorderly conduct. *Id.*

221. See 18 U.S.C. § 873 (2012) (“Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both.”).

222. See Paul H. Robinson et. al., *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, 89 TEX. L. REV. 291, 308 (2010). All states have some form of a blackmail statute, although the requirements differ by jurisdiction. See *id.* 308–12.

223. See *supra* note 210–11.

224. See *supra* text accompanying notes 11–12.

2013 on conspiracy and computer hacking charges for allegedly directing a co-conspirator to break into private email accounts in order to obtain nude photographs for his website.²²⁵ Moore and his co-conspirator were charged under federal statutes prohibiting fraud with connection to computers²²⁶ and aggravated identity theft.²²⁷ These statutes prohibit accessing another's computer without permission and subsequently acquiring information from that protected computer, as well as transferring this information.²²⁸ However, this statute would not apply to those individuals who had a picture sent to them, or those who originally took the photo. Moore's infamy likely attracted investigation, but low-level hackers may escape prosecution due to the difficulty of tracking people over the Internet.²²⁹

d. Problems with Criminal Statutes Currently Available to Revenge Porn Victims

One of the problems with currently available statutes prohibiting cyberharassment, blackmail, and hacking is their lack of enforceability.²³⁰ Even though victims may be able to recover through one of the current remedies, police are not always aware of how they apply.²³¹ This may lead officers to tell women to wait until a crime occurs offline.²³²

225. Indictment, *United States v. Moore*, No. CR13-0917 (C.D. Cal. Oct. 2013), available at http://www.wired.com/images_blogs/threatlevel/2014/01/revenge-porn-Moore-Evens-indictment.pdf.

226. 18 U.S.C. § 1030(a)(2)(C) (2006) ("Whoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer . . . shall be punished as provided in subsection (c) of this section."). Moore was charged under the provision dictating punishment when the information is used for commercial gain. Indictment, *Moore*, No. CR13-0917.

227. 18 U.S.C. § 1028A(a)(1) (2006) ("Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.").

228. *See id.*; *see also* 18 U.S.C. § 1030(a)(2)(C).

229. *See supra* note 172 and accompanying text.

230. *See* Franks, *Unwilling Avatars*, *supra* note 93, at 259.

231. *See* Laird, *supra* note 39, at 48 ("But Westby has also found, in her work as a consultant on online privacy and security, that law enforcement isn't fully aware of how existing laws might apply. With one client who was being cyberstalked, she had to convince the police that criminal laws apply.").

232. *See* Citron, *Law's Expressive Value*, *supra* note 63, at 402–03 ("Officers are often either incapable of properly investigating harassment or unwilling to do so until

[T]he trivialization of cyber gender harassment has an unfortunate consequence: the underenforcement of criminal law. Targeted individuals often refrain from reporting cyberharassment to authorities, fearing it will not be taken seriously. Law-enforcement agencies refuse to pursue cyberharassment complaints on the grounds that the conduct is legally insignificant, in much the same way that prosecutors once refused to file charges in cases involving gender-specific sexual assaults such as domestic violence and rape. Law's underenforcement may be due to the absence of training about cyberharassment.²³³

This lack of education for police officers about current cyber-harm statutes (which may not apply to many victims),²³⁴ compounded with the difficulty of finding an anonymous user without a website's help, gives victims little hope that anyone will be held responsible for their harm.²³⁵

3. *Criminal Laws Directly Addressing the Problem of Revenge Porn*

To date, six states have adopted anti-revenge porn legislation, but they generally fall into two categories of statutes: ones that follow the New Jersey model and ones that follow the California model.²³⁶ New Jersey and California were the first two states with statutes prosecutors could utilize to combat revenge porn, but each state differs significantly in its statutory requirements.²³⁷ Florida has already considered a revenge porn bill, but it failed to pass.²³⁸ Internationally, France criminalized "taking, recording or transmitting the picture of a person who is within a private place, without the consent of the person concerned,"²³⁹ and in 2014, Israel banned online distribution of sexual pictures or videos without the subjects' consent, which carries a sentence of up to five years in prison.²⁴⁰

it has traveled offline. Officers often advise victims to ignore the cyberharassment until that time.").

233. *Id.* at 402.

234. *See supra* note 213–16 and accompanying text.

235. *See* Franks, *Unwilling Avatars*, *supra* note 93, at 259.

236. *See infra* Parts II.B.3.a–b.

237. *See id.*

238. *See infra* Part II.B.3.c.

239. CODE PÉNAL [C. PÉN.] art. 226-1-2c (Fr.).

240. Jonathan Lis, *Israel Bans Posting Nude Photos, Sex Films Online*, HAARETZ (Jan. 6, 2014, 9:22 PM), <http://www.haaretz.com/news/national/1.567356>.

a. New Jersey Model

New Jersey was the first state to enact a statute that allowed for the criminal prosecution of revenge porn distributors, although this was probably not the original purpose of the statute when it was passed a decade ago.²⁴¹ The relevant portion of the statute criminalizes disclosure of 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 penetration or sexual contact, unless that person has consented to such disclosure.”²⁴² New Jersey divides crimes by degrees, ranging from first to fourth instead of misdemeanors and felonies.²⁴³ The non-consensual disclosure of sexual photographs or videos in New Jersey is a crime in the third degree,²⁴⁴ punishable for up to five years in prison or a \$30,000 fine, which is comparable to a felony in other states.²⁴⁵

The New Jersey State Senate Committee, which passed the legislation, focused on the non-consensual recording and observation aspects of the statute,²⁴⁶ rather than the non-consensual disclosure.²⁴⁷

241. *See infra* note 242 (statute became effective in 2004).

242. N.J. STAT. ANN. § 2C:14-9(c) (West 2004).

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. For purposes of this subsection, “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine not to exceed \$30,000 may be imposed for a violation of this subsection.

Id.

243. *See* N.J. STAT. ANN. § 2C:1-4(a) (West 1981) (“An offense defined by this code or by any other statute of this State, for which a sentence of imprisonment in excess of 6 months is authorized, constitutes a crime within the meaning of the Constitution of this State. Crimes are designated in this code as being of the first, second, third or fourth degree.”).

244. N.J. STAT. ANN. § 2C:14-9(c).

245. O’Connor, *supra* note 45. This would make the offense a felony in other states. *See, e.g.*, Habitual Felon and Previous Convictions from New Jersey, N.C. CRIM. L. (Feb. 11, 2013), <http://nccriminallaw.sog.unc.edu/habitual-felon-and-previous-convictions-from-new-jersey/>.

246. The observation and recording provisions are as follows:

a) An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person’s consent and under circumstances in which a reasonable person would not expect to be observed.

The legislative history illustrates the state senate committee's recognition of individuals' right to privacy over these private moments.²⁴⁸ The committee noted, "[t]his [bill] recognizes that people have a right to control the observation of their most intimate behavior under circumstances where a reasonable person would not expect to be observed."²⁴⁹

A major advantage of the New Jersey statute over other revenge porn statutes is it lacks the "intent to harass" requirement that other state and federal statutes mandate.²⁵⁰ This closes the loophole for defendants claiming that they were not motivated by a desire to humiliate or harass the victim, but posted or sent the photographs for purely personal reasons. Instead, the New Jersey statute is aimed at whether the person knew they were not licensed or privileged to disclose the intimate images without the depicted person's consent.²⁵¹

It is still unsettled whether or not New Jersey's statute violates the First Amendment.²⁵² It may do so because it distinguishes content based on the sexual nature of the picture or recording, and content-based distinctions require a higher level of scrutiny.²⁵³ However, the

b) An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

N.J. STAT. ANN. § 2C:14-9(a)-(b).

247. S. Comm. Statement, 210th Leg., S.B. 2366 (N.J. 2003).

248. *Id.* The law was used to prosecute Tyler Clementi's college roommate, Dharun Ravi. John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 18 (2012). Clementi asked Ravi if he could have use of their dorm room privately for a few hours. *Id.* Ravi agreed, but unbeknownst to Clementi, Ravi left his laptop open with his built-in webcam on and used it to stream Clementi's sexual encounter with another male at school without Clementi's consent or knowledge. *Id.* Tragically, Clementi committed suicide a few days later. *Id.*

249. N.J. S. Comm. Statement, 210th Leg., S.B. 2366.

250. *Cf.* N.J. STAT. ANN. § 2C:14-9.

