

# COMMENT

## FELONY COUNT 1: INDECENT DISCLOSURE\*

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## I. INTRODUCTION

Revenge porn has recently received extensive media attention as a newly minted pop culture phenomenon.<sup>1</sup> Websites like MyEx.com give spurned ex-lovers a proverbial soapbox from which to humiliate past partners and gain retribution for their perceived misdeeds.<sup>2</sup> The ability to publicly post nude pictures of former lovers has become a powerful tool for the brokenhearted.<sup>3</sup> Victims of these attacks experience severe emotional distress that can result in grave consequences.<sup>4</sup>

Once a victim becomes aware of a revenge porn attack, getting the pictures taken down can prove to be very challenging.<sup>5</sup> Particularly because as soon as a picture is posted, it often spreads like wildfire.<sup>6</sup> These pictures can be anonymously uploaded to hundreds of sites or downloaded to an individual's personal computer within seconds.<sup>7</sup>

Victims can find redress in both copyright and tort law if the conditions are present.<sup>8</sup> However, to a judgment proof offender,<sup>9</sup> these courses of action are hardly a deterrent.<sup>10</sup> Recently, many states have passed revenge porn laws that make the posting of nude pictures without the consent of the subject a criminal offense.<sup>11</sup> This Comment explains the labyrinth of existing legislation through which lawmakers must navigate to address cases of revenge porn and proposes methods by which criminal revenge porn statutes may pass constitutional muster.

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1. Aaron Sankin, *Revenge Porn: California Legislators Go After Troubling New Trend*, HUFFINGTON POST (June 5, 2013, 10:16 PM), [http://www.huffingtonpost.com/2013/06/05/revenge-porn-california\\_n\\_3391638.html](http://www.huffingtonpost.com/2013/06/05/revenge-porn-california_n_3391638.html).

2. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE MAG., Oct. 11, 2012, at 44.

3. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350 (2014).

4. *Id.* at 351.

5. 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>.

6. Citron & Franks, *supra* note 3, at 350.

7. Gerry Smith, *If You're Not Famous, Good Luck Getting Reddit to Take Down Your Nude Photos*, HUFFINGTON POST (Sept. 8, 2014, 3:29 PM), [http://www.huffingtonpost.com/2014/09/08/reddit-nude-photos\\_n\\_5784852.html](http://www.huffingtonpost.com/2014/09/08/reddit-nude-photos_n_5784852.html).

8. Steven Brill, *The Shocking Trend of Revenge Porn: Where Can a Victim Turn?*, HUFFINGTON POST (May 22, 2014, 2:13 PM), [http://www.huffingtonpost.com/steven-brill/the-shocking-trend-of-rev\\_b\\_5360782.html](http://www.huffingtonpost.com/steven-brill/the-shocking-trend-of-rev_b_5360782.html).

9. A judgment proof offender is someone who has no assets from which to recover if a judgment is entered against him. *Judgment Proof*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/judgment-proof> (last visited Sept. 18, 2015).

10. Citron & Franks, *supra* note 3, at 358.

11. Leber, *supra* note 5.

Part II of this Comment explains the history and concept of revenge porn and describes the ways in which the Internet is used as a platform for an attack.<sup>12</sup> It goes on to detail specific circumstances of several revenge porn attacks and their impact on the victim as well as the reasons revenge porn is so effective as a weapon in modern society.

Part III considers the unique climate of the Internet and how it affects both the obstacles victims must face in order to remove their pictures and the laws in place that shield most revenge porn websites from liability.<sup>13</sup> Part IV of this Comment outlines the current avenues, both criminal and civil, that victims can seek for redress.<sup>14</sup> This Part also highlights the strengths and weaknesses of each form of redress as well as practical considerations.

Part V is dedicated to the First Amendment issues that lawmakers must consider when drafting revenge porn legislation.<sup>15</sup> This Part also explores the constitutional weaknesses in current and proposed criminal revenge porn legislation. Finally, Part VI discusses the likelihood of current and proposed legislation passing constitutional muster as well as possible temporary and permanent remedies.<sup>16</sup> It is likely that the manner in which some of the current laws are written is an infringement on the First Amendment right to free speech. In an attempt to avoid First Amendment issues, some laws have been drafted very narrowly and thus exclude a large portion of revenge porn victims from protection.<sup>17</sup>

In the future, it seems that legislatures must draft laws more effectively to protect all victims of revenge porn while abstaining from criminalizing legitimate conduct falling under the umbrella of the First Amendment.<sup>18</sup> In the meantime, encouraging couples to use non-disclosure agreements before sharing intimate pictures with each other could help deter some would-be offenders or, at a minimum, provide evidence of non-consent to disclose in connection with pursuing criminal liability.<sup>19</sup>

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12. *Infra* Part II.

13. *Infra* Part III.

14. *Infra* Part IV.

15. *Infra* Part V.

16. *Infra* Part VI.

17. *See infra* Part VI.

18. Citron & Franks, *supra* note 3, at 386.

19. *See infra* notes 261–70.

## II. WHAT IS REVENGE PORN?

For many, the name may be self-explanatory.<sup>20</sup> Endrevengeporn.com—a non-profit organization dedicated to stopping revenge porn—defines the act as “[a] form of sexual abuse that involves the distribution of nude/sexually explicit photos and/or videos of an individual without their consent.”<sup>21</sup> These seemingly random acts of malice have recently transitioned into an entire genre of pornography.<sup>22</sup> With the rise of social media and the ability for people to share pictures through private and public communications instantly, revenge porn has become a rapidly growing problem.<sup>23</sup>

MyEx.com is one of the websites contributing to the issue.<sup>24</sup> Displaying a slogan in prominent, bold font encouraging users to “get revenge,” websites like MyEx.com pose attractive opportunities for spurned ex-lovers to retaliate on former significant others by posting their nude pictures.<sup>25</sup> “Anybody can download and upload them. The original poster automatically has an army.”<sup>26</sup> With the ability to post anonymously, there seems to be virtually no consequences for many posters looking to exact their revenge.<sup>27</sup>

A. *Revenge Porn: A History*

The concept of revenge porn, sometimes referred to as non-consensual pornography,<sup>28</sup> is not new.<sup>29</sup> In 1980, Hustler Magazine published “Beaver Hunt,” a column where subscribers

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20. See *PA Joins NJ and CA in Criminalizing “Revenge Porn”*, LOMBARDO L., <http://www.lombardolawoffices.com/2014/pa-joins-nj-and-ca-in-criminalizing-revenge-porn/> (last visited Sept. 18, 2015) (“Revenge porn is exactly what it sounds like.”).

21. *What Is Revenge Porn?*, END REVENGE PORN, <http://www.endrevengeporn.org> (last visited Sept. 18, 2015).

22. Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 21, 2013), <http://nymag.com/nymag/features/revenge-porn-2013-7/>.

23. See *“Revenge Porn” Banned in California*, CBS NEWS (Oct. 2, 2013, 12:43 PM), <http://www.cbsnews.com/news/revenge-porn-banned-in-california/> (“[R]evenge porn is a growing problem in the age of social media, when photos and videos that were made privately during a relationship can find their way onto hundreds of websites.”).

24. Aaron Minc, *How to Permanently Remove Posts from MyEx.com and Other Revenge Porn Websites*, DEFAMATION REMOVAL L. (Feb. 28, 2014), <http://www.defamationremoval.com/2014/02/28/permanently-remove-posts-revenge-porn-websites-like-MyEx-com/> (describing MyEx.com as a “revenge porn website that is used to publicly shame and humiliate previous romantic partners”).

25. MYEX, <http://www.MyEx.com/> (last visited Sept. 18, 2015).

26. Smith, *supra* note 7 (quoting Holly Jacobs, a 31-year-old revenge porn victim).

27. See *infra* Part III.

28. See Citron & Franks, *supra* note 3, at 346 (explaining that “revenge porn” is used interchangeably with the term non-consensual pornography).

29. Tsoulis-Reay, *supra* note 22.

could send in nude photographs of amateur models and receive payment if Hustler selected their pictures for an issue.<sup>30</sup> LaJuan Wood became an early victim of revenge porn after a neighbor stole nude pictures of her on a camping trip with her husband and submitted them to Beaver Hunt.<sup>31</sup> Next to the images, Hustler commingled both true and false statements, purporting that LaJuan had a passion for collecting arrowheads, which was true, and “desire[d] to be ‘screwed by two bikers,’” which was false.<sup>32</sup> Unfortunately, including false statements with non-consensual pornography is a disturbing trend that continues to persist today.<sup>33</sup> At the time, Hustler had very few controls in place to ensure that the subject of the pictures consented to his or her photo being published.<sup>34</sup> Years later in early 2000, Italian researcher Sergio Messina identified pictures and videos of uploaders’ ex-girlfriends uploaded to online forums as an emerging “genre he call[ed] ‘realcore pornography.’”<sup>35</sup> By 2008, complaints began to pour into porn aggregator Xtube alleging that some of the content was uploaded without the consent of the subjects.<sup>36</sup>

Two years later—the same year the revenge porn community, through the conviction of Joshua Ashby,<sup>37</sup> was handed its first prison sentence—Hunter Moore launched the infamous revenge porn website *Is Anyone Up?*<sup>38</sup> *Is Anyone Up?* (IAU)<sup>39</sup> initially gained attention when it began hosting pictures of naked musicians from well-known bands.<sup>40</sup> This trend gained so much

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30. *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1086 (5th Cir. 1984).

