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A DISH SERVED COLD: THE CASE FOR CRIMINALIZING REVENGE PORNOGRAPHY

JAMES T. DAWKINS IV[1]

> Revenge is the naked idol of the worship of a semi-barbarous age.[2]

I. INTRODUCTION

Hollie Toups was at work when she got the call.[3] A friend had overheard a conversation about a website that featured thousands of pictures of women in varying states of undress; a peremptory search revealed that Ms. Toups was among them.[4] After work, Toups logged on to the homepage of texxxan.com, which showed a map of Texas.[5] Zooming in on her small community of Nederland,[6] she saw her picture alongside dozens of other women from the area.[7] When she clicked on her photo, a page appeared showing her name, home address, a link to her Facebook profile,[8] and a long display of images featuring her in

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[1] J.D. Candidate, Cumberland School of Law, Samford University, 2015; B.A. English, The University of Alabama, 2010. I would like to thank Professor Woodrow Hartzog, whose work prompted this Comment, for his guidance and support. I would also like to extend my gratitude to all advocates for the criminalization of nonconsensual pornography, from whose work I heavily borrowed and whose bravery I admire.

[2] PERCY BYSSHE SHELLEY, A DEFENSE OF POETRY 12 (Albert S. Cook ed., 1903).

[3] James Fletcher, *The Revenge Porn Avengers*, BBC NEWS MAG., (Dec. 11, 2013, 14:25), http://www.bbc.com/news/magazine-25321301.

[4] *See id.*; Lorelei Laird, *Victims Are Taking on Websites for Posting Photos They Didn't Consent To*, ABA J. (Nov. 1, 2013, 9:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/.

[5] *See* Fletcher, *supra* note 3. The site has since been taken down by its hosting service, GoDaddy.com. *See* David Lee, *Yahoo & Google Linked to Revenge Porn Site*, COURTHOUSE NEWS SERVICE (Mar. 7, 2014), http://courthousenews.com/home/backissues.aspx (accessed by entering Keyword "Yahoo & Google" and Author "David Lee").

[6] Nederland, Texas is a small town of about 17,480 people. *Nederland, Texas Population*, CENSUS VIEWER, http://censusviewer.com/city/TX /Nederland (last visited Mar. 21, 2015).

[7] Fletcher, *supra* note 3.

[8] Eric Larson, *It's Still Easy to Get Away With Revenge Porn*, MASHABLE (Oct. 21, 2013), http://mashable.com/2013/10/21/revenge-porn/?utmcid=mash-com-fb-main-link. The pairing of nude photos online with links to social

a bikini, topless photos that Toups took as far back as eight years prior, and a photo she took as recently as the previous year.[9]

Toups was shocked.[10] She sent the eight-year-old photo to her ex-boyfriend only, and had taken the previous year's photo to track her fitness progress and had not sent it to anyone.[11] Toups believes that a hacker pulled the photos from her email and cloud network and uploaded them to the site.[12] Texxxan.com responded to Toups's request to remove the pictures with a message requesting a credit card number to charge her for taking the images down.[13] Men made lewd, even threatening, comments to her, both online and in person.[14] "Nice tits, honey," commented a grinning man passing Toups and her mother in a grocery store; "Haven't I seen you online?"[15]

Such is the plight of thousands of women across the country.[16] With a simple Google search for a woman's name, friends, family, acquaintances, strangers, and employers can find nude pictures of any woman who has been hacked or, more commonly, revenged upon by a jilted ex.[17] For women in a majority

media profiles is not an isolated phenomenon. Hunter Moore, a self-proclaimed "professional life ruiner," did the same on his website. Nina Ippolito, *The Hunter Moore Revenge Porn Website Was Totally Legal–That's the Scary Part*, POLICYMIC (Jan. 27, 2014), http://mic.com/articles/80217/the-hunter-moore-revenge-porn-website-was-totally-legal-that-s-the-scary-part.

[9] Larson, *supra* note 8.

[10] *See* Laird, *supra* note 4.

[11] *See* Larson, supra note 8.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See* Laura Sydell, *Calif. Bans Jilted Lovers From Posting Revenge Porn Online*, NPR (Oct. 2, 2013, 5:46 PM), http://www.npr.org/blogs/alltechconsidered/2013/10/02/228551353/calif-bans-jilted-lovers-from-posting-revenge-porn-online. Ninety percent of revenge porn victims are female. Natalie Webb, *End Revenge Porn Infographic*, CYBER C.R. INITIATIVE (Jan. 3, 2014), http://www.cybercivilrights.org/end_revenge_porn_infographic. *But see* Scott H. Greenfield, *#RevengePorn: Real Numbers Show It's Not Really A Gender Issue*, SIMPLE JUST. (July 29, 2014), http://blog.simplejustice.us/2014/07/29/revengeporn-real-numbers-show-its-not-really-a-gender-issue/ (stating that revenge porn is not a gender issue).

[17] *See generally* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–54 (2014) (discussing general harm caused by revenge porn and noting revenge porn's impact on victims' employment opportunities and social life); Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*,

of states, this type of harassment unfortunately incurs no criminal liability.[18]

Non-consensual pornography, or more commonly "revenge porn," is the act of posting sexually graphic photographs online without the consent of the subject.[19] These photographs or videos are generally obtained within the milieu of an intimate relationship or via more surreptitious means, such as hidden cameras.[20] Victims have reported feeling "simply humiliated, terrified, and helpless."[21] Troublingly, revenge pornography is not rare: "One in 10 former partners threaten to post sexually explicit images of their exes online, and an estimated 60 percent follow through."[22] There are also a staggering number of potential nonconsensual pornography victims; 44% of 18-to-24 year

21 SYRACUSE SCI. & TECH. L. REP. 1, 5–11 (2009) (discussing the rise of revenge pornography, and giving examples of how revenge pornography adversely affects the careers of women); Zac Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CALIF. L. REV. 1303, 1304–11 (2014) (discussing the impact of revenge porn on victims' lives, possible motivations for posting images on revenge porn websites, and the search features on many revenge porn websites).

[18] *See* Citron & Franks, *supra* note 17, at 371; *see also State Revenge Porn Legislation*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 1, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx; Rebecca Leber, *Is Revenge Porn Legal in Your State?*, NEW REPUBLIC (Sept. 3, 2014), http://www.newrepublic.com/article/119295/revenge-porn-laws-state-map-shows-theyre-rare-us. The exceptions as of this writing are Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, New Jersey, New York, Pennsylvania, Utah, Virginia, and Wisconsin. *See infra* Part II.

[19] *State Revenge Porn Legislation*, *supra* note 18. It should be noted that while the scope of this article often allows for the interchangeable use of "revenge pornography" and "nonconsensual pornography," the reality is that nonconsensual pornography is a broader term that includes revenge pornography (explicit photos posted by a former romantic partner) and other forms of nonconsensual pornography (such as voyeur videos or hacked photographs). *See* Mary Ann Franks, *Criminalizing Revenge Porn: Frequently Asked Questions* (Oct. 9, 2013) (unpublished), *available at* http://ssrn.com/abstract=2337998.

[20] *See* Franks, *supra* note 19.

[21] *See Victims Bravely Speak Out!*, ARMY OF SHE., http://armyofshe.com/victims-stories.html (last visited Nov. 14, 2014); *see also* Franklin, *supra* note 17, at 1309–10.

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

olds have reported participation in a practice known as "sexting,"[23] the sharing of intimate photographs with someone else via electronic media.[24] It is also prudent to note that revenge pornography primarily affects women. "[E]mpirical evidence so far indicates that revenge pornography is primarily produced and consumed by men and primarily targets women. Revenge pornography belongs to that class of activities that . . . [is] overwhelmingly (though of course not solely) perpetrated by men and directed overwhelmingly (again, not solely) at women."[25] Revenge pornography also carries a disparate impact depending on the gender of the victim. "[Revenge porn] punishes women and girls for engaging in activities that their male counterparts regularly undertake with minimal negative (and often positive) consequences."[26] While many men have undoubtedly endured its ill effects, revenge pornography remains for the most part a gendered issue.[27]

Moreover, once nude images are posted online, forcing the web host to take down the pictures is often ineffective;[28] the viral nature of the Internet allows for the proliferation of a single image—one photo can be downloaded and communicated an endless number of times.[29] Injunctions, which courts frequently use to halt damaging behavior, are largely ineffective to cure the

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[23] Amanda Hess, *Americans Are Sexting More Than Ever but Exploiting One Another Less*, SLATE (Feb. 11, 2014, 1:32 PM), http://www.slate.com/blogs/xx_factor/2014/02/11/sexting_and_revenge_porn_pew_finds_that_americans_are_sexting_more_but_forwarding.html.

[24] *See* Robert Mummert, *Sexting and the Law: How Lack of Reform in California Puts Teenagers in Jeopardy of Prosecution Under Child Pornography Laws Enacted to Protect Them*, 38 W. ST. U. L. REV. 71, 74–75 (2010) (discussing what constitutes "sexting" and how prevalent the activity is amongst teenagers).

[25] Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013), http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html (last visited Mar. 20, 2015).

[26] *Id.*

[27] Citron & Franks, *supra* note 17, at 353.

[28] *See* Franklin, *supra* note 17, at 1310 (discussing difficulties in removing revenge porn photographs from the Internet and stating that removal is often irrelevant because revenge-porn site users frequently download and save photographs).

[29] *See* Jeffery Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES (July 21, 2010), http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0.

harm represented by nonconsensual pornography.[30] After all, what good is issuing an injunction to take down one image when thousands of copies are in the possession of users across the globe?[31]

For obvious reasons, revenge pornography can have a debilitating impact on employment prospects, self-esteem, and interpersonal relationships.[32] Since "many employers are now routinely screening applicants' digital traces online,"[33] nonconsensual pornography can have just as devastating a financial impact as an emotional one.[34] More alarming is the prospect of physical harm; forty-nine percent of revenge pornography victims report being stalked by online users who saw their photos,[35] and fifty percent report that their names and addresses were listed next to nude images of them.[36] This creates a frightening cross-section of victims who are not only subjected to the humiliation and invasive effects of online revenge pornography, but also forced to fear the possibility of bodily harm from stalkers who have home addresses at their fingertips.[37]

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[30] *See* Ronneburger, *supra* note 17, at 8–10 (noting that once pictures are placed on the Internet, there is no legal mechanism for victims to get the pictures back); Laird, *supra* note 4. *See generally* Citron & Franks, *supra* note 17, at 346–48, 357–70 (discussing the inadequacy of current civil and criminal laws to combat revenge pornography).

[31] A highly publicized example of this was the Erin Andrews peephole video. Despite prosecution of the offender, the video is still disseminated online through peer-to-peer networks. Joseph Perkins, *Erin Andrews a Victim of Internet Rape*, EXAMINER.COM (Sept. 14, 2009), http://www.examiner.com/article/erin-andrews-a-victim-of-internet-rape/.

[32] *See* Citron & Franks, *supra* note 17, at 351–54; Ronneburger, *supra* note 17, at 8–10.

[33] Woodrow Hartzog, *Promises and Privacy: Promissory Estoppel and Confidential Disclosure in Online Communities*, 82 TEMP. L. REV. 891, 898 (2009).

[34] *See* Citron & Franks, *supra* note 17, at 352; Ronneburger, *supra* note 17, at 8–10.

[35] *End Revenge Porn Infographic*, CYBER C.R. INITIATIVE, http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/05/ERP4.png (last visited Mar. 3, 2014).

[36] *Id.*

[37] *See* Citron & Franks, *supra* note 17, at 351. An excellent example of the irrevocable nature of online images includes the viral dissemination of nude photographs of over one hundred movie actresses such as Jennifer Lawrence, Mary Elizabeth Winstead, and Kate Upton. The images were obtained by a hacker when he or she broke through cloud storage security protocols. *More Than 100 Celebrities Hacked, Nude Photos Leaked*, CBS NEWS, http://www.cbsnews.com/news/jennifer-lawrence-mary-elizabeth-winstead-kate-upton-hacked-dozens-of-nude-photos-leaked/ (last updated Sept. 1, 2014, 6:07 PM).

Federal laws have already recognized the harms propagated by child pornography[38]: Victims of revenge pornography often experience the psychological damage and feelings of helplessness associated with such victimization.[39] No mistake committed in youth can warrant the manner in which victims' lives are devastated so profoundly. No karmic dogma can justify such a ruinous punishment for a "crime" no worse than misplaced trust. So, why is revenge porn legal? Why have we, as a society, collectively shrugged our shoulders over an issue that potentially affects nearly half of the Millennial generation and countless others?[40]

This Comment proposes that the indiscriminate potential for harm presented by nonconsensual pornography warrants criminalization. Part I will explore the reasons why revenge pornography has resisted criminalization up to this point. Part II will examine current nonconsensual pornography criminal statutes as well as the cases prosecuted under them. Part III will examine alternative approaches to criminalization under existing laws. Part IV will examine the interaction between prospective revenge pornography criminalization statutes and Free Speech challenges under the First Amendment.