251. N.J. STAT. ANN. § 2C:14-9(c).

252. *See infra* note 253.

253. *See* Humbach, *supra* note 247, at 22-23 (internal quotations omitted) ("This statute is a content-based regulation of expression because it prohibits disclosures involving only certain kinds of content (intimate exposure, sexual penetration, or sexual contact). Regulations that discriminate based on content are normally invalid, unless they can pass strict scrutiny. The strict-scrutiny standard requires that a content-based regulation be narrowly tailored to promote a compelling Government interest, and there must not be a less restrictive alternative [that] would serve the Government's purpose. Whether New Jersey's sex-focused statute serves a compelling governmental interest, or whether a similar statute could be crafted to

law is still in effect and is currently used to charge individuals posting scandalous pictures of their former partners on the Internet.²⁵⁴

Idaho passed a bill similar to the New Jersey statute in March 2014. The statute makes it a felony to distribute intimate pictures of another when the actor knew or should have known that at least one party understood that the image was to remain private.²⁵⁵ Instead of enacting an entirely new law, the Idaho legislature opted to amend and expand their existing video voyeurism law to encompass revenge porn offenders.²⁵⁶ Although the statute has one element dissimilar to the New Jersey statute, that the defendant know that the parties agree that the photograph should remain private,²⁵⁷ it does not have other requirements that states like California impose, which could enable defendants to escape liability.²⁵⁸

Wisconsin quickly followed Idaho's lead and passed its own anti-revenge porn statute in April 2014.²⁵⁹ The law criminalizes posting sexual or nude photographs of another when the actor knows he or she does not have the consent of the subject of the photo.²⁶⁰ The offense is a Class A misdemeanor.²⁶¹ This law parallels the New Jersey statute in its lack of intent requirement and focus on knowledge of consent.

b. California Model

California criminalized nonconsensual pornography in October 2013.²⁶² Unlike New Jersey, California's law was passed to directly

serve such an interest, appears questionable at present.”). See *infra* notes 283–93 and accompanying text for more First Amendment analysis.

254. O'Connor, *supra* note 45. After “A”, the subject of the piece, contacted police when her ex-boyfriend posted dozens of nude pictures of her on various social media websites, they charged him with the New Jersey invasion of privacy statute. *Id.*

255. IDAHO CODE ANN. § 18–6609(2)–(3) (West 2014).

256. *See id.*

257. Even so, the California law requires the agreement of both parties about the level of privacy of the photo, CAL. PENAL CODE § 647(j)(4)(A) (West 2013) (emphasis added) (“Any person who photographs by any means the image of the inmate 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.”), while the Idaho law only requires that one party thought that the photo should remain private. *See* IDAHO CODE ANN. § 18–6609(2)–(3).

258. *See infra* Part II.B.3.b.

259. S.B. 367, 2013–2014 Leg., Reg. Sess. (Wis. 2014).

260. WIS. STAT. ANN. § 942.09(3m)(a) (West 2014).

261. *Id.*

262. *See* CAL. PENAL CODE § 647(j)(4).

address the growing problem of revenge porn.²⁶³ In particular, the law prohibits:

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.²⁶⁴

The offense is classified as a misdemeanor.²⁶⁵

California's law has an advantage over New Jersey's statute because the law applies even if the photograph was originally taken with consent.²⁶⁶ The ACLU originally fought an earlier version of the statute, claiming that it would infringe upon individual constitutionally protected free speech rights.²⁶⁷ However, the organization withdrew their opposition after the currently effective version was proposed.²⁶⁸

Despite the advantages California's law presents over the New Jersey model, journalists have pointed to several of the statute's shortcomings. The main concern is that the law only applies to defendant distributors who were also the original photographer.²⁶⁹ If the victim took a picture of herself and sent it to her boyfriend, who subsequently forwarded or posted it, the law would not apply.²⁷⁰ The statute also does not apply to hackers who redistribute pictures after

263. See Mark Melnicoe, *California's Crackdown on Revenge Porn Ready for Final Approval*, SALON (Sept. 11, 2013, 5:15 PM), http://www.salon.com/2013/09/11/california_s_crackdown_on_revenge_porn_set_for_final_approval_newscred/.

264. CAL. PENAL CODE § 647(j)(4)(A). The statute defines "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." CAL. PENAL CODE § 647(j)(4)(B).

265. CAL. PENAL CODE § 647. The penalty is up to six months in jail and a fine of up to \$1000. Natasha Lennard, *California Bans Revenge Porn*, SALON (Oct. 2, 2013), http://www.salon.com/2013/10/02/california_bans_revenge_porn/.

266. Melnicoe, *supra* note 263.

267. Lennard, *supra* note 265.

268. *Id.*

269. See Julia Dahl, "*Revenge Porn*" Law in California a Good First Step, but Flawed, Experts Say, CBS NEWS (Oct. 3, 2013), http://www.cbsnews.com/8301-504083_162-57605761-504083/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/; Heather Kelly, *New California 'Revenge Porn' Law May Miss Some Victims*, CNN (Oct. 3, 2013), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/>; Grace Wyler, *Do Revenge Porn Laws Actually Help Anyone?*, MOTHERBOARD (Oct. 9, 2013), <http://motherboard.vice.com/blog/do-revenge-porn-laws-actually-help-anyone>.

270. See Dahl, *supra* note 269; Kelly, *supra* note 269; Wyler, *supra* note 269.

breaking into a victim's phone or computer.²⁷¹ These two exceptions leave the majority of defendants untouchable by the law. Holly Jacobs estimates that of the thousand victims that have contacted her through her website, EndRevengePorn.com, eighty percent took the offending pictures themselves.²⁷²

Another issue the California statute presents is that the prosecution must prove that the defendant intended to cause serious emotional distress, and that the victim suffered serious emotional distress.²⁷³ As discussed in Part II, proving the defendant's rationale for disseminating the nude photographs can create an easy loophole for men to claim that they were simply seeking fame or money, and not the humiliation of their ex-partner.²⁷⁴ Further, requiring the prosecution to show that the victim suffered emotional distress would likely require her to testify in court and face cross examination about her traumatic experience.²⁷⁵ This element may further discourage women from coming forward, as the publicity from their testimony may put their photographs in the spotlight and encourage more traffic to offending websites.

Mary Anne Franks criticized the emotional distress provision, stating, "[t]his is a crime against the state . . . so the victim should not have to show damages."²⁷⁶ The problem with Franks' argument is that criminal law frequently requires prosecutors to prove the victim suffered some harm.²⁷⁷ For example, in New York, to be convicted of assault, the state must prove the defendant caused physical injury to another, requiring the prosecutor to show physical injury in a victim.²⁷⁸ The difference between the statutes in California and New

271. Eric Goldman, *California's New Law Shows It's Not Easy to Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:30 PM) [hereinafter Goldman, *CA Law*], <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/>. Although, if found, hackers could still be prosecuted under hacking statutes. See *supra* Part II.B.2.c.

272. Jacobs, *supra* note 154.

273. CAL. PENAL CODE § 647(j)(4)(A) (West 2013).

274. Wyler, *supra* note 269.

275. Eric Schulzke, *California Lawmakers Target 'Revenge Porn' but Miss, Critics Say*, DESERET NEWS (Sept. 8, 2013), <http://www.deseretnews.com/article/865586019/California-lawmakers-target-revenge-porn-but-miss-critics-say.html>.

276. *Id.*

277. See *infra* note 278 and accompanying text.

278. N.Y. PENAL LAW § 120.00 (McKinney 2014) ("A person is guilty of assault in the third degree when: 1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or 2) He recklessly causes physical injury to another person; or 3) With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.").