31. *Id.* at 1085.

32. Tsoulis-Reay, *supra* note 22.

33. *See Doe v. Hofstetter*, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, at \*2 (D. Colo. June 13, 2012) (mentioning false statements about the victim’s sexual conduct made on the defendant’s blog, which featured the victim’s nude pictures).

34. *Wood*, 736 F.2d at 1086.

35. Tsoulis-Reay, *supra* note 22 (quoting Sergio Messina, *Realcore: The Digital Porno Revolution*, SERGIO MESSINA, <http://www.sergiomessina.com/realcore> (last updated Mar. 2009)).

36. *Id.*

37. *Jilted Lover Makes Legal History as He Is Jailed for Posting Naked Picture of Ex-girlfriend on Facebook*, DAILYMAIL (Nov. 16, 2010, 2:02 PM), <http://www.dailymail.co.uk/news/article-1329812/Joshua-Ashby-Facebook-user-jailed-posting-naked-picture-ex-girlfriend.html>.

38. Tsoulis-Reay, *supra* note 22.

39. IAU is a commonly used abbreviation for *IsAnyoneUp.com* within the revenge porn community. *See generally* Fruzsina Eördögh, *Revenge Porn Site Is Anyone Up Is Now Down*, DAILY DOT (Apr. 19, 2012, 4:20 PM), <http://www.dailydot.com/news/revenge-porn-anyone-up-nudes-closed-hunter-moore/> (using the term “IAU” interchangeably with “IsAnyoneUp.com”).

40. Amanda Hess, *Hunter Moore’s Biggest Fan*, SLATE (Dec. 5, 2012, 4:25 PM), [http://www.slate.com/blogs/xx\\_factor/2012/12/05/hunter\\_moore\\_s\\_revenge\\_porn\\_cheerleader\\_is\\_anyone\\_up\\_s\\_biggest\\_fan\\_is\\_not.html](http://www.slate.com/blogs/xx_factor/2012/12/05/hunter_moore_s_revenge_porn_cheerleader_is_anyone_up_s_biggest_fan_is_not.html).

traction that indie bands looking to make a name began taking out ad space on the site.<sup>41</sup> Very quickly, the posts of naked band members turned into posts of everyday people.<sup>42</sup>

Over the course of the site's short 16-month life, IAU entertained as many as 350,000 unique visitors each day.<sup>43</sup> Users began posting pictures of their exes along with information including the person's full name, city of residence, links to social media, and place of work.<sup>44</sup> IAU's victims were not limited to the average person but also included an American Idol finalist, a reality-TV star, and the daughter of a major GOP donor.<sup>45</sup>

IAU creator Hunter Moore says the idea for the website "was a lucky accident."<sup>46</sup> Moore stumbled upon the idea while uploading nude pictures of recent sexual conquests to a dormant domain for his friends to view.<sup>47</sup> Moore, labeled "[t]he most hated man on the Internet," has unsurprisingly amassed his fair share of enemies while also developing a small but dedicated fan base.<sup>48</sup> One member of Moore's fandom even got an IAU tattoo.<sup>49</sup> Although his site has undoubtedly caused a great deal of harm, IAU has also gotten users lucrative porn gigs as well as provided a medium for future spouses to meet.<sup>50</sup> Despite all of its achievements, the infamous revenge porn site was shutdown in 2012 subsequent to an investigation by the FBI.<sup>51</sup>

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41. *Id.*

42. *Id.*

43. Morris, *supra* note 2, at 44.

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

45. Morris, *supra* note 2, at 44.

46. *Id.*

47. *Id.*

48. *Id.* After her picture was posted to Moore's website, a woman stabbed Moore in the shoulder with a ballpoint pen, an injury that required a trip to the hospital. *Id.* Conversely, one (clearly deranged) fan of Moore has expressed that she wished Moore had AIDS just so she could contract the virus and tell others she contracted it from him. Tsoulis-Reay, *supra* note 22.

49. Morris, *supra* note 2, at 44.

50. *Id.*

51. Camille Doder, "Gary Jones" Wants Your Nudes, VILLAGE VOICE (May 16, 2012), <http://www.villagevoice.com/2012-05-16/news/hacker-is-anyone-up-hunter-moore-fbi/> (explaining that Moore voluntarily sold his website to Bullyville.com). Allegations linking Hunter Moore to a hacker who broke into people's e-mail accounts, stole nude pictures, and uploaded them to the site prompted the FBI investigation. *Id.* On February 18, 2015, Hunter Moore pled guilty to felony hacking charges related to the FBI investigation. Russell Bandom, *Revenge Porn Magnate Hunter Moore Will Face up to Seven Years in Prison*, VERGE (Feb. 18, 2015, 7:23 PM), <http://www.theverge.com/2015/2/18/8065369/revenge-porn-magnate-hunter-moore-will-face-up-to-seven-years-in>. As a result of his plea, Moore faces a maximum sentence of seven years in prison. *Id.*

Following the shutdown of IAU, other sites quickly sprung up in its place.<sup>52</sup> These sites, however, are not easily found through a simple Google search.<sup>53</sup> One blogger, going by the name “the homie Drew”,<sup>54</sup> has provided Internet users looking for their fix of revenge porn with a short list of suggested sites to visit.<sup>55</sup> On his blog, Drew explains that since IAU has been shut down he has “come up with a list [of websites] that you can check out if you are into that kind of stuff.”<sup>56</sup> One of Drew’s recommendations, MyEx.com, features an area where users can “find someone you know” by searching for their first and last name and city of residence.<sup>57</sup> Users can scroll through hundreds of women’s pictures and leave comments ranging from descriptions of sexual acts they wish to perform on the woman pictured to insults regarding her appearance.<sup>58</sup> One user posted pictures of his ex-girlfriend with the words “my ex cheated and thinks she has the upper hand[, we’ll] see.”<sup>59</sup>

### B. *The Gravity of the Problem*

Each time a sexually explicit image is transmitted, the subject becomes a potential victim of revenge porn.<sup>60</sup> According to a survey conducted by Pew Research, 44% of adult cell phone owners, aged 18–24, and 34% of adult cell phone owners, aged 25–34, have received sexually explicit texts.<sup>61</sup> And the potential revenge porn victim pool is steadily increasing.<sup>62</sup> Once their photos are posted on the Internet, over 20% of victims reported their e-mail addresses and phone numbers appeared next to their nude photos, and over 50% reported that their naked photos appeared next to

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52. See Drew, *Revenge Porn Sites Like IsAnyoneUp.com? There Are Still a Few*, DREWISDOPE (Jan. 26, 2014), <http://drewisdope.com/2014/01/26/revenge-porn-sites-like-isanyoneup-com-there-are-still-a-few/> (describing the websites that are available following the shutdown of IAU).

53. A Google search of “revenge porn” brings up only articles discussing revenge porn on the first 3 pages. *Revenge Porn*, GOOGLE, <https://www.google.com/#q=revenge+porn> (last visited Sept. 18, 2015).

54. *About*, DREWISDOPE, <http://drewisdope.com/about/> (last visited Sept. 18, 2015).

55. Drew, *supra* note 52.

56. *Id.*

57. MYEX, *supra* note 25.

58. *Id.*

59. Comment to MYEX (on file with Author).

60. This is because, by definition, revenge porn requires “nude/sexually explicit photos and/or videos.” *What Is Revenge Porn?*, *supra* note 21.

61. Amanda Lenhart & Maeve Duggan, *Main Report*, PEW RES. CTR. (Feb. 11, 2014), <http://www.pewinternet.org/2014/02/11/main-report-30/>.

62. *Sexting Will Only Increase Among Teenagers*, FIRST POST (Oct. 9, 2014, 1:15 PM), <http://www.firstpost.com/living/sexting-will-increase-among-teenagers-says-survey-1749293.html>.

their full name and social networking profiles like Facebook.<sup>63</sup> This information encourages strangers to confront the person offline.<sup>64</sup> Some users even have threatened to rape or murder the pictured individual.<sup>65</sup>

A victim's fear can be debilitating.<sup>66</sup> In fact, "over 80% of revenge porn victims experience severe emotional distress and anxiety."<sup>67</sup> Victims of revenge porn can lose friends, affiliations with organizations, and even their jobs.<sup>68</sup> In order to protect themselves, some victims have even resorted to legally changing their names.<sup>69</sup> Others have taken more drastic measures and ended their own lives.<sup>70</sup>

In 2010, the death of Tyler Clementi gained national media attention when he committed suicide following the leak of a sexually explicit video.<sup>71</sup> Three weeks into his first semester at Rutgers University, Clementi asked his roommate for some privacy in their shared room for the night.<sup>72</sup> Clementi's roommate, eighteen-year-old Dharun Ravi, left the room but set up his laptop in order to spy on Clementi's date.<sup>73</sup> Ravi discovered that Clementi was using the room to have a sexual relationship with another man and solicited his Twitter followers to watch the live stream of the video proof.<sup>74</sup> Hours after this information was

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63. Citron & Franks, *supra* note 3, at 350–51.

64. *Id.*

65. Danielle Keats Citron, 'Revenge Porn' Should Be a Crime in the U.S., CNN OPINION (Jan. 16, 2014, 3:49 PM), <http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/> ("[Anonymous viewers have said,] '[f]irst I will rape you, then I'll kill you.'").

