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THE NEED TO CRIMINALIZE REVENGE PORN: HOW A LAW PROTECTING VICTIMS CAN AVOID RUNNING AFOUL OF THE FIRST AMENDMENT

ADRIENNE N. KITCHEN*

INTRODUCTION

Revenge Porn is a growing problem with potentially horrific consequences.¹ There are thousands, perhaps tens of thousands, of victims.² Virtually unheard of only four years ago,³ revenge porn occurs when an ex-paramour posts sexually explicit images of his former lover on the web, often with “disparaging descriptions” and contact information for the victim’s work and home, and sometimes even for her family members.⁴ The purpose of revenge porn is to humiliate and harass former lovers.⁵ Revenge porn can happen when the victim willingly took a photo specifically for her paramour, or when perpetrators captured the images using a hidden camera

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1. Janice Richardson, *If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law*, in FEMINIST PERSPECTIVES ON TORT LAW 145, 145 (Janice Richardson & Ericka Rackley eds., 2012); Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 363–64 (Nov. 2010); Eric Schulzke, *California Lawmakers Target ‘Revenge Porn’ but Miss, Critics Say*, DESERET NEWS, Sept. 20 2013, <http://www.deseretnews.com/article/865586019/California-lawmakers-target-revenge-porn-but-miss-critics-say.html> (quoting Erica Johnstone).

2. Robert Lang, *Lawmaker, A.G. Candidate Wants Crack down on “Revenge Porn”*, WBAL NEWS, Oct. 29, 2013, <http://www.wbal.com/article/103619/37/template-story/Lawmaker-A>.

3. Lorelei Laird, *Victims are Taking on ‘Revenge Porn’ Websites for Posting Photos They Didn’t Consent To*, A.B.A. J. (Nov. 1, 2013), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly.

4. As the vast majority of victims are women, I will refer to the perpetrators as male and the victims as female. Laird, *supra* note 3; 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?pagewanted=all&_r=0 (revenge porn often includes “identifying details, like where the women live and work, as well as links to their Facebook pages.”).

5. Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 44 (2012); Eric Goldman, *What Should We Do about Revenge Porn Sites Like Texxxan?*, TECH., MKTG. & L. BLOG (Feb. 9, 2013), http://blog.ericgoldman.org/archives/2013/02/what_should_we.htm (defining revenge porn as “pornographic depictions of former lovers, ostensibly to get revenge on them.”) [hereinafter Goldman, *What Should We Do*].

or victim coercion.⁶ Often perpetrators link the images to the victim's social networking pages or LinkedIn profile.⁷ Once the images appear on several websites, a Google search for the victim's name finds page after page of these pictures.⁸

Numerous websites are dedicated to revenge porn.⁹ These sites permit visitor comments, which are often "sexual, crude and insulting."¹⁰ The victims receive sexual solicitations from strangers.¹¹ The abuse includes rape threats, "false prostitution ads, [and] calling victims 'sluts'—even when the victim is a man."¹²

Revenge porn causes harms tied to its vengeful nature—a privacy invasion that interferes with and sometimes destroys the victim's relationships with others.¹³ Revenge porn victims lose or quit their jobs, they are harassed by strangers, and some even change their names or alter their appearance.¹⁴ Victims are often unable to attend college or find a job.¹⁵ Revenge porn targets "close down email accounts that have been flooded

6. Bartow, *supra* note 5, at 44–45.

7. Laird, *supra* note 3; Mitchell J. Matorin, *In The Real World, Revenge Porn is Far Worse than Making it Illegal*, TPM CAFÉ, Oct. 18, 2013, <http://talkingpointsmemo.com/cafè/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn>; Ave Mince-Didier, *Revenge Porn: Laws & Penalties*, CRIMINALDEFENSELAWYER.COM, <http://www.criminaldefenselawyer.com/resources/revenge-porn-laws-penalties.htm> (last visited Nov. 20, 2014) ("Many sites include identifying details, such as the person's full name, employer, and hometown, as well as links to the person's Facebook or other personal webpages, and nasty comments.")

8. Laird, *supra* note 3; Emily Bazelon, *Why do We Tolerate Revenge Porn? A New Bill in California Tries to Address the Problem, but Doesn't Go Far Enough*, SLATE (Sept. 25, 2013, 6:21 PM), http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html; Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, END REVENGE PORN (July 25, 2014), http://www.endrevengeporn.org/main_2013/?page_id=656 [hereinafter Franks, *A Quick Guide*].

9. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 245 (2011) [hereinafter Franks, *Unwilling Avatars*].

10. Laird, *supra* note 3 ("observers . . . disparage victims as 'stupid' or 'slutty').

11. Bazelon, *supra* note 8; Franks, *A Quick Guide*, *supra* note 8, at 1.

12. Laird, *supra* note 3.

13. Elizabeth Adjin-Tettey, *Sexual Wrongdoing: Do the Remedies Reflect the Wrong?*, in FEMINIST PERSPECTIVES ON TORT LAW 179, 181 (Janice Richardson & Erika Rackley eds., 2012) ("Long-term harm may also be psychological, affecting self-esteem, feelings of safety, ability to focus and obtain education, difficulties in maintaining employment and interpersonal relationships").

14. Laird, *supra* note 3; Goode, *supra* note 4 ("It's just an easy way to make people unemployable, undatable and potentially at physical risk," quoting Danielle Citron); Suneal Bedi, *California's Attempt to Avenge Revenge Porn*, HUFFINGTON POST (Sept. 9, 2013, 11:21 AM), http://www.huffingtonpost.com/suneal-bedi/california-revenge-porn_b_3879916.html (Revenge Porn "has other consequences, like making it difficult to find a job.")

15. Ryan, *supra* note 1, at 364 ("semi-nude and nude images can continue to affect a minor or young adult's reputation years after he or she creates and distributes the image. A sexting image that an individual created when he or she was thirteen may influence his or her ability to gain admission to college or gain employment years later.")

with abusive and obscene messages.”¹⁶ Victims suffer psychological harm.¹⁷ Some resort to suicide.¹⁸ Others are “stalked, assaulted or even killed.”¹⁹

Sixty to seventy percent of revenge porn victims are women.²⁰ The objectification of women has been an issue for centuries, and online sex-based harassment started with the invention of the internet.²¹ New technology brings new privacy risks.²² Technology manifestly increases these enhanced privacy risks because the information cannot be deleted, which leaves revenge porn victims “feel[ing] branded.”²³ While some people took sexually explicit photos for significant others “[b]efore the Internet . . . compromising photos could do limited harm because they stayed within a few people’s hands.”²⁴ Today revenge porn sites are designed specifically to “publicly shame, humiliate and degrade the victim” and refuse to remove the images.²⁵ Revenge porn is “potentially even more pernicious and long lasting than real-life harassment.”²⁶ This is true for several reasons: 1) “it [is] difficult if not impossible for [victims] to engage in self-help or legal remedies;” 2) harassers have a wide audience, including some “who will join in the harassment;” and 3) revenge porn “is accessible to almost anyone (the target’s co-workers, fellow students, clients, children) almost anywhere (at her place of work, her school, her home, her doctor’s office).”²⁷ Some argue information on the internet lasts only as long as interest in it remains or someone keeps it on the web.²⁸ However,

16. Franks, *Unwilling Avatars*, *supra* note 9, at 246.

17. Adjin-Tetty, *supra* note 13, at 181 (“Long-term harm may also be psychological, affecting self-esteem, feelings of safety, ability to focus and obtain education, difficulties in maintaining employment and interpersonal relationships”); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 89 (2009).

18. Michael Salter et al., *Beyond Criminalisation and Responsibilisation: Sexting, Gender and Young People*, 24 CURRENT ISSUES IN CRIM. JUST. 301, 303 (2012) (discussing the link between cyberbullying and teen suicide); Schulzke, *supra* note 1.

19. Franks, *Unwilling Avatars*, *supra* note 9, at 246.

20. Laird, *supra* note 3 (quoting University of Maryland law professor Danielle Citron).

21. Franks, *Unwilling Avatars*, *supra* note 9, at 243, 252.

22. Richardson, *supra* note 1, at 147; Salter et al., *supra* note 18, at 302–03 (discussing “the role of digital technologies, such as mobile phones with camera capabilities, in enabling the self-manufacture and distribution of naked or erotic sexts”).

23. Richardson, *supra* note 1, at 158–59 (discussing the psychological dangers of revenge porn “when the material is private sexual material that was the content of a privacy invasion, particularly when the motives were based upon revenge or associated with abuse.”).

24. Laird, *supra* note 3 (quoting attorney Erica Johnstone).

25. *Id.*

26. Franks, *Unwilling Avatars*, *supra* note 9, at 255.

27. *Id.* at 255–56.

28. Meg Leta Ambrose, *A Digital Dark Age and the Right to be Forgotten*, 17 J. INTERNET L. (No. 3) 1, 9 (2013) (discussing how websites fail and information on the web has an expiration date); Goldman, *What Should We Do*, *supra* note 5, at 16 (“distasteful content websites routinely fail on their

although some revenge porn sites no longer exist, new ones continually appear, and the images often appear on dozens of websites;²⁹ even if one site removes the images they are still available on several others. Ignoring revenge porn does nothing to protect victims because the damage is not tied to how long the images are posted: the damage is the loss of relationships, jobs, opportunities, and self-esteem.³⁰

In Part I, this Note demonstrates that victims currently have no effective legal recourse because civil suits, including privacy-based torts and copyright claims, fail to remove images or deter perpetrators. Because a greater deterrent is needed, revenge porn should be criminalized. Part II analyzes current laws attempting to criminalize revenge porn, specifically addressing the major concern regarding these laws—that they unconstitutionally prohibit too much speech. Finally, Part III proposes a solution to protect victims’ rights that will avoid constitutional concerns, through the First Amendment’s obscenity exception and through careful drafting, including examples of appropriate legislative language.

I. THE NEED TO CRIMINALIZE REVENGE PORN

Revenge porn is not a crime in most states so victims have no effective legal recourse.³¹ Additionally, revenge porn sites “are largely immune to criminal pursuit”³² because federal statutes grant websites broad immunity. This exemplifies how the law has failed to keep up with technology.³³ Even when crimes are alleged, revenge porn cases frequently result in dismissal of the more serious—if not all—the charges.³⁴ For example, a

own accord, often quite quickly These shutdowns aren’t an accident. Inevitably, the website operators face enormous pressure from the media coverage, the public’s opprobrium, the threats of vendors (especially payment service providers or ad networks) to cut off or reduce service, and yes, even the legal risks. As a result, distasteful content websites have comparatively short shelf lives.”)

29. Mince-Didier, *supra* note 7.

30. Adjin-Tetty, *supra* note 13, at 181; Citron, *supra* note 17, at 92; Ryan, *supra* note 1, at 364; Schulzke, *supra* note 1.

31. Ryan, *supra* note 1, at 361 (“the current state response to secondary sexting between young adults is inappropriate because it leaves adult victims without meaningful remedies”); Matorin, *supra* note 7; *State ‘Revenge Porn’ Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 1, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx> (ten states have criminalized revenge porn. Twenty-seven have pending legislation).

32. Goode, *supra* note 4; *see generally* Bartow, *supra* note 5.

33. Citron, *supra* note 17, at 90 (“To date, law enforcement’s response to online criminal activities has evolved slowly. Computer crimes are difficult to prosecute given law enforcement’s relative unfamiliarity with technology.”).

34. *People v. Barber*, No. 2013NY059761, 2014 WL 641316, at *1 (N.Y. Crim. Ct. Feb. 18, 2014) (granting motion to dismiss a criminal case filed against a revenge porn perpetrator charged with Aggravated Harassment, Dissemination of an Unlawful Surveillance Image and Public Display of Offensive Sexual Material reasoning “defendant’s conduct, while reprehensible, does not violate any of the criminal statutes under which he is charged.”); Franks, *Unwilling Avatars*, *supra* note 9, at 239, 244.

2014 criminal case against a revenge porn perpetrator failed because his “conduct, while reprehensible, d[id] not violate any of the criminal statutes under which he [wa]s charged.”³⁵ In short, “our current legal system isn’t well-designed to redress user-submitted online pornography.”³⁶

Because the purpose of revenge porn is to harm victims by disseminating sexually explicit images,³⁷ and because “dozens or even hundreds of other Web sites” redistribute those images, it is nearly impossible to remove them from the web.³⁸ Filing a civil suit may exacerbate the problem—some revenge porn sites remove the photograph for a short time then re-post it or even send it to other sites.³⁹ Civil suits used to combat revenge porn, such as privacy torts or copyright claims, frequently fail to do what victims wish they would: remove the images and deter perpetrators.⁴⁰ Tort claims are insufficient remedies because reputation- and privacy-based torts do not address the particular harms of revenge porn. Similarly, copyright claims fail to protect the victim from the reputational harms. Because civil suits are insufficient remedies and fail to deter revenge porn posters, new criminal laws are necessary to provide that deterrent.

A. Civil Suits are Insufficient Remedies because They Fail to do What Revenge Porn Victims Most Want: Remove the Images and Deter Perpetrators

Civil suits based on privacy violations are problematic. Most victims want the offensive material removed and civil suits almost never succeed in removing the images due to the sheer magnitude of dissemination.⁴¹ Highly publicized trials often end in re-victimization.⁴² Civil litigation is expensive

35. Barber, 2014 WL 641316, at *1.

36. Goldman, *What Should We Do*, *supra* note 5.

37. Bartow, *supra* note 5, at 46 (“Broad distribution is usually the goal of the revenge pornographer.”).

38. Ryan, *supra* note 1, at 363 (“[O]nce an individual transmits an image via cell phone or over the Internet, it is virtually impossible to remove it.”); Goode, *supra* note 4; Bedi, *supra* note 14 (“[T]he effects of revenge porn are amplified by websites dedicated solely to these kinds of posts! Talk about a bad breakup—now they go viral.”); Mince-Didier, *supra* note 7 (“Images can also be easily picked up by other websites, and content that is widely distributed on the Internet is difficult to remove. So, even if a person succeeds in getting images removed from one site, it may be difficult or impossible to get them completely off the Internet.”).

39. Laird, *supra* note 3 (quoting Attorney John S. Morgan).

40. Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013, 9:51 AM), <http://www.concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> [hereinafter Franks, *Why We Need a Response to Revenge Porn*].

41. *Id.*

42. *Id.*

and time-consuming, and many victims simply cannot afford it.⁴³ It is difficult to identify and prove who the perpetrator is for legal proceedings because it is so easy to anonymously post and distribute revenge porn.⁴⁴ Even when victims can prove who the perpetrator is in court and win money damages, many defendants are judgment-proof so victims cannot collect.⁴⁵

Although judgment-proof defendants may be subject to injunctive relief, most victims would fail to meet the four requirements. To obtain an injunction, plaintiffs must prove:

(1) [they] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate . . . ; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.⁴⁶

Further, a court order requiring a defendant or website to remove the images would fail to remove the images from the web entirely, particularly as they appear on numerous sites.⁴⁷ Because most perpetrators are judgment-proof, and injunctive relief may be difficult to obtain and would ultimately fail to remove the images, civil suits are “poor remedies.”⁴⁸ As

43. Citron, *supra* note 17, at 9 (“[H]igh cost of litigation often deters the filing of general tort suits”); Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1012 (“The remedies currently available require a victim of online harassment to file costly, time-consuming, and often fruitless lawsuits. Although this may be a problem in the physical world, it is a greater problem in the virtual world.”); Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40.

44. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40; Goldman, *What Should We Do*, *supra* note 5, at 16 (“It’s more complicated assessing the liability of the users who post revenge porn. We need to know more about how the defendants got the revenge porn and under what terms or understandings.”).

45. Adjin-Tetty, *supra* note 13, at 193 (“Perpetrators are often judgment-proof, making it unlikely survivors will obtain compensation.”); Tracy Clark-Flory, *Criminalizing Revenge Porn: As More People Post Naked Pictures of Exes, the Law has failed to Keep Up. Some Activists are Trying to Change That*, SALON (Apr. 6, 2013, 8:00 PM), http://www.salon.com/2013/04/07/criminalizing_revenge_porn/ (quoting Erica Johnstone, co-founder of nonprofit Without My Consent); Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40 (“the party responsible will not have enough financial resources to make a damages claim worthwhile (i.e., the defendant will be judgment-proof).”).

46. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (“According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

47. Lori Andrews, *California’s Revenge Porn Statute: A Start but Not a Solution*, IIT CHICAGO-KENT FACULTY BLOG (Oct. 4, 2013), <http://blogs.kentlaw.iit.edu/faculty/2013/10/04/californias-revenge-porn-statute-a-start-but-not-a-solution/> (reposted from *On the Edges of Science and Law*) (“Nude photos posted on one revenge porn sites are often re-posted on dozens of other sites.”).