I. THE RATIONALIZATION OF REVENGE PORNOGRAPHY

> Cheated on me and broke my heart \ Gonna show the world your private parts.[41]

Do men and women have the right to send intimate photographs without fear of reprisal? Should romantic partners have a responsibility to maintain the privacy of their significant others? The debate over nonconsensual pornography has many participants. One of the most visible is Hunter Moore, the founder of a well-known revenge pornography website.[42] Moore

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[38] *See* Clay Calvert, *Opening Up an Academic Privilege and Shutting Down Child Modeling Sites: Revising Child Pornography Laws in the United States*, 107 DICK. L. REV. 253, 276 (2002).

[39] *See* Citron & Franks, *supra* note 17, at 347.

[40] *Cf.* Hess, *supra* note 23 (noting that up to 44% of young Americans participate in sexting).

[41] BLOOD ON THE DANCE FLOOR, *Revenge Porn!*, *on* EVOLUTION (Dark Fantasy Records 2011).

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

maintains that his website serves as a justifiable punishment for women who allow themselves to be photographed in the nude.[43] The harm caused by revenge porn to victims, he insists, is short-lived: "'We've all masturbated to you or laughed at you, and it's done. It can't get any worse.'"[44] Moore is similarly dismissive of victims' emotional and mental ramifications after having their nude images posted online, despite his professed concerns over victims' potential for self-harm.[45] Moore has stated, "'If somebody killed themselves over being on the site, do you know how much money I'd make? At the end of the day, I do not want anybody to hurt themselves. But if they do? Thank you for the money.'"[46] Moore's observations are not without merit, as victimization due to revenge pornography has prompted suicide.[47]

Opinions of Internet users are split over laws criminalizing revenge pornography. While many are concerned over the potential for humiliation and harassment, others argue that it was the victims' objectionable behavior that created the potential for harm in the first place.[48] More often than not, detractors of nonconsensual pornography laws offer this advice: "[F]or individuals

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[43] *See* Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE, Oct. 11, 2012, *available at* http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113#ixzz2u4XJ02PO ("I'm sorry that your daughter was 'cyber-raped,' but, I mean, now she's educated on technology.").

[44] Camille Dodero, *Hunter Moore Makes a Living Screwing You*, VILLAGE VOICE (Apr. 4, 2012), http://www.villagevoice.com/2012-04-04/news/revenge-porn-hunter-moore-is-anyone-up/full/.

[45] *See id.*

> My site is different. If you're posted, and people are like, "You're fat; kill yourself," I can understand why people are hurting themselves over it, which I hope to God never happens. But these kids who have never even been posted on my site, who are getting called a "faggot" from a couple bullies at school? They're just weak-minded people. The shit *I* went through? Fucking 10,000 times worse than these fucking kids.

Id.

[46] *Isanyoneup.com—Hunter Moore—Brains Over Bullies*, BULLYVILLE.COM, http://www.bullyville.com/?page=articles&id=471 (last visited Feb. 27, 2014).

[47] *E.g.*, Mike Celizic, *Her Teen Committed Suicide Over 'Sexting,'* TODAY.COM (Mar. 6, 2009, 9:26AM), http://www.today.com/id/29546030/site/todayshow/ns/today-parenting_and_family/t/her-teen-committed-suicide-over-sexting/#.UQvJMIVyHkx.

[48] *Compare* Editorial, *Fighting Back Against Revenge Porn*, N.Y. TIMES (Oct. 12, 2013) http://www.nytimes.com/2013/10/13/opinion/sunday/fighting-back-against-revenge-porn.html, *with* Cathy Reisenwitz, *Revenge Porn Is*

who would prefer not to be a revenge porn victim or otherwise have intimate depictions of themselves publicly disclosed, the advice will be simple: don't take nude photos or videos."[49] After all, if an individual gives consent to be photographed or gives the picture to someone else, do they not also consent to allow the other person to do what they please with the image?

In 1966, Dr. Melvin Lerner, a psychologist at the University of Waterloo, advanced what he called the "Just World Theory."[50] In a series of highly publicized experiments, Lerner found that participants, who were observing another person receiving electric shocks and were unable to intervene, began to apply immoral attributes to the individual being electrocuted.[51] The more unfair and painful the treatment became, the more strongly the study participants derogated the victim.[52] The reason, he theorized, was because the idea of a truly innocent victim offends our sense of a moral and just universe.[53] People want to believe in a sense of cosmic karma, the supposed immutable truth that "what goes around comes around."[54] Lerner found that people believe that good things happen to honest and moral people, while bad things happen to people with objectionable qualities.[55] Individuals, like the study participants, apply unfounded context to the circumstances of victims that conforms to

Awful, but the Law Against it Is Worse, TPM (Oct. 16, 2014, 9:35 AM), http://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse. See, for example, the User Comments to CNN's Facebook post of the article *California Weighs Making 'Revenge Porn' Illegal*, FACEBOOK, https://www.facebook.com/cnn/posts/10151895057086509 (last accessed Mar. 4, 2014) for a survey of internet users' conflicting views on the issue.

[49] Eric Goldman, *From Eric's Blog: The Future of Revenge Porn*, 18 No. 3 CYBERSPACE LAW. 16 (Apr. 2013).

[50] MELVIN J. LERNER, RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD 1 (Leo Montada & Melvin J. Lerner eds., 1998); *see also* Claire Andre & Manuel Velasquez, *The Just World Theory*, SANTA CLARA UNIV. MARKKULA CTR. FOR APPLIED ETHICS, http://www.scu.edu/ethics/publications/iie/v3n2/justworld.html (last visited Nov. 14, 2014).

[51] LERNER, *supra* note 50, at 2.

[52] *Id.*

[53] *See id.* at 1; *see also* Andre & Velasquez, *supra* note 50.

[54] *See* LERNER, *supra* note 50, at 1–2, 4 (explaining how people may rationalize or justify the victim's suffering if those victims seem to deserve such punishment); *see also* Andre & Velasquez, *supra* note 50.

[55] *See* LERNER, *supra* note 50, at 1–2; *see also* Andre & Velasquez, *supra* note 50.

their idea of a fair and just world.[56] Doing so offers a greater sense of control over one's environment; living in a world with predictable consequences offers a greater sense of security.[57]

This concept, which has entered modern parlance under the label of "victim blaming,"[58] plays a large role in justifying resistance to revenge porn criminalization.[59] It is easier to place blame on the person featured in a sexually graphic image than it is to fault the parties outside of the frame, namely, the person who disseminated the photograph and the website that hosts the picture. As another old adage goes, "it takes two to tango;" however, individuals who are conceivably more responsible for the publication of explicit photos are largely immune to punishment by any formal social structure.[60] For the most part, the current legal landscape places no criminal liability on the person who disseminated the photograph and the website that hosts the picture; thus, while the pictured must deal with social and professional stigma, other parties who enable the dissemination of such photographs often escape reprimand.[61] Do not the discriminate effects of revenge porn also offend our societal notions of a just world?

Advising women "who would prefer not to be a revenge porn victim"[62] to simply avoid being photographed in the nude ignores the responsibilities and moral culpability of other parties such as former romantic partners, hackers, or assailants involved in nonconsensual pornography. Using that argument to justify resistance to nonconsensual pornography criminalization ignores victims of nonconsensual pornography whose pictures were taken without their knowledge. Taken to its logical ends, such advice ultimately coalesces into a belief that women should never remove their clothes or engage in consensual sex in any

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[56] *See* LERNER, *supra* note 50, at 1–2.

[57] *Id.* at 195; *see also* Juliana Breines, *Why Do We Blame Victims?*, PSYCHOL. TODAY (Nov. 24, 2013), http://www.psychologytoday.com/blog/in-love-and-war/201311/why-do-we-blame-victims.

[58] LERNER, *supra* note 38, at 3-4.

[59] *Cf.* Hess, *supra* note 23 ("If you are actually dumb enough to make a sex tape and think it won't get leaked, you are too dumb to ever have sex again.").

[60] *See* Carmen Rane Hudson, Op-Ed., *Revenge Porn, the Law, and Blaming the Victim*, THE FEMINIST WIRE (Nov. 10, 2013), http://thefeministwire.com/2013/11/op-ed-revenge-porn-the-law-and-blaming-the-victim/.

[61] Citron & Franks, *supra* note 17, at 351–52, 371.

[62] Goldman, *supra* note 49.

place where a camera can be hidden, which means anywhere.[63] Arguments that both advance the responsibility of the image subject and advocate against the criminalization of nonconsensual pornography ultimately place the blame solely at the feet of the victims, for they are the ones responsible for preventing the harm.[64] In the end, detractors who characterize revenge pornography criminalization as incompatible with free speech may not have fully considered the consequences of the legality of nonconsensual pornography. While such critics may believe in an individual's right to share intimate photographs with romantic partners, they offer no protections for what is essentially an act of expression.[65] In the end, free speech may be better served by criminalizing nonconsensual pornography.[66]

"Consensual sharing of intimate images is often done with the implied or express understanding that such images will remain confidential."[67] Many critics of revenge pornography laws argue that sharing intimate images extends to "wide-ranging consent."[68] However, ignoring the context[69] of consensual sharing of confidential information chafes heavily with other areas of law. For example, the disclosure of confidential financial information is highly regulated.[70] Trade secrets are similarly protected.[71] Health information is protected under HIPAA.[72] Educational information is protected under FERPA.[73] Violations under each of these sets of statutes are sensitive to the context in

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[63] Franks, *supra* note 19.

[64] *Id.*

[65] *See* Goldman, *supra* note 49.

[66] *Cf.* Hartzog, *supra* note 33, at 925 (discussing ways in which traditional equitable remedies can be used to protect online privacy while promoting free speech).

[67] Citron & Franks, *supra* note 17, at 354.

[68] *Id.* at 348 (citation omitted).

[69] "[C]ontextual integrity is the appropriate benchmark of privacy." Helen Nissenbaum, *Privacy As Contextual Integrity*, 79 WASH. L. REV. 119, 120 (2004). Nissenbaum goes on to argue that broad, sweeping laws that intrude into individuals' privacy necessarily fail because they cannot account for the context of the communicated information. *See id.* at 128–29, 136–38. She also argues that many normative structures provide amply clear guidelines into ascertaining whether communicated information should remain confidential. *Id.* at 138. For example, the information shared within intimacy is relevant. *Id.* at 128.

[70] *See* 12 U.S.C. § 3403 (2012).

[71] *See* 18 U.S.C. § 1832 (2012).

[72] 42 U.S.C. § 1320d-2(d) (2012).

[73] 20 U.S.C. § 1232g (2012).

which information is communicated and to whom.[74] The idea that people are entitled to confidentiality when it comes to the intimate aspects of their lives "finds robust support in scholarship developed from a variety of disciplinary perspectives, [and] is well entrenched in practical arenas of policy and law."[75]

In most jurisdictions, victims of nonconsensual pornography enjoy none of these protections.[76] Mary Anne Franks, an advocate for the criminalization of revenge pornography and professor at the University of Miami School of Law,[77] offers a compelling analogy (in an ironic tone) to illustrate the victim blaming mentality and wide-ranging consent arguments advanced by opponents:

> Let us imagine that there are no laws against identity theft. To the rising number of identity theft victims, we say: We do not need to have any laws against identity theft. Those who would prefer not to have their identity stolen should not own a credit card. Even if you never use your credit card, someone could hack into your computer and use your number to run up a $5000 bill on a fetish porn site. And really, most people are in fact very promiscuous with their credit card numbers, giving them to waiters and gas station attendants and all sorts of unsavory types. It would be ridiculous for them to expect that a waiter is only going to use their credit card for the limited purpose for which it was authorized; once they gave their consent for the card to be used in one context, they should expect that the waiter is going to use it anywhere he likes.[78]

Many scholars reject the notion that merely because individuals share information, even online, these individuals should then have no expectation of privacy.[79] Why else then would major online social networks such as Facebook and Google develop highly sophisticated privacy settings? Why would their users expend considerable energy adjusting these settings to restrict profile information available to the public at large?[80]

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[74] *See* Nissenbaum, *supra* note 69, at 129, 137–39.

[75] *Id.* at 128.

[76] *See* Citron & Franks, *supra* note 17, at 357–61 (discussing inadequate civil law remedies to combat revenge pornography in the United States).

[77] Kevin Collier, *Meet the Krav Maga-Fighting Law Professor Behind U.S. Revenge Porn Laws*, DAILY DOT (Apr. 15, 2014), http://www.dailydot.com/politics/mary-anne-franks-revenge-porn/.

[78] Franks, *supra* note 19.

[79] *See, e.g.*, Hartzog, *supra* note 33, at 893.

[80] Facebook users can adjust what information is visible to friends or online strangers. *Id.*

Ultimately, nonconsensual pornography criminalization detractors need to examine their respective rationales. While it is not necessarily inconsistent to believe that nonconsensual pornography is morally wrong *and* that laws criminalizing revenge pornography violate First Amendment protections, critics of such legislation should closely consider the fine line that exists between protecting women who are victimized by the practice and the rights of those who would harass them. While detractors may argue that it is impossible to craft a sufficiently narrow law that only effectively limits nonconsensual pornography rather than other forms of expression, it is axiomatic that a very bright line exists between intimate images submitted without consent and all other forms of communication. If consent is situational, there is little that could be considered more confidential than sharing intimate pictures.