66. See Citron & Franks, *supra* note 3, at 351 (explaining that one victim was so afraid that strangers who viewed her photos online would follow through on their sexual demands that she was unable to leave her home).

67. *Id.*

68. Citron, *supra* note 65 (explaining that one woman's employment with a government agency was terminated when a co-worker circulated nude pictures of her around the office); Dana Radcliffe, *The Internet: Power Without Responsibility?*, HUFFINGTON POST (Sept. 9, 2014, 3:37 PM), [http://www.huffingtonpost.com/dana-radcliffe/the-internet-power-withou\\_b\\_5784540.html](http://www.huffingtonpost.com/dana-radcliffe/the-internet-power-withou_b_5784540.html).

69. See Smith, *supra* note 7 (describing a woman who changed her name "to disassociate herself from the pictures").

70. See Hannah Jane Parkinson, *Twitter Trend Based on The Purge Films Exposes Horror of Revenge Porn*, GUARDIAN (July 21, 2014, 11:45 AM), <http://www.theguardian.com/technology/2014/jul/21/twitter-trend-purge-film-anarchy-revenge-porn-laws> (detailing the deaths of Amanda Todd and an unnamed Brazilian girl after their nude photos were posted online).

71. Ed Pilkington, *Tyler Clementi, Student Outed as Gay on Internet, Jumps to His Death*, GUARDIAN (Sept. 30, 2010, 4:08 PM), <http://www.theguardian.com/world/2010/sep/30/tyler-clementi-gay-student-suicide>.

72. *Id.*

73. *Id.*

74. *Id.*

posted, Clementi jumped off the George Washington Bridge to his death.<sup>75</sup>

Compared to IAU's reported 350,000 unique daily viewers, details of Clementi's sexual conduct reached a meager 150 Twitter followers.<sup>76</sup> When asked about his website leading people to take their own lives, Hunter Moore responded saying, "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."<sup>77</sup>

### C. Putting Revenge Porn into Perspective

Many critics' initial reaction to revenge porn is to blame the victim.<sup>78</sup> One user commented, "I have no sympathy for people who have their [pictures] posted. They are paying for their own stupidity."<sup>79</sup> Some critics even find the situation the victims are left in humorous.<sup>80</sup> In her article, *The Sexual Violence of Non-consensual Nudity*, Jenny Trout argues that "[w]e've become a society that feels entitled to the nudity of others; consent is not required, just as long as we get our fill of flesh."<sup>81</sup> Victim blaming<sup>82</sup> is grounded in the rationale that the end result is somehow deserved.<sup>83</sup> To these critics, a victim's nude pictures are a "scarlet letter," payment for the sin of having sexual urges and confidence in their bodies.<sup>84</sup>

Is it true that in the typical revenge porn context the pictures could not have been posted but for the victim consenting to them being taken in the first place? Of course.<sup>85</sup> However, the simple fact

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75. *Id.*

76. Morris, *supra* note 2, at 44; Pilkington, *supra* note 71.

77. *IsAnyoneUp.com - Hunter Moore - Brains over Bullies*, BULLYVILLE (Aug. 21, 2012), <http://archive.is/bDsMU>.

78. See Bojax39, Comment to "*Revenge Porn*" Banned in California, CBS NEWS (Oct. 2, 2014, 2:20 AM), <http://www.cbsnews.com/news/revenge-porn-banned-in-california/> (depicting just one of many comments blaming the victim of the attack rather than the attacker).

79. *Id.*

80. Xbeing, Comment to "*Revenge Porn*" Banned in California, CBS NEWS (Oct. 2, 2014, 4:40 AM), <http://www.cbsnews.com/news/revenge-porn-banned-in-california/>.

81. Jenny Trout, *The Sexual Violence of Non-consensual Nudity*, HUFFINGTON POST (Sept. 2, 2014, 1:26 PM), [http://www.huffingtonpost.com/jenny-trout/the-sexual-violence-of-non-consensual-nudity\\_b\\_5745440.html](http://www.huffingtonpost.com/jenny-trout/the-sexual-violence-of-non-consensual-nudity_b_5745440.html).

82. This Comment uses the term "victim blaming" to describe the act of blaming a victim for the crime committed against them.

83. Trout, *supra* note 81.

84. *Id.*

85. See Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, FORBES (Jan. 28, 2013, 1:13 PM), <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/> ("[F]or individuals who

that a woman gives consent for a picture to be taken does not mean she consents to it being posted online.<sup>86</sup> “Consent is contextual; it is not an on/off switch.”<sup>87</sup> When a man shares private information with his doctor, he is not authorizing the doctor to share that information with the public.<sup>88</sup> So too should be the standard for sharing private information in the context of a sexual relationship.<sup>89</sup> In order to begin protecting the victims of revenge porn and preventing more deaths, we must stop blaming the victim for the hateful acts of the people they once trusted.<sup>90</sup>

Revenge porn is a popular weapon of choice for spurned ex-lovers because it is effective, especially against women.<sup>91</sup> Studies show over 90% of those who fall victim to revenge porn are female.<sup>92</sup> This is because a woman’s sexuality is a much easier and more obvious target.<sup>93</sup> The double standard in American society regarding the sexuality of men and women is well recognized.<sup>94</sup> Women are generally seen as immoral and are shamed for expressing their sexuality while men are celebrated.<sup>95</sup> This dichotomy turns established women—judges, politicians, doctors, and entrepreneurs—into laughing stocks.<sup>96</sup> The moment a woman is sexualized in the eyes of society, her reputation and respect vanish.<sup>97</sup> This social reality is what makes revenge porn an incredibly effective weapon against women.<sup>98</sup> “It denies [women] control over their own bodies and lives.”<sup>99</sup> Yet, some scholars

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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.”)

86. See Citron & Franks, *supra* note 3, at 354 (“Consensual sharing of intimate images is often done with the implied or express understanding that such images will remain confidential.”).

87. *Id.* at 355.

88. *Id.*

89. *Id.*

90. *Id.* at 348.

91. *Id.* at 354.

92. *Id.* at 353.

93. *Id.* at 348 (“For years, women have had to struggle with legal and social disregard for their sexual boundaries.”).

94. *Id.* at 353; Derek A. Kreager & Jeremy Staff, *The Sexual Double Standard and Adolescent Peer Acceptance*, 72 SOC. PSYCHOL. Q. 143, 143 (2009) (“The belief that women and men are held to different standards of sexual conduct is pervasive in contemporary American society.”).

95. Citron & Franks, *supra* note 3, at 353; Kreager, *supra* note 94, at 143.

96. Reut Amit, *Revenge Porn Terrorism*, HUFFINGTON POST (Oct. 15, 2014, 5:22 PM), [http://www.huffingtonpost.com/reut-amit/revenge-porn-terrorism\\_b\\_5955830.html](http://www.huffingtonpost.com/reut-amit/revenge-porn-terrorism_b_5955830.html).

97. *Id.* (“[T]o reveal a woman’s sexuality is to annul her success.”).

98. *Id.*

99. Citron & Franks, *supra* note 3, at 353.

suggest that revenge porn is not just a women's issue.<sup>100</sup> Although more women become victims, the American Psychological Association reveals that men are more likely to report being victims of a revenge porn attack than are their female counterparts.<sup>101</sup> Regardless of gender or the circumstances surrounding an attack, revenge porn is a problem society as a whole must address. And we are beginning to.<sup>102</sup>

### III. THE TROUBLE WITH THE INTERNET

A revenge porn attack is not just an isolated harm.<sup>103</sup> Because the Internet provides an overwhelming means of amplification, an anonymous user with few friends or contacts in the real world can reach an audience of millions with the click of a mouse.<sup>104</sup> Once their pictures are posted, the pictured individuals continue to be harmed each time their pictures are viewed or downloaded.<sup>105</sup> Individuals therefore are incentivized to remove their pictures as quickly as possible to minimize the damage they cause.<sup>106</sup> However, due to the ease of access to content on the Internet and specific laws protecting third party hosts from liability for much of the content posted by users, victims face a daunting task when attempting to get their pictures removed. Although MyEx.com provides instructions to remove non-consensual pornography, those looking to minimize the damage done by a revenge porn attack are left feeling almost completely helpless.<sup>107</sup>

#### A. Step One: Give up

Due to the growing popularity of revenge porn, advice columns have sprung up to guide victims through the arduous process of picture removal. One advisor has broken down the process into two steps. The first step is to get the pictures taken

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100. Cynthia J. Najdowski & Meagen M. Hildebrand, *The Criminalization of Revenge Porn*, MONITOR ON PSYCHOL., Jan. 2014, at 26, 26.

101. *Id.*

102. *See infra* Part IV.

103. *See* Citron & Franks, *supra* note 3, at 364–65 (chronicling the type of harm inflicted on Erin Andrews and Lena Chen by revenge porn).

104. *Id.* at 350.

105. *Id.* at 365. Actress Lena Dunham has tweeted to followers telling them to “[r]emember, when you look at these pictures you are violating these women again and again. It’s not okay.” Lena Dunham, TWITTER (Sept. 1, 2014, 1:27 AM), <https://twitter.com/lenadunham/status/506357640294064128> (last visited Sept. 18, 2015).