Jersey is that New Jersey punishes the actual act of disseminating compromising photographs if the distributor knows he does not have permission.²⁷⁹ California, on the other hand, focuses on punishing the same action only when it has negative results.²⁸⁰

Another criticism of the California statute is the fact that the image must be taken “under circumstances where the parties agree or understand that the image shall remain private”²⁸¹ This may lead to disputes over what the parties’ understanding was over the level of privacy the picture was to be afforded.²⁸² And in the confines of the intimate settings, where these photographs are usually taken, it is difficult to know what actually transpired between two parties.²⁸³ As such, the California statute has too many pitfalls in order to be effective against the majority of revenge pornography defendants.

Virginia and Utah passed statutes similar to California’s, where they both have intent requirements that accompany the offense. Virginia recently passed a bill making it unlawful for anyone to maliciously distribute sexualized images of another person without license to do so and with “intent to coerce, harass, or intimidate”²⁸⁴ The offense is classified as a Class 1 misdemeanor.²⁸⁵ Utah became the sixth state to criminalize revenge porn, in a statute which makes it unlawful to distribute an “intimate image” of another with “intent to cause emotional distress” if three other conditions are met.²⁸⁶ First, the offender must know that the individual depicted did not consent to dissemination.²⁸⁷ Second, the photograph must have been taken in a situation where the depicted individual had a reasonable expectation of privacy.²⁸⁸ Last, the subject of the photograph must have actually suffered serious emotional distress.²⁸⁹

279. See N.J. STAT. ANN. § 2C:14-9(c) (West 2004); *supra* note 240 and accompanying text.

280. See CAL. PENAL CODE § 647(j)(4) (West 2013); *supra* note 257 and accompanying text.

281. CAL. PENAL CODE § 647(j)(4)(A).

282. Goldman, *CA Law*, *supra* note 271.

283. See *infra* text accompanying notes 353–57, 384–87 for additional criticism of California’s law.

284. Rachel Weiner, *Bill Banning Revenge Porn Passes in Virginia*, WASH. POST (Feb. 28, 2014), http://www.washingtonpost.com/local/virginia-politics/bill-banning-revenge-porn-passes-in-virginia/2014/02/28/7ccd021c-a0c1-11e3-b8d8-94577ff66b28_story.html.

285. *Id.*

286. H. B. 71, 2014 Leg., Gen. Sess. § 76-5b-203(2) (Utah 2014).

287. *Id.*

288. *Id.*

289. *Id.*

While these statutes do not have every limitation of California's (for example, the laws apply whether or not the poster was also the photographer), the intent requirement is still a serious enough loophole that it may be a barrier to convictions.

c. Failed Revenge Porn Legislation in Florida

Florida has already presented revenge porn legislation, which failed in May 2013.²⁹⁰ The proposed bill was limited in the types of activity it criminalized. First, it required that the sexual photograph also be accompanied by personal information about the subject.²⁹¹ While this element is present in many cases, the statute would not apply to photographs posted by themselves, without the victim's name or address.²⁹² Although the statute was probably aimed at the photographs, which could be the most damaging to victims' reputations, even without this information, if the victim's face is in the image, she would still be easily identifiable to others.²⁹³ The other problematic requirement for revenge porn victims is that the Florida bill only applied to pictures posted over social media.²⁹⁴ This would exempt individuals who emailed, texted, or mailed their photographs, which can still do a significant amount of damage to victims and their reputations.²⁹⁵ The bill failed due to free speech concerns,²⁹⁶ but a new law may be forthcoming.²⁹⁷

290. S.B. 946, FLA. STAT. § 847.0042 (Fla. 2013), *available at* <http://www.flsenate.gov/Session/Bill/2013/0946/BillText/Filed/HTML>. The failed provision stated:

Nude depictions with personal identifying information.—(1) A person may not knowingly use a computer or other device capable of electronic data transmission or distribution to transmit or post to a website or any other social networking service, or cause to be posted to a website or any other social networking service, any photograph or video of an individual which depicts nudity and contains any of the depicted individual's personal identification information, as defined in s. 817.568, or counterfeit or fictitious information purporting to be such 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.

Id.

291. Suzanne Choney, 'Revenge porn' Law in California Could Pave Way for Rest of Nation, NBC NEWS (Sept. 3, 2013, 4:34 PM), <http://www.nbcnews.com/technology/revenge-porn-law-california-could-pave-way-rest-nation-8C11022538>.

292. *See* Fla. S.B. 946.

293. *See* Choney, *supra* note 291.

294. *See* Fla. S.B. 946.

295. *See id.*

d. The Lack of Federal Legislation Addressing Revenge Porn

No federal statute currently exists that directly addresses the problem of revenge porn. Anti-revenge porn advocates stress the need for the recognition of this crime on a federal level because cyber crimes mostly occur across state lines.²⁹⁸ Additionally, if an injunction against a photograph were ordered in one state, it could easily be uploaded in another.²⁹⁹ Federal regulation of revenge porn would be particularly advantageous in light of the barriers posed by Section 230. Though Section 230 trumps any state criminal law, if a federal criminal law went into effect, websites could face liability for posting revenge porn.³⁰⁰

California House Representative Jackie Speier intends to introduce a federal bill targeted at revenge porn.³⁰¹ The proposed legislation has not been finalized and has details pending, such as the maximum punishment.³⁰² Mary Anne Franks is participating in drafting the legislation.³⁰³ “If disseminating ‘revenge porn’ becomes a federal crime, websites would not be able to raise the special Section 230 defense that intermediaries are sometimes able to raise with regard to other unlawful activity,” she stated.³⁰⁴

296. Associated Press, *Calif. Gov. Brown Signs Anti-Revenge Porn Bill*, USA TODAY (Oct. 1, 2013, 11:05 PM), <http://www.usatoday.com/story/news/nation/2013/10/01/california-brown-anti-revenge-porn-bill/2906305/>.

297. Bob Kealing, *Senate Bill Would Make Revenge Porn Illegal in Florida*, WESH.COM (Feb. 7, 2014), <http://www.wesh.com/news/central-florida/orange-county/senate-bill-would-make-revenge-porn-illegal-in-florida/-/12978032/24361798/-/791928/-/index.html#ixzz2sxYhBKWZ>.

298. See Franks, *Working Paper*, *supra* note 213, at 12.

299. See Patt Morrison, *‘Revenge Porn’ May Soon Be a Crime in California*, L.A. TIMES (Aug. 26, 2013, 11:46 AM), <http://www.latimes.com/opinion/opinion-la/la-ol-revenge-porn-should-it-be-a-crime-20130826,0,2875247.story#axzz2il7cuBsl>.

300. Steven Nelson, *Federal ‘Revenge Porn’ Bill Will Seek to Shriveled Booming Internet Fad*, U.S. NEWS (Mar. 26, 2014, 6:01 PM) [hereinafter Nelson, *Federal ‘Revenge Porn’ Bill*], <http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shriveled-booming-internet-fad>; See Steven Nelson, *New Federal Legislation Could Take a Nip Out of ‘Revenge Porn’*, U.S. NEWS (Nov. 21, 2013, 10:52 AM) [hereinafter Nelson, *New Federal Legislation*], <http://www.usnews.com/news/articles/2013/11/21/new-federal-legislation-could-take-a-nip-out-of-revenge-porn>.