II. CONTEMPORARY REVENGE PORN CRIMINAL STATUTES

> Revenge is best served cold and sweet \ So face the music and accept defeat.[81]

Recently, proposals for a host of nonconsensual pornography criminalization statutes have gained traction in several jurisdictions across the United States.[82] States that pass such proposals would join California, New Jersey, and a number of other states as jurisdictions that offer serious prosecution for publishers of nonconsensual graphic images.[83] This section will examine those current domestic and international laws along with domestic proposals for revenge pornography criminalization. Also relevant to any discussion regarding revenge pornography is § 230 of the Communications Decency Act, which enables the operation of revenge pornography sites despite the threat of civil liability.

A. The Communications Decency Act

Section 230 of the Communications Decency Act ("CDA")

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[81] BLOOD ON THE DANCE FLOOR, *supra* note 41.

[82] *See* Citron & Franks, *supra* note 17, at 371–73.

[83] *See* N.J. STAT. ANN. § 2C:14–9 (West 2014); CAL. PENAL CODE § 647(j)(2)–(4)(c) (West 2014). The exceptions as of this writing are Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, New Jersey, New York, Pennsylvania, Utah, Virginia, and Wisconsin. *Infra* Part II.

prevents holding websites liable for user-generated content.[84] Congress enacted the relevant provision largely "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."[85] In the findings section of the CDA, Congress listed the various reasons behind the adoption:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
>
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.[86]

It is ironic that the purpose of the CDA is to foster technological growth and creativity, but in this context is used to shield websites featuring content with negative social value. Beyond the onerous nature of monitoring the user generated content of millions of websites, the CDA arguably breaches the purpose for which it was enacted by subjecting the Internet at large to regulation.

The operative part of § 230 provides: "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."[87] Courts have interpreted this statute as a mandate to allow websites considerable flexibility in terms of potential liability for content generated by third parties.[88]

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[84] 47 U.S.C. § 230(c) (2012).

[85] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[86] 47 U.S.C. § 230(a).

[87] *Id*. § 230(c)(1).

[88] Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. § 230*, 52 A.L.R. FED. 2d 37 §§ 2, 20 & 22 (2011).

Courts have consistently rebuffed liability for tortious materials posted by a site's users.[89] As a result, victims of revenge pornography are unable to bring forth civil claims against website hosts in an effort to eradicate sexually explicit photos of themselves.[90] While the website exception for third party content liability has certainly aided the robust growth and development of the Internet as a whole,[91] many revenge pornography hosting sites that feature nothing but user-submitted graphic images have profited immensely from their immunity.[92] Revenge pornography websites, which generally exist wholly as a host for user-generated content, are protected by a loophole because the websites did not create the objectionable information.[93] However, nothing in the CDA prevents states from criminalizing the behavior of users who post potentially harmful materials to such websites.[94]

B. New Jersey

In 2004, New Jersey lawmakers passed a privacy law aimed at voyeurs that criminalized revenge pornography in that state. The statute provides in relevant part:

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

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[89] *E.g.*, Miles v. Raycom Media, Inc., No. 1:09CV713–LG–RHW, 2010 WL 3419438, at *3 (S.D. Miss. Aug. 26, 2010).

[90] *See* Goldman, *supra* note 49.

[91] *See* Eric Goldman, *Unregulating Online Harassment*, 57 DENV. U. L. REV. 59, 59–60 (2010).

[92] For example, Hunter Moore claimed that his website, IsAnyoneUp, received 300,000 hits per day and generated $20,000 per month in advertising revenue. Dave Lee, *IsAnyoneUp's Hunter Moore: 'The Net's Most Hated Man*,' BBC NEWS (Apr. 20, 2012, 10:01 ET), http://www.bbc.com/news/technology-17784232.

[93] *See* 47 U.S.C. § 230 (2012).

[94] *See* Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 853–55 (2010).

> the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.[95]

A crime in the third degree carries a three to five year sentence in New Jersey and does not confer sexual offender status upon those convicted under the law.[96] While the statute is certainly broad, covering all manner of images no matter who created the photo,[97] the statute is rarely invoked.[98] Under the law, the state must prove:

> 1) [T]he defendant must know that he is not licensed or privileged to disclose a photograph; 2) a person actually disclosed the photograph; 3) the photograph must be of another whose intimate parts are exposed; and 4) the individual depicted in the photograph has not consented to the disclosure of the photograph.[99]

In *State v. Parsons*, the State charged John Parsons under the statute when he sent a nude photograph of a schoolteacher to her employer after she ended her relationship with Parsons.[100] In another case, the State charged Erica Capasso with invasion of privacy under the statute after attempting to intimidate her boyfriend with nude photos.[101] In a more highly publicized case, Atlantic City mayoral candidate Craig Callaway filmed a former supporter having sex with a prostitute in a motel.[102] Among other crimes, including extortion, the Superior Court of New Jersey Appellate Division convicted Callaway of conspiracy to invade privacy under the New Jersey statute.[103] The State also invoked the statute in the highly publicized case of Tyler Clementi,

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[95] N.J. STAT. ANN. § 2C:14–9(b)–(c) (West 2014).
[96] *See id.* § 2C:43–6(a)(3).
[97] *See id.* § 2C:14–9(b)–(c). This is in contrast to California's law. *See infra* Part II C, note 110.
[98] Citron & Franks, *supra* note 17, at 371.
[99] State v. Parsons, No. A–3865–10T3, 2011 WL 6089210, at *2 (N.J. Super. Ct. App. Div. Dec. 8, 2011).
[100] *Id.* at *1.
[101] Andres Jauregui, *Erica Capasso Posted Nude Photos of Ex-Boyfriend, Made Threats: Police*, HUFFINGTON POST (Oct. 22, 2013), http://www.huffingtonpost.com/2013/10/22/erica-capasso-nude-photos-arrested_n_4142538.html.
[102] State v. Callaway, 2012 WL 4448776, at *1 (N.J. Super. Ct. App. Div. Sept. 27, 2012).
[103] *See id.* at *7 n.2; *see also* N.J. STAT. ANN. § 2C:5–2 (West 2014); *id.* § 2C:14–9(c).

a Rutgers freshman who threw himself off the George Washington Bridge after his roommate filmed and published a webcam video of Clementi and another man engaging in intercourse.[104]

The statute contains an affirmative defense: "It is an affirmative defense to a crime under this section that: the actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified . . . and the actor acted with a lawful purpose."[105] This represents a significant loophole in the New Jersey law.[106] If, before disseminating the video or image, the actor gave the subject notice of his or her intent to release the image, and if the actor had "a lawful purpose" in doing so, the actor has an affirmative defense the state must rebut beyond a reasonable doubt.[107] This is significant because outside of the statute containing this exception, there is often nothing illegal about humiliating someone.[108] Thus, an actor need merely to alert the party that he or she intends to victimize before posting sexually explicit images to be insulated from criminal liability.[109]

C. California

California's nonconsensual pornography statute is especially narrowly tailored. The law states:

> 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.[110]

Notably absent from the law is any provision criminalizing

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[104] *See* Megan DeMarco, *Live Coverage: Dharun Ravi Found Guilty on Most Counts in Webcam Spying Trial Verdict*, NJ.COM (Mar. 16, 2012, 2:28 PM), http://www.nj.com/news/index.ssf/2012/03/ravi_webcam_trial_verdict.html.

[105] N.J. STAT. ANN. § 2C:14–9.

[106] Mark Bennett, *Is New Jersey's Revenge-Porn Statute Constitutional?*, DEFENDING PEOPLE (Oct. 16, 2013), http://blog.bennettandbennett.com/2013/10/is-new-jerseys-revenge-porn-statute-constitutional.html.

[107] *Id.*

[108] *See id.*

[109] *Id.*

[110] CAL. PENAL CODE § 647(j)(4)(A) (West 2014).

the distribution of photographs *not* taken by the individual disseminating the photographs.[111] This leaves a significant gap in prosecuting revenge porn cases since self-made portraits are not covered under the law.[112] "Selfies," as they are more generally known, constitute an estimated 80% of all revenge porn cases.[113] The scienter requirement is also particularly onerous for the prosecution; proving intent to cause emotional distress can be a daunting task.[114] A violation of the statute constitutes a misdemeanor for disorderly conduct,[115] which carries a maximum sentence of six months and a fine of $1,000.[116] The California law, which was enacted in October of 2013,[117] is neither as far-reaching as its New Jersey counterpart, nor as strict.[118]

California State Senator Anthony Cannella, author of Senate Bill 255[119] which amended the California penal code to include the aforementioned provision, did not include images originally generated by the subject in the bill and required a finding of malicious intent over fears that doing so would have caused the bill to fail.[120] The law has come under fire for failing to consider the fact that the harm created by publication of self-photographed nude images is analogous to the harm created by the publication of nude images taken by the disseminating party.[121]

Furthermore, neither the New Jersey law nor the California

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[111] *See id.*

[112] *See id.*

[113] Heather Kelly, *New California 'Revenge Porn' Law May Miss Some Victims*, CNN TECH., http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/ (last updated Oct. 3, 2013, 6:32 AM).

[114] *See* Marjorie A. Shields, Annotation, *Action for Intentional Infliction of Emotional Distress Against Paramours*, 99 A.L.R.5th 445, § 6 (2002) (discussing sufficiency of evidence to support a claim of intentional infliction of emotional distress).

[115] CAL. PENAL CODE § 647 ("[E]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor . . . .").

[116] *Id.* § 19.

[117] Citron & Franks, *supra* note 17, at 373.

[118] *See id.* at 373–74.

[119] *Bill Analysis: SB255*, OFFICIAL CAL. LEGISLATION INFO., http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_255_cfa_20130703_114233_sen_floor.html.

[120] *No 'Selfies': Why California's Anti-Revenge Porn Bill Doesn't Do Much*, TECH 2 (Oct. 7, 2013, 4:23 PM), http://tech.firstpost.com/news-analysis/no-selfies-why-californias-anti-revenge-porn-law-doesnt-do-much-215319.html. "My bill would have died if we didn't do that." *Id.*

[121] *See id.* (discussing criticism of Senate Bill 255's exclusion of "selfies").

law contains exceptions for newsworthiness.[122] This is significant because nonconsensual pornography statutes offer protection to public figures who may be harassing subordinates. For example, Anthony Weiner, a New York state senator who sent explicit photographs of himself to a college student,[123] might be protected by the California statute from anyone seeking to release photographs that proved his objectionable behavior.[124] An effective way to circumvent this issue would be to include a newsworthiness exception to nonconsensual pornography statutes.[125] Such exceptions are not uncommon in cases rebutting First Amendment defenses.[126]

In addition, the intent aspect of the law requires a high level of evidence to prove. It is difficult to prove intent to cause emotional distress in a civil context, where the burden of proof is a preponderance of the evidence. Proving intent to cause emotional distress beyond a reasonable doubt is even more burdensome.[127] If lawmakers are determined to include a *mens rea* element in revenge porn crimes, then offering an objective standard is far more effective.[128]

D. Alaska

Alaska's revenge pornography law is applicable to many

[122] *See* N.J. STAT. ANN. § 2C:14–9 (West 2014); CAL. PENAL CODE § 647 (West 2014).

[123] Ashley Parker, *Congressman, Sharp Voice on Twitter, Finds it Can Cut 2 Ways*, N.Y. TIMES, May 31, 2011, *available at* http://www.nytimes.com/2011/05/31/nyregion/for-rep-anthony-weiner-twitter-has-double-edge.html.

[124] *See* CAL. PENAL CODE § 647(j)(4)(A). However, note that Weiner likely would not be protected if he took the pictures *himself*. *See id.*; *see also No 'Selfies*,' *supra* note 120.

[125] *See* Derek E. Baumauer, *Exposed*, 98 MINN. L. REV. 2025, 2067–68 (2014).

[126] *See, e.g.*, Bollea v. Gawker Media, LLC, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012). A highly publicized example of such an exception was used when Gawker.com successfully argued newsworthiness to dismiss an injunction attempting to halt the dissemination of a video showing professional wrestler "Hulk" Hogan engaging in an extramarital affair. *Id.* at *3–5.

[127] *See generally* Miles v. United States, 103 U.S. 304, 309 (1880) (discussing the burden of proof beyond a reasonable doubt).