106. Brill, *supra* note 8 (explaining that victims must act “quickly, confidently and decisively”).

107. Laws, *supra* note 44 (detailing one victim’s journey to help others who “felt helpless, frightened and exploited” because of a revenge porn attack).

down as quickly as possible; the second is to preserve the evidence.<sup>108</sup> MyEx.com also provides a step-by-step procedure to guide victims through the process of removing their pictures.<sup>109</sup> Individuals looking to have MyEx.com take down their pictures must choose one of four avenues provided by the website. A person making a takedown request must either have been a minor in the picture, a registered copyright owner of the picture, a law enforcement official, or a general requestor.<sup>110</sup> Law enforcement officials get preferential treatment with the site purporting to yield to their requests within forty-eight hours.<sup>111</sup> Except for official law enforcement requests, the website makes no representations on the length of time it will take to remove the pictures, or if they will be removed at all.<sup>112</sup> In fact, Reddit.com,<sup>113</sup> another platform used for revenge porn, has responded to similar takedown requests from victims by stating that “[w]e remove what we’re required to remove by law . . . . Beyond that . . . we feel it is necessary to maintain as neutral a platform as possible.”<sup>114</sup>

### B. *Defending the Proverbial Soapbox*

Reddit.com and MyEx.com are known as interactive computer service providers.<sup>115</sup> Interactive computer service providers, like popular social media sites Facebook and Twitter, are websites that

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108. See Brill, *supra* note 8.

109. See *Removal Policy*, MYEX, <http://www.myex.com/removal-policy/> (last visited Sept. 18, 2015).

110. *Id.*

111. *Law Enforcement*, MYEX, <http://www.myex.com/law-enforcement/> (last visited Sept. 18, 2015).

112. *Removal Policy*, *supra* note 109.

113. Reddit.com is the website responsible for hosting and disseminating stolen naked pictures of celebrity Jennifer Lawrence uploaded by an anonymous source. See *Reddit Bans Celebrity Forum Photos After a Week of “Whack-A-Mole”*, RE/CODE (Sept. 6, 2014), <http://recode.net/2014/09/06/reddit-bans-celebrity-photo-forums-after-a-week-of-whack-a-mole/>. Reddit.com recently amended its terms and conditions to address the revenge porn issue specifically. Andrea Peterson, *Reddit Is Finally Cracking Down on Revenge Porn*, WASH. POST (Feb. 24, 2015), <http://www.washingtonpost.com/blogs/the-switch/wp/2015/02/24/reddit-is-finally-cracking-down-on-revenge-porn/>. The new policy now requires that any picture posted of a person in a state of nudity is accompanied with authorized consent from the subject. *Id.*

114. Smith, *supra* note 7 (quoting Jason Harvey, Comment to *Announcements*, REDDIT (Sept. 7, 2014, 7:14 AM), [https://www.reddit.com/r/announcements/comments/2fpdax/time\\_to\\_talk/](https://www.reddit.com/r/announcements/comments/2fpdax/time_to_talk/)).

115. 47 U.S.C. § 230(f)(2) (2012) (“The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”); see also *Submit Pics and Stories of Your Ex*, MYEX, <http://www.myex.com/add-your-ex/> (last visited Sept. 18, 2015) (providing an area where users can upload information to a computer server).

serve as platforms for users to upload and share content such as pictures, videos, and even thoughts and ideas.<sup>116</sup> Websites that allow users to upload content are protected from much of the liability for user uploaded content under section 230 of the Communications Decency Act.<sup>117</sup> This means that MyEx.com is not liable for any of the pictures posted to its site by others.<sup>118</sup> Section 230 often has been admonished as a form of blanket immunity for the owners of these types of websites.<sup>119</sup> Thus, the Communications Decency Act enables revenge porn attackers to access their most valuable asset: an audience.<sup>120</sup>

Some commentators appear to support section 230 as a form of free speech protection and sound public policy.<sup>121</sup> Section 230 eliminates the overwhelming task of policing countless posts a day while allowing websites like Facebook to provide a useful and profitable service to law-abiding citizens.<sup>122</sup> Additionally, they argue that contrary to what commentators suggest, section 230 is not a form of blanket immunity.<sup>123</sup> The law maintains liability for “information content providers” or the individual responsible for the creation or development of the information.<sup>124</sup> By excluding these individuals, section 230 places liability where liability is due: on the person responsible for uploading the images.<sup>125</sup> Although section 230 appears to enable revenge porn attacks, it serves as an

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116. See generally *About Twitter*, TWITTER, [www.twitter.com/about](http://www.twitter.com/about) (last visited Sept. 18, 2015) (enabling users to upload pictures and ideas to the computer server); *Sign Up*, FACEBOOK, [www.facebook.com/home](http://www.facebook.com/home) (last visited Sept. 18, 2015) (enabling users to upload pictures and videos to the computer server for friends to view).

117. 47 U.S.C. § 230(c)(1)–(2). Section 230 of the Communications Decency Act specifies that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” § 230(c)(1); see also Edward Fenno & Christina Humphries, *Protection Under CDA § 230 and Responsibility for “Development” of Third-Party Content*, COMM. LAW., Aug. 2011, at 33 (“Hosting, reviewing, editing, and even soliciting content all typically are protected activities.”).

118. Citron & Franks, *supra* note 3, at 359 (explaining that a revenge porn site owner would not be liable for displaying even stolen nude images); Fenno & Humphries, *supra* note 117, at 33.

119. Brill, *supra* note 8.

120. *Id.*

121. *CDA 230 the Most Important Law Protecting Internet Speech*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> (last visited Sept. 18, 2015). “Tucked inside the Communications Decency Act (CDA) of 1996 is one of the most valuable tools for protecting freedom of expression and innovation on the Internet: Section 230.” *Id.*

122. Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Dec. 18, 2013, 5:35 PM), [http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet\\_b\\_4455090.html](http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html).

123. *Id.*

124. 47 U.S.C. § 230 (2012).

125. Franks, *supra* note 122.

important protection of free speech.<sup>126</sup> Thus, victims must look elsewhere in order to rectify an attack.<sup>127</sup>

#### IV. THE CURRENT SOLUTIONS

Currently, victims of a revenge porn attack can seek redress through a number of avenues including tort,<sup>128</sup> copyright,<sup>129</sup> and sexual harassment law.<sup>130</sup> Although some commentators argue that civil remedies are sufficient, practical considerations and the substantial escalation in frequency of revenge porn attacks make it increasingly clear that more effective measures are needed.<sup>131</sup> This Part discusses the shortcomings of civil remedies as well as the possible benefits of a criminal solution.

##### A. *The Failure of Civil Recourses*

Some victims have been successful in seeking redress for an attack by bringing a cause of action in tort.<sup>132</sup> A woman won a judgment against a man who posted sexually explicit photographs of her, alleging public disclosure of private facts and intentional infliction of emotional distress, among others.<sup>133</sup> The defendant, who never answered the complaint, allegedly e-mailed nude photographs to the victim's husband and created fake Twitter accounts using the victim's credentials.<sup>134</sup> He then used these accounts to contact third parties and disseminate the nude photographs to several individuals, who further disseminated the photographs.<sup>135</sup> It is not clear whether the defendant possessed any assets to satisfy the judgment against him.<sup>136</sup> If the defendant were judgment proof, the plaintiff in this case would not be able to recover the damages she was owed.

If the victim created the picture used in a revenge porn attack, she may find redress in copyright law as the copyright owner of

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126. See Fenno & Humphries, *supra* note 117, at 28 ("Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.")

127. See Citron & Franks, *supra* note 3, at 359 (noting that cite operators are immune from tort liability).

128. *Id.* at 357.

129. *Id.* at 359–60.

130. *Id.* at 360–61.

131. *Id.* at 357.

132. See *id.* at 357.

133. Doe v. Hofstetter, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, at \*1–2, \*7–8 (D. Colo. June 13, 2012).

134. *Id.* at \*1–3.

135. *Id.* at \*3.

136. *Id.* at \*9.

the photograph.<sup>137</sup> The current law makes a distinction between pictures taken by the victims themselves and pictures taken by others.<sup>138</sup> If the victim took the picture, the Digital Millennium Copyright Act of 1998 enables that person to get the pictures removed.<sup>139</sup> After registering the copyright, the victim would have to file a section 512 takedown notice with the website, who would then be required to take down the picture under the Digital Millennium Copyright Act.<sup>140</sup> But, if the victim did not take the picture, the victim does not own the copyright and her endeavor becomes more difficult still.<sup>141</sup>

Copyright law serves as a poor solution to a growing problem.<sup>142</sup> Because victims are unlikely to have the financial means to sue, revenge porn sites have little incentive to yield to takedown notices.<sup>143</sup> Even if a site agrees to take down the copyrighted picture, there is no guarantee that other sites to which the picture has migrated will take it down.<sup>144</sup> Additionally, reducing non-consensual-nudity attacks to a property right grossly mischaracterizes and diminishes the true harm done.<sup>145</sup>

Not only do the current options for civil recourse do little to deter judgment-proof offenders, most victims do not have the financial resources to bring a civil suit.<sup>146</sup> Furthermore, because victims in civil suits generally have to use their real names, fear of exposure often discourages them from seeking this form of redress.<sup>147</sup>

### B. *Creating Revenge Porn Criminals*

Where civil recourse fails, criminal liability may be able to bridge the gap.<sup>148</sup> Why do we punish criminals? Most scholars of criminal law fall into one of two theoretical categories: Utilitarian

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137. Citron & Franks, *supra* note 3, at 359–60.