48. Pete Brush, *1st Amendment Poses Hurdle for NY ‘Revenge Porn’ Bills*, LAW360 (Oct. 8, 2013, 7:39 PM), http://www.law360.com/newyork/articles/479052?nl_pk=9bab414e-81ff-4327-8aa1-c3d17e01a0ec&utm_source=newsletter&utm_medium=email&utm_campaign=newyork.

perpetrators frequently have “nothing to lose, which is why they engage in this behavior in the first place,” civil suits do not deter revenge porn.⁴⁹

1. Tort Claims are Insufficient Remedies Because Reputation- and Privacy-Based Torts Fail to Address Many Revenge Porn Harms

In general, tort law fails to compensate revenge porn victims. Tort law is “limited to those injured by the fault of others, who can afford the financial and emotional cost of initiating and maintaining civil suits, and are able to prove their case on a balance of probabilities.”⁵⁰ Tort suits are expensive and fail to help victims because the suits do not remove the images, and the defendants are frequently judgment-proof.⁵¹ Thus, tort claims are an inappropriate and incomplete remedy for revenge porn victims.⁵²

Revenge porn is unique because of its widespread dissemination and resulting harms. Anyone with internet access can post revenge porn anonymously for free, and it affects private individuals in a considerably more public manner than was possible before the internet.⁵³ While privacy torts may protect victims from some reputational harms, revenge porn is different. It is the dissemination of a real picture designed solely to harass or humiliate a private individual.

Revenge porn differs from other torts in several ways. While victims may successfully sue those who posted negative comments about the images, so long as those comments are not deemed statements of opinion,⁵⁴ victims may not succeed in actions against the actual posters because of the difficulty proving the poster’s identity in court, particularly since the websites are not obligated to identify posters and anonymous distribution is so simple.⁵⁵ Privacy-based torts are only remedies against the person who posted the photos; suits will not remove photos from Google search results or from the internet itself.⁵⁶ Even an injunction prohibiting a poster from further dissemination fails to remove the images as they appear on multiple

49. Clark-Flory, *supra* note 45 (quoting Erica Johnstone, co-founder of nonprofit, Without My Consent).

50. Adjin-Tetty, *supra* note 13, at 180 (internal citations omitted).

51. Clark-Flory, *supra* note 45 (quoting Erica Johnstone, co-founder of nonprofit, Without My Consent); Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40.

52. Adjin-Tetty, *supra* note 13, at 180.

53. Kim, *supra* note 43, at 1008.

54. *Id.* at 1006–07.

55. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40; Goldman, *What Should We Do*, *supra* note 5, at 16 (“It’s more complicated assessing the liability of the users who post revenge porn. We need to know more about how the defendants got the revenge porn and under what terms or understandings.”).

56. Matorin, *supra* note 7.

sites.⁵⁷ Revenge porn's dissemination creates issues tort law fails to address sufficiently: issues such as widespread reputational damage,⁵⁸ repeated and continual harassment,⁵⁹ and potential endangerment of the victim.⁶⁰

Reputation- and privacy-based torts fail to address many revenge porn harms including sexually violent comments, derogatory statements about a woman's appearance, and threats of violence.⁶¹ One of the most significant harms is "unwanted subjection to public scrutiny."⁶² Lawsuits may increase this harm by forcing the victim to suffer more humiliation through increased publicity.⁶³ Harms from revenge porn are often "intangible and do not always map onto traditional notions of tortious injury."⁶⁴ This is particularly true because privacy torts do not focus on the victim's experience, which is vital to many revenge porn harms.⁶⁵ Like other torts, revenge porn often has serious long-term consequences including loss of employment or opportunity.⁶⁶ However, tort law generally fails to cover its other long-term psychological effects including reduced self-esteem, feeling unsafe, an inability to "obtain education, [and] difficulties in maintaining employment and interpersonal relationships."⁶⁷

Because revenge porn is visual, the harm may be particularly severe. Images are memorable, and people believe pictures depict the truth.⁶⁸ However, images frequently present only a portion of the story, as they can be altered or presented out of context.⁶⁹ Revenge porn "can also expose and identify an individual in a way that mere words cannot, thus creating a greater danger to privacy and security."⁷⁰ Revenge porn "injuries [are] in a class by themselves" because it is so easy to disseminate revenge porn quickly and because it is almost impossible to stop the spread of these images or delete them from every website on which they appear.⁷¹ The images last indeterminately, and because websites are accessible internationally,

57. Ryan, *supra* note 1, at 363; Goode, *supra* note 4; Bedi, *supra* note 14; Mince-Didier, *supra* note 7.

58. Kim, *supra* note 43, at 1010.

59. Matorin, *supra* note 7; Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40.

60. Franks, *A Quick Guide*, *supra* note 8, at 1.

61. Franks, *Unwilling Avatars*, *supra* note 9, at 258–60.

62. *Id.*

63. *Id.* at 259.

64. Adjin-Tetty, *supra* note 13, at 179–80.

65. *Id.* at 180.

66. Adjin-Tetty, *supra* note 13, at 181; Citron, *supra* note 17, at 90; Schulzke, *supra* note 1.

67. Adjin-Tetty, *supra* note 13, at 181.

68. Kim, *supra* note 43, at 1024.

69. *Id.*

70. *Id.*

71. *Id.* at 1010.

the images can cause widespread reputational damage.⁷² Thus, there is no comparison to harm in the real world.⁷³

Victims of revenge porn may attempt to sue under tort claims like appropriation, defamation, public disclosure of private facts, or intentional infliction of emotional distress, but frequently these claims fail.⁷⁴ Appropriation claims fail because appropriation occurs when a defendant, for his advantage, uses a “plaintiff’s name or likeness.”⁷⁵ However, since “[i]t is only when the publicity is given for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded,”⁷⁶ appropriation suits only succeed when a commercial or extrinsic value is tied to the victim’s name or likeness.

Defamation is appropriate for untrue insults online, but statements of opinion constitute a complete defense.⁷⁷ Defamation protects the plaintiff’s interests in his or her reputation.⁷⁸ The plaintiff must show the defendant made a false statement that harmed the plaintiff’s reputation.⁷⁹ Allegations of fornication are defamatory *per se* in several states, particularly when fornication is a crime involving moral turpitude.⁸⁰ So, a court could find that revenge porn, since it relates to fornication, is defamatory *per se*. However, because truth is a complete defense,⁸¹ revenge porn posters will

72. *Id.*

73. *Id.*

74. *GoDaddy.com, L.L.C. v. Toups*, 429 S.W.3d 752 (Tex. App. 2014); *Salter et al.*, *supra* note 18, at 305; *Goode*, *supra* note 4.

75. *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”) (citing RESTATEMENT (SECOND) OF TORTS § 652C (1977)); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974).

76. *Wozencraft*, 15 F.3d at 437 (citing RESTATEMENT (SECOND) OF TORTS § 652C, cmt. d (1977)).

77. *Bryson v. News Am. Publ’ns, Inc.*, 672 N.E.2d 1207, 1220 (Ill. 1996); *Todd Love, Milkovich v. Lorrain Journal Company: Rejection of the Constitutional Fact-Opinion Dichotomy in Defamation Law*, 36 S.D. L. REV. 764, 764–765 (1991) (“*Milkovich* did not remove all constitutional protection for statements of opinion. Instead, it retained absolute constitutional protection for ‘pure opinion’ while denying such protection for ‘mixed opinion.’”).

78. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 14 (2014).

79. *Kolegas v. Hefel Broad. Corp.*, 607 N.E.2d 201, 206 (Ill. 1992); *Krasinski v. United Parcel Serv., Inc.*, 530 N.E.2d 468, 471 (Ill. 1988).

80. *Van Home v. Muller*, 705 N.E.2d 898, 903 (Ill. 1998); *Schivarelli v. CBS, Inc.*, 776 N.E.2d 693, 697 (Ill App. 1st Dist. 2002); *Gorman v. Swaggart*, 524 So. 2d 915 (La. Ct. App. 4th Cir. 1988), *writ denied*, 530 So. 2d 575 (La. 1988).

81. *Meiring de Villiers, Substantial Truth in Defamation Law*, 32 AM. J. TRIAL ADVOC. 91, 93 (2008) (“In a defamation action, the plaintiff must prove the falsity of the defamatory statement that allegedly harmed her reputation, while the defendant may rely on its truthfulness as a defense. Although absolute truth is a complete defense to a defamation charge, a defendant does not have to prove the literal truth of a defamatory statement to prevail The substantial truth doctrine overlooks minor inaccuracies and focuses upon the meaning conveyed by a publication. Under the doctrine, a publica-

avoid liability by emphasizing since the victim is in the pictures, she committed the depicted acts. Thus, by attempting to defend themselves, victims suffer the same harm the harassers intended in the first place: more publicity and further humiliation.⁸²

Public disclosure of private facts suits frequently fail, even where the plaintiff was underage.⁸³ Public disclosure occurs where “the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities.”⁸⁴ Public disclosure requires “a communication that reaches, or is sure to reach, the public.”⁸⁵ Disclosure includes dissemination to newspapers, magazines, and the internet.⁸⁶ Publicity may also include disclosure to those with “a special relationship with the plaintiff that makes the disclosure as devastating as disclosure to the public at large.”⁸⁷ However, disclosure is not actionable when it occurs to those “with a ‘natural and proper interest.’”⁸⁸ While a few courts have found liability for public disclosure where the defendant posted contact information and images on numerous sites and “the photographs [we]re extremely graphic and of a

tion would be substantially true, and thus First Amendment-protected, provided that it (a) is factually similar to the pleaded truth, and (b) differs from the truth by no more than insubstantial details. A statement differs from the truth ‘by no more than insubstantial details’ if the statement does not harm the plaintiff’s reputation more than would the pleaded truth.”).

82. Franks, *Unwilling Avatars*, *supra* 9, at 259.

83. *Doe v. Peterson*, 784 F. Supp. 2d 831, 834, 842–44 (E.D. Mich. 2011) (granting Defendants’ motion for summary judgment for public disclosure of private facts and intrusion upon seclusion, where nude images of plaintiff, which she took for her boyfriend when she was 17, were distributed on several websites.); *but see Doe v. Hofstetter*, No. 11-CV-02209-DME-MJW, 2012 WL 2319052 (D. Colo. June 13, 2012) (entering default judgment against defendant for intentional infliction of emotional distress, and public disclosure of private facts when Defendant published private sexual photographs on the internet.); *Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, *2, *5 (D. Haw. July 12, 2011) (granting damages of \$425,000 for public disclosure of private facts, negligent and intentional infliction of emotional distress and defamation when Defendant posted contact information and images on at least twenty-three “adult Websites without her consent the photographs are extremely graphic and of a personal nature” particularly as “much of the information provided about her sexual preferences were untrue”).

84. *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 78 (8th Cir. 1976) (“The generally recognized elements of the tort of public disclosure of private facts are (1) the publication, (2) absent any waiver or privilege, (3) of private matters in which the public has no legitimate concern, (4) such as to bring shame or humiliation to a person of ordinary sensibilities.”).

85. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

86. *Peterson*, 784 F. Supp. 2d at 842 (“Despite the fact that websites do not actually circulate in public like newspapers and magazines, their accessibility to anyone with access to the internet suggests that their contents should be treated as even more “widely disclosed” than information or photos portrayed in traditional print materials.”); *Tureen v. Equifax, Inc.*, 571 F.2d 411, 417–18 (8th Cir. 1978) (“any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity”).

87. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 838 (7th Cir. 2005) (citation omitted).

88. *Id.*

personal nature,”⁸⁹ once the images were already in public, “the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade.”⁹⁰ So once the images are on the web, the victim has no recourse against websites that repost the images because she has lost any privacy interest in those images.

One major barricade to successful privacy suits revolves around consent to the image. Consent to sexual activity does not preclude an action for surreptitious photography.⁹¹ However, consent to recording or photographing sexual acts in a private place does preclude invasion of privacy or intentional infliction of emotional distress suits.⁹² Intentional infliction of emotional distress requires “extreme and outrageous conduct intended to cause severe emotional distress.”⁹³ It further requires a “causal connection between the plaintiff’s injury and the defendant’s conduct, with the harm amounting to severe emotional distress to the plaintiff.”⁹⁴ While this privacy tort seems a likely choice, and sometimes succeeds,⁹⁵ courts are reluctant to permit intentional infliction claims due to concerns about too much litigation and the ease of faking emotional distress.⁹⁶ The general rule in the Restatement is “there is no liability for pure ‘emotional distress, without

89. *Doe v. Hofstetter*, No. 11-CV-02209-DME-MJW, 2012 WL 2319052, at *2 (D. Colo. June 13, 2012) (entering default judgment against defendant for intentional infliction of emotional distress, and public disclosure of private facts when Defendant published private sexual photographs on the internet.); *Taylor v. Franko*, No. 09-00002JMS/RLP, 2011 WL 2746714, at *2, *5 (D. Haw. July 12, 2011) (granting damages of \$425,000 for public disclosure of private facts, negligent and intentional infliction of emotional distress and defamation when Defendant posted contact information and images on at least twenty-three “adult Websites without her consent the photographs are extremely graphic and of a personal nature” particularly as “much of the information provided about her sexual preferences were untrue”).

90. *Cox Broad. Corp. v. Cohn*, 420 U. S. 469, 494–95 (1975).

91. *Lewis v. LeGrow*, 670 N.W.2d 675, 686 (Mich. Ct. App. 2003).

92. *Id.*

93. Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering Vosburg v. Putney in the Internet Age*, 5 CHARLESTON L. REV. 379, 391 (2011).

94. *Id.*

95. *Doe v. Peterson*, 784 F. Supp. 2d 831, 835, 842–44 (E.D. Mich. 2011) (denying Defendants’ motion for summary judgment with respect to intentional infliction of emotional distress where nude images of plaintiff, which she took for her boyfriend when she was 17, were distributed on several websites); *but see Taylor v. Franko*, CIV. 09-00002 JMS, 2011 WL 2746714, at *2, *5 (D. Haw. July 12, 2011) (granting damages of \$425,000 for public disclosure of private facts, negligent and intentional infliction of emotional distress and defamation when Defendant posted contact information and images on at least twenty-three “adult Websites without her consent the photographs are extremely graphic and of a personal nature” particularly as “much of the information provided about her sexual preferences were untrue”); *Doe v. Hofstetter*, No. 11-CV-02209-DME-MJW, 2012 WL 2319052 (D. Colo. June 13, 2012) (entering default judgment against defendant for intentional infliction of emotional distress, and public disclosure of private facts when Defendant published private sexual photographs on the internet.).

96. *See generally* Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983 (2008).

resulting bodily harm or any other invasion of the [plaintiff's] interests.”⁹⁷ Therefore, if the plaintiff cannot prove some harm beyond the harm to their reputation or psyche, their claim is not cognizable. Because privacy torts fail to protect victims against the initial posting or dissemination of revenge porn, fail to address many of the unique harms of revenge porn, and fail to remove the images from the web, privacy torts are an inadequate remedy.

2. Copyright Claims Fail to Protect the Victim From the Reputational Harms Propagated by Revenge Porn

Other civil claims fail to provide relief for revenge porn victims. Copyright claims provide one potential recourse, but the instances are so limited it is functionally useless.⁹⁸ Under copyright law, reproduction and publication rights require written permission from the copyright holder.⁹⁹ However, a victim can only file a copyright claim if she took the picture or video herself.¹⁰⁰ Even if the victim took the images herself, she must register those images with the U.S. Copyright Office before she can request a website to remove the photos or ask Google to remove them from its search results.¹⁰¹ Victims frequently cannot obtain damages for copyright infringement because few victims register their copyrights and thus have no standing to sue.¹⁰² The registration issue is exacerbated since many victims are unaware the images were posted,¹⁰³ and do not learn of their posting within the requisite ninety days.

While in theory victims who took explicit images of themselves could use copyright law to prevent others from publishing revenge porn, copyright law provides no relief for victims who did not take the images themselves or failed to register their copyright in the image.¹⁰⁴ Even if victims succeed in copyright claims, the suit only provides “a tiny bit of solace

97. *Id.* at 1005–06.

98. David Kluff, *Revenge Porn: “Is Anyone Up” on Copyright Law?*, TRADEMARK & COPYRIGHT L. BLOG (Dec. 20, 2011), <http://www.trademarkandcopyrightlawblog.com/2011/12/revenge-porn-is-anyone-up-on-copyright-law/>.

99. *Id.*

100. *Id.*; Laird, *supra* note 3 (“As for copyright law, if the photo was a self-portrait, the victim owns the copyright.”); Matorin, *supra* note 7 (“Attempts to cast this as a copyright issue are absurd—but it’s one of the only available legal avenues. It is not a good fit. She only owns the copyright if she took the pictures herself; if her now ex-boyfriend/ex-husband did, he owns it.”).

101. Matorin, *supra* note 7.

102. Laird, *supra* note 3.

103. Bartow, *supra* note 5, at 44 (“‘Revenge Porn’ is pornography in which at least one of the subjects was unaware that sexual acts were being fixed in a tangible medium of expression or was unaware of or opposed to the work’s distribution, usually over the Internet.”)

104. *Id.* at 44–45, 48.

from the inability of their tormentors to fully commoditize revenge pornography.”¹⁰⁵ Additionally, the expense, time and publicity issues facing victims who sue under a tort theory also apply to copyright suits.¹⁰⁶

Copyright law has several other pitfalls as a revenge porn remedy. Copyright law incentivizes the production and distribution of pornography by protecting the producers’ copyright in the final product.¹⁰⁷ Revenge porn is popular and profitable, demonstrated by the number of websites dedicated to it, and “economic incentives fall in favor of [websites] allowing customers to upload and circulate anything they like, as broadly as they choose.”¹⁰⁸ While copyright suits can lead to an injunction against the named sites, several websites frequently re-post the images.¹⁰⁹ Therefore, it is difficult, if not impossible, to remove photos from every website.¹¹⁰ Compounding this issue is the fact that even if a copyright suit forces Google to remove the images from its search results, Google tells searchers the image has been removed, but continues to provide a link to the images.¹¹¹ Furthermore, as long as people see the pictures or know of their existence, revenge porn can have ramifications for years to come even if the offending images eventually disappear from the web.