[128] *See* Citron & Franks, *supra* note 17, at 387 (discussing the difficulties of criminalizing revenge pornography).

cases of nonconsensual pornography,[129] but is generally neglected in conversations regarding revenge pornography legislation.[130] Alaska has made it a misdemeanor to "publish[] or distribute[] electronic or printed photographs, pictures, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act."[131] A class B misdemeanor, violation of the Alaska revenge pornography statute carries a 90-day maximum jail sentence.[132]

E. Idaho

On March 19, Idaho passed the first revenge pornography criminalization statute of 2014.[133] Categorizing the crime under "Video Voyeurism," Idaho's statute makes it a felony to

> intentionally or with reckless disregard disseminate[], publish[] or sell[] or conspire[] 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.[134]

The statute defines "intimate areas" as "buttocks, genitals or genital areas of males or females, and the breast area of females."[135] Idaho's law represents a vast improvement over earlier legislation.[136] It does not require the subject to have actually suffered mental anguish, covers images taken by the subject personally, provides a somewhat more distinct definition of proscribed imagery, and does not require the subject to have expressly forbidden the dissemination of the image by relying on

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[129] *See* ALASKA STAT. ANN. § 11.61.120(a)(6) (West 2014).

[130] *See, e.g.*, Adi Robertson, *Texas Woman Wins Half-Million Dollar Revenge Porn Lawsuit*, THE VERGE (Mar. 1, 2014, 1:17 PM), http://www.theverge.com/2014/3/1/5459904/texas-woman-wins-half-million-dollar-revenge-porn-lawsuit (discussing revenge pornography legislation in states other than Alaska).

[131] ALASKA STAT. § 11.61.120 (2014).

[132] *Id.* § 12.55.135.

[133] Crime of Video Voyerism, H.B. 563, 2014 Idaho Sess. Laws ch. 173 (codified as amended at IDAHO CODE ANN. § 18-6609 (2014)).

[134] *Id.* § (2)(b).

[135] *Id.* § (1)(d).

[136] *See* Betsy Z. Russell, *'Revenge Porn' May Be Outside Idaho Law*, THE SPOKESMAN-REVIEW, Feb. 6, 2012, *available at* http://www.spokesman.com/stories/2014/feb/06/revenge-porn-may-be-outside-idaho-law/. *Compare* IDAHO CODE ANN. § 18-6609 (2014), *with id.* § 18-6609 (2013).

an understanding of privacy.[137] In addition, the Idaho statute attempts to avoid being preempted by the CDA by carving out an exception for "interactive computer service[s]" as defined in federal law.[138]

F. Utah

On March 29, 2014, Utah made dissemination of revenge pornography a misdemeanor.[139] An individual violates Utah's revenge pornography law when he or she

> 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 under this section.[140]

Utah's statute provides a specific definition for "intimate image" that largely follows the definitions equivalent definitions for "nudity" and "sexual conduct" found in other states, though it does uniquely criminalize the dissemination of "computer-generated"[141] images. Utah is also careful not to tread afoul of the Communications Decency Act, carving out an exception for "interactive computer service[s]."[142]

G. Virginia

On March 31, 2014, Virginia passed a law making it a misdemeanor to harass others by posting intimate photos online.[143] Virginia's revenge pornography statute is broad, providing that

> [a]ny person who, with the intent to coerce, harass, or intimidate, maliciously disseminates or sells any videographic or still image created by any means whatsoever that depicts another

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[137] IDAHO CODE ANN. § 18-6609.
[138] *Id.* § 4 (citing 47 U.S.C. § 230(f)(2) (2012)).
[139] Distribution of Intimate Images, 2014 Utah Laws 124 (H.B. 71) (codified as enacted at UTAH CODE ANN. § 76-5b-203) (West 2014)).
[140] UTAH CODE ANN. § 76-5b-203(2)(a)–(c).
[141] *Id.* § 76-5b-203(1)(b).
[142] *Id.* § 76-5b-203(4)(a) (citing 47 U.S.C. § 230(f)(2)).
[143] H.B. 326, 2014 Leg. Reg. Sess. (Va. 2014) (codified as amended at VA. CODE ANN. § 18.2-386.2 (West 2014)).

> person who is totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast, where such person knows or has reason to know that he is not licensed or authorized to disseminate or sell such videographic or still image is guilty of a Class 1 misdemeanor.[144]

Virginia's revenge pornography statute represents an improvement over earlier drafts of the bill in that it does not require a jury to find that the victim actually suffered severe emotional distress.[145] The law's definition of proscribed visual subject matter is very broad,[146] opening the Virginia statute to First Amendment attacks. However, the statute's lack of consent requirement is commendable in that an offender can still be prosecuted when he or she *should have known* that he or she was not authorized to disseminate intimate photographs. This is an improvement over the California statute, which requires the offender to have reached an understanding with the subject that the images are to remain private.[147]

H. Wisconsin

In April, 2014, Wisconsin passed a law aimed at combating revenge pornography.[148] The statute makes it a misdemeanor to "[p]ost[], publish[], or cause[] to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation."[149] The Wisconsin statute also covers would-be posters with no knowledge of the subject's consent by making it a misdemeanor to "[p]ost[], publish[], or cause[] to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted."[150] Notably, the Wisconsin statute fails to criminalize websites designed primarily to disseminate revenge pornography or provide an exception for private images of public officials.[151]

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[144] VA. CODE ANN. § 18.2-386.2.
[145] *Cf.* Proposed H.B. 49, 2014 Leg. Reg. Sess. (Va. 2014) *available at* https://legiscan.com/VA/text/HB49/2014 (requiring that "the depicted person suffers substantial emotional distress").
[146] *Cf.* UTAH CODE ANN. § 76-5b-203(1)(b)–(c) (West 2014).
[147] *See* CAL. PENAL CODE § 647 (West 2014).
[148] WIS. STAT. ANN. § 942.09 (West 2014).
[149] *Id.* § (3m)(a)1.
[150] *Id.* § (3m)(a)2.
[151] *See id.*

I. Arizona

On April 30, 2014, Arizona passed a revenge pornography law making it a felony to publish or film non-consensual images of a nude person or a person engaged in sexual activities.[152] The law comprehensively states that it is illegal 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."[153] The law, already one of the strictest in the nation, also punishes offenders more severely if the subject of the image is recognizable.[154] As of this writing, the law is being revised in the state legislature after the ACLU successfully challenged the statute as an unconstitutional restriction on free speech.[155]

J. Maryland

With consultation from noted advocate Danielle Citron, Maryland passed a revenge pornography statute on May 15, 2014.[156] The law, which refers to the crime as "revenge pornography," makes it a misdemeanor, in relevant part, to

> intentionally cause serious emotional distress to another by intentionally placing on the Internet a photograph, film, videotape, recording, or any other reproduction of the image of the other person that reveals the identity of the other person with his or her intimate parts exposed or while engaged in an act of sexual contact.[157]

Importantly, the statute also defines "intimate parts" and "sexual contact" in keeping with constitutional requirements.[158]

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[152] H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (codified as amended at ARIZ. REV. STAT. ANN. § 13-1425 (West 2014)).
[153] ARIZ. REV. STAT. ANN. § 13-1425(A).
[154] *Id.* § 13-1425(C).
[155] *Judge Puts Arizona 'Revenge Porn' on Hold*, ASSOCIATED PRESS (Nov. 26, 2014, 5:36 PM), http://ktar.com/23/1786644/Judge-puts-Arizona-revenge-porn-law-on-hold.
[156] H.B. 43, 434th Gen. Assemb., (Md. 2014) (codified as MD. CODE ANN., CRIM. LAW § 3-809 (West 2014)); Gynene Sullivan, *Prof. Danielle Citron Partners with Maryland Legislator for "Revenge Porn" Bill*, UNIV. OF MD. L. SCHOOL, http://www.law.umaryland.edu/about/features/feature_details.html?feature=212 (last visited March 19, 2015).
[157] MD. CODE ANN., CRIM. LAW § 3-809(a)(2)–(3).
[158] *See id.* § 3-809 (a)(2)–(3).

Unlike Delaware however, the law exclusively criminalizes posting nude images rather than also criminalizing websites that primarily disseminate revenge pornography.[159] This will likely keep this statute from being preempted by the CDA, which prevents websites from being held liable for user-generated content.[160]

K. Colorado

On May 29, 2014, Colorado passed a revenge pornography criminalization statute.[161] The statute makes it a misdemeanor for anyone to "post[] or distribute[] 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 eighteen years of age or older."[162] The law requires that the post be made "[w]ith the intent to harass the depicted person and inflict serious emotional distress upon the depicted person."[163] In addition, the statute carves out an exception for individuals to publish nude photos with the consent of the subject.[164]

L. Hawaii

On June 20, 2014, Hawaii made it a felony to disseminate revenge pornography.[165] The law criminalized the knowing disclosure of

> an image or video of another identifiable person either in the nude . . . or engaging in sexual conduct . . . without the consent of the depicted person, 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.[166]

[159] *See id.* (citing 47 U.S.C. § 230(f)(2) (2012)).
[160] *See generally* 47 U.S.C. § 230.
[161] H.B. 1378, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014) (codified as COLO. REV. STAT. ANN. § 18-7-107 (West 2014)).
[162] COLO. REV. STAT. ANN. § 18-7-107(1)(a).
[163] *Id.* § 18-7-107(1)(a)(I).
[164] *See id.* § 18-7-107(1)(a)(II)(A).
[165] H.B. 1750, 27th Leg., Reg. Sess. (Haw. 2014) (codified as HAW. REV. STAT. § 711-1110.9 (West 2014)).
[166] HAW. REV. STAT. § 711-1110.9(1)(b).

Like many other states, Hawaii's statute has an intent requirement,[167] though it is much broader than the "severe emotional distress" standard. While the law fails to make an exception for public figures,[168] it does adequately define "nude" and "sexual conduct."[169]

M. Georgia

On July 1, 2014, the dissemination of revenge pornography became illegal in Georgia.[170] The Georgia statute makes it a misdemeanor for a person to "[e]lectronically transmit[] or post . . . a photograph or video which depicts nudity or sexually explicit conduct of an adult when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person."[171] Both "nudity"[172] and "sexually explicit conduct"[173] are specifically defined by statute. Georgia's statute is unique in that it requires malicious intent in the form of "harassment" or alternatively requires potential prosecutors to demonstrate financial harm to the victim.[174] This undoubtedly facilitates convictions under the Georgia statute when compared to more stringent scienter requirements like that found in California's revenge pornography law.

N. Pennsylvania

On July 9, 2014, the Pennsylvania legislature made the dissemination of nonconsensual pornography a misdemeanor.[175] Under Pennsylvania law,

> a person commits the offense of unlawful dissemination of intimate image if, with intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.[176]

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[167] *See id.* at 1(a)–(b).
[168] *See id.*
[169] *Id.* § 712-1210.
[170] 2014 Georgia Laws Act 519 (H.B. 838) (codified as GA. CODE ANN. § 16-11-90 (West 2014)).
[171] GA. CODE ANN. § 16-11-90(b)(1).
[172] *Id.*
[173] *Id.* § 16-12-100(a)(4).
[174] *Id.* § 16-11-90(a)(2).
[175] H.B. 2107, 109th Gen. Assemb. (Pa. 2014) (codified as 18 PA. CONS. STAT. ANN. § 3131 (West 2014)).
[176] 18 PA. CONS. STAT. ANN. § 3131(a).

As in most states with revenge pornography statutes, "nudity"[177] and "sexual conduct"[178] are scrupulously defined. Additionally, the law makes no distinction as who took the photo or whether it was taken with consent; only consent to distribute the image functions as a defense.[179] However, the Pennsylvania statute makes no exception for images of a public official or figure and does not address hosting revenge pornography websites.[180]

O. New York

On August 1, 2014, New York strengthened an already existing law that can be used to combat revenge pornography.[181] However, the law can be qualified more as a voyeurism statute rather than a true nonconsensual pornography law in that it criminalizes the surreptitious recording of sexual acts rather than their unconsented dissemination.[182] The statute makes it a felony to

> use[] or install[] or permit[] the utilization or installation of an imaging device to surreptitiously view, broadcast, or record such person in an identifiable manner . . . engaging in sexual conduct . . . in the same image with the sexual or intimate part of any other person . . . when such person has a reasonable expectation of privacy, without such person's knowledge or consent.[183]

Intentional dissemination of the unlawfully captured images is further proscribed,[184] but the statute does not go on to protect the unconsented dissemination of legally obtained images.[185] Most revenge porn is obtained lawfully. Therefore, as New York statute only proscribes intimate images that were obtained unlawfully, images that were taken with the permission of the subject but disseminated without that subject's permission would not be addressed by the statute. While the law has been hailed as a

[177] *Id.* § 5903(e)(2).
[178] *Id.* § 5903(e)(3).
[179] *See id.* § 3131.
[180] *Id.*
[181] S. 1982-C, 2014 Sess. Law News of N.Y. Ch. 193 (codified as amended at N.Y. PENAL LAW § 250.45(5) (McKinney 2014)).
[182] *See* N.Y. PENAL LAW § 250.45(5).
[183] *Id.* § 250.45(1).
[184] *Id.* § 250.55 (outlawing the dissemination of the unlawful surveillance proscribed under § 250.45).
[185] *See id.* § 250.45.

revenge pornography statute,[186] such declarations reflect a poor understanding of the fact that the spread of nonconsensual pornography is primarily caused by jilted ex-lovers rather than "Peeping Toms."