138. Brill, *supra* note 8.

139. *Resources, END REVENGE PORN* <http://www.endrevengeporn.org/helpful-resources> (last visited Sept. 18, 2015).

140. See 17 U.S.C. § 512(c)(1)(C), (c)(3) (2012) (detailing the requirement to comply with a takedown notice under the Copyright Act).

141. See *DMCA Complaint, MYEX*, <http://www.myex.com/dmca-complaint/> (last visited Sept. 18, 2015) (“[I]f you have a [copyright] to these images please include all legal information or e-mail will be ignored.”).

142. See Citron & Franks, *supra* note 3, at 360 (“[E]ven successful copyright actions cannot put the genie back in the bottle.”).

143. See *id.* (“They know that most victims cannot afford to hire a lawyer.”).

144. *Id.*

145. *Id.*

146. *Id.* at 358.

147. *Id.*

148. See *id.* at 361 (arguing that a criminal law is necessary to fully protect current and future victims of revenge porn).

or Retributivist.<sup>149</sup> Utilitarians believe that the purpose of punishing criminals is to incapacitate them, rehabilitate them, and deter them.<sup>150</sup> In other words, society punishes criminals so that they are unable to reoffend, no longer want to offend, or decide not to offend because of the legal consequences.<sup>151</sup> Retributivists, on the other hand, believe that society punishes criminals solely because they deserve it.<sup>152</sup> A victim of a mugging may lose a few dollars and feel unsafe for a period of time. Conversely, the true harm of a revenge porn attack is unquantifiable.<sup>153</sup> The victim can experience long-term damage to her reputation and to her emotional wellbeing that lasts well beyond the attack itself.<sup>154</sup> Thus, deterrence is a necessary objective if we are to completely protect individuals using criminal law.<sup>155</sup>

In an attempt to produce an effective method of deterrence, New Jersey became the first state to pass a criminal revenge porn law.<sup>156</sup> This law makes it a third-degree crime to disclose a picture or film of exposed parts of another without that person's consent.<sup>157</sup> Violation of this law can result in imprisonment of up to five years.<sup>158</sup> Despite being the longest living U.S. revenge porn law, the statute has only been used to prosecute offenders sporadically.<sup>159</sup> Coincidentally, one of the offenders prosecuted under the New Jersey law was Dahrin Ravi, roommate of deceased college student and revenge porn victim Tyler Clementi.<sup>160</sup>

Following the passage of the New Jersey revenge porn law, thirteen states have passed laws criminalizing revenge porn since 2013.<sup>161</sup> An additional seventeen states introduced bills that would criminalize revenge porn that same year.<sup>162</sup> Furthermore, three

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149. C.L. Ten, *Crime and Punishment*, in A COMPANION TO ETHICS 366 (Peter Singer ed., 1991).

150. Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 116 (2000) (“[U]tilitarian penology has traditionally emphasized deterrence, reform and incapacitation . . .”).

151. *Id.* at 126–27, 132, 171 (discussing the utilitarian goals of deterrence, incapacitation, and reform).

152. Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) (explaining that retributivism is the belief that “punishment is justified because people deserve it”).

153. See discussion *supra* Part II.B (detailing the effects a revenge porn attack can have on a victim).

154. Citron & Franks, *supra* note 3, at 365.

155. See, e.g., *id.* at 357.

156. *Id.* at 371.

157. N.J. STAT. ANN. § 2C:14–9(b) (West 2005).

158. § 2C:43–6(a)(3).

159. Citron & Franks, *supra* note 3, at 371.

160. *Id.* at 372.

161. Leber, *supra* note 5.

162. Citron & Franks, *supra* note 3, at 371.

other states—Texas, Alaska, and New Jersey—have broad privacy laws that extend to incidents of revenge porn.<sup>163</sup>

Some of these laws have required revision to better protect revenge porn victims.<sup>164</sup> In response to criticism, the revision of California Bill SB 255 broadens the law to cover pictures taken by the victim also known as “selfies.”<sup>165</sup> This revision will protect the remaining 80% of revenge porn victims whose intimate pictures were self-taken.<sup>166</sup> Additionally, California’s revenge porn law has been criticized as ineffective on other grounds.<sup>167</sup> Because the law requires that the perpetrator intend to cause severe emotional distress, the law does not protect victims of revenge porn attackers with no such intent.<sup>168</sup>

California’s revenge porn law is not the only recent revenge porn legislation that has received criticism.<sup>169</sup> Connecticut introduced a bill that would make it illegal to electronically disseminate “an intimate image” with “the intent to harass, annoy, alarm or terrorize another person.”<sup>170</sup> Representatives of the American Civil Liberties Union claim that while the intent is respectable, the bill has several constitutional deficiencies and is in need of a complete overhaul.<sup>171</sup> At the time of this writing, Connecticut has not passed a criminal revenge porn law.<sup>172</sup>

Arizona’s attempt at criminalizing revenge porn has gained attention for being exceedingly overbroad.<sup>173</sup> The bill, H.B. 2515, makes it “unlawful to intentionally disclose, display, distribute,

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163. Leber, *supra* note 5.

164. Hunter Schwarz, *California’s Revenge Porn Law, Which Notoriously Didn’t Include Selfies, Now Will*, WASH. POST (Aug. 27, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/27/californias-revenge-porn-law-which-notoriously-didnt-include-selfies-now-will/> (“[The bill] was criticized by advocates for not going far enough, because it only covered photos or videos taken by someone else.”).

165. *Id.*

166. *Id.*

167. Citron & Franks, *supra* note 3, at 373–74.

168. CAL PENAL CODE § 647(j)(3) (West 2014). Some non-consensual pornography posts do not appear to have any malicious intent. *Hot Single Milf*, MYEX <http://www.myex.com/santa-clarita/amanda-stewart/34020/> (last visited Sept. 18, 2015) (portraying a revenge porn post with the subtitle “one of my Buddies Exs. [S]hes [sic] [expletive] smoking hot and id [sic] thought id [sic] SHARE!”).

169. *‘Revenge Porn’ Bill Needs Changes*, ACLU-CT (Mar. 26, 2014), <http://www.acluct.org/updates/revenge-porn-bill-needs-changes/>.

170. See S. 489, 2014 Gen. Assemb., Feb. Sess. (Conn. 2014); *‘Revenge Porn’ Bill Needs Changes*, *supra* note 169.

171. *‘Revenge Porn’ Bill Needs Changes*, *supra* note 169.

172. *States with Revenge Porn Criminal Laws*, C.A. GOLDBERG, PLLC, <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> (last updated Sept. 2, 2015).

173. Sarah Jeong, *Is Arizona’s Revenge Porn Law Overbroad?*, FORBES (Sept. 23, 2014, 2:58 PM), <http://www.forbes.com/sites/sarahjeong/2014/09/23/is-arizonas-revenge-porn-law-overbroad/> [hereinafter Jeong, *Arizona’s Revenge Porn Law*].

publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity.”<sup>174</sup> Under H.B. 2515, a library in Arizona that provides Internet access to the public would be criminally liable if the patrons are able to access nude photographs using a library computer.<sup>175</sup> H.B. 2515 would also make it a felony for a mother in Arizona to share pictures with a family member of her unclothed child in the privacy of her own home.<sup>176</sup> It is for these reasons that the American Civil Liberties Union has filed a lawsuit challenging Arizona’s revenge porn law on First Amendment grounds.<sup>177</sup>

## V. THE FIRST AMENDMENT ISSUE

“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”<sup>178</sup> The First Amendment to the U.S. Constitution protects many freedoms, the most significant for this analysis being the freedom of speech.<sup>179</sup> Some scholars have commented that eliminating the First Amendment from our Constitution would mean eliminating the ability to challenge abuses of government.<sup>180</sup> Freedom of speech—to share one’s thoughts, ideas, and opinions—is essential to the security of the nation.<sup>181</sup> The preservation of this fundamental right is a central issue in the wake of burgeoning criminal revenge porn laws.<sup>182</sup>

### A. *The First Amendment: A History*

The right to free speech was founded, like much of our law, in English tradition.<sup>183</sup> Parliament, charged with the task of creating

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174. H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

175. Jeong, *Arizona’s Revenge Porn Law*, *supra* note 173.

176. *Id.*

177. *Id.*

178. U.S. CONST. amend. I.

179. *Id.* (including freedom of religion, the right to an assembly, and the right to petition the government for redress of grievances).

180. ISIDORE STARR, *THE IDEA OF LIBERTY: FIRST AMENDMENT FREEDOMS* 5 (1978).

181. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

182. See Jeong, *Arizona’s Revenge Porn Law*, *supra* note 173 (explaining the First Amendment issue in the revenge porn context); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (“[F]reedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation . . .”); Liz Halloran, *Race To Stop ‘Revenge Porn’ Raises Free Speech Worries*, KCUR (Mar. 6, 2014, 12:42 PM), <http://kcur.org/post/race-stop-revenge-porn-raises-free-speech-worries>.