One possible solution to the problem of judgment-proof defendants is to make website sponsors liable.¹¹² However, internet service providers have no legal obligation to identify or remove offensive posts or locate revenge porn posters.¹¹³ The Communications Decency Act (CDA) grants far-ranging immunity to website owners and operators for the posts of third-party users and website subscribers¹¹⁴ and providers have no “legal obligation to assist parties injured by online content in identifying the human wrongdoers who post damaging materials.”¹¹⁵ This commonly affects

105. *Id.* at 45–46.

106. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40.

107. Bartow, *supra* note 5, at 19.

108. *Id.* at 45.

109. Laird, *supra* note 3 (“Copyright law fails to address dissemination and republication because “[d]igital photos are easy to reproduce, so the original poster (or an angry site operator) can easily resubmit photos to another site.”) (quoting revenge porn victim Rebekah Wells).

110. *Id.*; Ryan, *supra* note 1, at 363; Goode, *supra* note 4; Bedi, *supra* note 14; Mince-Didier, *supra* note 7.

111. Matorin, *supra* note 7.

112. Kim, *supra* note 43, at 1034–35.

113. Clark-Flory, *supra* note 45.

114. 47 U.S.C. § 230(c)(1) (1998) (“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.”); Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40 (Section 230 of the Communications Decency Act has been interpreted to grant website owners and operators far-ranging immunity for tortious material submitted by third-party users).

115. Bartow, *supra* note 5, at 45.

revenge porn victims.¹¹⁶ Revenge porn posters are anonymous, often requiring a court order to identify the poster for legal proceedings.¹¹⁷ If the images are legally obscene, a CDA exception for obscenity may apply, but only if the victim owns the copyright and the site ignored takedown notices. Otherwise, the CDA protects the sites because they are only “republishing user-submitted content.”¹¹⁸ Congress passed the CDA to protect innocent internet service providers from liability for obscene material— but now it “shield[s] websites that traffic in such content.”¹¹⁹

Many commentators argue revenge porn laws should “appl[y] to website operators who republish user submissions.”¹²⁰ One federal district court held “[t]he immunity afforded by the CDA is not absolute and may be for-

116. See generally Goldman, *What Should We Do*, *supra* note 5.

117. Clark-Flory, *supra* note 45.

118. Laird, *supra* note 3 (quoting Eric Goldman, law professor at Santa Clara University). Although altering the scope of the CDA is beyond the scope of this article, some pertinent changes may help solve the problem of judgment-free defendants in the internet context. Commentators argue Congress should “grant people the right to have their photos removed.” Andrews, *supra* note 47. Because websites benefit from online traffic, they can best prevent harm caused by revenge porn, and thus courts should hold sites to a reasonable care standard to protect victims from foreseeable harm caused by online harassment. Kim, *supra* note 119, at 117. This reasonable care should include user guidelines, user controls, report abuse buttons, and consequences such as “strip[ping] or threaten[ing] to strip a harasser of anonymity,” or expulsion of abusive posters. *Id.* Websites should reasonably respond to requests to remove revenge porn. *Id.* Courts often hold proprietors liable for nonphysical harm caused by third parties including invasion of privacy. *Id.* at 118. Another potential solution is to make website sponsors and owners liable under a proprietorship theory. Kim, *supra* note 43, at 1034–35. Website owners are proprietors because they both control and receive benefit from their sites. *Id.* Their duty may be higher than proprietors of real-world businesses because millions may visit their site each week, a virtual impossibility in the real world. *Id.* at 1039. Proprietorship liability for web site sponsors “deters antisocial conduct and compensates those injured by such conduct. It allocates the risk of injury to the party in the best position to avoid its occurrence and absorb the loss.” *Id.* at 1045.

Web site owners and sponsors could make several changes to help curb revenge porn. They could require posters to register prior to posting comments, require users indemnify sponsors from harm caused by the users, and ban offensive posters. *Id.* at 1015–16. Requiring sponsors to remove “digital image[s] of a naked person” when the victim so requests should be a requirement, but it will not help victims when the images are already circulating broadly on other sites. *Id.* at 1023.

Another potential solution is to require web sites obtain written consent from the subject of nude images when the subject is identifiable, and keep that consent for a year following the image’s removal. *Id.* at 1025. However, this alone likely will not deter posters, because of the ease of copying or forging the victim’s signature for the consent form. Additionally, web site owners could institute waiting periods prior to permitting a post, which would give the poster a chance to rethink his comment, and require a longer waiting period for sites more likely to cause harm. *Id.* at 1017. Prominently posted notices regarding the potential legal ramifications of user-uploaded comments might also deter posters from publishing damaging messages. *Id.*

119. Nancy Kim, *Imposing Tort Liability on Websites for Cyber-Harassment*, 118 YALE L.J. POCKET PART 115, 116 (2008), <http://thepocketpart.org/2008/12/15/kim.html>.

120. Eric Goldman, *California’s New Law Shows It’s Not Easy To Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:03 PM), <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/> [hereinafter Goldman, *It’s Not Easy to Regulate Revenge Porn*].

feited if the site owner invites the posting of illegal materials or makes actionable postings itself.”¹²¹ However, until all the circuits adopt this reasoning, and until every state criminalizes revenge porn, the materials will remain legal. For instance, one class action lawsuit against a web site dedicated to revenge porn failed because of CDA protections.¹²² The court reasoned this protection covers material posted of an “alleged obscene or unlawful nature.”¹²³

Tort and copyright actions almost certainly will not prevent revenge porn when the defendant is judgment-proof and therefore unconcerned about his liability. Copyright law requires a victim take the image and register her copyright within 90 days of first publication. Removing the images from one website does not remove them from the internet, thus copyright claims provide insufficient relief to revenge porn victims. As neither privacy torts nor copyright law successfully removes revenge porn images or deters it in the first instance, a more effective deterrent is necessary.

B. Criminalizing Revenge Porn is the Best and Perhaps Only Way To Provide a Much-Needed Deterrent

A criminal deterrent is vital as disseminating revenge porn becomes increasingly easy and hundreds of websites monetize it.¹²⁴ Because civil law does not carry the same social stigma as criminal law, it is not a successful deterrent.¹²⁵ Many perpetrators have nothing to lose, so they are not concerned about a civil judgment.¹²⁶ However, revenge porn perpetrators likely do not want to be imprisoned;¹²⁷ so, legal scholars, legislators and advocates are pushing to criminalize revenge porn. In 2014, nine states enacted legislation and twenty-seven have pending legislation prohibiting revenge porn.¹²⁸ One state lawmaker explained legislation was necessary to

121. Jones v. Dirty World Entm't Recordings, L.L.C., 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011) (citing Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157 (9th Cir. 2008) (en banc)).

122. GoDaddy.com, L.L.C. v. Toups, 429 S.W.3d 752, 762 (Tex. App. 2014) (“Plaintiffs seek to hold GoDaddy liable as the publisher of the contested website content; therefore, plaintiffs’ claims are barred under 47 U.S.C. § 230”).

123. *Id.* at 760–61.

124. Brush, *supra* note 48 (quoting University of Miami School of Law professor, Mary Anne Franks, “who is working with lawmakers in various states to push similar legislation.”).

125. Nannette Miranda, *State Senate Committee Seeks New Law on ‘Revenge Porn’*, ABC 30 (June 4, 2013), <http://abclocal.go.com/kfsn/story?section=news/state&id=9127761> (quoting State Senator, Anthony Cannella).

126. Clark-Flory, *supra* note 45.

127. Miranda, *supra* note 125 (quoting State Senator, Anthony Cannella).

128. Anita L. Allen, *First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 913 (2012) [hereinafter Allen, *Privacy Jurisprudence as an In-*

help law enforcement combat revenge porn because “[c]urrently, there are zero ramifications for someone who distributes revenge porn.”¹²⁹ Another highlighted the need to punish “harassment and the worst type of cyberbullying.”¹³⁰

Criminal law “protect[s] the public against harm[] by punishing harmful results of conduct”¹³¹ and carries the imprimatur of community condemnation.¹³² Criminal convictions carry “an ineradicable connotation of moral condemnation and personal guilt.”¹³³ Additionally, criminal law is essential to creating a “good society” because it “defines the minimum conditions of man’s responsibility to his fellows and holds him to that responsibility.”¹³⁴ Criminal law incentivizes obedience to the law—the threat of punishment deters those who might engage in criminal activities.¹³⁵ The likelihood of a criminal conviction is a cost placed on committing a crime.¹³⁶ If a person considering posting revenge porn weighs the potential costs against the potential gains, he could find facing criminal punishment outweighs his desire to harass or humiliate his former paramour. While nothing will completely deter revenge porn, just as the illegality of rape or sexual assault or child pornography does not completely deter those

strument of Social Change] (“Legal scholars now recognize ‘the offensive Internet’ as a major problem, worthy of . . . legal reforms.”); Goode, *supra* note 4; Paul Samakow, *Revenge Porn Now Illegal in CA: Punish Criminals who Violate Trust*, WASH. TIMES (Oct. 7, 2013),

<http://communities.washingtontimes.com/neighborhood/leading-edge-legal-advice-everyday-matters/2013/oct/6/revenge-porn-now-illegal-ca-trust-violations-need/> (“Criminal prosecution and punishment are needed in addition to lawsuits.”); Jessica Roy, *Proposed Florida Law Would Make Publishing Revenge Porn Without Victim’s Consent a Third-Degree Felon*, BETA BEAT (Mar. 8, 2013), <http://betabeat.com/2013/03/proposed-florida-law-would-make-publishing-revenge-porn-without-victims-consent-a-third-degree-felony/> (“A law like [the one proposed in Florida] could provide much-needed recourse for victims of revenge porn, many of whom have difficulty finding lawyers willing to take on their cases.”); *State ‘Revenge Porn’ Legislation*, *supra* note 31.

129. *Bill that Would Criminalize ‘Revenge Porn’ Advances in Legislature*, ROCK RIVER TIMES, Mar. 31, 2014, <http://rockrivertimes.com/2014/03/31/bill-that-would-criminalize-revenge-porn-advances-in-legislature/> (quoting Representative Joe Sosnowski).

130. Maura Zurick, *Revenge Porn Ban Introduced in Springfield: Measure Would Make Posting Explicit Pics Online Without Subject’s Permission a Felony*, CHI. TRIB. (Jan. 29, 2014), http://articles.chicagotribune.com/2014-01-29/news/ct-illinois-revenge-porn-ban-talk-0129-20140129_1_revenge-such-content-permission (quoting co-sponsor Senator Michael Hastings).

131. WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 1.3(b) (2d ed. 2013).

132. Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.”).

133. *Id.* at 424.

134. *Id.* at 410.

135. Marcelo Ferrante, *Deterrence and Crime Results*, 10 *NEW CRIM. L. REV.* 1, 7 (2007).

136. *Id.* at 4–5.

crimes,¹³⁷ criminal punishment may be an effective deterrent because offenders are often judgment-proof but fear imprisonment.

Deterrence removes the motivation for criminal conduct; its true value is shaping the public's future conduct.¹³⁸ Legal experts agree criminal penalties deter crimes.¹³⁹ Two primary aims of criminal law are preventing and deterring social wrongs; it prevents and punishes harm to society.¹⁴⁰ Revenge porn harms society in three main ways. First, it harms the economy. Second, it undermines societal norms and changes the dynamics of interpersonal interactions. Third, it is often a crime or leads to criminal activity.

1. Revenge Porn Harms Society Because it Harms the Economy

Revenge porn harms the economy by removing its victims from the job market, making them unemployable,¹⁴¹ and harming their opportunities for self-improvement by potentially preventing them from receiving higher education that could lead to more lucrative employment.¹⁴² Further, it causes psychological issues that are costly to society.¹⁴³

Unemployment has many costs, both economic and social. Its economic costs include loss of productivity, increased welfare recipients, and lower tax revenues.¹⁴⁴ The social costs of unemployment include "poverty, poor health and premature mortality, psychological stress and suicide,

137. Samakow, *supra* note 128 ("Criminal punishment will not be a perfect deterrent to every jerk considering posting photographs of his or her partner to the world. Criminal punishment will not erase the psychological torture a victim suffers, nor will it prevent the suicide of some victims. Nonetheless, laws must be adopted to address this criminal behavior because one of the goals of criminal laws is deterrence. Consequences can have a connection to behavior. If you know there are no consequences to posting nude photos of your ex on a website, or in sending them to your entire email contacts list, you are more likely to do so than if you know that doing so could land you in jail and paste you as a criminal for life.").

138. Frank G. Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 588 (1982).

139. Brush, *supra* note 48 ("according to [Stetson Law professor Catherine J.] Cameron and others").

140. Samakow, *supra* note 128 ("Volumes have been written about the purpose and effectiveness of criminal laws. We are a society of laws. Laws sustain us and guide us. Laws draw lines. When those lines are crossed there must be consequences. While laws cannot prevent all criminal actions, without the laws society would perish.").

141. Laird, *supra* note 3; Goode, *supra* note 4 ("It's just an easy way to make people unemployable, undatable and potentially at physical risk," quoting Danielle Citron).

142. Ryan, *supra* note 1, at 364.

143. Richardson, *supra* note 1, at 158–59.

144. Tony Eardley, *Identifying and Quantifying the Costs of Unemployment*, in THE PRICE OF PROSPERITY: THE ECONOMIC AND SOCIAL COSTS OF UNEMPLOYMENT 44 (Richard Taylor & Peter Saunders eds., 2002) ("the loss of productive output, forgone revenue, budgetary costs arising from unemployment insurance or welfare provision, and estimates of individual financial losses resulting from prolonged employment.").

criminal behaviour, [and] loss of human capital.”¹⁴⁵ The government loses revenue as people cannot work, and it must spend more money to assist the unemployed.¹⁴⁶ Victims of revenge porn suffer psychological harm, which leads to increased societal costs of caring for these individuals.¹⁴⁷ Those victims who lose their jobs suffer long-term losses from unemployment including decreased skills, which in turn further harm the country’s economic productivity eventually leading “to less aggregate wealth.”¹⁴⁸

2. Revenge Porn Harms the Public by Undermining Societal Norms and Changing the Dynamics of Interpersonal Interactions

Revenge porn harms society by undermining community norms and changing interpersonal interactions that make “intimacy difficult, if not impossible.”¹⁴⁹ Failing to take a strong stand by criminalizing revenge porn “encourages . . . society to cultivate insensitivity and apathy as a norm, and to shun mutual respect and civility as core values. Inaction . . . reinforces a standard of conduct that would be intolerable in the physical world.”¹⁵⁰ Revenge porn sites “devoted . . . to demeaning, harassing and humiliating individuals . . . surely threaten . . . the ‘moral ecology’ of society.”¹⁵¹

Criminalizing revenge porn “would deter damaging privacy invasions and send the powerful message that posting someone’s most private mo-

145. *Id.*

146. J.T. Young, *The Ripple Effect of High Unemployment: When Workers Suffer, so does the Nation as a Whole*, WASH. TIMES, May 14, 2013, <http://www.washingtontimes.com/news/2013/may/14/the-ripple-effect-of-high-unemployment/#ixzz2hibXL081>.

147. *Mental Illness Surveillance Among Adults in the United States*, CTR. FOR DISEASE CONTROL (Sept. 2, 2011), <http://www.cdc.gov/mmwr/preview/mmwrhtml/su6003a1.htm> (“In 2002 and 2003, mental illness cost the United States an estimated \$300 billion annually, which included approximately \$193 billion from lost earnings and wages and \$24 billion in disability benefits in 2002 and \$100 billion in health-care expenditures in 2003.”).

148. *Long-Term Unemployment: Consequences and Solutions: Testimony Before the Joint Economic Commission* (Apr. 24, 2013) (statement of Kevin A. Hassett, John G. Searle Senior Fellow, Director of Economic Policy Studies, American Enterprise Institute), available at http://www.policyuncertainty.com/app/Hasset_testimony.pdf (“unemployment has an influence on the risk of future unemployment and earnings of a worker, effects that may partially be attributable to both employers’ perceptions of workers and to workers’ loss of general and specific skills during a period of unemployment.”); Young, *supra* note 146 (“As the Congressional Budget Office’s 2012 study observed, many displaced workers lose earnings upon unemployment but ‘also often suffer long-term losses in earnings from a combination of factors.’”).

149. Adjin-Tetty, *supra* note 13, at 192 (discussing “the resulting human and social costs” of sexual victimization); Kim, *supra* note 43, at 1051.