301. Nelson, *Federal ‘Revenge Porn’ Bill*, *supra* note 300.

302. *Id.*

303. *Id.*

304. *Id.* (internal quotations omitted).

e. Arguments Against Criminalizing Revenge Porn Legislation

The first issue with criminalizing nonconsensual pornography is that it may be difficult to track down the offending user if he hides his identity, especially without the aid of the website.³⁰⁵ Second, while in criminal cases victims do not expend time and money suing the defendant, there is the same problem present in civil cases of the possibility of an increase in publicity.³⁰⁶ Because revenge porn is a violation of privacy, bringing suit could exacerbate the victim's harm by further degrading their personal lives.³⁰⁷

Third, Eric Goldman, a professor at Santa Clara University School of Law, is skeptical that new laws would provide any additional relief to victims that do not already exist in our current anti-harassment and anti-stalking statutes.³⁰⁸ He also argues that society will eventually adjust our social norms: as nude photographs become more ubiquitous, the less novel they will be and less of a "taint" will be associated with them.³⁰⁹ Goldman posits that we will eventually develop a type of "blindness" to these sexual depictions.³¹⁰ He compares revenge porn websites to the website Zillow, where individuals can look up the value of their neighbor's house.³¹¹ Goldman asserts that it is now "bad etiquette" to look up the value of a friend's home, or at least to bring it up publicly, and the same will eventually be true for revenge porn websites.³¹² He urges that if society can wait until views shift to this kind of understanding, it will not need any new laws to punish this behavior.³¹³

Goldman's argument parallels one that commentators have made concerning future political candidates' debauchorous online photographs.³¹⁴ While a scandalous picture of a politician is shocking now, in a few decades, younger generations may not have the same

305. See Bazelon, *supra* note 182.

306. *Id.*

307. *See id.*

308. Somini Sengupta, 'Revenge Porn' Could Be Criminal Offense in California, N.Y. TIMES BITS BLOG (Aug. 27, 2013 8:18 AM), <http://bits.blogs.nytimes.com/2013/08/27/revenge-porn-could-be-criminal-offense-in-california/>.

309. Goldman, *Revenge Porn Sites Like Texxxan*, *supra* note 147.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. Jeremy W. Peters & Brian Stelter, *The Facebook Skeletons Come Out*, N.Y. TIMES, Nov. 5, 2010, <http://www.nytimes.com/2010/11/07/fashion/07indiscretions.html>.

shaming instinct that exists today.³¹⁵ James Lull, a communications professor at San Jose University stated,

We're in kind of a cultural transformation right now . . . It's a relatively slow process in political terms. But culturally we're going to get used to this. So I'm not sure the 'Oh my God!' feelings we're getting today will be the same on down the line. I think there's going to be an erosion to the impact.³¹⁶

The logic is that if everyone has embarrassing online pictures, whether they be drunken Facebook photographs or nude photographs of themselves, the stigma will vanish.³¹⁷ However, this may be "overly optimistic."³¹⁸

A fourth argument against new laws criminalizing revenge porn is that several revenge porn websites have already been shut down, which could signal the possibility of the approaching extinction of all revenge porn websites.³¹⁹ Goldman argues that many of these controversial websites get shut down rather quickly, after succumbing to public pressure, bad publicity, unhappy advertisers, or even legal risks.³²⁰ If these websites will naturally buckle on their own accord, this evidences that current laws may be sufficient to combat the problem.³²¹

f. First Amendment Concerns

The biggest hurdle new anti-revenge porn legislation faces is the free speech concerns arising under the First Amendment.³²² Two

315. "By the time the next generation comes into power, they'll just assume this is how it's always been," said Anil Dash, a technology consultant. *Id.*

316. *Id.*

317. *Cf. id.* As Daniel J. Solove, a professor at George Washington Law School and author of *THE FUTURE OF REPUTATION* said, "a lot of people make the argument that if everyone's warts are exposed, hey, Everybody has warts, we'll live with it." *Id.* (internal quotations omitted).

318. *See id.* (quoting Solove).

319. Meg Leta Ambrose, *A Digital Dark Age and the Right to Be Forgotten*, J. INTERNET L., Sept. 2013, at 1, 17 ("Some harmful information will last beyond periods that seem appropriate, but a great deal of harmful information will disappear. For example, the revenge porn site IsAnyoneUp.com was shut down on April 19, 2012, taking down all of its anonymously submitted humiliating images with it.").

320. Goldman, *Revenge Porn Sites Like Texxxan*, *supra* note 147 (noting that, along with IsAnyoneUp, JuicyCampus and People's Dirt met their demise).

321. *Id.*

322. The relevant portion of the First Amendment states, "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. An entire Note could be dedicated to the First Amendment issues arising from revenge porn legislation, and I am only briefly discussing them here in the interest of providing a complete picture of the current legal landscape. *Compare* Franks, *Working Paper*,

views have emerged regarding the rights of an individual to disseminate sexually explicit photographs of another without their consent. One analysis of the issue is that anti-revenge porn statutes violate the First Amendment; an opposing view is that revenge pornography is not protected free speech.

Those arguing that revenge porn restriction would curtail free speech point to the fact that even sexually graphic interests, short of obscene, are protected by the First Amendment.³²³ The Supreme Court has consistently held individuals' First Amendment rights in the highest regard, even when the speech expressed is of the most unpleasant character.³²⁴ Additionally, the photographs could be found to have artistic value, which is protected by the First Amendment.³²⁵

The opposing view does not see the nonconsensual disclosure of another's intimate photographs as a First Amendment right. The reasoning is that the photographs are not proffered as matters affecting public discourse, and are of a purely private concern.³²⁶ Private matters, this side argues, do not warrant the same type of First

supra note 213, at 16–19, and Danielle Citron, *Squaring Revenge Porn Criminal Statutes with First Amendment*, CONCURRING OPINIONS (Oct. 13, 2013) [hereinafter Citron, *First Amendment*], <http://www.concurringopinions.com/archives/2013/10/squaring-revenge-porn-criminal-statutes-with-first-amendment-protections.html>, with Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, DEFENDING PEOPLE (Oct. 14, 2013), <http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional.html>. For a more thorough analysis of these concerns, see Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

323. Bennett, *supra* note 322.

324. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011) (upholding the Westboro Baptist Church members' right to conduct an anti-gay protest outside a military funeral because the speech they were expressing, "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import"); *United States v. Stevens*, 130 S. Ct. 1577 (2010) (discussing where the court upheld the constitutionality of "crush videos," which showed the illegal torture and killing of animals); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (holding a Minnesota statute facially invalid for its content based distinction, which prohibited conduct such as burning a cross or Nazi swastika when the individual knows that it will arouse anger in others).

325. See *Foster v. Svenson*, 2013 N.Y. Misc. Lexis 3425. In *Foster*, plaintiffs requested a preliminary injunction against their defendant-photographer neighbor for taking pictures of them and their children from his apartment, through their window. *Id.* at *1–2. The photos were displayed in an exhibit called "The Neighbors." *Id.* The plaintiffs had never consented to having their pictures taken or displayed. *Id.* The judge denied the plaintiffs' request, stating that under New York law, an individual's right to privacy yielded to an artist's First Amendment rights. *Id.* at *6–10.

326. Franks, *Working Paper*, *supra* note 213, at 15.

Amendment protection as concerns affecting the public, because this type of speech does not add value to society.³²⁷ Another way revenge porn could escape First Amendment protection is if it were classified as a type of recognized unprotected speech. “Historically and traditionally, such depictions would likely have been seen as unprotected obscenity,” said Eugene Volokh, a law professor at UCLA School of Law, whose focus is First Amendment studies.³²⁸

A few commentators have voiced concerns about the impact of revenge porn legislation on censoring one recently prevalent exercise of free speech: exposure of public officials. A recent example of this phenomenon is the recent scandal concerning former congressman Anthony Weiner, who sent nude photographs to a college student.³²⁹ The concern is that the college student would be vulnerable to prosecution, which may deter him or her from sharing these pictures.³³⁰ However, these concerns may not be problematic because photographs of public officials would probably constitute a matter affecting public discourse.³³¹ Because the public has a legitimate interest in learning about the character of their representatives, published sexual photographs of them may be protected under the First Amendment.³³²

The connection between revenge porn and the First Amendment is a gray area, as revenge porn is not strictly political, high-value speech, which would warrant First Amendment protection, or even commercial speech, which is less protected. The Supreme Court will have to resolve this debate, as there are valid arguments on both sides of the issue, and no precedent directly on point. Specific revenge porn legislation faces legal hurdles and practical critiques, but it is

327. *Id.* (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-60 (1985)) (“The Supreme Court has ‘long recognized that not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection. . . .’ In contrast, speech on matters of purely private concern is of less First Amendment concern.”).

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

329. *See, e.g.*, Choney, *supra* note 291; Melnicoe, *supra* note 263.