P. Delaware

On August 12, 2014, Delaware criminalized revenge pornography as a misdemeanor.[187] The law follows the Maryland model, making it illegal to

> knowingly reproduce[], distribute[], exhibit[], publish[], transmit[], or otherwise disseminate[] a visual depiction of a person who is nude, or who is engaging in sexual conduct, when the person knows or should have known that the reproduction, distribution, exhibition, publication, transmission, or other dissemination was without the consent of the person depicted and that the visual depiction was created or provided to the person under circumstances in which the person depicted has a reasonable expectation of privacy.[188]

From a First Amendment standpoint, Delaware's law is especially effective because it specifically defines what constitutes "nudity" and "sexual conduct" as contemplated by statute.[189] Additionally, the Delaware statute punishes individuals for hosting websites "for the purpose of reproducing, distributing, exhibiting, publishing, transmitting, or otherwise disseminating such visual depictions."[190] The Delaware statute also contains several aggravating factors that result in a felony charge, including publishing identifying information, intentionally posting nude materials with the intent to harass, recidivism, steals the images from a phone or computer, or captures the images without the subject's knowledge.[191] Most commendably, Delaware's statute clearly states that an individual who has consented to the possession of intimate photos within the context of a personal relationship "retains a reasonable expectation of privacy" with

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[186] *See* Teri Weaver, *"Revenge Porn" Now Illegal in New York*, SYRACUSE.COM (Aug. 1, 2014, 12:55 PM), http://www.syracuse.com/news/index.ssf/2014/08/revenge_porn_now_illegal_in_new_york.html.
[187] H.B. 260, 2014 Del. Laws Ch. 415 (codified as amended at DEL. CODE ANN. tit. 11, § 1335 (West 2014)).
[188] DEL. CODE ANN. tit. 11, § 1335(9).
[189] *See id.* § 1335(9)(a)(1), (3).
[190] *Id.* § 1335(9)(c)(3).
[191] *See id.* § 1335(9)(a)(c).

regard to the dissemination of such images.[192]

Delaware's revenge pornography statute clearly identifies forbidden visual content, when a person has an expectation of privacy, and differentiates among varying degrees of revenge pornography. As a result, it is one of the most comprehensive and constitutionally sound examples of revenge pornography legislation in the country.

Q. Illinois

On December 29, 2014, Illinois passed a revenge pornography law that resembles the Delaware model.[193] While it does not provide for the punitive escalation of more heinous revenge pornography cases, the Illinois statute makes it a felony to disseminate an image of a "sexual act" obtained "under 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."[194] Like Delaware, the Illinois statute specifically defines "sexual act" in hopes of conforming to First Amendment restrictions.[195] However, the Illinois diverges from the Delaware model and tracks Maryland's statute by excluding "interactive computer service[s]" from the law, meaning that revenge pornography website owners cannot be prosecuted under the law.[196] Again, this appears to be an attempt to avoid preemption by the Communications Decency Act.[197]

R. Israel

In January of 2014, Israel became the first nation to ban revenge pornography outright.[198] The law in Israel recognizes nonconsensual pornography as sexual assault, treating offenders as sexual offenders and subjects as victims of sexual assault.[199]

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[192] *Id.*

[193] *See* S.B. 1009, 2014 Ill. Legis. Serv. P.A. 98-1138 (codified as 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2014)).

[194] 720 ILL. COMP. STAT. ANN. 5/11-23.5(b)(3).

[195] *See id.* § 11-23.5(a).

[196] *See id.* § 11-23.5(d)(1).

[197] *See id.*

[198] Sam Frizell, *Israel Bans 'Revenge Porn*,' TIME.COM (Jan. 7, 2014), http://world.time.com/2014/01/07/israel-bans-revenge-porn/.

[199] Yifa Yaakov, *Israeli Law Makes Revenge Porn a Sex Crime*, THE TIMES OF ISRAEL (Jan. 6, 2014, 9:11 PM), http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/.

The bill was drafted by Yafit Kariv, whose concern began after witnessing a video of a man having sex with the man's ex-girlfriend; the video was shared on the mobile messaging application WhatsApp tens of thousands of times.[200] In Israel, sexual assault, and therefore revenge pornography, is punishable by up to five years in prison.[201]

S. Federal Law

As of this writing, no federal statute dedicated to revenge pornography exists.[202] However, federal voyeurism laws offer reprieve for a narrow swath of nonconsensual pornography victims. The relevant statute reads:

> Whoever, in the special maritime and territorial jurisdiction of the United States, has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.[203]

This law only covers individuals who have been victimized via surreptitious filming or photography, but does offer some protections to individuals such as sportscaster Erin Andrews, who was filmed in a hotel room through a peephole.[204]

A federal law criminalizing nonconsensual pornography would immediately transform the legal landscape for victims of revenge pornography.[205] Such legislation would potentially circumvent § 230 protections on a limited basis.[206] If web hosts are exposed to liability for nonconsensual pornography, the process for removing such images could be as simple as alerting the provider of the objectionable content.[207] Web services such as

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[200] *Id.*
[201] *See id.*
[202] *See Activists Working to Draft Nationwide 'Revenge Porn' Legislation*, CIRCA, http://cir.ca/news/revenge-porn-laws-in-the-us (last visited Oct. 26, 2014) (discussing activists attempting to draft federal revenge porn legislation).
[203] 18 U.S.C. § 1801 (2012).
[204] Perkins, *supra* note 31.
[205] Jacob Gershmann, *Anti-Revenge Porn Activists Seek Federal Law*, WALL ST. J. (Nov. 25, 2013), http://blogs.wsj.com/law/2013/11/25/anti-revenge-porn-activists-seek-federal-law/.
[206] Citron & Franks, *supra* note 17, at 390.
[207] *See id.*

Google already have streamlined mechanisms for analogous reports and removal from searches.[208] Such images have proliferated, but efforts to combat revenge pornography would likely be analogous to efforts to remove images of child pornography that companies with significant online presences have already had success in curtailing. Moreover, a federal law would enable the prosecution of the owners of websites that traffic nonconsensual explicit images.[209] In light of these facts, a federal law against revenge pornography could be on the horizon.[210] Even so, a large number of states are considering their own revenge pornography statutes.[211] As of this writing, fourteen additional states have introduced revenge pornography legislation amid the growing movement to combat online harassment.[212]

While this is certainly a mark of progress, drafters of nonconsensual pornography statutes must be careful to strike a balance between broadly covering all victims but also resisting constitutionality challenges under the First Amendment.[213]

PART III. ALTERNATIVES TO CRIMINALIZATION

> Don't blame me or say I ruined your life \ An invasion of privacy. . .Yeah f***ing right.[214]

Current avenues for imposing civil liability on revenge pornography submitters are expensive and difficult. Nevertheless, legal scholars continue to explore areas of civil law that may be utilized. Civil remedies for victims of revenge pornography can

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[208] *Removing Content From Google*, GOOGLE, https://support.google.com/legal/troubleshooter/1114905?hl=en (last visited Mar. 7, 2014).
[209] *See* Citron & Franks, *supra* note 17, at 389–90.
[210] *See* Stephen Nelson, *Federal 'Revenge Porn' Bill Will Seek to Shrivel Booming Internet Fad*, U.S. NEWS AND WORLD REP. (Mar. 26, 2014, 6:01 PM), http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shrivel-booming-internet-fad.
[211] Citron & Franks, *supra* note 17, at 371.
[212] These states include Alabama, Florida, Tennessee, Kentucky, Washington, New Mexico, Missouri, Illinois, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut. Rebecca Leber, *Is Revenge Porn Legal in Your State?*, NEW REPUBLIC, http://www.newrepublic.com/article/119295/revenge-porn-laws-state-map-shows-theyre-rare-us (last visited Mar. 20, 2015). After its improper photography criminalization law was ruled unconstitutional, the Texas legislature is also considering revenge pornography legislation. *See* H.R. 147, 84th Legis., (Texas 2015); *Ex parte* Thompson, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014).
[213] *Infra* Part IV.
[214] BLOOD ON THE DANCE FLOOR, *supra* note 41.

be costly, ineffective, and emotionally draining. Further, criminal remedies in states without revenge pornography criminalization statutes are largely ineffective.[215] Pursuing remedies under tort or copyright laws are expensive, especially if the defendant is judgment-proof by virtue of being unable to pay a compensatory award. Proving the elements of such civil actions, such as intentional infliction of emotional distress (IIED) are particularly onerous. Further, litigants run the risk of exposing themselves and doing themselves more personal, emotional, and professional harm by intensifying the attention they receive by filing a lawsuit via the Streisand Effect.[216] While pseudonymous litigation can help protect victims' identities, public details necessary to such suits can reveal identities to people familiar with the parties; these are arguably the most important people from whom such information should be kept.[217]

A. Tort Remedies

In a narrow segment of cases, tort remedies have offered relief to revenge pornography victims.[218] In fact, tort remedies are hypothetically available to most victims of revenge pornography.[219] However, there are several disadvantages to tort law that engender difficulty in considering these civil actions as a true solution for nonconsensual pornography.[220]

Revenge pornography victims have successfully remedied the effects of dissemination of sexually explicit images through the use of two torts: IIED and Disclosure of Private Facts (DPF).[221] In the context of revenge pornography, DPF is the

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[215] *See, e.g.*, Erin Donahue, *Judge Throws Out New York "Revenge Porn" Case*, CBS NEWS (Feb. 25, 2014, 4:42 PM), http://www.cbsnews.com/news/judge-throws-out-new-york-revenge-porn-case/.

[216] The "Streisand Effect" is commonly known to occur to people, often celebrities, when they "tr[y] to have a piece of information censored or removed, only to have it backfire and cause the information to receive much more attention than it was previously receiving. It is named that way because of a situation that Barbara Streisand got into in 2003." Mickey Mellen, *About*, THE STREISAND EFFECT, http://www.thestreisandeffect.com/about/ (last visited Mar. 8, 2014).

[217] *Overview of Pseudonymous Litigation*, WITHOUT MY CONSENT, http://www.withoutmyconsent.org/attorneys/overview-pseudonymous-litigation (last visited Mar. 8, 2014).

[218] *See* Citron & Franks, *supra* note 17, at 357.

[219] *Id.*

[220] *See id.* at 357–59.

[221] *See id.* at 357–58; *see also, e.g.*, Taylor v. Franko, No. 09-00002 JMS/RLP,

most relevant of the four invasion of privacy tort claims.[222] One plaintiff successfully brought claims under both torts against an ex-boyfriend who posted her nude photographs to 23 revenge pornography websites in an effort to humiliate her.[223] The ex-boyfriend also created an online profile advertising the plaintiff's availability for masochistic sex, which prompted lewd and threatening voicemails.[224] The elements of IIED as provided in the Restatement Second of Torts are:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.[225]

The central difficulty with alleging IIED is the intent requirement. As with the California revenge pornography statute, it is very difficult to demonstrate the intent or reckless disregard for the emotional wellbeing of the victim in court.[226] However, some victims have had success with an IIED claim; a Texas jury awarded a woman $500,000 in damages stemming from her ex-boyfriend posting videos he had recorded without her consent.[227]

2011 WL 2746714, at *5 (D. Haw. June 12, 2011).

[222] *See* Citron & Franks, *supra* note 17, at 357–58. *See generally* Russell G. Donaldson, Annotation, *False Light Invasion of Privacy – Cognizability and Elements*, 57 A.L.R. 4th 22 (1987) (listing the four torts available for invasion of privacy actions as appropriation, unreasonable intrusion, public disclosure of private facts, and false light in the public eye). It interesting to note that modern revenge pornography cases have analogs in early privacy cases as well; a woman sued a company for featuring a "flattering" image of herself in an advertisement without her consent, claiming distress from the unwanted attention it brought her. Roberson v. Rochester Folding Box Co., 64 N.E. 442, 442 (N.Y. 1902).

[223] *Taylor*, 2011 WL 2746714, at *5.

[224] *Id.* at *3–4.

[225] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[226] *See supra* Part II C.

[227] Brian Rogers, *Jury Awards $500,000 in 'Revenge Porn' Lawsuit*, HOUS. CHRON. (Feb. 21, 2014, 2:33 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php. However, the defendant may never be able to pay the award. *Id.*

DPF is much more applicable than IIED to victims of nonconsensual pornography; it recognizes that people should not be expected to tolerate lewd and harassing invasions into their personal privacy. In addressing DPF, the Second Restatement of Torts states that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[228]

DPF seems particularly applicable to revenge pornography victims because of the natural conformity of the motivations behind revenge pornography to the elements of the tort. Moreover, sexual images are private in nature, lack legitimate public concern, and are reasonably offensive.[229]

Despite the theoretical applicability of available tort remedies, practical difficulties make IIED and DPF ill-suited as a universal remedy for nonconsensual pornography.[230] Most victims cannot afford to bring such lawsuits; this is especially true because prospective defendants rarely have the assets necessary to justify the costly process of litigation.[231] Further, it is also diffi-

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[228] RESTATEMENT (SECOND) OF TORTS § 652D (1977) (labeling the tort as "Publicity Given to Private Life").