150. Kim, *supra* note 43, at 1054.

151. Allen, *Privacy Jurisprudence as an Instrument of Social Change*, *supra* note 128, at 915.

ments, most often in a breach of their trust and without their permission, is unacceptable.”¹⁵²

3. Revenge Porn Harms Society Because it is Often a Separate Crime or Leads to Criminal Activity

Revenge porn constitutes “sexual use without consent.”¹⁵³ Other kinds of sexual use without consent, such as rape or sexual assault, are prosecuted “even if the perpetrator never touches the victim.”¹⁵⁴ Revenge porn may constitute sexual exploitation, because the victim is used in “pornography, or other sexually manipulative activity that has caused or could cause serious emotional injury.”¹⁵⁵ Revenge porn “transforms unwilling individuals into sexual entertainment for strangers.”¹⁵⁶ Moreover, revenge porn subjects victims to danger beyond humiliation. Victims frequently receive threats of sexual assault, rape and death.¹⁵⁷ Victims may commit suicide: they are stalked, harassed, assaulted and sometimes even killed.¹⁵⁸ Where it involves computer fraud or hacking, the perpetrators violate the Computer Fraud and Abuse Act,¹⁵⁹ but without more posting the images is not a crime.¹⁶⁰ While some instances of revenge porn constitute existing crimes, the protections are far from complete.¹⁶¹ In many instances, the age of the victim precludes damages.¹⁶² The law already recognizes several crimes for possession, creation or distribution of harmful images and for sexual use

152. Danielle Keats Citron, ‘Revenge Porn’ Should be a Crime, CNN (Jan. 16, 2014, 3:49 PM), <http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html>.

153. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40.

154. *Id.*

155. BLACK’S LAW DICTIONARY 1498–99 (9th ed. 2009).

156. Franks, *A Quick Guide*, *supra* note 8, at 1.

157. Logan Reputation, *New York Bans Revenge Porn Website*, INTERNETREPUTATION.COM (Oct. 18, 2013), <http://www.internetreputation.com/new-york-bans-revenge-porn-website/>.

158. Franks, *Unwilling Avatars*, *supra* note 9, at 246; Salter et al., *supra* note 18, at 303; Franks, *A Quick Guide*, *supra* note 8, at 1; Schulzke, *supra* note 1.

159. Kashmir Hill, *How Revenge Porn King Hunter Moore Was Taken Down*, FORBES (Jan. 24, 2014), <http://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/> (Hunter Moore, owner of sites that post revenge porn “was arrested along with Chris ‘Gary Jones’ Evens and charged with hacking and conspiracy to hack.”).

160. *People v. Barber*, No. 2013NY059761, 2014 WL 641316 (N.Y. Crim. Ct. Feb. 18, 2014) (granting a motion to dismiss a criminal case filed against a revenge porn perpetrator charged with Aggravated Harassment, Dissemination of an Unlawful Surveillance Image and Public Display of Offensive Sexual Material reasoning “defendant’s conduct, while reprehensible, does not violate any of the criminal statutes under which he is charged.”).

161. Laird, *supra* note 3 (In many states, Johnstone says, nonconsensual pornography violates the state criminal laws on stalking, voyeurism, hacking and more. But the police are used to ‘brick-and-mortar crime scenes,’ Johnstone says, and may not think to apply those laws to online behavior.”) (quoting Erica Johnstone; also references Jody Westby, Chair of the Privacy and Computer Crime Committee of the ABA’s Science & Technology Law Section); Matorin, *supra* note 7.

162. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40.

without consent.¹⁶³ So far only one state has attempted to prosecute a revenge porn poster—unsuccessfully¹⁶⁴—thus “involuntary porn falls between the cracks because it is new.”¹⁶⁵

Revenge porn imposes a high cost on society, and criminal penalties are “the most effective deterrent.”¹⁶⁶ Since criminal cases do not cost victims thousands of dollars they do not have,¹⁶⁷ criminalizing revenge porn allows those who are unable to pay the same opportunity to stop revenge porn as those with means.¹⁶⁸ Preventing victimization so there need be no compensation is another primary goal of criminal law.¹⁶⁹ New laws criminalizing revenge porn are “necessary because existing laws do not apply.”¹⁷⁰ Furthermore, because the images are almost impossible to remove, criminalizing revenge porn to deter its initial posting is “the best possible outcome.”¹⁷¹ Criminal laws would deter revenge porn and prevent victimization.

163. BLACK’S LAW DICTIONARY 1188 (9th ed. 2009) (defining “sexual offense” as “[a]n offense involving unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty, and bestiality”); *id.* at 1498–99 (defining “sexual exploitation” as “[t]he use of a person, esp. a child, in prostitution, pornography, or other sexually manipulative activity that has caused or could cause serious emotional injury”); *id.* at 1279 (defining “child pornography” as “[m]aterial depicting a person under the age of 18 engaged in sexual activity . . . those directly involved in its distribution can be criminally punished.”).

164. *Barber*, 2014 WL 641316 (dismissing all counts filed against a revenge porn perpetrator charged with Aggravated Harassment, Dissemination of an Unlawful Surveillance Image and Public Display of Offensive Sexual Material reasoning “defendant’s conduct, while reprehensible, does not violate any of the criminal statutes under which he is charged.”).

165. Matorin, *supra* note 7.

166. Franks, *A Quick Guide*, *supra* note 8, at 1.

167. Laird, *supra* note 3 (criminalizing revenge porn “have the financial and privacy concerns of lawsuits, and the laws would provide quick takedowns rather than financial damages.”); Brush, *supra* note 48 (“Moreover, criminal cases don’t cost the complainant untold thousands of dollars”) (citing Alan L. Friel).

168. Brush, *supra* note 48 (“The big difference is the expense. If you don’t have the financial resources to bring a civil claim, it’s not really a remedy. A criminal statute levels the playing field for economically disadvantaged victims”) (citing Edwards Wildman Palmer, LLP media and technology partner, Alan L. Friel).

169. Carrington, *supra* note 138, at 587.

170. Matorin, *supra* note 7; see Sam Jasenosky, *Revenge-Porn Laws Needed: There is Currently No State Law Protecting Victims of Revenge Porn*, MINN. DAILY, Oct. 22, 2013, <http://www.mndaily.com/opinion/columns/2013/10/07/revenge-porn-laws-needed> (“With the rise of revenge porn websites, we can’t allow loopholes in our cyber-bullying laws to leave victims without protection.”).

171. Jasenosky, *supra* note 170 (“Our laws should reflect critical thinking on the way technology is mediating our relationships. A federal law should be our goal, but state laws are where we can start. There must be consequences of cruelly exploiting people through revenge porn.”); 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/>.

II. AN ANALYSIS OF SOME LAWS THAT CRIMINALIZE REVENGE PORN

Most states do not prohibit posting another's image or personal information online without permission.¹⁷² During the past two years, ten states enacted legislation, and legislators in at least twenty-seven states introduced bills.¹⁷³ However, two fail to cover the vast majority of victims: one only protects victims who were unaware someone captured the images; the other does not protect victims who took the image themselves.¹⁷⁴ Due to the ease of taking and posting nude pictures, the fact that just ten states have criminalized revenge porn "highlights how poorly legislation has kept up with technological advances."¹⁷⁵

New Jersey passed a law in 2003 that makes it a third-degree felony to disseminate a sexually explicit picture of someone without her consent.¹⁷⁶ While legislators did not discuss revenge porn, as it was unheard of 11 years ago, the statute is "fairly comprehensive."¹⁷⁷ Since then, it appears other states may have utilized this statute as a basis for their own laws criminalizing revenge porn. New Jersey's statute expresses "the idea that the exposure of [the victim's] 'intimate parts' or 'sexual contacts' is inherently intrusive."¹⁷⁸ Some advocates feel New Jersey's law is a prime example of how to criminalize revenge porn.¹⁷⁹ Some even argue that, although it was not directed at revenge porn, it more successfully holds posters responsible than other statutes.¹⁸⁰

Laws criminalizing revenge porn typically prohibit dissemination without consent, but fail to define consent fully.¹⁸¹ They further require the

172. Mince-Didier, *supra* note 7.

173. *State 'Revenge Porn' Legislation*, *supra* note 31.

174. CAL. PENAL CODE § 647 (West 2013) ("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."); WIS. STAT. ANN. § 942.09 (West 2014).

175. Jasenosky, *supra* note 170.

176. NJ STAT. ANN. § 2C:14-9(b) (West 2003), available at <https://www.judiciary.state.nj.us/criminal/charges/sexual014.pdf>.

177. Franks, *A Quick Guide*, *supra* note 8, at 1.

178. Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. REV. 357, 383-84 (2013).

179. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40.

180. Jasenosky, *supra* note 170.

181. ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West) ("It is unlawful to intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure."); COLO. REV. STAT. ANN. § 18-7-107 (West 2014); GA. CODE ANN. § 16-11-90 (West 2014); HAW. REV. STAT. § 711-1110.9 (West 2014); IDAHO CODE ANN. § 18-6609 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014); VA. CODE ANN. § 18.2-386.1 (West 2014).

intent to harass or cause emotional distress.¹⁸² Revenge porn's dissemination on websites is prohibited, and the laws immunize websites from liability.¹⁸³ One law criminalizes the possession, distribution, exhibition or reproduction of a nude image if the subject did not consent, but this only applies when the subject is unaware the image was captured.¹⁸⁴ This fails to protect victims who took the images themselves, and may criminalize too much speech because courts have long protected the private possession of pornography.¹⁸⁵ So long as the law sufficiently explains that the only possession it criminalizes are sexually explicit or nude images the victim was unaware were taken, it can likely meet constitutional scrutiny. Laws criminalizing revenge porn also provide exceptions for commercial and lawful purposes.¹⁸⁶ Many of the laws do not require the subject be identified or identifiable.¹⁸⁷ This could make the laws overly broad by criminalizing a victimless act, as the harms of revenge porn are tied primarily to others knowing the subject's identity.

Concerning penalties, there is a split regarding whether revenge porn constitutes a misdemeanor or a felony.¹⁸⁸ One law provides for more severe punishment when there are aggravating factors, such as when the victim is less than 18 years of age.¹⁸⁹ Three other laws raise the punishment for second violations—one law makes a subsequent violation a felony punishable

182. COLO. REV. STAT. ANN. § 18-7-107 (West 2014); GA. CODE ANN. § 16-11-90 (West 2014); HAW. REV. STAT. § 711-1110.9 (West 2014); IDAHO CODE ANN. § 18-6609 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014).

183. COLO. REV. STAT. ANN. § 18-7-107 (West 2014); IDAHO CODE ANN. § 18-6609 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014) (“This section does not apply to an Internet service provider or interactive computer service, as defined in 47 U.S.C. Sec. 230(f)(2), a provider of an electronic communications service as defined in 18 U.S.C. Sec. 2510, a telecommunications service, information service, or mobile service as defined in 47 U.S.C. Sec. 153, including a commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or a cable operator as defined in 47 U.S.C. Sec. 522”).

184. WIS. STAT. ANN. § 942.09 (West 2014) (“does not know of and consent to the capture of the representation”).

185. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

186. ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West); GA. CODE ANN. § 16-11-90 (West 2014); HAW. REV. STAT. § 711-1110.9 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014); VA. CODE ANN. § 18.2-386.1 (West 2014); WIS. STAT. ANN. § 942.09 (West 2014).

187. The following require identification: CAL. PENAL CODE § 647 (West 2013); COLO. REV. STAT. ANN. § 18-7-107 (West 2014); HAW. REV. STAT. § 711-1110.9 (West 2014). The following statutes do not require the subject be identified or identifiable: ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West); GA. CODE ANN. § 16-11-90 (West 2014); IDAHO CODE ANN. § 18-6609 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014).

188. COLO. REV. STAT. ANN. § 18-7-107 (West 2014) (misdemeanor punishable by between six and eighteen months in prison and “the court shall fine the defendant up to ten thousand dollars.”); HAW. REV. STAT. § 711-1110.9 (West 2014) (felony carry a maximum possible penalty of 5 years in prison); IDAHO CODE ANN. § 18-6609 (West 2014); WIS. STAT. ANN. § 942.09 (West 2014) (misdemeanor punishable by “a fine not to exceed \$10,000 or imprisonment not to exceed 9 months, or both.”).

189. VA. CODE ANN. § 18.2-386.1 (West 2014).

“by imprisonment of not less than one nor more than five years, a fine of not more than \$100,000.00, or both.”¹⁹⁰ Colorado’s law further protects victims by creating a private cause of action.¹⁹¹ It also ensures victims “retain a protectable right of authorship regarding the commercial use of the private image,” thereby protecting the victim’s right to sue under copyright as well as require websites to remove the images.¹⁹²

Current and proposed laws criminalizing revenge porn do not address its true harms. These laws fail to remove the photos from the web, either from the site on which they were initially posted or the re-postings on “dozens or even hundreds of other Web sites.”¹⁹³ Congressional action is the only way to remedy this issue because the CDA grants broad immunity to internet service providers for the acts of private parties.¹⁹⁴

One potential solution appears in Hawaii’s revenge porn statute, which provides “the court may order the destruction of any recording made in violation of this section.”¹⁹⁵ This law also expressly protects websites from liability.¹⁹⁶ Assuming the destruction of the images imposes a duty on websites to remove those images without imposing liability because they were posted on the site, this solution would remove the images from the web but continue to protect websites and thus not violate the CDA. Since criminal laws provide effective deterrents, criminalizing revenge porn would drastically reduce the need to remove the images in the first place. The concerns regarding laws criminalizing revenge porn include that they: (1) inadequately protect victims and are insufficient in several common instances of revenge porn; and (2) impermissibly infringe upon free speech.

190. GA. CODE ANN. § 16-11-90 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014) (“Distribution of an intimate image is a third degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode”); VA. CODE ANN. § 18.2-386.1 (West 2014) (“Where it is alleged in the warrant, information, or indictment on which the person is convicted and found by the court or jury trying the case that the person has previously been convicted within the 10-year period immediately preceding the offense charged of two or more of the offenses specified in this section, each such offense occurring on a different date, and when such offenses were not part of a common act, transaction, or scheme, and such person has been at liberty as defined in § 53.1-151 between each conviction, he shall be guilty of a Class 6 felony.”).

191. COLO. REV. STAT. ANN. § 18-7-107 (West 2014).

192. *Id.*

193. Andrews, *supra* note 47.

194. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105, 1109 (9th Cir. 2009) (holding that where a woman alleged her former boyfriend created fake profiles under her name on Yahoo, posted nude photos and provided her contact information, impersonated her in chat rooms and directed people to her fake profiles Yahoo! was immune under Section 230, but could be liable on a promissory estoppel theory because it promised to take down the content but did not.); Andrews, *supra* note 47.

195. HAW. REV. STAT. § 711-1110.9 (West 2014).

196. *Id.*

A. The Laws Inadequately Protect Victims and Are Insufficient in Several Common Instances of Revenge Porn

The laws criminalizing revenge porn are insufficient. Some are inadequate because they are not applicable in several common instances of revenge porn.¹⁹⁷ Some state laws miss the issue entirely by applying only when the perpetrator took the image and knew the subject did not consent.¹⁹⁸ Others do not require the victim be identified or identifiable.¹⁹⁹ These laws do not protect the vast majority of victims because most laws do not apply when victims took the picture themselves; almost eighty percent of revenge porn victims took the picture themselves.²⁰⁰ Because these laws do not cover most victims, particularly those who took the images themselves, they may promote a “‘blame the victim’ mentality.”²⁰¹

Jurisdiction is another potential issue, simply because of the ease of posting revenge porn from anywhere at any time. States can prosecute out-of-state defendants who harm its residents.²⁰² Laws criminalizing revenge porn should address jurisdiction so perpetrators cannot avoid liability by posting the images from a state where the victim does not reside. To this end, legislators should utilize the detrimental effects test first defined by Justice Oliver Wendell Holmes.²⁰³ The detrimental effects test states “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as

197. Bedi, *supra* note 14 (quoting Mary Anne Franks); Schulzke, *supra* note 1 (quoting Eugene Volokh).

198. CAL. PENAL CODE § 647 (West 2013) (applies when the perpetrator takes the image prior to distribution.); VA. CODE ANN. § 18.2-386.1 (West 2014) (applies when the perpetrator “knowingly and intentionally create[s] any videographic or still image by any means whatsoever of any nonconsenting person”); WIS. STAT. ANN. § 942.09 (West 2014) (felony violation only applies when the defendant “knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.”).

199. ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West); GA. CODE ANN. § 16-11-90 (West 2014); IDAHO CODE ANN. § 18-6609 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014).

200. CAL. PENAL CODE § 647 (West 2013); WIS. STAT. ANN. § 942.09 (West 2014); Bedi, *supra* note 14; Goldman, *It’s Not Easy To Regulate Revenge Porn*, *supra* note 120.

201. Kelly, *supra* note 171 (quoting Mary Anne Franks).

202. *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding a court may exercise specific personal jurisdiction over a nonresident defendant acting outside the forum when the defendant intentionally directed tortious conduct toward the state, knowing the conduct would harm a resident of the forum); *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397-98 (4th Cir. 2003) (“To decide whether the requisites of specific jurisdiction are satisfied in this case, it is necessary to consider how they apply to the particular circumstance in which, as here, an out-of-state defendant has acted outside of the forum in a manner that injures someone residing in the forum.”).