330. *See* Choney, *supra* note 291.

331. Citron, *First Amendment*, *supra* note 322.

332. *Id.* Citron discusses Anthony Weiner, who sent sexual images to a college student who later exposed him to the press. *Id.* Citron posits that the public had a legitimate interest in viewing the pictures because it calls his judgment into question. *Id.*; *see also*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (showing where the court held broader First Amendment protections applied to speech concerning public figures).

most likely the preferable avenue for victims seeking criminal punishments for their offenders.

III. REVENGE PORN SHOULD BE CLASSIFIED AS A SEXUAL OFFENSE

Victims of revenge pornography should not be forced to wait until society begins to accept sexually graphic images of their neighbor as commonplace, which, according to Goldman, is when the sting of stigmatization will evidently evaporate.³³³ Goldman does not speculate how long this shift in acceptance will take. However, it is safe to say that waiting for a society to completely alter its understanding of an issue will not happen overnight. Simply waiting for societal attitudes to shift will not help the teenage girls committing suicide now, or the countless victims whose professional and personal lives are utterly destroyed by these posts. Under current laws, revenge porn websites are not dying out. A few have been shut down, but hundreds of others have popped up in their place.³³⁴ Existing laws, like cyberstalking and cyberharassment, do not cover all victims because they require a showing of repeat patterns of behavior.³³⁵

A. Specific Criminal Statutes that Directly Address the Severity of Revenge Porn Are Needed

While cyberharassment, cyberstalking, and blackmail statutes may help some victims, they are not directly on point, and they leave the majority of posters immune from criminal prosecution.³³⁶ Specific statutes in all states addressing revenge porn are needed because it is the best way to mitigate the problem of revenge porn. Specific laws would be beneficial for deterring future offenders. The prevailing view is that posting nude images of one's ex-partner without consent is legal, so posters shoulder no risk in uploading damaging pictures.³³⁷ This view is not only prevailing, but is also the correct view in forty-four states.³³⁸ Criminalizing the behavior would put others on notice of the consequences of non-compliance.³³⁹ Because a civil suit is not a

333. *See supra* text accompanying notes 309–13.

334. In the interest of not increasing traffic to these websites, I will not name them, although a simple Google search will provide the reader with a myriad of examples.

335. Sengupta, *supra* note 308.

336. *See supra* Part II.B.2.

337. Citron, *Law's Expressive Value*, *supra* note 63, at 376–77.

338. *See supra* Parts II.B.3.a–b.

339. *Id.*

possibility for many victims,³⁴⁰ and the pictures may never be fully expunged from the web, watching their perpetrators brought to justice may be the only consolation available for these victims.³⁴¹ Of course, the new statute would have to be combined with sufficient instruction for law enforcement, so that officers know both about the law and how to utilize it.

When states adopt criminal statutes, they can signal to the public what type of conduct they disapprove. Citron states that this is because the law plays an integral role in society's moral composition.³⁴² The law broadcasts what behavior we find objectionable through what it prohibits, and what type of harm society sees as worthy of correction.³⁴³ Other scholars find that this channel runs the other way and see the law as only responsive to the current society's moral trends.³⁴⁴ It is difficult to say whether the law is active or reactionary in relation to society's moral views, but it is most likely some combination of both.

Consider the example of sexual harassment. Workplace sexual harassment was considered fairly ordinary until courts started to punish it in the late 1970s.³⁴⁵ At that time, the social meaning of sexual harassment shifted and society began to view it as a type of gender discrimination.³⁴⁶ However, it is not a coincidence that these laws were implemented in the 1970s (and not the 1950s), after radical feminists started to define sexism and assert that men were oppressing women through sexual relations in the workplace.³⁴⁷ If

340. See *supra* Part II.B.1.

341. Morrison, *supra* note 299.

342. Citron, *Law's Expressive Value*, *supra* note 63, at 407.

343. *Id.*

344. See Eric A. Johnson, *Harm to the "Fabric of Society" as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from *Ravin v. State**, 27 Seattle U. L. Rev. 41, 56 (2003) ("The process whereby the criminal law reinforces moral reaction patterns sometimes is multifaceted and mysterious."); Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 358 (1998) ("'Wrongness' is a collective judgment of society, and laws are the political manifestation of society's collective moral ideals.").

345. Citron, *Law's Expressive Value*, *supra* note 63, at 407–08 ("[C]ourt rulings in the late 1970s and early 1980s changed the social meaning of sexual harassment by recognizing it as a form of gender discrimination. Before those decisions, only two small grassroots women's groups working against sexual abuse in the workplace existed, one of which used another name to describe the phenomenon. The media's sole coverage of the issue appeared in the women's magazine Redbook.").

346. *Id.*

347. See Lucetta Pope, *Everything You Ever Wanted to Know About Sexual Harassment but Were Too Politically Correct to Ask (or, the Use and Abuse of 'But*

revenge porn were nationally criminalized, it would convey that society condemns this behavior because lawmakers see it as important enough to allocate resources to prosecution.

State laws currently in place may not be active, but reactionary to the recent publicity of revenge porn. However, the law in New Jersey, which is probably the “best” law in terms of capturing the most revenge porn offenders due to its focus on consent and lack of loopholes, was not passed to address revenge porn.³⁴⁸ Nonetheless, it has been used to prosecute these types of perpetrators and has paved the way for other states to recognize this harm as worthy of criminalization.

If the law does shape morality, as Citron proposes, then legislation addressing revenge porn would be instrumental in edging society closer to understanding the gravity of this wrongdoing. If legislation is simply reactionary, then it needs to be passed now—while journalists are still writing about it and legislators are still interested. Victims will not suffer any less when newspapers tire of this topic, but there may be less call to action when this occurs. Either way, for these victims, society’s disapproval of their offender alone does little to vindicate their harm. Without a law criminalizing revenge porn, violated women experience the double suffering felt by victims of rape and sexual harassment before those harms were criminalized: the harm in the event itself and the non-existence of a law to address it.³⁴⁹

Even if legislation addressing revenge porn is simply responsive to a moral trend, it could still aid victims by validating their suffering. The absence of legislation presents a cyclical problem: because we view these harms as trivial, there are no criminal statutes for them, and because there are no criminal statutes for them, we see the harm as trivial.³⁵⁰ A specific legal statute would send a clear message to victims of revenge porn that their suffering is legitimate and deserving of recognition.³⁵¹ Laws targeting revenge porn could also alert police and prosecutors to start taking this type of offense seriously.³⁵²

For’ Analysis in Sexual Harassment Law Under Title VII), 30 Sw. U. L. Rev. 253, 257–58 (2001).

348. *See supra* note 241 and accompanying text.

349. *See WEST, supra* note 97, at 96.

350. “The trivialization of cyber harassment . . . may blunt the efficacy of existing criminal law Law has an important role to play in detriivializing cyber gender harassment and serving as a force of moral suasion.” Citron, *Law’s Expressive Value*, *supra* note 63, at 404.

351. *See id.* at 407.

352. Sengupta, *supra* note 308.

Revenge porn should be treated as a felony, because a severe classification reflects the amount of harm experienced by victims. California's classification of the crime as a misdemeanor completely trivializes the offense.³⁵³ By classifying the offense as a misdemeanor and requiring a showing of emotional distress, the California legislature shows that it does not see distribution of revenge porn as an objectively harmful invasion of privacy.³⁵⁴ Additionally, the anti-revenge porn law is housed in Section 647, the same section criminalizing obstructing a sidewalk while intoxicated (not in a motor vehicle),³⁵⁵ loitering at a public toilet to solicit lewd acts,³⁵⁶ and confronting someone in public for the purposes of begging.³⁵⁷ The fact that California views these offenses and revenge porn offenses alike represents that the state sees revenge porn as a minor problem.

A law with serious consequences would also signal to women that it is not their fault for trusting their partner with sensitive material. It would put others on notice that posting intimate photographs without another's consent will not be tolerated. A law would express that a woman's only options are not forgoing this type of sexual behavior or suffering in silence once targeted. The law would legitimize these women's harms, and present a clear route to fight back.