183. David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 431 (1983) (“The privilege evolved during the struggle of the British Parliament to gain more authority at the expense of the Crown.”).

the laws with the consent of the Crown, began its duties by asking the King for forgiveness for anything said during the process that displeased him.<sup>184</sup> Motivated by the need for criticism and debate in the law-making process, Parliament eventually stopped asking for forgiveness when speaking on the floor.<sup>185</sup> Eventually, this parliamentary privilege of free speech became a right for members of Parliament that was later extended to colonial assemblies.<sup>186</sup> Finally, on December 15, 1791, the Bill of Rights, including the First Amendment right to free speech, was ratified into law.<sup>187</sup>

Historically, the government could only regulate speech in a very narrow set of circumstances.<sup>188</sup> Regulations of the content of speech must survive strict scrutiny; the law must serve a compelling governmental interest that cannot be achieved through less restrictive means.<sup>189</sup> This test has proved very difficult to satisfy.<sup>190</sup> The limits of First Amendment protection often have been challenged on the grounds that the speech in question is hateful or offensive.<sup>191</sup> Nevertheless, the Supreme Court repeatedly has held that hateful and deeply offensive speech still enjoys a presumption of protection under the First Amendment.<sup>192</sup>

The modern right to free speech, however, is not absolute.<sup>193</sup> The Supreme Court has defined specific exceptions to types of speech that are unprotected by the First Amendment and do not have to meet strict scrutiny standards.<sup>194</sup> Among these is the exception for obscenity.<sup>195</sup> The obscenity exception denies free-speech protection to any speech that is classified as obscene.<sup>196</sup>

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184. *Id.* at 431–32.

185. *Id.* at 432.

186. *Id.* at 433–34.

187. *Bill of Rights FAQs*, NAT'L CONST. CTR., <http://constitutioncenter.org/media/files/BOR-faqs.pdf> (last visited Sept. 18, 2015).

188. Citron & Franks, *supra* note 3, at 374.

189. *United States v. Alvarez*, 132 S. Ct. 2537, 2548–51 (2012).

190. Citron & Franks, *supra* note 3, at 374.

191. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 454–55 (2011); *Cohen v. California*, 403 U.S. 15, 18 (1971).

192. *Snyder*, 562 U.S. at 448, 461 (holding that picketing the funeral of Lance Corporal Matthew Snyder by Westboro Baptist Church with signs reading “Thank God for Dead Soldiers” was protected speech under the First Amendment); *Cohen*, 403 U.S. at 16, 26 (holding that a man wearing a jacket emblazoned with the words “Fuck the Draft” was protected by the First Amendment).

193. KATHLEEN ANN RUANE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT, CONG. RES. SERV. 1 (Sept. 8, 2014) (“The Supreme Court has identified categories of speech that are unprotected by the First Amendment and may be prohibited entirely.”).

194. *Id.*; Citron & Franks, *supra* note 3, at 375.

195. RUANE, *supra* note 193, at 2.

196. *Id.*

But the determination of what is obscene has proved difficult to define.<sup>197</sup> In a famous concurring opinion in 1963, Justice Stewart stated that he could not define what obscene was, but that he would know it when he saw it.<sup>198</sup> Ten years later, in *Miller v. California*, the Court created a three-part test in an attempt to lend clarity to the definition.<sup>199</sup> Most pornography, however, does not fall within this test.<sup>200</sup> In fact, for pornography to be characterized as obscene, it must at a minimum “depict[] or describe[], in a patently offensive way, sexual conduct.”<sup>201</sup> At the time of this writing, no court has decided whether revenge porn falls within the obscenity exception to the First Amendment.<sup>202</sup>

Despite this uncertainty, the Supreme Court has ruled that the goals of protecting privacy, autonomy, and the fostering of private expression are legitimate grounds for regulation.<sup>203</sup> In *City of San Diego v. Roe*, the Court held that sexually explicit images were not a legitimate news interest and were therefore not protected by the First Amendment.<sup>204</sup> This type of regulation is held to “less rigorous” scrutiny when it relates to speech that is not a matter of public concern.<sup>205</sup>

When public officials are involved, the argument that speech in the form of non-consensual pornography has no legitimate public interest becomes weaker.<sup>206</sup> Take the case of Anthony Wiener. Congressman Wiener sent sexually explicit images of himself to women who were not his wife while holding a public office.<sup>207</sup> Later, several of the women who received the pictures

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197. *Id.* (“This determination is by no means a simple one.”).

198. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

199. *Miller v. California*, 413 U.S. 15, 24 (1973).

200. RUANE, *supra* note 193, at 2.

201. *Miller*, 413 U.S. at 24 (defining a three-prong test that determines whether the work appeals to a prurient interest using prevailing community standards, whether the work depicts or describes sexual conduct in an offensive way, and whether the work lacks serious artistic, scientific, literary, or scientific value).

202. See generally Danielle Citron, *Debunking the First Amendment Myths Surrounding Revenge Porn Laws*, FORBES (Apr. 18, 2014, 10:19 AM), <http://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/> (explaining the Supreme Court’s decisions regarding similar issues but not precedent regarding revenge porn specifically).

203. *Bartnicki v. Vopper*, 532 U.S. 514, 536–38 (2001) (Breyer, J., concurring).

204. *City of San Diego v. Roe*, 543 U.S. 77, 77, 84 (2004).

205. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 454 (2011) (placing emphasis on whether the speech involved matters “of interest to society at large”).

206. Citron & Franks, *supra* note 3, at 383 (arguing that in the case of Anthony Wiener, “[t]he public interest lies in the fact that he was having an extramarital, online sexual relationship while running for public office”).

207. Kevin Liptak, *Weiner Estimates He Sexted Three Women After Resigning*, CNN POL. TICKER (July 25, 2013, 1:09 PM), <http://politicalticker.blogs.cnn.com/2013/07/25/weiner-estimates-he-sexted-three-women-after-resigning/?iref=allsearch>.

sent them to the press where they were widely distributed.<sup>208</sup> Because the moral aptitude of our country's lawmakers may be a legitimate public interest, it is less clear whether Congressman Wiener would enjoy the less rigorous scrutiny enjoyed by private individuals.<sup>209</sup> But, this situation is a rarity in the revenge porn context where most victims are not public officials.<sup>210</sup>

Logically, the threat of public release of nude pictures of private individuals would have a chilling effect on private expression.<sup>211</sup> Because revenge porn attacks can easily be said to undermine privacy, autonomy, and private expression, states have a legitimate interest in regulating this form of speech.<sup>212</sup> Still, when it comes to the criminalization of revenge porn, scholars have fallen into one of two camps: those for making revenge porn a crime, and those against it.<sup>213</sup>

### B. Criminalizing Revenge Porn Is a Bad Idea

Critics have given many reasons as to why criminalizing revenge porn is a bad idea.<sup>214</sup> These arguments range from the need to reduce, not increase, the population of already overcrowded prisons to the necessity of implementing a cultural change on how the female body is perceived.<sup>215</sup> More persuasively, many scholars argue that criminalizing revenge porn can and has created overbroad laws that encompass legitimate, non-criminal conduct.<sup>216</sup> The Overbreadth Doctrine requires that a law be struck down as unconstitutional if, when proscribing unprotected speech, it also proscribes speech that is protected under the First

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208. Alison Gendar & Corky Siemaszko, *Rep. Anthony Weiner Sext Pic Scandal: Provocative New Photos of Queens Congressman Hitting the Web*, N.Y. DAILY NEWS (June 6, 2011, 12:50 PM), <http://www.nydailynews.com/new-york/rep-anthony-weiner-sext-pic-scandal-provocative-new-photos-queens-congressman-hitting-web-article-1.125973>.

209. Citron & Franks, *supra* note 3, at 383–84.

210. *Id.* at 383.

211. *Id.* at 385.

212. *See id.* (arguing that revenge porn undermines privacy and freedom of expression which is unfavorable).

213. Compare Lux Alptraum, *Why Revenge Porn Laws Are a Bad Idea*, BOINKOLOGY 101, <https://medium.com/boinkology-101/why-revenge-porn-laws-are-a-bad-idea-e073f340cee6> (last visited Sept. 18, 2015) (arguing against the criminalization of revenge porn), with Citron & Franks, *supra* note 3, at 361 (arguing that revenge porn should be criminalized).

214. Alptraum, *supra* note 222.

215. *Id.* (“The War on Drugs did its part to flood the prison system with people who shouldn’t be there. Do we really need a War on Revenge Porn to do the same?”). “Perhaps instead of punishing someone . . . we could work to reduce the power and impact of revenge porn itself. The public release of naked or pornographic photos is only powerful because we, as a society, have decided that nudity and sex are embarrassing, shameful things.” *Id.*

216. *See* Jeong, *Arizona’s Revenge Porn Law*, *supra* note 173.

Amendment.<sup>217</sup> In other words, if the government passes a law that would incidentally make protected speech illegal, the law will be struck down as overbroad.<sup>218</sup> It is under this doctrine that current revenge porn laws are vulnerable to attack on First Amendment grounds.<sup>219</sup> An overbroad law like the one passed in Arizona makes criminals out of librarians simply doing their jobs and dotting mothers sharing pictures of their children.<sup>220</sup>

Consequently, laws that are too narrow, like California's unrevised revenge porn law, are nothing more than lip service to a growing problem.<sup>221</sup> Thus, in order to be effective, revenge porn laws must toe the line between criminalizing hurtful conduct and infringing upon the right to free speech.<sup>222</sup> As it stands, laws like Arizona's H.B. 2515 protect victims of revenge porn while creating victims of an overbroad law.<sup>223</sup> In one document, the Arizona legislature diluted the protection of the First Amendment, providing recourse for few while injuring the fundamental rights of many.<sup>224</sup> Until it can be overturned, Arizona's H.B. 2515 threatens everyday, law-abiding citizens with prison time.<sup>225</sup>

### C. *Criminalizing Revenge Porn Is Necessary*

Alternatively, an equally opinionated alliance of critics argue that making revenge porn a crime is the only effective method of deterrence.<sup>226</sup> These scholars address some of the arguments

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217. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute . . . because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

218. *Id.*

219. Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), <http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/> [hereinafter Jeong, *Revenge Porn Is Bad*] ("An overbroad criminal law is a threat to the public, runs the risk of being struck down by a court (for violating the First Amendment).").