203. *Calder*, 465 U.S. at 789 (“Jurisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.”) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1980)); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 37 (2014).

if he had been present at the effect.”²⁰⁴ Because revenge porn foreseeably harms the victim in the state in which she lives, laws criminalizing revenge porn should incorporate language from the detrimental effects test into the statute. An example of incorporating the detrimental effects test appears in Georgia’s revenge porn law which subjects individuals to prosecution for activities conducted “within or outside of this state” if that conduct “involves an individual who resides in [Georgia]” unless the person is within the state, in which case the violation need not affect an individual residing inside the state.²⁰⁵

Another reason these laws are inadequate is they almost never criminalize the redistribution of the images, just the original posting.²⁰⁶ This leaves victims unable to remove the images, one of the results they most desire. All but one law fails to protect victims when the perpetrator hacks into the victim’s computer or steals the images some other way.²⁰⁷ Although these actions are prohibited by other statutes under which the perpetrators may be liable, failing to expressly criminalize the dissemination of images obtained illegally provides a potential loophole regarding revenge porn particularly as many only prohibit the dissemination of images the poster either took or received from another person.²⁰⁸ One proposed Delaware law that is awaiting signature expressly prohibits revenge porn when the perpetrator obtained the images through theft, “unauthorized access to a computer system . . . or by unauthorized access to electronic mail or an electronic mail service provider.”²⁰⁹ This closes the potential loophole.

Some revenge porn laws include language addressing a reasonable expectation of privacy, but none creates a right to privacy based on the context of an intimate relationship or a right to privacy regarding sexually explicit images.²¹⁰ One’s definition of a reasonable expectation of privacy

204. *Strassheim*, 221 U.S. at 285.

205. GA. CODE ANN. § 16-11-90 (West 2014).

206. Goldman, *It’s Not Easy To Regulate Revenge Porn*, *supra* note 120.

207. H.R. 260, 147th Gen. Assemb., 2d Reg. Sess. (Del. 2014).

208. CAL. PENAL CODE § 647 (West 2013) (applies when the perpetrator takes the image prior to distribution); VA. CODE ANN. § 18.2-386.1 (West 2014) (applies when the perpetrator “knowingly and intentionally create[s] any videographic or still image by any means whatsoever of any nonconsenting person.”); WIS. STAT. ANN. § 942.09 (West 2014) (applies when the defendant “knows or has reason to know that the person who is depicted nude does not know of and consent to the capture of the representation.”); Goldman, *It’s Not Easy To Regulate Revenge Porn*, *supra* note 120.

209. H.R. 260.

210. COLO. REV. STAT. ANN. § 18-7-107 (West 2014) (“When the actor knew or should have known that the depicted person had a reasonable expectation that the image would remain private”); HAW. REV. STAT. § 711-1110.9 (West 2014) (“The person intentionally or knowingly installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any device for observing, recording, amplifying, or broadcasting another person in a stage of undress or sexual activity in that place”); IDAHO CODE ANN. § 18-6609 (West 2014) (“A place where a reasonable

turns on the location where the images were captured.²¹¹ These statutes fail to address how prosecutors could prove the parties agreed the images would remain private,²¹² creating further obstacles to successful prosecution by severely limiting the number of victims who could prove the defendant knew the victim intended the images remain confidential. These laws also fail to address confidentiality disputes that may arise when the parties agree the image will stay private.²¹³

These laws require intent to cause severe emotional distress or harass the victim. Some commentators argue emotional distress is not a sufficient reason to criminalize revenge porn.²¹⁴ Emotional distress does not fully encompass common harms such as reputational harm, harassment, or physical endangerment.²¹⁵ Intent is generally difficult to prove.²¹⁶ Laws that only apply when the defendant intends to cause severe emotional distress may be exceedingly difficult to prove without a “smoking gun.”²¹⁷ This is particularly true of revenge porn because there are a multitude of potential motivations behind sharing intimate photos including increasing website traffic, obtaining notoriety,²¹⁸ or for “bragging rights, compensation or as a

person would believe that he could undress, be undressed or engage in sexual activity in privacy, without concern that he is being viewed, photographed, filmed or otherwise recorded by an imaging device”); UTAH CODE ANN. § 76-5b-203 (West 2014) (“the intimate image was created by or provided to the actor under circumstances in which the individual has a reasonable expectation of privacy”); VA. CODE ANN. § 18.2-386.1 (West 2014) (“when the circumstances set forth in clause (i) or (ii) are otherwise such that the person being recorded would have a reasonable expectation of privacy”).

211.

“Place where a person has a reasonable expectation of privacy” means:

- (i) A place where a reasonable person would believe that he could undress, be undressed or engage in sexual activity in privacy, without concern that he is being viewed, photographed, filmed or otherwise recorded by an imaging device; or
- (ii) A place where a person might reasonably expect to be safe from casual or hostile surveillance by an imaging device; or
- (iii) Any public place where a person, by taking reasonable steps to conceal intimate areas, should be free from the viewing, recording, storing or transmitting of images obtained by imaging devices designed to overcome the barriers created by a person’s covering of intimate areas.

IDAHO CODE ANN. § 18-6609 (West 2014).

212. COLO. REV. STAT. ANN. § 18-7-107 (West 2014); HAW. REV. STAT. § 711-1110.9 (West 2014); IDAHO CODE ANN. § 18-6609 (West 2014); UTAH CODE ANN. § 76-5B-203 (West 2014); VA. CODE ANN. § 18.2-386.1 (West 2014).

213. *Id.*

214. Bedi, *supra* note 14.

215. *Id.*

216. *United States v. Heras*, 609 F.3d 101, 106 (2d Cir. 2010) (“The law has long recognized that criminal intent may be proved by circumstantial evidence alone.”); *United States v. Salameh*, 152 F.3d 88, 143 (2d Cir. 1998) (“[A]s a general rule most evidence of intent is circumstantial.”); *State v. Cram*, 955 A.2d 528, 530–31 (Vt. 2008).

217. *Id.*

218. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40 (“Many admitted purveyors of non-consensual pornography maintain, with some plausibility, that their sole intention is to obtain notoriety, fulfill some sexual desire, or increase traffic for their websites.”).

joke.”²¹⁹ The intent element in these statutes is also too narrow.²²⁰ For instance, requiring the intent to cause severe emotional distress may not cover cases where a former couple is competing for the same job and the poster wants to discredit his former paramour to obtain the position.²²¹ Without the intent to cause emotional distress and without guidelines regarding how to prove the defendant knew the images were to remain private, posting revenge porn would not constitute a crime although its ultimate effects would remain the same.²²²

B. The Primary Concern with Laws Criminalizing Revenge Porn Would Impermissibly Infringe on Free Speech

The most frequently cited concern regarding a law criminalizing revenge porn is that it would infringe on free speech.²²³ Free speech protections extend to the internet.²²⁴ When speech is restricted, and that speech does not fall under an exception, the government must have a compelling interest to restrict the speech and the restriction must be narrowly tailored.²²⁵ These concerns may result in reluctance to criminalize revenge porn.²²⁶ First Amendment groups voiced concerns about an early draft of California’s law because it did not require actual harm.²²⁷ While some laws require identification, many do not, which may result in the statutes being overly broad because they do not require actual harm.²²⁸ The law, like most others criminalizing revenge porn, requires the victim suffer “emotional distress,”²²⁹ but some critics maintain it criminalizes too much speech.²³⁰

219. Bedi, *supra* note 14.

220. Andrews, *supra* note 47.

221. *Id.*

222. *Id.*

223. U.S. CONST. amend. I, cl. 2. (“Congress shall make no law . . . abridging the freedom of speech.”); Laird, *supra* note 3; Goode, *supra* note 4 (“proposals have met opposition from critics who worry that such laws would infringe on the First Amendment. And some experts, like Eric Goldman, a law professor at Santa Clara University, have said that any state law would be vulnerable to First Amendment challenges.”).

224. Doe v. Shurtleff, 628 F.3d 1217, 1222 (10th Cir. 2010) (citing Reno v. ACLU, 521 U.S. 844, 870 (1997)); see also James v. Meow Media, Inc., 300 F.3d 683, 696 (6th Cir. 2002).

225. United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000); Reno 521 U.S. at 874; Sable Comm’ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Ryan, *supra* note 1, at 366.

226. Samakow, *supra* note 128.

227. Laird, *supra* note 3.

228. Requires identification: CAL. PENAL CODE § 647 (West 2013); COLO. REV. STAT. ANN. § 18-7-107 (West 2014); HAW. REV. STAT. § 711-1110.9 (West 2014). Doesn’t require identification: ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West); GA. CODE ANN. § 16-11-90 (West 2014); IDAHO CODE ANN. § 18-6609 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014).

229. Aaron Sankinaaron, *Revenge Porn: California Legislators Go after Troubling New Trend*, HUFFINGTON POST (Oct. 7, 2013, 10:16 PM), http://www.huffingtonpost.com/2013/06/05/revenge-porn-california_n_3391638.html; see e.g. COLO. REV. STAT. ANN. § 18-7-107 (West 2014) (distress and

Critics also fear these laws may chill valuable speech by preventing the distribution of images demonstrating “a crime or impropriety.”²³¹ Issues of crime or impropriety, like political sex scandals, affect the public and are newsworthy, so they would retain protection under freedom of the press.²³² Only one law explicitly excludes images for newsworthy events, and none mention political malfeasance.²³³ A carefully drafted law would clearly exclude images disseminated for these and similar lawful purposes.²³⁴ Moreover, “it is disingenuous to proclaim such laws ‘worse’ than the problem because someone may hypothetically want to post nude photos of a public figure to show unfitness for office.”²³⁵

Another oft-cited concern is that these statutes restrict the content of speech by focusing on revenge porn’s offensive nature.²³⁶ When a law prohibits the content or viewpoint of speech—including speech intended to annoy, harass, or cause emotional distress—courts deem the restriction unconstitutional.²³⁷ Commentators argue statutes that prohibit revenge porn, and thus focus on harassment or emotional distress, do not serve a compelling government interest.²³⁸ They argue protecting people from

identification); GA. CODE ANN. § 16-11-90 (West 2014) (emotional distress); HAW. REV. STAT. § 711-1110.9 (West 2014) (identifiable); UTAH CODE ANN. § 76-5b-203 (West 2014) (emotional distress).

230. Laird, *supra* note 3.

231. Bedi, *supra* note 14.

232. *McCann v. U.S. Dep’t of Health & Human Servs.*, 828 F. Supp. 2d 317, 323 (D.D.C. 2011) (“to overcome the privacy interests at stake, Plaintiff must show that the exempt information is necessary to ‘shed any light on the [mis]conduct of any Government agency or official.’”) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989)); U.S. CONST. amend. I, cl. 2.

233. COLO. REV. STAT. ANN. § 18-7-107(2) (West 2014) (“It shall not be an offense under this section if the photograph, video, or image is related to a newsworthy event.”).

234. ARIZ. REV. STAT. ANN. § 13-1425 (2014) (WEST); GA. ANN. CODE § 16-11-90 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014); VA. CODE ANN. § 18.2-386.1 (West 2014).

235. Matorin, *supra* note 7.

236. See generally Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking”*, 107 NW. U. L. REV. 731 (2013) [hereinafter Volokh, *One-to-One Speech vs. One-to-Many Speech*].

237. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (discussing “our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (“the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers”); *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (“Some ‘breathing space’ for contentious speech is essential, however, under the Free Speech Clause.”); Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 236, at 768–69, 772.

238. John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 31 (2012); *But see Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *Katz v. United States*, 389 U.S. 347, 351–52 (1967) (“What a person knowingly exposes to the public, even in his own home or office,

harm due to the “non-consensual dissemination of personal secrets”²³⁹ does not constitute a compelling government interest. Commentators contend that the right to know private facts about others outweighs the individual’s right to privacy.²⁴⁰ This claim turns on the right to know “the truth about qualities, character, conduct, and propensities of those around us and, to put it bluntly, the adverse ways in which they might affect us.”²⁴¹ While in the case of a pedophile or rapist, this argument is tenable, it loses its impact for things that do not affect others directly, such as the fact someone took or allowed a significant other to take sexually explicit images.²⁴²

Critics further emphasize that the release of personal information does not involve imminent death or destruction, and harms such as embarrassment, humiliation and economic losses are “not likely to be seriously debilitating.”²⁴³ However, this contention ignores the fact that revenge porn results in physical threats, stalking, attacks, or even death, each of which constitute imminent danger.²⁴⁴

Critics also insist, because of the newness of the right to keep personal information private, statutes criminalizing revenge porn should not protect personal information.²⁴⁵ However, people have a vested interest in protecting their privacy. For centuries, scholars and philosophers discussed the importance of privacy.²⁴⁶ Privacy protection entered American law in the 1890s, and is thus by no means a new right.²⁴⁷ The right to personal privacy for non-public individuals whose sexual activity has no impact on their coworkers or friends is greater than the right to information protected with-

is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”) (internal citations omitted).

239. Humbach, *supra* note 238, at 34.

240. *Id.* at 35.

241. *Id.*

242. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1094 (2000) (“In some instances, it may be quite unlikely that certain speech would be useful to the listeners either for political purposes or for daily life purposes; this largely has to do with information that shows people in ridiculous, embarrassing, or demeaning contexts without revealing any useful new information about them. Everybody knows that I go to the bathroom; printing a picture of me on the toilet would embarrass me not because it reveals something new about me, but because it shows me in a pose that by cultural convention is seen as ridiculous or undignified.”) [hereinafter Volokh, *Freedom of Speech and Information Privacy*].

243. Humbach, *supra* note 238, at 34.

244. Franks, *Unwilling Avatars*, *supra* note 9, at 246.

245. Humbach, *supra* note 238, at 36 (“the very newness of the freestanding right of privacy is at least some indication that it protects little that the law has not long protected anyway.”).

246. Judith DeCew, *Privacy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), <http://plato.stanford.edu/archives/fall2013/entries/privacy/> (the right to privacy concept goes back to Aristotle).

247. *Id.* (“Early treatises on privacy appeared with the development of privacy protection in American law from the 1890’s”).

in the ambit of the First Amendment.²⁴⁸ A carefully crafted law can protect this privacy right.

III. HOW A LAW CAN CRIMINALIZE REVENGE PORN, PROTECT VICTIMS, AND NOT VIOLATE THE CONSTITUTION

Although First Amendment concerns loom over revenge porn legislation, the right to free speech is limited.²⁴⁹ Free speech does not—and should not—protect the ability to defame others or invade their privacy by disseminating nude or sexually explicit images without consent.²⁵⁰ Speech that is “‘vulgar,’ ‘offensive,’ and ‘shocking’ . . . is not entitled to absolute constitutional protection under all circumstances.”²⁵¹ Courts examine laws that infringe on speech, including images, using strict scrutiny unless the speech falls under an exception, like obscenity when courts use rational

248. Lofton v. Sec’y of Dep’t of Children & Family Servs., 377 F.3d 1275, 1282 (11th Cir. 2004) (footnotes omitted) (“The right to privacy that is the touchstone for a right to sexual intimacy by consenting adults has its Supreme Court lineage and trajectory through the decisions in *Griswold* (1965), *Eisenstadt* (1972), *Roe v. Wade* (1973), and *Carey* (1977), and culminating with *Lawrence* (2003).”); Conn. Dep’t of Pub. Safety v. Freedom of Info. Comm’n, No. CV950555483S, 1996 WL 589253, at *2 (Conn. Super. Ct. Oct. 3, 1996) (“Sexual relations, for example, are normally entirely private matters When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of privacy, unless the matter is one of legitimate public interest.”) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. b); *Jersevic v. Kuhl*, No. 238808, 2003 WL 1558207, at *2 (Mich. Ct. App. Mar. 25, 2003) (“there is ample support for plaintiff’s claim that his status as a public official did not necessarily elevate his sexual relations into a matter of legitimate public interest. There is no evidence that plaintiff used or misused his office or in any way made his private sexual matters a matter of public concern.”).

249. *Brush*, *supra* note 48 (“The First Amendment is strong, powerful and important—but it’s not absolute,” quoting Neil Richards); *Matorin*, *supra* note 7 (“The First Amendment’s guarantee of free speech is not absolute. This is not merely ‘uncomfortable speech’ and there is no difficulty differentiating between this and newsworthy stories.”); *Samakow*, *supra* note 128 (“Not all speech is protected. Laws can and should be crafted in every state, and federally, that make illegal the nonconsensual dissemination of nude images or videos of others. This is a very simple concept that is easily defined. It should be seriously punished once proven.”).

250. *New York Times Co. v. Sullivan*, 376 U.S. 254, 301–02 (1964) (“The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.”); *United States v. Thomas*, 74 F.3d 701, 710 (6th Cir. 1996) (The Supreme Court has “recognized that the right to possess obscene materials in the privacy of one’s home does not create ‘a correlative right to receive it, transport it, or distribute it’ in interstate commerce even if it is for private use only. Nor does it create ‘some zone of constitutionally protected privacy [that] follows such material when it is moved outside the home area.’”) (quoting *United States v. Orito*, 413 U.S. 139, 141–42 (1973) (zone); *United States v. 12 200–Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973) (distribute)); Anita L. Allen, *What We Must Hide: The Ethics of Privacy and the Ethos of Disclosure*, 25 ST. THOMAS L. REV. 1, 9 (2012) [hereinafter Allen, *What We Must Hide*]; *Brush*, *supra* note 48 (quoting Mary Anne Franks).

251. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747 (1978).

basis review.²⁵² Revenge porn is not protected speech because it is obscene, and therefore falls under a categorical exception to the First Amendment.²⁵³

Regardless, even if courts do not deem revenge porn obscene, a sufficiently clear law would avoid running afoul of the First Amendment.²⁵⁴ First Amendment scholars say careful drafting could keep any law criminalizing revenge porn from running afoul of the First Amendment.²⁵⁵ Indeed, one free speech defender says “a suitably clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there’s good reason to think that the subject did not consent to publication would be constitutional” because a narrow statute would avoid criminalizing too much speech.²⁵⁶ Another argues a law regulating public exhibition of sexual acts “would be presumptively valid” because it is a legitimate governmental regulation that does “not significantly infringe any privacy rights.”²⁵⁷ A law with specific definitions would apply only in certain instances. Exceptions for lawful dissemination and voluntary exposure would similarly avoid criminalizing too much speech. Focusing on the time, place and manner of revenge porn would prevent a law from criminalizing the speech’s content.

A. Revenge Porn is Not Protected Speech Because It Falls under the Categorical First Amendment Exception for Obscenity

Free Speech protections are subject to several categorical exceptions including obscenity.²⁵⁸ The Supreme Court balances free speech “against

252. Ripplinger v. Collins, 868 F.2d 1043, 1050 (9th Cir. 1989); Ryan, *supra* note 1, at 366.

253. Humbach, *supra* note 238, at 39; Ryan, *supra* note 1, at 365–66 (“the state has the authority to intervene and curb . . . some instances of primary and secondary sexting between young adults based upon the categorical exclusion of obscenity . . . from First Amendment protection.”).

254. See Appendix A, providing a sample statute criminalizing revenge porn, and Appendix B, providing guidelines for legislators considering revenge porn laws.

255. Goode, *supra* note 4 (quoting Eugene Volokh); Matorin, *supra* note 7 (“Wrapping oneself in the First Amendment with a shrug of the shoulders while pointing to non-existent or ineffective remedies is a cop-out. Free speech advocates should work with victims and legislators to draft effective laws that protect legitimate speech. Public figures can be narrowly carved out to address theoretical scenarios. Public figures know what they’re getting into. Young women don’t sign up for that.”); Schulzke, *supra* note 1 (quoting Mary Anne Franks and Eugene Volokh).

256. Bazelon, *supra* note 8 (quoting Eugene Volokh).

257. Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 639 (2006) [hereinafter Goldman, *The Constitutional Right to Privacy*].

258. Miller v. California, 413 U.S. 15, 25–26 (1973) (“Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”); A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. At’y Gen. of Mass., 383 U.S. 413, 418 (1966) (“[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole

the government's legitimate interests in protecting public health and safety."²⁵⁹ Obscenity is not protected speech.²⁶⁰ The obscenity exception is among the most promising bases for upholding laws that restrict free expression for the sake of privacy²⁶¹ and as such is likely the best way to combat revenge porn.

While some assert laws criminalizing revenge porn would be unconstitutional on the grounds pornography is protected speech, this argument is untenable.²⁶² The Supreme Court has held it is unconstitutional for a state to criminalize private possession of pornography; however, "the States retain broad power to regulate obscenity."²⁶³ Protecting public health and welfare is a legitimate State interest.²⁶⁴ The Nation and its States have a right "to maintain a decent society" and these "primary requirements of decency may be enforced against obscen[ity]."²⁶⁵ The Constitution does "not protect the public, commercial exhibition of obscene films even when restricted solely to consenting adults."²⁶⁶ The Supreme Court respects each state's "long-recognized legitimate interest in regulating the use of obscene material."²⁶⁷ Indeed, "prurience and patent offensiveness are apparently permissible grounds on which to discriminate—and by implication, they do

appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."); *Roth v. United States*, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press.").

259. *McCullen v. Coakley*, 571 F.3d 167, 174 (1st Cir. 2009).

260. *Miller*, 413 U.S. at 25–26; "*John Cleland's Memoirs of a Woman of Pleasure*", 383 U.S. at 418; *Roth*, 354 U.S. at 485.

261. Humbach, *supra* note 238, at 25; Ryan, *supra* note 1, at 365–66 ("[T]he state has the authority to intervene and curb . . . some instances of primary and secondary sexting between young adults based upon the categorical exclusion of obscenity . . . from First Amendment protection.").

262. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40 ("Whatever one's views on pornography more broadly, it should be a non-controversial proposition that pornography must at a minimum be restricted to individuals who are 1.) adults and 2.) consenting.").

263. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) ("[T]he First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime [T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.").

264. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

265. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 440 (1957) ("In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.'"); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

266. David B. Cruz, "*The Sexual Freedom Cases*?" *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV 299, 320 (2000).

267. *Paris Adult Theatre I*, 413 U.S. at 57 ("The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions.").

not constitute ‘viewpoints’ . . . a distinction based on lasciviousness is viewpoint neutral.”²⁶⁸

When courts deem speech obscene, they apply rational basis review because obscene speech does not fall within the ambit of the First Amendment.²⁶⁹ Rational basis review requires a law be “substantially related to important and legitimate objectives.”²⁷⁰ “States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients.”²⁷¹ Because revenge porn images are linked to the victim’s social and professional networking profiles, it is highly probable the images will be viewed by unwilling recipients who would find them offensive. The Supreme Court has held that “[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”²⁷² Revenge porn, designed solely to harass and humiliate the perpetrator’s former paramour, simply cannot meet these requirements to secure First Amendment protections.

When addressing the constitutionality of limits on obscene speech, courts consider whether the speech has expressive value and whether it

268. *Gen. Media Commc’ns, Inc. v. Cohen*, 131 F.3d 273, 282 (2d Cir. 1997) (discussing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382–384 (1992)).

269. *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004) (“[T]he *Lawrence* opinion did not employ fundamental-rights analysis and that it ultimately applied rational-basis review, rather than strict scrutiny, to the challenged statute.”); *Ripplinger v. Collins*, 868 F.2d 1043, 1050 (9th Cir. 1989) (“There is no fundamental right to engage in obscene speech. Strict scrutiny is thus not appropriate.” The court applied a rational basis test, upholding laws that are “rationally related to a legitimate state interest.”); *Cohen*, 131 F.3d at 282 (“Because we conclude that the Act regulates speech in a nonpublic forum in a viewpoint-neutral manner, the Act need only be reasonable in light of the purpose of the forum, and reflect a legitimate government concern, in order to pass constitutional muster. The Supreme Court has admonished that a restriction in a nonpublic forum ‘need only be reasonable; it need not be the most reasonable or the only reasonable limitation.’”) (internal citations omitted); *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 339 (Ala. 2010) (using rational basis review for Texas statute which regulates the sale of sexual devices); *State v. Brennan*, 772 So. 2d 64, 76 (La. 2000) (using rational basis review to strike down as unconstitutional a law that “bans the promotion of obscene devices” because it “bears no rational relationship to a legitimate state interest”).

270. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985); *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965) (White, J., concurring).

271. *Miller v. California*, 413 U.S. 15, 18–19 (1973); see *Paris Adult Theatre I*, 413 U.S. at 57 (recognizing “the high importance of the state interest in regulating the exposure of obscene materials to juveniles and consenting adults.”); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Ginsberg v. New York*, 390 U.S. 629, 637–643 (1968); *Redrup v. New York*, 386 U.S. 767, 769 (1967); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

272. *Miller*, 413 U.S. at 26.

offends “contemporary community standards.”²⁷³ Courts may find “the unauthorized distribution of pictures of a person naked or having sex . . . is so valueless and so distressing that there is indeed a compelling interest in restricting it.”²⁷⁴ This is particularly true because revenge porn is designed to harass and humiliate victims by showing them “in ridiculous, embarrassing, or demeaning contexts without revealing any useful new information about them”—making it useless for political or other legitimate purposes.²⁷⁵ Indeed, “[e]ven where speech is affected, the government has a compelling state interest in protecting citizens’ most basic privacy.”²⁷⁶ Most people feel they have a right to keep their sexual activity private, particularly within an intimate relationship, and violating that privacy is offensive. The Supreme Court agrees.²⁷⁷ Therefore, a court would almost certainly find posting lascivious images solely to harass and humiliate the victim offends community standards²⁷⁸ and find, therefore, revenge porn is obscene and thus not protected.

B. How a Law Criminalizing Revenge Porn Can Avoid Violating the First Amendment

If, as seems likely, courts deem revenge porn unprotected obscenity, then the law need only bear “some rational relationship to a legitimate state purpose.”²⁷⁹ A law criminalizing revenge porn could easily meet this standard, as protecting privacy is not only a legitimate but also a substantial state

273. *Id.* at 24; *Roth v. United States*, 354 U.S. 476, 489 (1957) (Obscenity is determined by considering “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”).

274. *Volokh, Freedom of Speech and Information Privacy*, *supra* note 242, at 1116.

275. *Id.* at 1094.

276. *Carey v. Brown*, 447 U.S. 455, 456, 467–69 (1980); *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (“cases . . . characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”) (footnotes omitted); *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (“the protection of a person’s general right to privacy—his right to be let alone by other people—is, . . . left largely to the law of the individual States.”); *Kim*, *supra* note 43, at 1057.

277. *Lawrence v. Texas*, 539 U.S. 558, 567, 578 (2003) (extending the right to privacy to “the most private human conduct, sexual behavior”).

278. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007) (“speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.”); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382–384 (1992); *Roth*, 354 U.S. at 489; *Gen. Media Commc’ns, Inc. v. Cohen*, 131 F.3d 273, 282 (2d Cir. 1997) (discussing *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382–384 (1992)); *Kim*, *supra* note 43, at 1048.

279. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973); *Ripplinger v. Collins*, 868 F.2d 1043, 1050 (9th Cir. 1989) (holding “[t]here is no fundamental right to engage in obscene speech. Strict scrutiny is thus not appropriate.” The court applied a rational basis test, upholding laws that are “rationally related to a legitimate state interest.”).

interest.²⁸⁰ However, even if a court did not deem revenge porn obscene, a law criminalizing revenge porn can survive free-speech challenges in several ways. First, the law should require the subject be identified or identifiable and carefully define intent and consent.²⁸¹ Second, the law should specifically define the acts and body parts that cannot be depicted.²⁸² Third, the law should carefully restrict the “time, place, manner and means” of revenge porn rather than its content.²⁸³ Fourth, the law should expressly exclude consensual pornography and artistic works as well as nude images taken to show impropriety or criminal activity to avoid being overly broad.²⁸⁴ Fifth, the law should create a right to privacy when someone takes or permits the taking of a nude photo specifically for viewing by her paramour.

1. Laws Criminalizing Revenge Porn Should Prevent Dissemination of Lascivious Images of an Identified Subject without the Subject’s Consent and Carefully Define Intent and Consent

A law criminalizing revenge porn should prohibit the taking, distribution, publication, dissemination or sale of “a sexually graphic visual depiction of an individual without that individual’s consent” via mail or “any interactive computer service.”²⁸⁵ The statute should require the individual be identified or identifiable to ensure there is actual harm.²⁸⁶ To secure a criminal conviction, prosecutors must prove the defendant had the requisite state of mind.²⁸⁷ Thus, these statutes should prohibit intentionally, knowingly or recklessly posting the nude or semi-nude image of another.²⁸⁸ In

280. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1516 (10th Cir. 1994) (recognizing “Colorado’s substantial interest in protecting privacy.”); *Project 80’s, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) (“We previously accepted the cities’ asserted interests in protecting privacy [and] preventing crime”); *U.D. Registry, Inc. v. State*, 144 Cal. App. 4th 405, 423 (Cal. Ct. App. 2006) (“[T]he United States Supreme Court has recognized a substantial state interest in . . . protecting privacy.”) (citing *Schaumburg v. Citizens for Better Env’t* 444 U.S. 620, 636 (1980)).

281. Terrence Berg, *State Criminal Jurisdiction in Cyberspace: Is There a Sheriff on the Electronic Frontier?*, 79 MICH. B.J. 659, 659 (2000).

282. Brush, *supra* note 48.

283. Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 236, at 769–70.

284. Kim, *supra* note 43, at 1058.

285. Franks, *A Quick Guide*, *supra* note 8 at 2–3.

286. CAL. PENAL CODE § 647 (West 2013); COLO. REV. STAT. ANN. § 18-7-107 (West 2014); HAW. REV. STAT. § 711-1110.9 (West 2014).

287. BLACK’S LAW DICTIONARY 881 (9th ed. 2009).

288. IDAHO CODE ANN. § 18-6609 (West 2014) (criminalizing posting the nude or sexually explicit image of another when “[h]e either intentionally or with reckless disregard disseminates, publishes or sells or conspires to disseminate, publish or sell any image or images of the intimate areas of another person or persons without the consent of such other person or persons and he knows or reasonably should have known that one (1) or both parties agreed or understood that the images should remain private.”); UTAH CODE ANN. § 76-5b-203 (West 2014) (“An actor commits the offense of distribution

tent can be difficult to prove in any criminal case because there is rarely direct evidence, so courts permit circumstantial evidence.²⁸⁹ Since the sole purpose of several websites is to permit users to post sexually explicit images to harass and humiliate others, posting a sexually explicit image on a revenge porn site must be included as one way to prove the requisite intent. Many states prohibit revenge porn intended to harass the victim or cause her emotional distress, but some also prohibit revenge porn tied to other purposes, including one that prohibits images which “cause[] financial loss to the depicted person and serve[] no legitimate purpose to the depicted person.”²⁹⁰

While many of these laws require the intent to harass, they fail to provide guidance as to what factors courts should consider. However, one state provides some useful guidance: “[a]n actor . . . commits the offense of posting a private image for harassment if he or she posts or distributes through the use of social media or any web site any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person.”²⁹¹ Revenge porn legislation should include similar language. It should also include factors courts may consider to determine whether the poster intended to harass and humiliate the victim. These factors include but are not limited to, whether the post appears on any revenge porn sites or sites similarly designed to harass and humiliate, whether the poster included the victim’s personal or contact information, and whether the poster linked the images to the victim’s social networking pages.

To protect victims fully, any law criminalizing revenge porn should apply to the dissemination of images intended not just to harass or humiliate, but also to cause professional harm. This would address cases where friends or family members who, due to their relationship with the former significant other, could gain access to and post the images simply because they dislike their friends’ or family members’ former paramour, or to gain a professional or educational advantage, or even when the perpetrator insists he posted the pictures as a joke. This would protect victims even when the

of intimate images if the actor, with the intent to cause emotional distress or harm, knowingly or intentionally distributes to any third party any intimate image of an individual who is 18 years of age or older, if: (a) the actor knows that the depicted individual has not given consent to the actor to distribute the intimate image; (b) the intimate image was created by or provided to the actor under circumstances in which the individual has a reasonable expectation of privacy; and (c) actual emotional distress or harm is caused to the person as a result of the distribution.”)

289. *United States v. Heras*, 609 F.3d 101, 106 (2d Cir. 2010) (“The law has long recognized that criminal intent may be proved by circumstantial evidence alone.”); *United States v. Salameh*, 152 F.3d 88, 143 (2d Cir. 1998) (“[A]s a general rule most evidence of intent is circumstantial.”).

290. GA. CODE ANN. § 16-11-90 (West 2014).

291. COLO. REV. STAT. ANN. § 18-7-107 (West 2014).

ex-paramour did not post the image. Hawaii's statute provides a prime example. It criminalizes the knowing disclosure of sexually explicit or nude images without consent "with intent to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships."²⁹² This would protect victims from extensive and common revenge porn harms. Furthermore, to protect victims from further dissemination and re-posting by other individuals, the laws should criminalize reproduction of revenge porn images when the subject did not consent to that reproduction.²⁹³

Laws should criminalize knowingly or recklessly posting revenge porn.²⁹⁴ This would prevent defendants from avoiding culpability for posting revenge porn when they claim they did not know it would humiliate or harass the victim or claim they believed the victim consented. These laws must fully define consent as including "the lack of specific agreement, approval, or assent to reproducing, distributing, exhibiting, publishing, transmitting, or otherwise disseminating such visual depictions."²⁹⁵ The laws should also provide guidance as to how courts can determine whether the subject consented. One way to provide this guidance would be to state: *due to the presumptive privacy expectation inherent in a dating or sexual relationship with regard to sexually explicit images, when a person disseminates these images, they must overcome this presumption by providing proof the victim consented.*

Since eighty percent of revenge porn victims took the images themselves,²⁹⁶ the law must explicitly protect those victims. One way to do this is to state: *the fact an individual took or agreed to have another take a sexually explicit image of herself for a specific individual does not mean that individual gave up any reasonable expectation of privacy in that image, nor shall sharing the image with another indicate the victim intended the image be disseminated to third parties.* Any law criminalizing revenge porn should require the subject's written consent before the poster can claim he reasonably believed he had permission to post the images. Requiring written permission and defining consent would prevent those who permitted someone to take sexually explicit images for publication from later

292. HAW. REV. STAT. § 711-1110.9 (West 2014).

293. WIS. STAT. ANN. § 942.09 (West 2014) (criminalizing the "reproduction of a representation that the person knows or has reason to know was captured in violation of subd. 1. and that depicts the nudity depicted in the representation captured in violation of subd. 1., if the person depicted nude in the reproduction did not consent to the making of the reproduction.").