[229] *See* Doe v. Hofstetter, No. 11-CV-02209-DME-MJW, 2012 WL 2319052, at *8 (D. Colo. June 13, 2012).

> The Court concludes that Defendant's disclosure of his relationship with Jane Doe in tandem with publishing the Private Photographs he took of her is actionable under this tort theory. First, facts were private in nature. Second, the facts were disclosed to the public. Third, the disclosure would be highly offensive because it "would cause emotional distress or embarrassment to a reasonable person" under the "the circumstances of [this] particular case," in significant part because Jane Doe is married. Fourth, the private fact is not of a legitimate concern to the public. Finally, although Count Eight does not expressly allege it, it is inferable from the complaint that Defendant acted with reckless disregard, as he "knew or should have known that the fact . . . disclosed w[as] private in nature." Thus, Plaintiffs are entitled to relief under Count Eight.

Id. (citations omitted).

[230] *See* Citron & Franks, *supra* note 17, at 357–58. The Supreme Court dealt at least one critical blow to the DPF doctrine in *B.J.F. v. Florida Star*. 491 U.S. 524, 533 (1989) (creating a highly restrictive test on when a state can use DFP to punish true speech without violating the First Amendment).

[231] Citron & Franks, *supra* note 17, at 358–59.

cult to find attorneys to even take such cases; revenge pornography is a relatively recent phenomenon and many lawyers are uncomfortable or unfamiliar with relevant provisions of tort law within the context of nonconsensual pornography.[232]

B. Confidentiality

Confidentiality, a long dormant area of the law, may offer an effective means by which to curtail and remedy revenge pornography.[233] Confidentiality, which is related to but predates the right to privacy,[234] is a legal theory that "protects the information we share with others based upon our expectations of trust and reliance in relationships."[235] It is hard to know for sure why confidentiality has not been used, but it may be "that the immaturity of the confidentiality tort in America coupled with the fame of the privacy torts is largely to blame."[236] Breach of confidentiality is a tort that is functionally similar to DPF, but instead of concentrating on the nature of the information disclosed, it focuses on the context of the relationship in which the information was shared.[237] It is interesting to note that the genesis of privacy rights stemmed from the fear of the availability of

[232] *See id.* at 358.

[233] Woodrow Hartzog, *How to Fight Revenge Porn*, ATLANTIC (May 10, 2013, 1:42 PM), http://www.theatlantic.com/technology/archive/2013/05/how-to-fight-revenge-porn/275759/.

[234] *Id.*

[235] Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 125 (2007).

[236] *Id.* at 176.

[237] *Id.* at 174.

> The key conceptual difference between the breach of confidence tort and public disclosure of private facts tort is the nature of what is protected. The public disclosure tort focuses on the nature of the information being made public. By contrast, the focus of the tort of breach of confidentiality is on the nature of the relationship. As one scholar has put it, 'while the private-facts tort focuses on the nature of the information published, the breach of confidence action focuses on the parties' obligations to each other.' In many public disclosure cases, courts have struggled in recognizing that information shared with other people can still be private. 'Privacy' has often been understood to mean total secrecy. Confidentiality is more nuanced, as it involves the sharing of information with others and the norms by which people within relationships handle each other's personal information.

Id. (citations omitted).

"[i]nstantaneous photographs . . . [that] invade[] the sacred precincts of private and domestic life."[238] Within the context of revenge pornography, it is likely that the architects of American privacy law would shudder at the lack of legal remedies available to curtail the lightning-fast proliferation of confidential communications.[239] However, confidentiality has largely fallen out of

[238] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[239] *See id.* at 196. Two former Supreme Court Justices responsible for the inception of American privacy law wrote a scathing critique of the abuse of free speech protections decades before the birth of revenge pornography. In relevant part, it states:

> Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Id.

the limelight of American jurisprudence, despite its relative growth in England and abroad.[240] Confidentiality offers both equitable and monetary relief for the aggrieved party by "enforc[ing] express or implied promises and shared expectations."[241]

As far back as 1859, a Georgia court enjoined the publication of confidential correspondence between business partners "not upon the grounds that such publications tend to wound the feelings, to degrade or injure the author, and to expose him to personal abuse and litigation, or to disturb the peace of society,"[242] but because "the restraining process of a Court of Equity may be invoked to prevent the publication of mere private letters on business, or on family concerns, or on matters of personal friendship."[243] Nevertheless, the tort of breach of confidentiality has largely taken a back seat to its DPF cousin; this is troublesome for victims of revenge pornography because confidentiality torts appear to be well tailored for such violations of trust.[244]

Under modern English interpretations of confidentiality, the tort has three elements: "First, the information must have 'the necessary quality of confidence about it.' Second, the information 'must have been imparted in circumstances importing an obligation of confidence.' And third, there must be an 'unauthorised use of that information to the detriment of the party communicating it.'"[245] These elements confer significant advantages to breach of confidentiality over DPF. In most cases it

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[240] Richards & Solove, *supra* note 235, at 126.

> In America, the prevailing belief is that people assume the risk of betrayal when they share secrets with each other. But in England, spouses, ex-spouses, friends, and nearly anyone else can be liable for divulging confidences. As one English court noted, "when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement."

Id. (citations omitted).

[241] Hartzog, *supra* note 233.

[242] Roberts v. McKee, 29 Ga. 161, 163 (1859).

[243] *Id.* The court further justified its decision: "[W]ith what pretence can it be urged that any one has the right to spread private letters before the world, merely to gratify personal enmity or revenge, and thereby subject the writer to injury and abuse; or to administer to a depraved public appetite?" *Id.* at 164–65.

[244] *See* Richards & Solove, *supra* note 235, at 175. "Confidentiality stands directly at odds with the notion that when people share information with others they necessarily assume the risk of betrayal. The very purpose of confidentiality law is to recognize and enforce expectations of trust." *Id.*

[245] *Id.* at 161–62 (citing Coco v. A.N. Clark (Eng'rs) Ltd., [1969] R.P.C. 41

is axiomatic that sexually explicit communications are shared with a "necessary quality of confidence" to a romantic partner with whom an obligation of confidence is strongly implied. Additionally, the detrimental element of breach of confidence could be uniquely tailored to former romantic partners who share nonconsensual pornography in an effort to obtain revenge.

While the current American iteration of breach of confidentiality is exceedingly underdeveloped and limited in scope, there is no reason to doubt that it could effectively "be made much more robust to sit alongside the more commonly asserted privacy torts."[246] It is important to stress, however, that confidentiality "is no panacea" for the problems presented by nonconsensual pornography.[247] It is entirely possible that a reasonable expectation of privacy standard would fail to encompass many revenge pornography victims' unique circumstances. Further, the deterrent effect of developing privacy torts in American jurisprudence may offer no further deterrent effect than the ones already in existence. Breach of confidentiality similarly contains the existing limitations of IIED and DPF claims, such as that many defendants are functionally judgment-proof.[248] Finally, breach of confidentiality is further limited by its inapplicability to the most onerous of revenge pornography disseminators: websites devoted exclusively to hosting third party nonconsensual pornography.[249]

C. Copyright and Intellectual Property

Copyright law may offer victims of revenge pornography not only a means of recovery, but also a method of managing potential harm to their reputation and employability. However,

(Eng.)).

[246] Hartzog, *supra* note 233.

[247] *Id.*

[248] *See* Citron & Franks, *supra* note 17, at 358; *cf.* Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 445 (2014) (discussing the deterrent effect of criminal fines upon judgment proof defendants).

[249] Hartzog, *supra* note 233. However, Hartzog also notes that "[u]nder an 'inducement to breach confidentiality' theory, it is even possible that certain websites would not be able to take full advantage of the immunity typically provided by Section 230 of the Communications Decency Act." *Id.*

like each alternative to criminalization, many victims are in danger of falling through the cracks.[250] Roughly 80% of revenge pornography cases involve nude self-portraits taken with the subject's own camera device,[251] a medium known popularly as a "selfie."[252] Applicable copyright law can cover a self-portrait[253] because, as the author of the photo, the victim is entitled to register the photograph for a copyright,[254] which in most cases is required to obtain remedies for infringement.[255]

The third-party user liability protection offered by § 230 comes with an exception: "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property."[256] Accordingly, website operators and third-party posters can be potentially liable for copyright infringement under specific provisions of the Digital Millennium Copyright Act (DMCA).[257]

The DMCA requires websites to comply with statutory content takedown provisions in order to remain insulated from liability for hosting copyrighted content.[258] The fear of incurring liability "to the tune of up to $150,000 per photo" should motivate websites to take down copyrighted images.[259] Once an image is copyrighted, the take down notification procedure is not particularly burdensome. Victims of revenge pornography must

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[250] *See* Citron & Franks, *supra* note 17, at 360.

[251] Levendowski, *supra* note 22.

[252] *Selfie Definition*, OXFORD ENGLISH DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited Mar. 8, 2014).

[253] Photographs are included as a form of protected authorship. 17 U.S.C. § 102 (2012).

[254] *See* 17 U.S.C. § 409.

[255] *Id.* § 412.

[256] 47 U.S.C. § 230. It should be noted that service providers are not held to the same standard as website hosts:

> A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—(A) the material is made available online by a person other than the service provider.

17 U.S.C. § 512.

[257] Levendowski, *supra* note 248, at 442–44.

[258] 17 U.S.C. § 512(c), (f)–(g); Levendowski, *supra* note 248.

[259] Levendowski, *supra* note 22.

submit to the service provider their name, signature, identification of the copyrighted image, the material infringing upon the copyright, and a good faith statement that the material being shown on the website infringes upon their copyright.[260]

However, even champions of this strategy admit that copyright law "certainly isn't a perfect solution."[261] The one-fifth of nonconsensual pornography victims whose images are not self-portraits likely cannot use copyright law as a means to recovery.[262] In addition, truly removing a photograph may prove impossible as controversial viral videos or images often appear in new Internet locations as soon as they are removed.[263] Further, the process of registering a photograph with the United States Copyright Office, a requirement of being able to obtain monetary recovery for copyright infringements, compels registrants to pay a fee and submit a copy of the sexually graphic photo to the government.[264] While Google can issue over thirty million takedown requests in a given month,[265] service providers face an onerous task in differentiating between legitimate and false claims while simultaneously providing a compelling reason to doubt the efficacy of takedown requests. Finally, issuing takedown requests may become a weekly chore for victims of revenge pornography; each takedown notice only obliges the web host to remove the offending photograph one time.[266] The image can be submitted repeatedly by any party possessing the image or video. Ultimately, utilizing copyright law may be too burdensome to prove effective in the long run.[267]

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[260] 17 U.S.C. § 512(c)(3); *see also* Levendowski, *supra* note 248.
[261] Levendowski, *supra* note 22.
[262] *See* Citron & Franks, *supra* note 17, at 360.
[263] *See id.*; Rosen, *supra* note 29.
[264] Jeff John Roberts, *No, Copyright Is Not the Answer to Revenge Porn*, GIGAOM (Feb. 6, 2014, 7:24 AM), http://gigaom.com/2014/02/06/no-copyright-is-not-the-answer-to-revenge-porn/.
[265] *Removing Content from Google*, GOOGLE, https://www.google.com/transparencyreport/removals/copyright/ (last visited Mar. 8, 2014).
[266] Roberts, *supra* note 264.
[267] Hunter Moore notably ignored a copyright takedown request with impunity. *See* Kelly Goff, *Woodland Hills Woman Determined to Bring Down Revenge Porn*, L.A. DAILY NEWS (Feb. 3, 2014, 8:44 PM), http://www.dailynews.com/general-news/20140203/woodland-hills-woman-determined-to-bring-down-revenge-porn.

D. Estoppel

Estoppel, the established equitable theory that remedies injurious but reasonable reliance on a promise,[268] may offer an avenue by which to legally recognize an implied contract of confidentiality.[269] Promises can be made expressly, but they can also be wholly "inferred . . . from conduct;" either method is sufficient since the law does not distinguish between express and implied promises.[270] More specifically, implied promises of confidentiality occur as a matter "of custom [and] course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality."[271] Implied contracts of confidentiality are especially applicable to romantic partners, who often exchange consummately private information with "the cultural and customary understanding that it will be held in confidence."[272] Even so, "[i]n order for promissory estoppel to be effective, a plaintiff must prove the existence of a 'clear, definite, or unambiguous' promise."[273]

While this doctrine is somewhat novel, it does have roots in well-established law. Doctor-patient and attorney-client privileges exist largely to provide a candid atmosphere in which to generate meaningful and purposefully effective dialogue without fear of breach of confidence; similarly, intimacy is contingent

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[268] Hartzog, *supra* note 33, at 909.

[269] Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 908–10 (2006).

[270] RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981).

[271] 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, 1058 (2000).

[272] McClurg, *supra* note 269, at 912–13.

> Who knows the most confidential information about you? Who knows the details of your mental and physical health? Your personal business affairs? Your sexual activities and preferences? Who has the closest physical access to you? Who knows your quirks, eccentricities, and indiscretions? Your innermost "secrets?" A doctor, lawyer, psychotherapist, banker, accountant, or minister may possess some of this information, but only one category of persons is likely to possess all of it: intimate romantic partners.