B. Revenge Porn Is a Type of Sexual Misconduct

Non-consensual pornography should be classified as a sexual offense because of its similarity to other types of sexual offenses, like sexual assault and sexual harassment. The offense is comparable to other sexual misconduct crimes because of the nature of the wrongful act, the harm that the victim experiences, and society's attitude towards the transgression.

First, revenge porn parallels other sexual crimes. The nature of the wrongdoing turns on issues of privacy, consent, and violations of the body. And as the Internet progressively becomes more realistic to

353. See CAL. PENAL CODE § 647 (West 2013). "The problem is that the [California] bill only goes halfway. It makes it a misdemeanor offense to post revenge porn only if a prosecutor shows that the poster intended to inflict emotional distress, rather than treating the act of posting a sexual photo without consent as an objectively harmful invasion of privacy. And the punishment wouldn't apply if the subject of the photo took the picture herself, which means it wouldn't help people whose exes persuaded them to hand over photos as a sign of trust." Bazelon, *supra* note 182.

354. See Bazelon, *supra* note 182.

355. CAL. PENAL CODE § 647(f).

356. CAL. PENAL CODE § 647(d).

357. CAL. PENAL CODE § 647(c).

users, virtual sexual harassment will edge closer to resembling traditional sexual crimes.³⁵⁸ Revenge porn crimes would also have similar defenses as sexual offenses: that the victim consented, or someone else other than the defendant committed the crime.

Second, the harm victims of revenge porn feel resembles the harm of victims of sexual harassment. Sexual harassment recognizes that victims do not have to be physically touched to experience real harm.³⁵⁹ Like victims of sexual harassment, revenge porn victims experience an invasion of the body—they feel dirty and humiliated by this indecent exposure.³⁶⁰ Further, online harassment has the potential to be more damaging than offline harassment.³⁶¹ When a woman is sexually harassed, her next employer will probably not find out about the crime unless she chooses to divulge it. A recent study found that eighty-one percent of employers “Google” prospective job candidates.³⁶² This means that these pictures will taint almost every future job application for the rest of the woman’s life. One revenge porn victim called the offense a “cyberrape,” which she felt adequately represented the damage she felt.³⁶³

The third similarity between other sexual crimes and revenge porn is society’s treatment of these wrongdoings. Women are told now to not send pictures to their boyfriends if they want to avoid becoming a victim of revenge porn,³⁶⁴ just as women were told to not dress a certain way to avoid being raped,³⁶⁵ or to quit their job to avoid being sexually harassed.³⁶⁶ This “boys will be boys” mentality conveys that the *women* are the ones responsible for the crime that befell them, and not the actual perpetrator.³⁶⁷ Revenge porn is only the latest in

358. Citron, *Law’s Expressive Value*, *supra* note 63, at 376 (“As the market leans toward more realistic sensory experiences in virtual worlds and as these sites become more popular, cyber gender harassment may more closely approximate conventional notions of sexual violence.”).

359. *See* WEST, *supra* note 97, at 103.

360. *See id.*

361. *See supra* notes 109–18 and accompanying text.

362. *You WILL Get Googled . . . Are You Afraid?*, DIRECTEMPLOYERS (Feb. 21, 2014), <http://www.directemployers.org/2014/02/21/you-will-get-googled-are-you-afraid/>.

363. Roy, *Battle*, *supra* note 84.

364. *See supra* note 147 and accompanying text.

365. *See* Franks, *Victim Blaming*, *supra* note 148.

366. *See* Citron, *Law’s Expressive Value*, *supra* note 63, at 398.

367. *See* Jordan Larson, *The New Pornographers*, AM. PROSPECT (Oct. 7, 2013), <http://prospect.org/article/new-pornographers> (quoting Danielle Citron) (“It’s like we went back 30 years, and the response that we see to online harassment is so similar to the ways society used to trivialize and write off sexual harassment in the workplace and domestic violence. ‘Yeah, turn your computer off, boys will be boys, it’s no big

predominately female, sexualized crimes to be trivialized by our culture.

C. Thinking about Revenge Porn Laws like Sexual Misconduct Laws

The most important legal takeaway from sexual offenses is that consent is not absolute.³⁶⁸ Historically, a woman's lack of consent to sex was not always considered in the criminal justice system.³⁶⁹ Even in the mid-twentieth century, a woman was still thought to be in a permanent state of consent to her husband.³⁷⁰ The full marital rape exemption was only completely eliminated in all states in the early 1990s.³⁷¹ Consenting to sex once does not mean that later sexual activity is necessarily consensual. It should logically follow that consenting to sharing a picture with a partner one time should not be inferred as permanent license for that person to use that private picture to humiliate and harass at any time he sees fit.³⁷²

1. *The Focus of Revenge Porn Criminal Statutes Should Be on the Defendant, Not the Victim*

In the nineteenth century, in order to prove a defendant was guilty of rape, the prosecution had to prove that she opposed the man with the "utmost resistance."³⁷³ Resistance by the victim was not just one relevant fact contextualized in the overall case, but the legal standard which the court measured consent, and the focal point of the criminal rape case.³⁷⁴ "Utmost resistance" was understood as physical struggle

deal.' Same way with sexual harassment in the workplace, it was, 'Yeah, it's just a perk for men to enjoy.' As much as we made some progress with sexual harassment in the workplace and changing social attitudes, we have a long way to go about online harassment.").

368. See generally Mary Anne Franks, *Why You Can't Punch a Boxer in the Face When He Asks You for Directions: Consent, Context, and Humanity*, CONCURRING OPINIONS (Feb. 9, 2013), <http://www.concurringopinions.com/archives/2013/02/why-you-cant-punch-a-boxer-in-the-face-when-he-asks-you-for-directions-consent-context-and-humanity.html>.

369. See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

370. See *id.* at 1376; see also MODEL PENAL CODE § 213.1 (1962) (amended 2001) ("(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if . . .").

371. See Sack, *supra* note 137, at 554.

372. See Bazelon, *supra* note 182.

373. Citron, *Law's Expressive Value*, *supra* note 63, at 392.

374. H. Lane Kneedler, *Sexual Assault Law Reform in Virginia—A Legislative History*, 68 Va. L. Rev. 459, 476 (1982); see also *supra* note 115 and accompanying

to the victim's fullest, for the entire time the sexual assault occurred.³⁷⁵ The rape conviction did not hinge on the conduct of the defendant (e.g., how much force he used), but the conduct of the victim, and if her resistance was adequate to represent her true unwillingness.³⁷⁶ This victim-focused requirement was largely derived from the fear that unchaste women would have consensual sex with the defendant and later bring false rape charges.³⁷⁷ The "utmost resistance" requirement reflected society's view that if a woman truly did not consent to the sexual act, she would fight to resist it.³⁷⁸ This onerous legal standard resulted in very few defendants being convicted of rape.³⁷⁹ The low conviction rate was also due in part to the fact that focusing on the conduct of the victim discouraged victims from coming forward to report the offense.³⁸⁰ The "utmost resistance" requirement has since been abolished.³⁸¹ Today, evidence of the victim's resistance is factually relevant at trial, but is no longer a legal element that must be proven.³⁸² Still, these reforms have not

text (discussing how these evidentiary requirements were not present in crimes that affected both men and women equally).

375. See *infra* note 376.

376. See Estrich, *supra* note 127, at 1122–23 (discussing *Brown*). In *Brown*, a sixteen-year-old girl was seized by her neighbor while walking home from her grandmother's house. *Brown v. State*, 106 N.W. 536 (1906). He forced himself upon her, and she testified at trial:

I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled.

Id. The jury found the defendant guilty of rape, but the Supreme Court of Wisconsin reversed. *Id.* The court did not hold that the defendant's conduct was insufficient to qualify as rape, but that the victim's resistance did not sufficiently express her non-consent. *Id.* "Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated." *Id.* at 538.