294. BLACK'S LAW DICTIONARY 950, 1385 (9th ed. 2009).

295. H.R. 260, 147th Gen Assemb. § 1335 (Del. 2013).

296. Jasenosky, *supra* note 170; Kelly, *supra* note 171 (citing a recent Cyber Civil Rights Initiative survey).

changing their minds and claiming the images were published without consent. A written permission requirement would protect against fraudulent claims and protect consensual pornography. However, it may be easy for perpetrators to fake written consent by forging or copying the victim's signature, so the law should increase penalties when a perpetrator forges the victim's signature.

2. Laws Criminalizing Revenge Porn Should Define Sexually Graphic Images with Sufficient Specificity to Avoid Being Overly Inclusive but Broadly Enough to Protect Most Victims

Laws to criminalize revenge porn should specifically define the prohibited images to avoid being overly broad. Most of the statutes specifically define sexually graphic images as those revealing intimate areas or showing sexually explicit conduct.²⁹⁷ A proposed model law utilizes the intimate areas definition from 18 U.S.C. Section 1801, "the naked or undergarment-clad genitals, pubic area, buttocks, or any portion of the female breast below the top of the areola."²⁹⁸ Utah's law prohibits: "any visual depiction . . . made or produced by electronic, mechanical, or other means," and specifically defines intimate image as one depicting "(i) exposed human male or female genitals or pubic area, with less than an opaque covering; (ii) a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or (iii) the individual engaged in any sexually explicit conduct."²⁹⁹

The model law utilizes the definition of sexually explicit conduct in 18 U.S.C. Section 2256.³⁰⁰ Again, Utah's law provides a good example definition of "sexually explicit conduct":

actual or simulated:

- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (ii) masturbation;

297. GA. CODE ANN. § 16-11-90 (West 2014) ("(2) 'Nudity' means: (A) The showing of the human male or female genitals, pubic area, or buttocks without any covering or with less than a full opaque covering; (B) The showing of the female breasts without any covering or with less than a full opaque covering; or (C) The depiction of covered male genitals in a discernibly turgid state."); VA. CODE ANN. § 18.2-386.1(A) (West 2014) ("[T]hat person is totally nude, clad in undergarments, or in a state of undress so as to expose the genitals, pubic area, buttocks or female breast in a restroom, dressing room, locker room, hotel room, motel room, tanning bed, tanning booth, bedroom or other location."); Jasenosky, *supra* note 170.

298. 18 U.S.C.A. § 1801 (West 2004); Franks, *A Quick Guide*, *supra* note 8, at 3.

299. UTAH CODE ANN. § 76-5b-203 (West 2014).

300. 18 U.S.C.A. § 2256 (West 2008); Franks, *A Quick Guide*, *supra* note 8, at 2.

- (iii) bestiality;
- (iv) sadistic or masochistic activities;
- (v) exhibition of the genitals, pubic region, buttocks, or female breast of any individual;
- (vi) visual depiction of nudity or partial nudity;
- (vii) fondling or touching of the genitals, pubic region, buttocks, or female breast; or
- (viii) explicit representation of the defecation or urination functions.³⁰¹

Utilizing pre-existing statutory definitions for sexual acts or intimate areas,³⁰² and providing precise definitions of the intimate areas and actions, are two ways laws can avoid constitutional challenges. When statutes include sufficiently detailed definitions to clearly explain what images are prohibited, it prevents the statute from criminalizing more images than necessary and thereby meets the narrowly tailored prong required under strict scrutiny.

3. Laws Criminalizing Revenge Porn Should Create Exceptions to Protect Consensual Pornography, Nudity in Art, and Images that Depict Crimes or Political Misconduct

Any law criminalizing revenge porn must include an exception for “voluntary exposure in public or commercial settings.”³⁰³ Most of the recent laws that criminalize revenge porn provide such an exception.³⁰⁴ A voluntary exposure exception protects lawful pornography, the ownership and creation of which the Supreme Court has repeatedly protected,³⁰⁵ as well as protects artistic expression by eliminating liability for artists who create, sell or publish nude paintings or drawings so long as the subject consented. A voluntary exposure exception also protects theatrical productions involving nudity. Protecting art, performances, and consensual pornography, would prevent the law from being over-inclusive and chilling too much speech.

301. UTAH CODE ANN. § 76-5b-203 (West 2014).

302. GA. CODE ANN. § 16-11-90 (West 2014) (“‘Sexually explicit conduct’ shall have the same meaning as set forth in Code Section 16-12-100.”).

303. Franks, *A Quick Guide*, *supra* note 8, at 2.

304. See ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West); GA. CODE ANN. § 16-11-90 (West 2014); HAW. REV. STAT. § 711-1110.9 (West, Westlaw through 2014 Act 200); UTAH CODE ANN. § 76-5b-203 (West 2014); See also IDAHO CODE ANN. § 18-6609 (West, Westlaw through 2014 Sess.); VA. CODE ANN. § 18.2-386.1 (West 2014); WIS. STAT. ANN. § 942.09 (West 2014).

305. Claudia Tuchman, *Does Privacy Have Four Walls? Salvaging Stanley v. Georgia*, 94 COLUM. L. REV. 2267, 2272 (1994).

Another way to prevent a revenge porn statute from being overly broad is by explicitly protecting images that show misconduct by public figures, particularly political leaders.³⁰⁶ This would address concerns that criminalizing revenge porn may chill important speech by preventing the publication of images like those of Anthony Weiner because individuals fear criminal liability.³⁰⁷ This exception would protect victims and the public's right to know in cases of political misconduct.³⁰⁸ Another vital exception is one for images taken and disseminated for lawful purposes including "law enforcement, reporting unlawful conduct, or legal proceedings."³⁰⁹ Georgia's law provides further protection for "legitimate medical, scientific or educational activities," as well as when an individual posts a sexually explicit image of herself.³¹⁰ Statutes criminalizing revenge porn should incorporate the exceptions for medical, scientific and educational activities, and include language such as: *images taken and disseminated for lawful purposes, including criminal investigations and criminal or civil legal proceedings, as well as images that demonstrate political malfeasance or impropriety shall not constitute revenge porn.* By including exceptions to protect artistic expression and lawful pornography, and images demonstrating criminal or improper behavior, the law would avoid being overly inclusive.

4. Laws Criminalizing Revenge Porn Should Carefully Restrict Its Time, Place and Manner Rather than Its Content

Courts uphold laws that "regulate the time, place, and manner" of speech,³¹¹ particularly when they restrict conduct such as "harassment" or "stalking."³¹² These restrictions on the manner of expression "provide for public safety and . . . maintain order."³¹³ Generally, laws are content-

306. COLO. REV. STAT. ANN. § 18-7-107 (West 2014) ("'Newsworthy event' means a matter of public interest, public concern, or related to a public figure who is intimately involved in the resolution of important public questions, or by reason of his or her fame shape events in areas of concern to society.").

307. Bedi, *supra* note 14, at 2.

308. Goldman, *It's Not Easy To Regulate Revenge Porn*, *supra* note 120, at 3.

309. ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West); *see* GA. CODE ANN. § 16-11-90 (West 2014); UTAH CODE ANN. § 76-5b-203 (West 2014); VA. CODE ANN. § 18.2-386.1 (West 2014); *Cf.* Franks, *A Quick Guide*, *supra* note 8, at 2.

310. GA. CODE ANN. § 16-11-90 (West 2014).

311. *McCullen v. Coakley*, 571 F.3d 167, 175 (1st Cir. 2009); *see Kovacs v. Cooper*, 336 U.S. 77 (1949) (using intermediate scrutiny to determine the constitutionality of a law that restricts the time, place and manner of speech.).

312. *Volokh, One-to-One Speech vs. One-to-Many Speech*, *supra* note 236, at 770 (citing *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988); *Gormley v. Dir.*, 632 F.2d 938, 941-42 (2d Cir. 1980)).

313. Kim, *supra* note 43, at 1049.

neutral when they “burden speech for reasons unrelated to either the speaker’s viewpoint or the speech’s content.”³¹⁴ Courts treat “facially content-based laws . . . as content neutral if they are justified with reference to the ‘secondary effects’ of speech”—for example protecting a community from the crime and degradation that may accompany an adult movie theatre.³¹⁵ Furthermore, courts uphold a content-neutral law even when “incidentally, it has an adverse effect on certain messages while leaving others untouched.”³¹⁶ When a law incidentally burdens speech it is subject to intermediate scrutiny, and courts sustain “a content-neutral regulation . . . if it furthers an important governmental interest that is unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”³¹⁷

A law criminalizing revenge porn furthers an important or substantial government interest. The state has a substantial interest in protecting its citizens’ privacy and protecting them from physical danger.³¹⁸ Criminalizing revenge porn does not suppress expression because posting a sexually explicit image solely to harass the subject is not expression that implicates First Amendment protections.³¹⁹ Nudity alone is not protected expressive

314. *McCullen*, 571 F.3d at 174–75.

315. *Volokh, One-to-One Speech vs. One-to-Many Speech*, *supra* note 236, at 770; *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986) (holding “intermediate scrutiny is the proper standard of review for ordinances aimed against the secondary effects of adult businesses.” Reasoning that “the Renton ordinance is aimed not at the *content* of the films shown at ‘adult motion picture theatres,’ but rather at the *secondary effects* of such theaters on the surrounding community.” The court further found “[t]he ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protec[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life,’ not to suppress the expression of unpopular views In short, the Renton ordinance is completely consistent with our definition of ‘content-neutral’ speech regulations as those that ‘are justified without reference to the content of the regulated speech’” quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)); *Stanley v. Georgia*, 394 U.S. 557, 563–64 (1969) (“Roth and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity.”).

316. *Playtime Theatres, Inc.*, 475 U.S. at 47–48; *McGuire v. Reilly*, 260 F.3d 36, 43 (1st Cir. 2001) (citing *Hill v. Colorado*, 530 U.S. 703, 736 (2000)).

317. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994) (“a content-neutral regulation will be sustained if it furthers an important governmental interest that is unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”); *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”).

318. *Kim*, *supra* note 43, at 1056–57; *see Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59–61 (1973) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)) (Warren, C.J., dissenting); *McCullen v. Coakley*, 571 F.3d 167, 174–75 (1st Cir. 2009).

319. *Kim*, *supra* note 43, at 1056–57.

conduct.³²⁰ While photographs—even erotic ones—can be protected expression,³²¹ obscenity is not,³²² nor is the act of intercourse.³²³ Since posting a nude picture without the subject’s consent is obscene because it offends community norms,³²⁴ and since the subjects of revenge porn images are not the posters, the act of expression is only “the uploading of another’s image. Even where speech is affected, the government has a compelling state interest in protecting citizens’ most basic privacy.”³²⁵

Specifically prohibiting the manner and means of revenge pornography will prevent the law from being overly broad. A law prohibiting revenge porn should focus on the harassing nature of revenge porn and its distribution via web sites, the sole purpose of which is to humiliate unsuspecting victims. It should also address the physical dangers inherent in revenge porn. An example of language to prohibit the means and manner but not the content is: *given the physical and psychological dangers to the subject, an actor is prohibited from posting a nude or sexually explicit image of another on a website designed to harass, demean, or cause professional, psychological or emotional harm to the victim. The fact a poster claims he posted the images as a joke alone shall not constitute a defense, particularly when the defendant knew or should have known the act could lead to harassment or harm to the victim.* This would prohibit the means and manner of revenge porn as opposed to prohibiting its sexually explicit content.

320. While erotic dancing is protected expressive conduct, it is public commercial entertainment, making it fundamentally different from revenge porn. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (“Being ‘in a state of nudity’ is not an inherently expressive condition. . . [H]owever, nude [barroom] dancing . . . is expressive conduct, although . . . it falls only within the outer ambit of the First Amendment’s protection.”); *see also* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”).

321. *W. Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 632 (1943); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995)) (photographs are protected speech); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985) (erotic photographs are protected speech).

322. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *Roth v. United States*, 354 U.S. 476, 483 (1957)); *Miller v. California*, 413 U.S. 15, 23 (1973) (citing *Kois v. Wisconsin*, 408 U.S. 229 (1972)).

323. *832 Corp. v. Gloucester Twp.*, 404 F.Supp.2d 614, 626 (D.N.J. 2005) (“Having sex, without more, is not expressive conduct protected by the First Amendment.”); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 289 n.8 (6th Cir. 1998); *O’Connor v. City and Cnty. of Denver*, 894 F.2d 1210, 1218 (10th Cir. 1990).

324. *Roth*, 354 U.S. at 489.

325. *Kim*, *supra* note 43, at 1056–57.

An “individual’s natural rights end[] where they cause[] harm to others.”³²⁶ Current trends indicate courts would likely uphold a law criminalizing revenge porn:

[t]he law seems to be returning . . . to an era when criminal libel laws could impose liability . . . for true statements or opinions that were supposedly not said with ‘good motives’ . . . when the speech is harshly critical and thus potentially damaging to reputation.³²⁷

Because protecting privacy for sexual activity is a substantial interest,³²⁸ states can incidentally prohibit the dissemination of revenge porn. Similarly, because even “facially content-based laws” survive constitutional challenges when “they are justified with reference to the ‘secondary effects’ of speech,”³²⁹ a law prohibiting revenge porn to protect victims because of its inherent dangers including stalking, harassment and physical violence³³⁰ would withstand a constitutional challenge.

5. Laws Criminalizing Revenge Porn Should Incorporate and Define an Appropriate Right to Privacy for Sexually Explicit Images Taken in the Context of an Intimate Relationship

“Privacy . . . has a place in free society. Our moral interests include freedom from judgment, freedom to don masks, freedom to build and maintain reputations, and freedom to and from intimacy.”³³¹ There is a legal right to privacy in America—it appears in our judiciary’s interpretation of the Constitution, including the Fourth and Fourteenth Amendments, as well as Federal, state, and common laws.³³² The right to privacy includes causes

326. Goldman, *The Constitutional Right to Privacy*, *supra* note 257, at 622.

327. Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 236, at 738.

328. Courts recognize a substantial state interest in protecting privacy. See *Carey v. Brown*, 447 U.S. 455, 456 (1980) (“the State’s interest in protecting the . . . privacy of the home is of the highest order”); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1516 (10th Cir. 1994) (discussing “Colorado’s substantial interest in protecting privacy.”); *Project 80’s, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991) (“We previously accepted the cities’ asserted interests in protecting privacy, preventing crime, and protecting consumers as substantial state interests.”); *U.D. Registry, Inc. v. State*, 144 Cal. App. 4th 405, 423 (Cal. Ct. App. 2006); *State v. Sheldon*, 629 A.2d 753, 762 n. 2 (Md. 1993) (“the Supreme Court held that . . . a state has compelling interest in protecting privacy”) (citations omitted); see also *Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 631 (1980).

329. Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 236, at 771.

330. Franks, *Unwilling Avatars*, *supra* note 9, at 246.

331. Allen, *What We Must Hide*, *supra* note 250, at 12.

332. U.S. CONST. amend. I, cl. 2, 3; U.S. CONST. amend. IV, cl. 1; U.S. CONST. amend. XIV, § 1; DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763–64 (1989) (“Both common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private. According to Webster’s initial definition, information may be classified as ‘private’ if it is ‘intended for or restricted to the use of a particular person or group or class of persons:

of action for intrusion upon seclusion, publication of embarrassing private facts, being placed in a false light, or the use of one's name or likeness without consent.³³³ Victims of criminal activity, particularly involving sexual use without consent, have a heightened expectation of privacy.³³⁴ This privacy right covers "traditionally private relationships" including "voluntary sexual relationships . . . where individuals enjoy a clear expectation of privacy."³³⁵ The Supreme Court has directly addressed the right to privacy regarding forced nudity:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . to compel anyone, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without unlawful authority, is an indignity, an assault, and a trespass.³³⁶

Similarly, the Seventh Circuit suggested in dicta that revenge porn would constitute a privacy invasion: "[i]magine if nude pictures of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her. She would still feel that her privacy had been invaded."³³⁷

A law criminalizing revenge porn should define the right to privacy, such as: "[a] person who has consented to the capture or possession of an image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that

not freely available to the public."); *Gruschus v. Curtis Pub. Co.*, 342 F.2d 775, 776 (10th Cir. 1965) ("The intangible but protected right of privacy recognizes, with some limitations, a right to seclusion, to freedom from public disclosure of personal matters of private life and other damaging and unnewsworthy publicity of a personal nature, and to recover for the appropriation of name or picture."); *Allen, What We Must Hide*, *supra* note 250, at 13, 14.

333. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (right to privacy protects "the individual interest in avoiding disclosure of personal matters."); *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891); *Smith v. City of Artesia*, 772 P.2d 373, 376 (N.M. Ct. App. 1989) (the constitutional right to info privacy "closely resembles—and may be identical to—the interest protected by the common law prohibition against unreasonable publicity given to one's private life."); *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 502 (Tex. App. 1989) ("[T]he central element of the right of privacy and its attendant public policy: the individual's exclusive right to determine the occasion, extent, and conditions under which he will disclose his private affairs to others.").

334. *Aid for Women v. Foulston*, 441 F.3d 1101, 1128 (10th Cir. 2006) (Herrera, J., concurring in part and dissenting in part); *see Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir.1998) ("a number of our sister circuits have concluded that information regarding private sexual matters warrants constitutional protection against public dissemination.").

335. *Aid for Women*, 441 F.3d at 1128 (Herrera, J., concurring in part and dissenting in part).

336. *Botsford*, 141 U.S. at 252.