Id. at 913.

[273] Hartzog, *supra* note 33, at 918.

upon sharing private thoughts and facts without the fear of exposure.[274] The Supreme Court also has placed a high value on the sanctity of intimate relationships in a trio of famous Due Process cases.[275]

While it may be difficult in general to draw the lines of implied contracts of confidentiality,[276] there can be little doubt that the dissemination of revenge pornography lies beyond the bright line expectation that "intimate partners will not use private, embarrassing information acquired during their relationship to humiliate, abuse, or otherwise injure the other person by distributing the information via the Internet or other instrument of mass communication."[277] It is not problematic to imagine then, that individuals involved in intimate relationships often form implied contracts with each other and may breach their implied promises through acts like revenge porn.[278]

While the potential for estoppel remedies may seem attractive, especially because they circumvent First Amendment concerns,[279] significant problems abound. The doctrine as applied to revenge pornography would, unlike criminal statutes, represent immediately unfamiliar territory. As well as dealing with difficult equitable concepts, implied contracts of confidentiality entail an emaciated body of case law.[280] Furthermore, estoppel remedies possess serious doctrinal difficulties; courts will likely struggle with determining the correct threshold of intimacy required to attain an "intimate relationship,"[281] and draw thin, as

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[274] McClurg, *supra* note 269, at 913.

> Part of intimacy is finding someone with whom we feel safe and comfortable taking off the mask and being and revealing our true selves. Intimacy will remain unattainable so long as intimate partners feel compelled to withhold private facts or aspects about themselves, measuring everything they say or do out of fear that it might be revealed to others.

Id. at 914.

[275] *E.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); *see also* McClurg, *supra* note 269, at 914.

[276] McClurg, *supra* note 269, at 915. After all, "[m]odesty and discretion scales vary tremendously." *Id.*

[277] *Id.* at 916. "A contract term to this effect arises from the nature of an intimate relationship." *Id.*

[278] *See id.*

[279] *Id.* at 938.

[280] *See* McClurg, *supra* note 269, at 888.

[281] *See id.* at 917–18.

opposed to bright lines separating protected from unprotected speech under equitable theories.[282] Determining damages for equitable remedies is also tricky, as is typical for emotional damages; moreover, they would likely run small.[283] Finally, "implied promises are unlikely to be helpful in attempting to find a systematic remedy" for violations of implied contracts because "[a]pplication of such a standard would be unpredictable."[284]

It should also be noted that this theory of estoppel would have no effect on nonconsensual pornography websites or on anyone not deemed to fit into a probable legal definition of intimacy. Ultimately, while an estoppel theory of implied contracts of confidentiality represents a novel and possibly effective application of relevant equity law, robust development of the doctrine would need to occur before it is ready to be used as a systematic remedy for revenge pornography.

E. Alternative Criminal Law

A few criminal statutes have potential application to nonconsensual pornography cases. Voyeurism statutes apply when explicit videos are captured using illicit means.[285] It is also illegal to capture explicit images via hacking a personal computer.[286] Using available criminal laws can be effective in applying liability to websites that host revenge pornography. However, these laws are applicable only under limited circumstances.

Voyeurism statutes apply when an individual "has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy."[287] These laws are only applicable in a narrow swath of nonconsensual pornography cases, such as the Erin Andrews peephole case.[288] Because the scope of the law is limited to capturing an image without the subject's consent and only in circumstances in which the subject has an expectation of privacy within the context of the events being captured, a majority of revenge pornography cases are excluded from prosecution. For example,

[282] *Id.* at 921.
[283] *Id.* at 934–36.
[284] Hartzog, *supra* note 33, at 918.
[285] 18 U.S.C. § 1801 (2012).
[286] 18 U.S.C. § 1030.
[287] *Id.*
[288] Perkins, *supra* note 31.

"selfies," which constitute 80% of revenge porn cases,[289] are not subject to voyeurism statutes because the images were not created without the subject's consent. Further, even in cases that would be covered by the California statute, in which the subject did not take explicit images, consent of the subject to the creation of the photo may also function as a defense for the perpetrator.[290]

Two high profile revenge pornography website entrepreneurs have been prosecuted for their activities, but neither indicted under revenge pornography laws.[291] Hunter Moore, the aforementioned founder of a revenge pornography website, was indicted on December 20, 2013, for fraud and related activity in connection with computer hacking under the Computer Fraud and Abuse Act (CFAA).[292] The CFAA has also been subject to much condemnation; critics have deemed it to be "not a particularly well-drafted law" because of "vagueness," and the fact that key terms "are not defined anywhere in the statute."[293]

Moore allegedly paid an accomplice several hundred dollars to break into secure email accounts and download intimate photos, which he then posted on his website.[294] The relevant statute, however, has limited application in nonconsensual pornography cases because it only outlaws the unauthorized access of confidential information—a classic example of which would be to hack into someone's computer without permission.[295] If a revenge pornography website merely allows third-party users to

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[289] Kelly, *supra* note 113. *See* Press Release, Cyber Civil Rights Initiative, Calif. Legislation Against Revenge Porn Signed Into Law (Oct. 2, 2013) (on file with the Cyber Civil Rights Initiative).

[290] *See supra* Part II C.

[291] Jessica Roy, *Revenge Porn King Hunter Moore Was Arrested, But Not for Hosting Revenge Porn*, TIME (Jan. 27, 2014), http://newsfeed.time.com/2014/01/27/revenge-porn-king-hunter-moore-was-arrested-but-not-for-hosting-revenge-porn/.

[292] Indictment, United States v. Moore, No. CR-13-0917 (C.D. Cal. Dec. 20, 2013), *available at* http://www.scribd.com/doc/201777072/Hunter-Moore-Charles-Evens-Revenge-Porn-Indictment.

[293] Levendowski, *supra* note 22.

[294] *Id.*

[295] 18 U.S.C. § 1030 (2012). The relevant federal statute applies to: "Who[m]ever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." *Id.* § 1030(a)(2)(C) (2012). Punishment under subsection (a) or (b) of this statute includes, in relevant part:

> [A] fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or

post nonconsensual pornographic content, these laws have no effect. Furthermore, the laws have no relevance those individuals who post nonconsensual pornography if it was not acquired via hacking.[296] Essentially, Moore is being prosecuted not for hosting a revenge pornography site, but because he engaged in a conspiracy to acquire protected information illegally.[297] Moore has since pleaded not guilty to all fifteen counts.[298]

In another case, California Attorney General Kamala Harris filed several creative charges against Kevin Bollaert, an operator of a prominent revenge pornography website.[299] Bollaert, ultimately convicted, was charged with one count of conspiracy[300] to commit identity theft,[301] two counts of extortion,[302] and 28 counts of identity theft under California law.[303] In addition to

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> an attempt to commit an offense punishable under this subparagraph, if . . . the offense was committed for purposes of commercial advantage or private financial gain.

Id. § 1030(c)(2)(B)(i).

[296] *See generally id.* § 1030(a)(2)(C).

[297] Indictment, *supra* note 292, at 2–3.

[298] Julia Dahl, *"Revenge Porn" Website Creator Hunter Moore Pleads Not Guilty*, CBS NEWS (Feb. 14, 2014, 12:16 PM), http://www.cbsnews.com/news/revenge-porn-website-creator-hunter-moore-pleads-not-guilty/.

[299] Katy Steinmetz, *A New Strategy for Prosecuting Revenge Porn*, TIME (Dec. 10, 2013), http://nation.time.com/2013/12/10/a-new-strategy-for-prosecuting-revenge-porn/.

[300] The California Penal Code defines conspiracy as follows: "If two or more persons conspire . . . [t]o commit any crime." CAL. PENAL CODE § 182 (West 2014).

[301] The California Penal Code defines identity theft as follows:

> Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

Id. § 530.5.

[302] The California Penal Code defines extortion as follows:

> Every person who extorts any money or other property from another, under circumstances not amounting to robbery or carjacking, by means of force, or any threat, such as is mentioned in Section 519, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, three or four years.

Id. § 520.

[303] Complaint, People v. Bollaert, (Cal. Dep't. Super. Ct. Dec. 10, 2013),

hosting a revenge pornography website, Bollaert ran a companion service called changemyreputation.com, which charged revenge pornography victims a fee to have their sexually explicit photographs removed from Bollaert's pornography site.[304] There is nothing wrong with a website that sells a service purporting to improve a potential customer's online reputation, but when that same service is operated by the entity responsible for the online damage in the first place, obvious legal issues that can arise. The problem with this approach is that it can only be used against revenge pornography sites and individual disseminators that actually attempt to extort their victims; however, many jilted exes merely want nothing more than to humiliate their victims.[305]

The identity theft strategy is a novel application of that law, which is traditionally used to prosecute thieves who obtain personal financial information and use that information to steal directly from their targets.[306] This application of identity theft is also unique because the State of California applied the law to behavior that affects a class of victims rather than an individual.[307] Bollaert was specifically accused of using "personal identifying information . . . for an unlawful purpose to wit, to harass and annoy" and "to obtain credit, goods, services, and money."[308] It is important to note that the California identity theft statute does not specify from whom such goods and services must be taken, but rather that the information merely be used "for any unlawful purpose."[309] The crucial unlawful purpose in this case, again, is arguably to obtain extorted funds from Bollaert's victims; hosting a revenge pornography site is not unlawful.[310] As such, this strategy, successful in Bollaert's case, is only applicable in the narrow segment of revenge pornography cases

available at http://oag.ca.gov/system/files/attachments/press_releases/Complaint_3.pdf.

[304] *"Revenge Porn" Site Operator Guilty of Extortion, Identity Theft*, CIRCA, http://cir.ca/news/california-man-arrested-for-revenge-porn-extortion (last updated Mar. 3, 2015, 7:05 PM).

[305] Steinmetz, *supra* note 299 (discussing that a spokesman for the California Attorney General admitted that this case is one about landing "a big fish, not all the little fish" when it comes to revenge porn).

[306] *Consumer Information: Identity Theft*, FED. TRADE COMM'N (2014), *available at* http://www.consumer.ftc.gov/features/feature-0014-identity-theft.

[307] *See* Complaint, *supra* note 303.

[308] *Id.* at 4.

[309] *See* CAL. PENAL CODE § 530.5 (West 2014).

[310] *See supra* pp. 3–5.

in which a website operator or a submitting party attempts to extort the subject of the graphic images in their possession. Limiting prosecution to "big fish" may not be enough, as even creative uses of criminal statutes are not guaranteed to succeed.[311]

PART IV. REVENGE PORN AND THE FIRST AMENDMENT

Love all, trust a few, Do wrong to none.[312]

This Comment proposes that the ability to share intimate photos with a romantic partner is a form of expression that ought to be protected, and that free speech may be better served by criminalizing revenge pornography. But what about the effect of the First Amendment on current and potential revenge pornography laws? One 2013 bill aimed at banning revenge pornography died in the Florida legislature largely over First Amendment concerns.[313] Is the dissemination of sexually graphic photos of an ex-girlfriend a form of free speech protected by the First Amendment? Is revenge pornography a necessary evil to maintain the American idea of free speech? Is any potential ban on revenge pornography necessarily overbroad, thereby affecting speech in other contexts?

The debate over the constitutionality of nonconsensual pornography criminalization statutes is a hotly contested one. Throughout the history of jurisprudence, courts in the United States have generally resisted free speech challenges.[314] The Supreme Court has stated that the most important aspect of free speech "is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[315] Free expression, especially when the ideas expressed are potentially controversial, has been protected as a matter of course. "'[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.'"[316]

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[311] *See* Donahue, *supra* note 215.

[312] WILLIAM SHAKESPEARE, ALL'S WELL THAT ENDS WELL act 1, sc. 1 (emphasis added).

[313] Kelly, *supra* note 113; *see* Rick Stone, *In Florida, 'Revenge Porn' is a Moving* Target, WLRN (Dec. 4, 2013, 7:56 AM), http://wlrn.org/post/florida-revenge-porn-moving-target.

[314] *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988).

[315] Virginia v. Black, 538 U.S. 343, 358 (2003).

[316] *Hustler*, 485 U.S. at 50–51 (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 (1984)).

However, even with the grave importance the Court has placed upon the protection of free speech, it has recognized that some forms of speech are too harmful to justify First Amendment protection.[317] Even so, the Court has placed one of the highest burdens in constitutional law on state action that would curtail free speech.[318] In contrast, the Court has stated that regulation of definitively private concerns does not necessarily deserve the same level of scrutiny as public concerns.[319] As a whole, the Court has concluded that people should not trust the government to decide what can or cannot be said; thus the Court has erred on the side of caution.