220. See Jeong, *Arizona's Revenge Porn Law*, *supra* note 173.

221. Jeong, *Revenge Porn Is Bad*, *supra* note 219. Before revisions, California's revenge porn law only protected 20% of revenge porn victims. See Schwarz, *supra* note 164.

222. Compare Jeong, *Arizona's Revenge Porn Law*, *supra* note 173 (criticizing the broad language of Arizona's H.B. 2515), with Schwarz, *supra* note 164 (noting the small amount of revenge porn victims California's S.B. 255 will cover).

223. See Jeong, *Arizona's Revenge Porn Law*, *supra* note 173 (highlighting examples of potential victims of the overbroad law).

224. *Id.*

225. *Id.*

226. Citron & Franks, *supra* note 3, at 361 ("A criminal law solution is essential to deter judgment-proof perpetrators."); see also Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 250 (2015) (stating that revenge porn should be criminalized because a greater deterrent is needed).

leveraged by dissenters, maintaining that overcrowded prisons and an already robust criminal code are poor reasons to refuse to protect victims of new crimes.<sup>227</sup> Highlighting the current failures of existing civil and criminal law, scholars contend that a criminal revenge porn law is necessary to protect these victims.<sup>228</sup> While acknowledging that overbroad revenge porn laws are a potential problem, critics argue that it is possible to draft a revenge porn law that protects victims of revenge porn but does not infringe upon the fundamental rights of others.<sup>229</sup>

The Supreme Court has referred to the application of the Overbreadth Doctrine as “strong medicine.”<sup>230</sup> “It has been employed by the Court sparingly and only as a last resort.”<sup>231</sup> The doctrine has never been invoked if a limiting construction has been or could be used regarding the interpretation of the statute.<sup>232</sup> Despite the scant use of the doctrine, scholars concede that the concern of repeal for overbreadth is a legitimate one.<sup>233</sup> Only meticulous and precise drafting, they argue, will avoid these constitutional concerns.<sup>234</sup>

## VI. THE SUSTAINABILITY OF A CRIMINAL SOLUTION

At the time of this writing, twenty-one states have passed laws criminalizing revenge porn while seventeen others have proposed similar legislation.<sup>235</sup> Legislators must draft revenge porn laws carefully in order to be both effective and constitutional.<sup>236</sup> Florida lawmakers recently rejected a

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227. Citron & Franks, *supra* note 3, at 362 (contending that the argument “that our society should not criminalize certain behavior because too many other kinds of behavior are already criminalized is at best a non sequitur . . . [and individuals who feel that way are] the shallowest of thinkers”). Additionally, scholars combat assertions that criminalizing revenge porn perpetuates a societal notion that women should be ashamed of their bodies by contending that a criminal statute is actually protecting their sexual autonomy, not negating it. *Id.*

228. *Id.*

229. *Id.* at 376 (“A narrowly crafted revenge porn criminal statute that protects the privacy of sexually explicit images can be reconciled with the First Amendment.”).

230. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

231. *Id.*

232. *Id.*

233. Citron & Franks, *supra* note 3, at 386 (“Civil liberties groups rightly worry that if revenge porn laws ‘aren’t narrowly focused enough[,] they can be interpreted too broadly.” (quoting Anne Flaherty, ‘Revenge Porn’ Victims Press for New Laws, *BIGSTORY* (Nov. 15, 2013 5:34 PM), <http://bigstory.ap.org/article/revenge-porn-victims-press-new-laws>)).

234. *Id.*

235. Mary Emily O’Hara, *A Federal Revenge-Porn Bill Is Expected Next Month*, *DAILY DOT* (Jun. 21, 2015, 6:10 PM), <http://www.dailydot.com/politics/federal-revenge-porn-bill/>.

236. Citron & Franks, *supra* note 3, at 386.

proposed revenge porn bill after First Amendment concerns surfaced.<sup>237</sup> After striking down part of a similar law, the Missouri Supreme Court also voiced constitutional concerns.<sup>238</sup> Given the constitutional boundaries, it is probable that some of the current and proposed revenge porn legislation may go too far.<sup>239</sup>

A. *The Constitutionality of Current Legislation*

In April of 2014, Arizona Governor Jan Brewer signed H.B. 2515 into law.<sup>240</sup> The bill, passed unanimously in the House and the Senate, was blocked from enforcement by a federal judge seven months later.<sup>241</sup> H.B. 2515 makes it a crime to intentionally disclose a photograph of another person in a state of nudity if the person knows or should have known that the depicted person has not consented.<sup>242</sup> As discussed *supra*, this bill proscribes conduct that is protected under the First Amendment.<sup>243</sup> Without revisions, it is unlikely that this bill will be upheld.<sup>244</sup>

California passed its revenge porn law in October of 2013, making revenge porn attacks a misdemeanor punishable by up to 6 months in jail and a \$1000 fine.<sup>245</sup> In December of 2014, Noe Iniguez became the first person to be convicted under the new law.<sup>246</sup> Even after revisions, scholars claim “[t]he law is still not perfect.”<sup>247</sup> The law places a heavy burden on victims to prove they

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237. “*Revenge Porn*” Banned in California, *supra* note 23.

238. See *State v. Vaughn*, 366 S.W.3d 513, 513, 520 (Mo. 2012) (en banc) (holding that the provision “repeated unwanted communication to another person” was unconstitutionally overbroad (quoting Mo. Ann. Stat. § 565.090(1)(5) (West Supp. 2008))).

239. *Federal Judge Puts Arizona ‘Revenge Porn’ Law on Hold*, FOX NEWS (Nov. 26, 2014), <http://www.foxnews.com/politics/2014/11/26/federal-judge-puts-arizona-revenge-porn-law-on-hold/> (“The range of material that this law could bring in was hugely overbroad . . . as sort of a malicious invasion of privacy.” (quoting David Horowitz, executive director of the Media Coalition)).

240. H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014); Matthew Hendley, *Jan Brewer Signs Bill Making “Revenge Porn” a Felony*, PHX. NEW TIMES (May 1, 2014), [http://blogs.phoenixnewtimes.com/valleyfever/2014/05/jan\\_brewer\\_signs\\_arizona\\_revenge\\_porn\\_law.php](http://blogs.phoenixnewtimes.com/valleyfever/2014/05/jan_brewer_signs_arizona_revenge_porn_law.php).

241. *Federal Judge Puts Arizona ‘Revenge Porn’ Law on Hold*, *supra* note 239.

242. H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014).

243. *Federal Judge Puts Arizona ‘Revenge Porn’ Law on Hold*, *supra* note 239.

244. *Id.*

245. See “*Revenge Porn*” Banned in California, *supra* note 23.

246. Veronica Rocha, *‘Revenge Porn’ Conviction Is a First Under California Law*, L.A. TIMES (Dec. 4, 2014), <http://www.latimes.com/local/crime/la-me-1204-revenge-porn-20141205-story.html>.

247. See *id.* (quoting Mary Anne Franks, an associate professor of Law at the University of Miami).

suffered serious emotional distress as a result of the attack.<sup>248</sup> This requirement is not only difficult and unnecessary, but it forces victims to expose even more of their private lives to the public.<sup>249</sup> The amount of emotional distress a victim feels should have no impact on whether or not a crime was committed.<sup>250</sup>

The California law also requires that the offender have the intent to cause the victim severe emotional distress.<sup>251</sup> Although this requirement makes it less likely that the law will be overbroad, it also means that attackers who had no ill intent towards their victims will go unpunished.<sup>252</sup> Still, because of the law's intent requirement, it seems unlikely that this bill will be overturned as unconstitutional.<sup>253</sup>

In April of 2014, the state of Connecticut attempted to pass a revenge porn bill amid strong protests from the American Civil Liberties Union.<sup>254</sup> The non-profit organization argued that the legislation would criminalize pictures showing parts of the human body that may legally be shown in public.<sup>255</sup> It would also criminalize third parties, like MyEx.com, who distributed the pictures without notice of non-consent.<sup>256</sup> If passed, this law would directly conflict with section 230 of the Communications Decency Act, which grants immunity for third parties like MyEx.com.<sup>257</sup> Without revision, it is likely that this bill will be struck down in federal court.<sup>258</sup>

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248. See 2013 Cal. Stat. 3898 (explaining that the perpetrator must act “with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress”); Rocha, *supra* note 246.

249. Rocha, *supra* note 246.

250. See *id.* (arguing that the requirement of emotional distress is unnecessary and burdensome on the victim).

251. See 2013 Cal. Stat. 3899.

252. See *id.* (discussing how only those with the intent to cause emotional distress will be held accountable under this law); see also Citron & Franks, *supra* note 3, at 387 (stating that the California law will “not reach people who repost nude images without knowledge or agreement that the image be kept private”).

253. Citron & Franks, *supra* note 3, at 374–75 (noting that due to the intent requirement in the California law, which is absent from other proposed revenge porn statutes, it is more likely to be upheld by courts on First Amendment grounds).