337. *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004).

relationship.”³³⁸ It should also define a private or confidential relationship as any intimate or sexual relationship. A reasonable expectation of privacy relies on societal understandings of what people “seek[] to preserve as private,”³³⁹ a concept which, for the Fourth Amendment, excludes information “knowingly expose[d] to the public, even in [one’s] own home.”³⁴⁰ However, there are instances where people make information accessible to others but retain a reasonable expectation of privacy.³⁴¹ This is particularly true for private relationships even when someone takes or consents to having a sexually explicit image taken.³⁴² Including a reasonable expectation of privacy will help prevent a loophole that might allow perpetrators to avoid criminal liability “by arguing that, in sharing the image in the first place, the complainant waived any expectation of privacy.”³⁴³ By defining a reasonable expectation of privacy,³⁴⁴ emphasizing that a reasonable expectation of privacy arises from “circumstances in which a reasonable person would know or understand that the image was to remain private; and knows or should have known that the person in the image has not consented to the dissemination,”³⁴⁵ and creating a presumptive right to privacy within an intimate relationship, legislation would properly treat revenge porn not as a First Amendment issue but rather as a privacy issue.

Protecting privacy is “an important way to achieve desired forms of limited access.”³⁴⁶ Privacy includes the right to “restrict publication of intimate facts.”³⁴⁷ Further, it deserves protection even when people are indifferent to it due to their age or because they do not comprehend the risks of new technologies.³⁴⁸ There are things we must hide to protect our “common dignity and separate virtues” as well as to protect ourselves from harm.³⁴⁹ Dignity, autonomy, and the right to have relationships are inherent to hu-

338. Franks, *A Quick Guide*, *supra* note 8, at 2.

339. *Katz v. United States*, 389 U.S. 347, 351 (1967).

340. *Id.*

341. Laird, *supra* note 3, at 3 (“[Mary Anne] Franks analyzes the issue as one of consent in context. Just as a boxer hasn’t consented to be punched outside the ring, someone who sends a naughty picture to a lover has not consented to have that picture distributed online.”); Brush, *supra* note 48, at 5–6 (citing privacy expert, Neil Richards).

342. *Id.*

343. Brush, *supra* note 48, at 6.

344. IDAHO CODE ANN. § 18-6609 (West, Westlaw through 2014 Sess.); UTAH CODE ANN. § 76-5b-203 (West 2014); VA. CODE ANN. § 18.2-386.1 (West 2014); WIS. STAT. ANN. § 942.09 (West 2014).

345. H.R. 4320, 98th Gen. Assemb., Reg. Sess. (Ill. 2014); *see also* Concepcion, *supra* note 130, at 2–3 (citing Chicago criminal defense lawyer and DePaul adjunct sociology professor, Matt Fakhoury).

346. Allen, *What We Must Hide*, *supra* note 250, at 4–5.

347. *Id.* at 5.

348. *Id.* at 18.

349. *Id.*

man beings and for things such as sexual activity, “people should be largely let alone.”³⁵⁰ Many scholars argue people deserve protection “against negligence, cruelty, and unjustified damage to their reputations.”³⁵¹ The government has an interest in protecting individual privacy.³⁵² Protecting privacy preserves reputations and helps “sustain civility by condemning behaviors that offend courtesy, honor, and appropriateness.”³⁵³ Privacy promotes personal relationships by permitting individuals to keep personal information private.³⁵⁴ It enhances “respect for human dignity” and autonomy.³⁵⁵ In the case of revenge porn “[t]here is indisputably a privacy interest at stake where unauthorized, widespread distribution of nude images is concerned.”³⁵⁶

CONCLUSION

Revenge porn harms thousands of victims.³⁵⁷ They sometimes suffer horrific consequences including committing suicide, being harassed, assaulted, stalked and murdered.³⁵⁸ Current civil and criminal laws inadequately protect victims.³⁵⁹ Because revenge porn perpetrators are frequently judgment-proof, criminal law provides a far greater deterrent than civil law.³⁶⁰ Thus, laws criminalizing revenge porn are necessary. Currently ten states attempt to criminalize revenge porn, and laws are pending in several states.³⁶¹ Some raise constitutional concerns or fail to protect the vast majority of victims.³⁶² However, as this Note demonstrates, a law criminalizing revenge porn can protect victims, deter revenge porn, and meet

350. Allen, *Privacy Jurisprudence as an Instrument of Social Change*, *supra* note 128, at 890.

351. *Id.* at 917 (quoting Cass R. Sunstein, *Believing False Rumors*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 106 (Saul Levmore & Martha C. Nussbaum eds., 2011-2012)).

352. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1516 (10th Cir. 1994); *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638 (9th Cir. 1991); *U.D. Registry, Inc. v. State*, 144 Cal. App. 4th 405, 423 (Cal. Ct. App. 2006); *Humbach*, *supra* note 252, at 32.

353. Allen, *What We Must Hide*, *supra* note 250, at 6.

354. *Id.*

355. *Id.*

356. Kim, *supra* note 43, at 1056–57.

357. Lang, *supra* note 2.

358. Franks, *Unwilling Avatars*, *supra* note 9, at 246.

359. Ryan, *supra* note 1, at 375; Matorin, *supra* note 7, at 4; Clark-Flory, *supra* note 45 (quoting Erica Johnstone).

360. Franks, *Why We Need a Response to Revenge Porn*, *supra* note 40, at 6; Clark-Flory, *supra* note 45 (quoting Erica Johnstone).

361. *State 'Revenge Porn' Legislation*, *supra* note 31.

362. Goldman, *It's Not Easy To Regulate Revenge Porn*, *supra* note 120; Jasenosky, *supra* note 170; Kelly, *supra* note 171; *see* CAL. PENAL CODE § 647 (West 2013); WIS. STAT. ANN. § 942.09 (West 2014).

constitutional free speech requirements.³⁶³ Because the internet creates “a larger and more accessible pool of victims,”³⁶⁴ the time is ripe for courts to extend privacy protections, particularly in regards to revenge porn. These protections should include the right to keep personal sexual behavior private when the sole purpose or effect of disseminating sexually explicit images is to harass or humiliate.

APPENDIX A

MODEL REVENGE PORN STATUTE

1) Given the physical and psychological dangers to the subject, and to protect an individual’s right to privacy particularly regarding sexual activity, it shall be a crime for an actor to post a nude or sexually explicit image of another on a website designed to harass, demean, or cause professional, psychological or emotional harm to the victim.

a) An actor may not intentionally, knowingly, or recklessly take, reproduce, distribute, publish, sell or otherwise disseminate via mail or electronic means including the internet, email, social media or any web site, an intimate, nude, semi-nude, or sexually explicit photograph, video or image captured “by electronic, mechanical, or other means,”³⁶⁵ including images obtained through theft, “unauthorized access to a computer system . . . or by unauthorized access to electronic mail or an electronic mail service provider”³⁶⁶ of an individual who is identified or identifiable either by that image or by materials associated with that image without the subject’s consent and when that image is intended to cause, or is likely to cause³⁶⁷ harassment or emotional distress or “cause[] financial loss . . . and serve[] no legitimate purpose to the depicted person”³⁶⁸ or those that “harm substantially the depicted person with respect to that person’s health, safety, business, calling, career, financial condition, reputation, or personal relationships.”³⁶⁹

i) An intimate image is one that depicts:

363. For examples of a statute and guidelines for statutes, see Appendices A and B.

364. Berg, *supra* note 281, at 659 (quoting Attorney General Janet Reno).

365. UTAH CODE ANN. § 76-5b-203 (West 2014).

366. H.R. 260, 147th Gen. Assemb., 2nd Reg. Sess. § 1335 (Del. 2014).

367. CAL. PENAL CODE § 647 (West 2013); COLO. REV. STAT. ANN. § 18-7-107 (West 2014); HAW. REV. STAT. § 711-1110.9 (West, Westlaw through 2014 Act 200); WIS. STAT. ANN. § 942.09 (West 2014); Franks, *A Quick Guide*, *supra* note 8, at 2–3.

368. GA. CODE ANN. § 16-11-90 (West 2014).

369. HAW. REV. STAT. § 711-1110.9 (West, Westlaw through 2014 Act 200).

- A) an “exposed human male or female genitals or pubic area, with less than an opaque covering;”
- B) a “female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or
- C) an “individual engaged in any sexually explicit conduct;”³⁷⁰ or
- D) “actual or simulated:
- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (ii) masturbation;
 - (iii) bestiality;
 - (iv) sadistic or masochistic activities;
 - (v) exhibition of the genitals, pubic region, buttocks, or female breast of any individual;
 - (vi) visual depiction of nudity or partial nudity;
 - (vii) fondling or touching of the genitals, pubic region, buttocks, or female breast; or
 - (viii) explicit representation of the defecation or urination functions.”³⁷¹
- b) When considering whether the poster intended to harass, humiliate, or otherwise harm the victim courts may consider the following factors, plus any additional factors circumstances require:
- i) whether the post appears on any revenge porn sites or sites similarly designed to harass and humiliate;
 - ii) whether the poster included the victim’s personal or contact information or contact information for her family, friends or coworkers;
 - iii) whether the poster linked the images to the victim’s social networking pages.
 - iv) The fact a poster claims he posted the images as a joke shall not alone constitute a defense, particularly when the defendant knew or should have known the act could lead to harassment or harm to the victim.
- c) When considering whether the subject consented, courts should consider:

370. UTAH CODE ANN. § 76-5b-203 (West 2014).

371. *Id.*

i) “the lack of specific agreement, approval, or assent to reproducing, distributing, exhibiting, publishing, transmitting, or otherwise disseminating such visual depictions.”³⁷²

ii) due to the presumptive privacy expectation inherent in a dating or sexual relationship with regard to sexually explicit images when a person disseminates these images they must overcome this presumption by providing proof the victim consented including written consent; and

iii) the fact an individual took or agreed to have another take a sexually explicit image of herself for a specific individual does not mean that individual gave up any reasonable expectation of privacy in that image nor shall sharing the image with another indicate the victim intended the image be disseminated to third parties.

2) RIGHT TO PRIVACY: “A person who has consented to the capture or possession of an image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that relationship.”³⁷³ This statute creates a right to privacy

a) in any private or confidential relationship, including any intimate, romantic, or sexual relationship.

b) when “the intimate image was created by or provided to the actor under circumstances in which the individual has a reasonable expectation of privacy,”³⁷⁴ including “circumstances in which a reasonable person would know or understand that the image was to remain private; and knows or should have known that the person in the image has not consented to the dissemination.”³⁷⁵

c) when “[a] person who has consented to the capture or possession of an image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that relationship.”³⁷⁶

3) JURISDICTION: this statute shall apply to activities conducted “within or outside of this state” if that conduct “involves an individual who resides in” the state, unless the perpetrator is within the state, in which case the violation need not affect an individual residing inside the state.³⁷⁷

372. H.R. 260, 147th Gen. Assemb., 2d Reg. Sess. § 1335 (Del. 2014).

373. Franks, *A Quick Guide*, *supra* note 8, at 2.

374. UTAH CODE ANN. § 76-5b-203 (West 2014).

375. H.R. 4320, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

376. Franks, *A Quick Guide*, *supra* note 8, at 2.

377. GA. CODE ANN. § 16-11-90 (West 2014).

4) EXCEPTIONS: it shall not be a crime to post images for:

a) lawful purposes, including images for law enforcement purposes, to report unlawful conduct, criminal investigations, or for legal proceedings whether criminal or civil;

b) “legitimate medical, scientific or educational activities;”³⁷⁸

c) to show impropriety, political malfeasance, or misconduct on the part of a public official;

d) when an individual posts a sexually explicit image of himself or herself;³⁷⁹ and

e) for “voluntary exposure in public or commercial settings” including but not limited to commercial pornography, theatrical, film or video productions, and for other nudity occurring in or sexual acts performed voluntarily in public.³⁸⁰

5) REMEDIES: this statute creates:

a) a private cause of action: an individual who is the subject of an image covered by this statute shall have a private cause of action against the perpetrators, including those who captured the image either without the subject’s consent or knowledge, those who disseminate the image without consent or knowledge, and those who reproduce or republish the image without consent.³⁸¹

b) a copyright for the subject: “[a]n individual whose private intimate parts have been posted in accordance with this section shall retain a protectable right of authorship regarding the commercial use of the private image.”³⁸² This includes the right to sue under copyright law and to require websites to remove the image.

c) the right to removal of the images: “In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section.”³⁸³

378. *Id.*

379. *Id.*

380. ARIZ. REV. STAT. ANN. § 13-1425 (2014) (West); *See* GA. CODE ANN. § 16-11-90 (West 2014); HAW. REV. STAT. § 711-1110.9 (West, Westlaw through 2014 Act 200); UTAH CODE ANN. § 76-5b-203 (West 2014); WIS. STAT. ANN. § 942.09 (West 2014); *See also* IDAHO CODE ANN. § 18-6609 (West, Westlaw through 2014 Sess.); VA. CODE ANN. § 18.2-386.1 (West 2014); *Cf. Franks, A Quick Guide, supra* note 8, at 2.

381. COLO. REV. STAT. ANN. § 18-7-107 (West 2014).

382. *Id.*

383. HAW. REV. STAT. § 711-1110.9 (West, Westlaw through 2014 Act 200).

6) LIABILITY:

- a) For “a second or subsequent conviction for an offense under this section that arises from a separate criminal episode”³⁸⁴ the offense is a [higher level crime with the appropriate punishment].
- b) Where the person has been convicted within the previous ten years “immediately preceding the offense charged of two or more of the offenses specified in this section,” each on a different date “not part of a common act, transaction, or scheme,”³⁸⁵ the punishment shall increase.
- c) If the victim is less than 18 years of age³⁸⁶ or suffers from any kind of disability, the first instance shall be punishable by a longer sentence and higher fine than the initial offense for other victims.

APPENDIX B

GUIDELINES FOR LAWS PROHIBITING REVENGE PORN

Provide jurisdiction for effects felt within the state by subjecting individuals to prosecution for activities conducted “within or outside of this state” if that conduct “involves an individual who resides in [Georgia]” unless the person is within the state, in which case the violation need not affect an individual residing inside the state.³⁸⁷

Define intent, including guidelines for judges such as “if he or she posts or distributes through the use of social media or any web site any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person;”³⁸⁸ or whether the post appears on any revenge porn sites, or sites similarly designed to harass and humiliate; whether the poster included personal or contact information such as a name, address, or phone number, and whether the poster linked the images to the victim’s social networking pages.

384. UTAH CODE ANN. § 76-5b-203 (West 2014); See GA. CODE ANN. § 16-11-90 (West 2014).

385. VA. CODE ANN. § 18.2-386.1 (West 2014).

386. *Id.*

387. GA. CODE ANN. § 16-11-90 (West 2014).

388. COLO. REV. STAT. ANN. § 18-7-107 (West 2014).

Define consent, including guidelines for courts such as “the lack of specific agreement, approval, or assent to reproducing, distributing, exhibiting, publishing, transmitting, or otherwise disseminating such visual depictions.”³⁸⁹

Specifically define body parts and actions that may not be depicted: “the naked or undergarment-clad genitals, pubic area, buttocks, or any portion of the female breast below the top of the areola.”³⁹⁰

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person.³⁹¹

Prohibit revenge porn based on its time place, manner and means: the dissemination of sexually explicit images to harass, demean, or cause professional, psychological or emotional harm to the victim. The fact a poster claims he posted the images as a joke alone shall not constitute a defense, particularly when the defendant knew or should have known the images could lead to harassment or harm to the victim.

Exclude voluntary nudity, including voluntary nudity or sexual acts in public and pornography; “When the person was voluntarily nude in public or voluntarily engaging in sexual conduct in public; or Pursuant to a voluntary commercial transaction.”³⁹²

Create a right to privacy within the context of an intimate relationship: “circumstances in which a reasonable person would know or understand that the image was to remain private; and knows or should have known that the person in the image has not consented to the dissemination.”³⁹³

389. *Id.*

390. Franks, *A Quick Guide*, *supra* note 8, at 3.

391. 18 USC § 2256; Franks, *A Quick Guide*, *supra* note 8, at 2.

392. Haw. Rev. Stat. § 711-1110.9 (West) 1(b)(i)(B).

393. H.B. 4320, 97th Gen. Assemb. (Ill. 2011).

Create a private cause of action based on the statute.³⁹⁴

Exclude images taken for lawful purposes including criminal investigations, civil suits, and images which demonstrate impropriety:

- (1) The activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses;
- (2) Legitimate medical, scientific, or educational activities;
- (3) Any person who transmits or posts a photograph or video depicting only himself or herself engaged in nudity or sexually explicit conduct;
- (4) The transmission or posting of a photograph or video that was originally made for commercial purposes; or
- (5) Any person who transmits or posts a photograph or video depicting a person voluntarily engaged in nudity or sexually explicit conduct in a public setting; or
- (6) The transmission is made pursuant to or in anticipation of a civil action.³⁹⁵

Provide for removal of those images found to violate the statute: “In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section.”³⁹⁶

394. COLO. REV. STAT. ANN. § 18-7-1071(a)(4)(a) (West 2014).

395. GA. CODE ANN. § 16-11-90(e) (West 2014).

396. HAW. REV. STAT. ANN. § 711-1110.9 (West, Westlaw through 2014 Act 200).