The Court employs strict scrutiny to most laws that would purport to limit free speech.[320] Strict scrutiny applies an extremely high burden on the government to demonstrate the necessity of the protections offered by a law that would potentially violate the First Amendment.[321] Prospective and current anti-revenge pornography statutes are content-based; that is, revenge pornography laws would criminalize the nonconsensual dissemination of images and videos based on the substance of the communication, namely sexually graphic material.[322] The standard for a constitutionally valid regulation of speech or expression is one of strict scrutiny; the state must prove of the law in question: (1) that the government has a compelling interest in restricting the form of speech being regulated, (2) that the law is narrowly tailored for that specific purpose, and (3) that no less-restrictive alternative exists.[323] Much of the constitutional debate

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[317] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (holding that "fighting words" are not protected by freedom of speech principles).

[318] Baumgartner v. United States, 322 U.S. 665, 673–74 (1944).

[319] Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (reasoning that matters of private concern receive less rigorous First Amendment protections "because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: '[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas.'").

[320] *E.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

[321] *See* BRANNON DENNING, GLANNON GUIDE TO CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS AND LIBERTIES 126 (2012).

[322] *See id*.

[323] *Playboy*, 529 U.S. at 813; *see also* R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (stating that "[c]ontent-based regulations are presumptively invalid").

regarding revenge pornography criminalization revolves around any proposed law's ability to function within the parameters of this strict burden.[324]

A state could very likely find a compelling government interest in preventing the substantial and quantifiable harm represented by revenge pornography.[325] Given the litany of alternatives that impose civil liability, criminalization of revenge pornography would face an uphill battle.[326] However, with the limitations of civil protections and their relatively futile deterring effects, a court could find that a sufficiently narrow criminalization statute lacks a less-restrictive and at least as effective alternative.[327] Furthermore, the Court has made it clear that lines have to be drawn when balancing public speech interests against reputational and privacy interests; although there is only one case where the Court employed such a test, and one that was also exceedingly vague.[328] In that test, a court must look at the "content, form, and context" of the speech "as revealed by the whole record."[329]

The Supreme Court has previously addressed the public dissemination of private information.[330] In a case where a private conversation was intercepted, the Court ruled that a radio host had a right to broadcast the contents of that conversation to the public at large.[331] However, the Court's analysis heavily concentrated on the fact that the matter was of public importance and that the broadcaster played no role in the interception of the communication.[332] The Court found that a free speech component was being advocated on *both* sides of the argument: the right to disseminate true information versus the protection of oral communications.[333] The Court further recognized a universal

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[324] *See* Reisenwitz, *supra* note 48; *see also infra* Part IV, Counter Arguments.
[325] *See supra* pp. 3–6.
[326] *See supra* Part III.
[327] *See* Citron & Franks, *supra* note 17, at 361, 386.
[328] McClurg, *supra* note 269, at 921.
[329] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).
[330] Bartnicki v. Vopper, 532 U.S. 514 (2001); *see also* McClurg, *supra* note 269, at 910.
[331] It should also be noted that the conversation was taped illegally, but that the radio host did not perform the recording: "respondents played no part in the illegal interception." *Id.* at 519.
[332] *Id.* at 528.
[333] *Id.* at 526–27.

"interest in individual privacy,"[334] and that "the fear of public disclosure of private conversations might well have a chilling effect on private speech."[335] These concerns are analogous to the revenge pornography debate.[336] Potential victims have a reasonable fear of the public exposure of private expressions that violate their interest in private speech.

Despite the fact that private concerns warrant less strict protections than public ones[337] and that protections afforded should be narrowly construed,[338] the harms represented by revenge pornography are likely compelling enough to withstand a First Amendment. But this is a high burden to meet. To wit, the guarantee of free speech "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[339] Among the existing categories of unprotected speech, obscenity is the most likely to offer current and prospective revenge pornography laws respite from strict scrutiny.

A. Obscenity

Obscenity is defined as "conduct tending to corrupt the public morals by its indecency or lewdness."[340] The Supreme Court has restricted this extremely broad definition by requiring that state statutes designed to regulate obscene material be carefully and narrowly limited.[341] Even so, the Court has historically struggled with finding a sufficiently narrow definition of "obscenity."[342] Further, obscene materials can only be regulated if they possess no intrinsic value.[343] In defining obscenity, the Court outlined three attributes that expressive material must possess in order to be punishable by state law:

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[334] *Id.* at 518.
[335] *Id.* at 532–33.
[336] Citron & Franks, *supra* note 17.
[337] Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).
[338] Smith v. Daily Mail Publ'g Co., 443 U.S 97, 105–06 (1979). "Our holding in this case is narrow. . . . At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." *Id.*
[339] United States v. Stevens, 559 U.S. 460, 470 (2010).
[340] *What is OBSCENITY*?, THE LAW DICTIONARY, http://thelawdictionary.org/obscenity/#ixzz2uA6HJqf5 (last visited Nov. 15, 2014).
[341] Miller v. California, 413 U.S. 15, 23–24 (1973).
[342] Denning, *supra* note 321, at 149.
[343] *See* DANIEL A. FARBER, THE FIRST AMENDMENT 143–44 (4th ed. 2014) (citing Paris Adult Theatre v. Slaton, 413 U.S. 49 (1975); Miller v. California, 413 U.S. 15 (1973)).

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[344]

While it would seem axiomatic that nonconsensual pornography portrays sexual conduct that appeals to a prurient interest and possesses no literary, artistic, or scientific value, the standard employed by the Court is high and it is not clear whether revenge pornography would meet such a test. The Court requires that statutes regulating obscene materials must confine the scope of the regulation to content which depicts or describes sexual conduct, and the regulated conduct must be "specifically defined."[345]This means that laws that define revenge pornography only by the conduct of disseminating private videos may not pass constitutional muster since the sexual conduct within the material must also be narrowly defined. In other words, it is problematic for an effective anti-revenge pornography statute to limit itself by only criminalizing the dissemination of images portraying only certain sexual acts.

However, the Court expressed a potentially applicable value when it upheld the illegality of the possession or distribution of child pornography.[346] The Court noted a compelling interest in "safeguarding the physical and psychological well-being of a minor."[347] Any prospective revenge pornography criminalization statute would protect the same interests in an adult context. It is entirely possible, even plausible, that the significant harms generated by revenge pornography may confer a similarly unprotected status onto such images.

The stakes are high for revenge pornography to qualify as obscenity; the Court has suggested that it may not allow the regulation of speech outside the exceptions for obscenity, libel,[348] or any of the other traditional forms of unprotected speech.[349]

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[344] *Miller*, 413 U.S. at 24 (citations omitted). This is known as the LAPS (literary, artistic, political, or social value) test. Denning, *supra* note 321, at 151–52.

[345] *Miller*, 413 U.S. at 24.

[346] New York v. Ferber, 458 U.S. 747, 765 (1982).

[347] *Id.* at 756–57 (citation omitted).

[348] Libel is inapplicable, since truth is always an affirmative defense for libel. *See, e.g.*, 50 AM. JUR. 2D *Libel and Slander* § 249 (2014).

[349] *See* United States v. Stevens, 559 U.S. 460, 471–72 (2010).

However, the Court left some room for future regulation of forms of speech not yet recognized as unprotected when it stated, "[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[350]

Another potential problem is the regulation of images that contain only nudity rather than sexual acts. One author noted that in obscenity cases dealing with other issues than nonconsensual pornography, the Court distinguished nude images as nonactionable while upholding laws that addressed depictions of actual coitus.[351] However, that same author still believes that revenge pornography likely falls within the category of historically unprotected speech.[352] Until the Court rules on the issue, both sides will continue to speculate on the constitutionality of nonconsensual pornography criminalization statutes.

B. Counter Arguments

As previously mentioned, the constitutionality of current and potential nonconsensual pornography statutes is a hotly contested debate. Critics of such legislation are not convinced that revenge pornography laws can pass constitutional muster under existing Supreme Court case law, arguing that "[m]erely meeting strict scrutiny is not enough to uphold a statute. The State must also show that the speech that is restricted falls in some category that has been historically unprotected."[353] Those categories, once again, include "obscenity . . . defamation . . . fraud . . . incitement . . . and speech integral to criminal conduct."[354]

Revenge pornography does not fall under libel or fraud: nonconsensual pornography images are necessarily true. Further, revenge pornography does not fall under incitement; it can be published without the imminent commission of a crime.[355] Nonconsensual pornography is not integral to criminal conduct

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[350] *Id.* at 472.

[351] Eugene Volokh, *Florida "Revenge Porn" Bill*, THE VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/.

[352] *See id.*

[353] Bennett, *supra* note 106.

[354] United States v. Stevens, 559 U.S. 460, 468 (2010) (citations omitted).

[355] *See generally* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that the principles of the First Amendment do not permit a state to enact restrictions on speech in the absence of imminent lawless action).

unless it is outlawed, but the Court will not hold an expression to be integral to criminal conduct if the statute itself makes the speech a form of criminal conduct.[356] Therefore, the only historically unprotected form of speech under which revenge pornography could fall is obscenity.

Some critics argue that revenge pornography cannot qualify as obscenity because the Supreme Court has never included sexual acts or nudity in its definition of obscenity.[357] However, this point of view interprets current Supreme Court case law as a categorical rejection of nude and sexually explicit images as obscenity, which is not the case.[358] The *Stevens* Court did not categorically rule that the First Amendment protects pornographic images; it instituted a social or artistic value requirement that nonconsensual pornographic images may not be able to meet.[359]

Revenge pornography criminalization critics have categorically rejected the notion that any limitation on free speech as it currently exists damages "[t]he entire speech ecosystem [of the Internet] because those service providers [would] decide what people can and cannot post, even if it isn't illegal."[360] However, Section 230 of the CDA provides that:

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.[361]

In other words, web hosts are already enabled to decide what people can and cannot post, so long as they meet a good faith burden for removal.[362]

Other opponents see revenge pornography as a necessary

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[356] *See generally* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (holding that the protections of the First Amendment do not extend to speech or writing used as an integral part of criminal conduct). Otherwise any law criminalizing certain forms of speech would be constitutional under the integral to criminal conduct exception.

[357] Bennett, *supra* note 106.

[358] *See id.*

[359] *See Stevens*, 559 U.S. at 479–80.

[360] Steven Nelson, *New Federal Legislation Could Take a Nip Out of 'Revenge Porn,'* U.S. NEWS & WORLD REP. (Nov. 21, 2013, 10:52 AM), http://www.usnews.com/news/articles/2013/11/21/new-federal-legislation-could-take-a-nip-out-of-revenge-porn.

[361] 47 U.S.C. § 230(c)(2) (2012).

[362] *Id.*

evil: "The difficulty in differentiating newsworthy stories and smut is the reason it's important to keep even uncomfortable speech free."[363] While there are certainly many objectionable forms of speech that deserve First Amendment protection, characterizing revenge pornography as merely "uncomfortable" is a gross understatement that neglects the very real and damaging effects nonconsensual pornography has on its victims.

Revenge pornography criminalization statutes, critics contend, are overbroad. "[Revenge pornography laws] might forbid . . . a photo or video which contains evidence of a crime."[364] The Anthony Weiner scandal is often cited as a situation in which the exposure of a political figure's objectionable qualities could have been suppressed by revenge pornography laws.[365] This is a significant flaw in modern revenge pornography laws, but one that is easily remedied. Mary Anne Franks and Danielle Citron have written recommendations for lawmakers that account for such situations by including a newsworthiness exception.[366] Opponents also suggest that existing avenues for imposing liability upon posters of revenge pornography are sufficient.[367] This argument has been discussed in Part III, and it is apparent that civil remedies are expensive, protracted, and devoid of the deterrent qualities necessary to effectively curtail the proliferation of revenge pornography.[368]

This Comment has maintained that free speech interests exist on both sides of this debate, and that preserving the right to intimate self-expression is more compelling than preserving the right to disseminate sexually graphic photos in one's possession.[369] Certainly, even without revenge pornography laws, men and women *can* still share intimate photographs with romantic partners, but are not truly *free* to do so; the current legal state of affairs does not preserve that right by protecting it.

CONCLUSION

Revenge is a kind of wild justice, which the more a man's nature

[363] Reisenwitz, *supra* note 48.
[364] *Id.*
[365] *Id.*
[366] *See* Citron & Franks, *supra* note 17, at 386–90.
[367] Reisenwitz, *supra* note 48.
[368] *See supra* Part III.
[369] *Supra* Part II.

runs to, the more ought law to weed it out.[370]

There are many challenges confronting revenge pornography legislation, most notably those of a constitutional nature. While it may take an abundance of analysis, it does not require a great deal of sense to see that available avenues for recovery and forms of deterrence are insufficient to prevent and remedy the grievous effects of nonconsensual pornography. Even as legislators debate the merits and pitfalls of prospective revenge pornography statutes, it is important that interested parties generate meaningful dialogue regarding not only the nonconsensual sharing of explicit images, but also the rights and responsibilities of consenting romantic partners during and after a relationship. The merits of revenge porn criminalization are not exclusive to providing justice for victims: it is first and foremost about illuminating the social accountability that comes with the vast communicative power available to all in the 21st century.

[370] FRANCIS BACON, *On Revenge*, *in* THE ESSAYS OF LORD BACON 17 (Longmans, Green, & Co. ed., 1873).