377. Kneedler, *supra* note 374, at 475.

378. See Estrich, *supra* note 127, at 1130.

379. See Kneedler, *supra* note 374, at 464; Wells & Motley, *supra* note 143, at 146–47.

380. See Wicktom, *supra* note 127, at 400–01 ("The inadequate definition of rape contributes to these low rates because the focus on the victim's conduct discourages reporting, the element of nonconsent is difficult to prove, and, therefore, prosecutors are reluctant to bring cases and juries are reluctant to convict. The inadequacies of rape law threaten the safety and independence of women, who are the overwhelming majority of rape victims in the United States.").

381. Wells & Motley, *supra* note 143, at 151.

382. Kneedler, *supra* note 374, at 485.

entirely shifted the focus of rape trials, as a woman's level of resistance persists as a heavy indicator of whether a crime occurred.³⁸³

California's revenge porn legislation parallels rape statutes that historically focused on the conduct of the victim in order to prove the crime.³⁸⁴ Specifically, in order to be convicted of violating the anti-revenge porn law in California, the victim must have "suffer[ed] serious emotional distress."³⁸⁵ While this requirement is likely present in nearly all revenge porn cases, this legal element puts the woman on trial, to prove that she actually suffered in order to secure a conviction. She would most likely be required to take the stand, be questioned and cross examined, and rehash the pain she experienced just to meet this requirement. Did she go to a therapist? Did she try to commit suicide? If she suffered in silence, is this *serious* enough to meet this requirement? While having a victim-focused element is necessary in many crimes, such as assault,³⁸⁶ it does not seem necessary for revenge porn. Assault is penalized more harshly if the defendant causes *serious* physical injury, rather than just physical injury, which rationalizes why the victim should testify as to the severity of the resulting harm.³⁸⁷ However, revenge porn has no such scaling offenses. Like rape, the focus should be on the non-consensual act of the defendant instead of the behavior of the victim. The additional requirement leaves room for the defense to unnecessarily badger victims on the stand about their emotional stability or possibly allow defendants to be acquitted on a technicality.

It should also be noted that the other misdemeanors in California Section 647 that are grouped with revenge porn (obstructing a sidewalk while intoxicated,³⁸⁸ loitering at a public toilet to solicit lewd acts,³⁸⁹ and confronting someone in public for the purposes of begging³⁹⁰) do not have victim conduct requirements. Obstructing a sidewalk and loitering at a public toilet do not require that anyone

383. Wells & Motley, *supra* note 143, at 152.

384. See CAL. PENAL CODE § 647(j)(4)(A) (West 2013).

385. *Id.*

386. See N.Y. PENAL LAW § 120.00 (McKinney 2014).

387. Compare N.Y. PENAL LAW § 120.05(1) ("A person is guilty of assault in the second degree when . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person . . ."), with N.Y. PENAL LAW § 120.00(1) ("A person is guilty of assault in the third degree when . . . [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person . . .").

388. CAL. PENAL CODE § 647(f).

389. CAL. PENAL CODE § 647(d).

390. CAL. PENAL CODE § 647(c).

have been harmed for a conviction.³⁹¹ The statute of confronting someone for the purpose of begging only requires that someone be “accost[ed],” not that the person suffers any kind of injury or emotional distress.³⁹² It is troubling that California chose to include that victims of revenge porn suffer serious emotional harm, when like offenses in their section have no such requirement.

While it may not be possible to completely eliminate any element that focuses on the victim, the victim focus of revenge porn statutes should be on consent. Like the “utmost resistance” requirement, mandating that the victim show that she seriously suffered emotional distress is just an additional burden that would impede justice in revenge porn cases. Eliminating this element may encourage more victims to come forward if they knew they would not necessarily have to testify. It may also result in more just convictions, as juries and judges would not be able to acquit on the basis that the victim had not adequately demonstrated that she experienced a high enough level of emotional suffering.

2. *If Revenge Porn Were Classified as a Sexual Offense, Rape Shield Laws May Apply*

By classifying revenge porn as a sexual misconduct crime, some states may be able to impose rape shield laws to protect victims. This section introduces rape shield laws generally, and outlines why these rules could be beneficial for victims of revenge porn. This part examines how these current laws might apply to revenge porn victims by discussing the similarities and distinctions between revenge porn and traditional sexual misconduct.

Rape shield laws, which prohibit the introduction of certain types of evidence at trial for crimes of sexual misconduct, are instituted in all states and by the federal government.³⁹³ States vary in the level of restriction afforded to this type of evidence.³⁹⁴ Federal rape shield laws also apply to allegations of sexual harassment.³⁹⁵ Specifically,

391. CAL. PENAL CODE § 647(d), (f).

392. CAL. PENAL CODE § 647(c).

393. 1 BARBARA BERGMAN & NANCY HOLLANDER, WHARTON’S CRIMINAL EVIDENCE § 4:41 (15th ed. 1997).

394. *See generally id.* (discussing the four different ways states have addressed rape shield laws).

395. 2 SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 26:3 (“FED. R. EVID. 412 was extended under a provision of the Violent Crime Control and Law Enforcement Act of 1994 effective December 1, 1994, to civil cases and specifically Title VII actions in which the plaintiff has alleged sexual harassment.”).

Federal Rule of Evidence 412 governs the treatment of a victim's past sexual history in a federal criminal sexual misconduct case. The relevant provisions state:

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. (1) Criminal Cases. The court may admit the following evidence in a criminal case: (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights.³⁹⁶

The purpose behind rape shield laws aligns with potential obstacles that victims of revenge porn would also face at trial. The advisory committee's notes provide that the rule's goal is to protect victims against "invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process."³⁹⁷ The committee calls the rationale behind rape shield laws "obvious," which is to encourage victims to come forward by protecting their privacy.³⁹⁸ Rape shield laws were also implemented to reduce introduction of unnecessarily inflammatory evidence at trial,³⁹⁹ and prevent propensity reasoning, which presumes that if a victim consented to sexual acts in the past, she must have consented to the sexual act in question.⁴⁰⁰

Certain evidence is presumptively inadmissible in rape cases under current rape shield laws. This includes prior sexual acts with third parties, and evidence of the victim's sexual predisposition.⁴⁰¹ This

396. FED. R. EVID. 412.

397. FED. R. EVID. 412 advisory committee's note subdiv. (a).

398. *Id.*

399. Leah DaSilva, Note, *The Next Generation of Sexual Conduct: Expanding the Protective Reach of Rape Shield Laws to Include Evidence Found on Myspace*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 211, 220 (2008).

400. *Id.*

401. Darlene Barrier, Comment, *Protection for Victims: Why Washington Should Adopt A Sexual Harassment Evidence Shield Statute*, 31 GONZ. L. REV. 591, 603 (1996).

type of evidence generally is considered too prejudicial to outweigh its probative value.⁴⁰² This rule should also apply in revenge porn cases, as evidence of prior sexual behavior would most likely shed no light on the victim's consent or defendant's innocence. However, prior posting history by the victim could be admissible, because if the victim allowed pornographic photographs of herself to be posted in the past, then the poster may have believed she would have consented in the contested instance.

In sexual misconduct cases, rape shield laws do not prevent a defendant from introducing evidence of the victim's sexual activity with a third party if it is relevant in proving that the defendant was not the one responsible for the victim's injuries.⁴⁰³ In revenge porn cases, this would allow the defendant to introduce evidence of sexualized posting activities with third parties only if it was legally relevant to prove that someone other than him distributed the compromising photographs. This may broaden the evidentiary net beyond what is traditionally allowed to be introduced in rape cases, where the defendant normally has to prove that the victim engaged in sexual activity with a third party during the reasonable time period of the rape allegation.⁴⁰⁴ However, if the defendant in a revenge porn case asserts that someone else posted the photo, this may introduce evidence that parses through the victim's entire social history, as any party a victim could have been in contact with (be it former lover or roommate with access to her computer) could have received or taken a sexual photograph. Ideally, due to technological advances, a court would be able to narrow down when the photograph was taken. This could eliminate parties that came in contact with the victim before the date the photograph was taken. In order to limit the evidence

402. *Id.*

403. FED. R. EVID. 412(b)(1)(A); *see also* FED. R. EVID. 412 advisory committee's note subdiv. (b) ("Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible.").