254. ‘Revenge Porn’ Bill Needs Changes, *supra* note 169.

255. *Id.*

256. *Id.*

257. See *id.* (explaining that the bill would violate the principle of immunity for these third parties that has consistently been upheld by the courts); see also 47 U.S.C. § 230(c) (2012) (providing that no provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider).

258. *Testimony in Opposition to Senate Bill 489, an Act Concerning Unlawful Dissemination of an Intimate Image of Another Person*, ACLU-CT (Mar. 24, 2014), <http://www.acluct.org/wp-content/uploads/2014/03/acluct-sb489testimonyrevengeporn.pdf>.

*B. A Temporary Solution*

At the time of this writing, only thirteen states have revenge porn laws on their books.<sup>259</sup> While citizens of the remaining thirty-seven states wait for a state or federal law to pass, they remain unprotected.<sup>260</sup> These existing and potential victims should utilize contract law to better protect themselves. By signing a non-disclosure agreement, a person is contractually bound not to share information they receive from another person.<sup>261</sup> Celebrities often use this remedy when they enter into new business and personal relationships.<sup>262</sup> In fact, pop icons from Britney Spears to Mariah Carey are rumored to use non-disclosure agreements in a personal context.<sup>263</sup>

Using a non-disclosure agreement in the context of personal relationships has two main benefits. First, by having a sexual partner sign a non-disclosure agreement, victims are providing themselves with a remedy in contract law.<sup>264</sup> If a partner breaches this agreement by posting pictures on the Internet, the victim can recover damages from the attacker.<sup>265</sup> Of course, the utility of this remedy depends upon the attacker having assets from which to satisfy an adverse judgment.<sup>266</sup> The other main benefit of using this type of agreement is evidence related.<sup>267</sup> In the event of a

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259. Leber, *supra* note 5.

260. See generally Citron & Franks, *supra* note 3, at 358–61 (arguing that current civil remedies are insufficient to protect revenge porn victims, thus a remedy in criminal law is necessary).

261. 1 CORPORATE COUNSEL'S GUIDE TO TECHNOLOGY MANAGEMENT & TRANSACTIONS § 6:26, Westlaw (database updated June 2014); *Nondisclosure Agreements*, FINDLAW, <http://smallbusiness.findlaw.com/intellectual-property/a-nondisclosure-agreement.html>.

262. Audrey Davidow, *L.A.'s Secret Service*, L.A. TIMES (July 26, 2007), <http://articles.latimes.com/2007/jul/26/home/hm-confidential26>.

263. 7 *Unbelievable Confidentiality Agreements*, FAME 10 (Feb. 6, 2015), <http://www.fame10.com/entertainment/7-unbelievable-celebrity-nondisclosure-agreements/3/>. Celebrity Chris Brown is rumored to have required his party guests to sign a confidentiality agreement before he arrived to prevent anyone from disclosing his behavior at a birthday party. *Id.*

264. See *Courtroom Scis., Inc. v. Andrews*, No. 3:09-CV-251-O, 2009 WL 1313274, at \*12 (N.D. Tex. May 11, 2009) (explaining that a cause of action for breach of a non-disclosure agreement requires proving that a valid contract was breached and damages were incurred as a result).

265. *Id.*

266. See Citron & Franks, *supra* note 3, at 358 (“Even in ideal circumstances . . . it may be hard to recover much in the way of damages . . . if defendants are effectively judgment proof.”).

267. See Teri Karobnik, *Who Does California's New Revenge Porn Law Actually Protect?*, NEW MEDIA RTS. (Oct. 29, 2013, 11:35 AM), [http://www.newmediarights.org/who\\_does\\_california's\\_new\\_revenge\\_porn\\_law\\_actually\\_protect](http://www.newmediarights.org/who_does_california's_new_revenge_porn_law_actually_protect) (“Unless both parties stop to sign a non-disclosure agreement, it will be extremely difficult to prove [non-consent] in court.”).

breach, the victim can use the agreement to show that the defendant had notice of non-consent in a criminal proceeding.<sup>268</sup> Additionally, using this type of agreement can have a deterrence effect.<sup>269</sup> If expectations of privacy are set at the beginning of a sexual relationship using this type of agreement, the party receiving the pictures may be less likely to share them.<sup>270</sup> Though not a complete solution, using non-disclosure agreements in the context of personal relationships can prove beneficial while citizens wait for better-drafted revenge porn legislation.<sup>271</sup>

### C. A Permanent Solution

Drafting a law that is both effective and constitutional is possible.<sup>272</sup> An important element of a revenge porn law is defining the required mens rea.<sup>273</sup> The mens rea should encompass the defendant's knowledge that the subject of the picture did not consent to disclosure.<sup>274</sup> Including this element will ensure that individuals like the librarian in Arizona will not be culpable under the law.<sup>275</sup> Legislatures should look to California's revenge porn law, which provides an example of an appropriate mens rea element.<sup>276</sup>

The mens rea requirement should not be confused with motive.<sup>277</sup> California's revenge porn law goes too far in also requiring the defendant "know[s] or should know that distortions of the image will cause serious emotional distress."<sup>278</sup> A malicious motive requirement does nothing to bolster the constitutionality of

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268. See H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (requiring that the subject did not consent to disclosure of the picture); 1 CORPORATE COUNSEL'S GUIDE TO TECHNOLOGY MANAGEMENT & TRANSACTIONS, *supra* note 261, § 6:26 (providing that a non-disclosure agreement embodies the notion that the parties to the agreement did not consent to disclosure); *Nondisclosure Agreements*, *supra* note 261.

269. See generally *United States v. Microsoft Corp.*, 7 Trade Reg. Rep. (CCH) ¶ 4088A, at 45, 107 (1997) (explaining that utilizing non-disclosure agreements can serve as a deterrent to disclosing information).

270. See *id.*; see also Karobnik, *supra* note 267 (discussing the high probability of successful litigation if the victim has a non-disclosure agreement with the perpetrator).

271. See *supra* notes 264–70.

272. Citron & Franks, *supra* note 3, at 376.

273. *Id.* at 387.

274. *Id.*

275. See *id.*; see also Jeong, *supra* note 173.

276. CAL. PENAL CODE § 647(j)(4)(A) (West Supp. 2015) (requiring as an element that the parties "agree or understand the image shall remain private").

277. See MARY ANNE FRANKS, DRAFTING AN EFFECTIVE "REVENGE PORN" LAW: A GUIDE FOR LEGISLATORS 3, [http://www.endrevengeporn.org/main\\_2013/wp-content/uploads/2014/08/Guide-for-Legislators\\_7-18-14.pdf](http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf).

278. PENAL § 647(j)(4)(A).

a law and leaves many victims without redress.<sup>279</sup> Additionally, victims of attackers who act without any malicious motive are left unprotected.<sup>280</sup> Malicious motive requirements should be left out of revenge porn laws.<sup>281</sup>

A revenge porn law should also provide exceptions for disclosure that is within the public interest.<sup>282</sup> While not eliminating overbreadth issues, an exception for disclosures that are within the public interest will better reflect the current state of First Amendment jurisprudence.<sup>283</sup> This kind of exception would ensure that the women who exposed Congressman Weiner's sexually explicit photos would be immune from prosecution.<sup>284</sup>

## VII. CONCLUSION

Revenge porn is a serious problem.<sup>285</sup> Lives have been destroyed and ended by this cultural phenomenon.<sup>286</sup> Current remedies for victims are insufficient at best, making the existence of a criminal remedy both urgent and necessary.<sup>287</sup> Although present attempts at criminalization have raised constitutional concerns, these concerns can be avoided with "[c]areful and precise drafting."<sup>288</sup> No one should be able to expose a person's most private moments to the world without his or her consent.<sup>289</sup> Doing so should be a criminal act in every state.<sup>290</sup> If states can reconcile their revenge porn laws with the First

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279. Citron & Franks, *supra* note 3, at 387 ("Malicious motive requirements are not demanded by the First Amendment and, in fact, create an unprincipled and indefensible hierarchy of perpetrators.").

280. *See id.* (arguing that intent should be irrelevant).

281. *Id.*

282. *Id.* at 388.

283. *Id.*

284. *Id.*

285. *See 'Revenge Porn': Peers Urge Greater Clarity on Guidelines*, BBC NEWS (July 29, 2014), <http://www.bbc.com/news/uk-politics-28541144> ("[Revenge porn] is becoming . . . a serious problem.").

286. *See* Citron & Franks, *supra* note 3, at 347 (explaining that victims suffer great harms "including stalking, loss of professional and educational opportunities, and psychological damage"); *see also* Kitchen, *supra* note 226, at 265 (stating that some revenge porn victims resort to suicide or are even killed).

287. *See* Citron & Franks, *supra* note 3, at 349 ("In the real world, civil lawsuits are no remedy at all." (quoting Mitchell A. Matorin, *In the Real World, Revenge Porn Is Far Worse Than Making It Illegal*, TPM CAFE: OPINION (Oct. 18 2013, 6:00 AM), <http://talkingpointsmemo.com/caffe/our-current-law-is-ompletely-inadequate-for-dealing-with-revenge-porn>)).

288. *Id.* at 386.

289. *Id.* at 390.

290. *Id.*

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Amendment, it seems we may soon be able to gain control over this destructive trend.<sup>291</sup>

*Taylor E. Gissell*

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291. *Id.* at 390–91.