404. *See* 1 BERGMAN & HOLLANDER, *supra* note 393 (internal quotations omitted) ("The defendant may wish to introduce evidence that the complainant engaged in sexual relations (consensual or otherwise) with someone else within a reasonable time period before her physical examination after the alleged rape with the defendant. Evidence of alternative theories for injuries associated with a possible rape is usually excluded unless the defendant can establish it is sufficiently relevant to prove that someone other than the defendant was the source of the complainant's injury.").

admitted for this defense, courts should only allow evidence of sexual activity with third parties if it can be reasonably shown that the victim shared the pictures in question with them or the party somehow had access to the picture. This is preferable instead of general evidence that the victim had previously engaged in sexual conduct with third parties, who may have had the opportunity to photograph her in a state of undress.

The other type of evidence exempt from the rape shield rule is evidence to show that the victim consented to the act with the defendant.⁴⁰⁵ If the victim asserts she did not consent to the sexual activity, the defendant may be able to admit evidence of previous sexual acts between them, or statements the victim made communicating her desire to have sex with the defendant.⁴⁰⁶ In revenge porn cases, evidence warranting this exemption would have to be related to the defendant reasonably believing the victim consented to sharing the photographs, not consenting to sexual activity. Evidence of previous sexual conduct would be even less relevant to this consideration, as consenting to sexual acts is generally not related to consenting to publication of private photographs. Examples of activity that may be admitted could be evidence the victim had previously allowed her boyfriend to post photographs of her online, or that the victim was in the pornography industry and had repeatedly allowed others to post nude pictures of her on other websites. Based on this previous conduct, the defendant may have inferred the victim would have consented to the photograph dissemination at issue.

In traditional sexual assault cases, the defendant may also be able to introduce evidence of a victim's sexual past if it reveals that the victim had a motive to fabricate the claim.⁴⁰⁷ This type of evidence should also be admissible in revenge porn cases, as it is relevant to the defendant's innocence. Additionally, any other evidence pursuant to protecting the defendant's Sixth Amendment rights should not be barred under rape shield laws in revenge porn cases, such as a defendant's right to confront witnesses against him.⁴⁰⁸ While it may

405. FED. R. EVID. 412(b)(1)(B).

406. FED. R. EVID. 412 advisory committee's note subdiv. (b).

407. 1 BERGMAN & HOLLANDER, *supra* note 393; Kneedler, *supra* note 374, at 500.

408. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI. "State rape shield law could not be used to deprive accused of his constitutional right to confront witnesses against him." 24 AM. JUR. 2D *Proof of Facts* § 515 (1980) (citing *Sandoval v. Acevedo*, 996 F.2d 145 (7th Cir. 1993)).

be necessary to expand our understanding of these rape shield laws if they were to cover revenge porn cases, these victims could derive the same benefits that these laws provide in traditional sexual assault cases.

3. *By Making Revenge Porn a Sexual Offense, the Victim's Name May Not Have to Be Fully Disclosed in Court Documents*

In many states, victims of sexual offenses are allowed to operate under an alias, or to provide incomplete names in trial documents. Requiring the victim's full name to be published in court documents would be a hefty deterrent for victims to come forward.⁴⁰⁹ Some critics have viewed the disclosure of the full names of rape and sexual assault victims as a "second rape" as the publication often leads to criticism and stigmatization from members of the community.⁴¹⁰ Studies have also shown that protecting a rape victim's name is likely to increase reporting.⁴¹¹ Incomplete disclosure of identities is disfavored in the legal system, as the public has an interest in being fully informed about what transpires in its legal proceedings.⁴¹² However, this interest can be abridged when it is exceptionally necessary to protect the privacy of the parties, as is the case with rape victims.⁴¹³ Currently, fifteen states restrict the names of adult victims of sexual assault.⁴¹⁴

409. See *supra* note 207 and accompanying text (discussing how bringing suit may increase publicity to the offending photos).

410. Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions*, 42 GA. L. REV. 471, 487 (2008).

411. *Id.*

412. *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 873 (7th Cir. 1997).

413. *Id.*

414. See Schumm, *supra* note 409, at 487; see also ALASKA STAT. ANN. § 12.61.140 (2013) (requiring use of the victim's initials); ARK. CODE ANN. § 16-90-1104 (West 2014) (directing law enforcement generally to not disclose identifying information of victims of sex crimes); CAL. GOV'T CODE § 54961 (West 2008) (allowing certain documents to refrain from using a victim's identity); COLO. REV. STAT. ANN. § 18-3-407 (West 2014) (permitting a court to issue a protective order concerning disclosure of victim's information); CONN. GEN. STAT. ANN. § 54-86e (West 2003) (providing that a sexual assault victim's information should remain confidential); FLA. STAT. ANN. § 92.56 (West 2014) (allowing a victim to petition for confidential status); MASS. GEN. LAWS ANN. ch. 265, § 24C (West 2012) (requiring rape victims' names to be withheld from public inspection in court and police records); MO. ANN. STAT. § 595.037 (West 2014) (exempting sexual abuse victims from the general rule of all records being open to the public); MONT. CODE ANN. § 44-5-311 (West 2013) (restricting dissemination of a victim's identity when the victim requests confidentiality); NEB. REV. STAT. ANN. § 81-1842 (West 2014) (prohibiting the name

Revenge porn victims would derive a great benefit from incomplete disclosure of their identities. Laws that prohibit the press from publishing a victim's name, when obtained legally through court documents, have been routinely struck down as unconstitutional.⁴¹⁵ This makes initial publication in court records the only barrier to publicity for victims of revenge porn.⁴¹⁶ Protecting the identities of revenge porn victims could encourage reporting, for this would give them some protection from public investigation. Additionally, because the nature of the crime is an invasion of privacy, publishing the victim's name would only further the crime, as it would increase attention to the embarrassing photographs.

CONCLUSION

Revenge porn is a serious offense, and if unregulated, its prevalence will continue. Victims experience humiliation, mental anguish, threats to their safety, destruction of their careers, and a few have even taken their own lives. In order to adequately punish the behavior in relation to the objectively wrongful act and harm caused, there needs to be a serious criminal statute directly addressing the problem. Revenge porn victims should not be forced to wait as long as victims of domestic violence, rape, and other intimate partner crimes had to wait to see their wrongdoings vindicated through the law. The ideal statute should be similar to New Jersey's in its offense level and focus on the act of non-consensual disclosure, and unlike California's, which classifies it as a misdemeanor, has various loopholes, and requires the victim to show emotional distress. Revenge porn should be classified as a type of sexual misconduct because of the nature of the offense and because of the evidentiary protections it would allow victims under rape shield laws. A statute with serious

of any sexual assault victim from being made public); NEV. REV. STAT. ANN. § 200.3772 (West 2013) (allowing victims of sexual offenses to use pseudonyms); N.Y. CIV. RIGHTS LAW § 50-b (McKinney 2006) (requiring the identity of victims of sexual offenses to be confidential); S.C. CODE ANN. § 16-3-730 (2014) (prohibiting the publication of the name of victims of sexual conduct); S.D. CODIFIED LAWS § 23A-6-22 (2014) (generally requiring the names of sexual offense victims to be suppressed at the victim's request); TEX. CRIM. PROC. CODE ANN. ART. 57.02 (West 2007) (allowing victims of sexual offenses to choose a pseudonym used in legal documents).

415. See *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 55 (Tex. 1992); *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596 (1982); see also Susan Puder, *Protecting the Rape Victim Through Mandatory Closure Statutes: Is It Constitutional?*, 32 N.Y.L. SCH. L. REV. 111 (1987).

416. Considering how much press current legislation and victims of revenge porn are currently getting, these criminal cases in New Jersey and California will almost certainly be widely covered.

consequences could help victims like Annmarie see their tormentors brought to justice and hopefully cause this horrific industry to fade away by putting others on notice that their conduct will no longer be tolerated by the legal system.