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PUBLIC SHAMING IN THE DIGITAL AGE: ARE CRIMINAL LAWS THE MOST EFFECTIVE MEANS TO REGULATE REVENGE PORN?

*LUKE FIEDLER**

This Note attempts to develop an initial framework for best regulating the growing trend of online harassment known as “revenge porn.” Revenge porn is the act of widely disseminating, via the Internet, nude or otherwise explicit photos or videos that were produced and exchanged while two individuals shared an intimate encounter or relationship. Oftentimes revenge porn “attacks” occur out of spite or scorn felt by one of the individuals as a way to publically humiliate the other individual. The Note first describes this type of harassment, its unique effects on its victims, and observes the ways in which the trend is becoming increasingly widespread.

In the fall of 2013, California became the first state to draft new, specific legislation targeting revenge porn. This Note begins by analyzes the positive effects intended by this legislation, and highlights noteworthy criticisms that have been directed towards the law since it was enacted.

The Note then uses the perceived shortcomings of the California law as an opportunity to examine which area of the law is best for regulating a uniquely modern-day dilemma—either through criminal or civil legislation. The Note examines the various advantages and disadvantages of using criminal law to regulate revenge porn, as well as the advantages and disadvantages of trying to regulate revenge porn through various privacy and harassment-related doctrines in a civil context.

Then, the Note argues for copyright law as the ideal area of the law from which revenge porn can and should be regulated. In short, while other regulatory areas discussed work to discourage the creation of revenge porn, copyright law allows society to achieve the ideal balance between creation and protection. Creators of the underlying content exploited by revenge porn should be encouraged to continue producing this content within their personal relationships. Creators should also have strong and targeted remedies, though, in case they fall victim to a revenge porn attack. This Note attempts to highlight the ways in which copyright law can be altered, slightly, to achieve this balance.

I. INTRODUCTION

A. *Two New Types of Online Behavior Highlight the Possible Harms of Sharing Over the Internet*

In his keynote address at the 2010 Mobile World Congress in Barcelona, Eric Schmidt, then CEO of Google, said that “the joint project of all of us [in the mobile industry] [is] to make mobile be the answer to pretty much everything.”¹ The proliferation and complexity within the mobile phone and Internet industries have made more virtuous pursuits easier; it has allowed for saving lives after an earthquake in Haiti² and transforming agriculture in Africa.³ Yet, the increased mobility and connectivity in modern culture have also become the “answers” to devastating new forms of heartbreak, shame, and harassment.⁴

With cellphone cameras rampant, many Americans are giving in to the urge to document more and more about their lives.⁵ In addition, nearly two-thirds of smartphone users store personal and intimate information on their mobile phones, including bank account information, passwords, credit card numbers, and even—when it comes to dating—revealing photos.⁶ As

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1. Jim Luce, *The Impact of Cell Phones on Psychology, Community, Culture, Arts and Economics*, HUFFINGTON POST (Mar. 22, 2010, 9:30 AM), http://www.huffingtonpost.com/jim-luce/the-impact-of-cell-phones_b_508011.html.

2. Tim Large, *Cell Phones and Radios Help Save Lives After Haiti Earthquake*, REUTERS (Jan. 25, 2010, 6:07 AM), <http://www.reuters.com/article/2010/01/25/us-haiti-telecoms-idUSTRE60007M20100125>.

3. Tolu Ogunlesi & Stephanie Busari, *Seven Ways Mobile Phones Have Changed Lives in Africa*, CNN (Sept. 14, 2012, 2:02 PM), <http://www.cnn.com/2012/09/13/world/africa/mobile-phones-change-africa/index.html>.

4. Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657-58 (2012).

5. Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?pagewanted=all&_r=0.

6. *Lovers Beware: Scorned Exes May Share Intimate Data And Images Online*, MCAFEE (Feb. 4, 2013), <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx> [hereinafter

a result, two developing and alarming online trends are affecting the flirtation, courtship, and breakups of dating culture.⁷ One phenomenon is referred to as “sexting,” which is defined as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet.”⁸ The other, and the focus of this Note, is a type of nonconsensual pornography,⁹ known colloquially as “revenge porn.”¹⁰ This is a form of sexual assault that involves the distribution of nude or sexually explicit photos or videos of an individual without their consent¹¹ after the two parties shared or created the content during their relationship.¹² In this case, a scorned ex-lover or a friend generally posts revenge porn in order to seek revenge after a relationship has gone sour.¹³

Thus far, much of the legal activity specifically combating sexting focuses on the ages of the parties involved in the creation, storage, and distribution of the explicit images.¹⁴ This is partly because state laws against child pornography provide an already established legislative framework and moral operating stance from which to address the relatively new sexting trend— though it has been questioned whether state laws

Lovers Beware].

7. Willard Foxton, *Revenge Porn and Snapchat: How Young Women Are Being Lured into Sharing Naked Photos and Videos with Strangers*, THE TELEGRAPH BLOG (Feb. 13, 2013), <http://blogs.telegraph.co.uk/technology/willardfoxton2/100008808/revenge-porn-and-snapchat-how-young-women-are-being-lured-into-sharing-naked-photos-and-videos-with-strangers/>.

8. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009), *aff'd sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010); Foxton, *supra* note 7.

9. Somini Sengupta, ‘*Revenge Porn*’ *Could Be Criminal Offense in California*, THE N.Y. TIMES BITS BLOG (Aug. 27, 2013, 8:18 AM), http://bits.blogs.nytimes.com/2013/08/27/revenge-porn-could-be-criminal-offense-in-california/?_r=0.

10. END REVENGE PORN, <http://www.endrevengeporn.org/> (last visited June 26, 2014) [hereinafter *End Revenge Porn*].

11. *Id.*

12. Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 364 (2010).

13. *End Revenge Porn*, *supra* note 10.

14. Ryan, *supra* note 12, at 361.

prohibiting child pornography sufficiently cover revenge porn.¹⁵ This activity also originates in part from the rapid growth in cellphone use among teenagers over the last decade, the correlative growth in sexting, and society's desire to prevent that behavior from leading to a corresponding growth in sexual behavior among teenagers.¹⁶ Florida, for example, created a law that addresses only sexting between minors, and escalates the charges and punishments based on the number of offenses.¹⁷ Additionally,

[I]n Pennsylvania, the state at the center of the nation's first federal sexting case, a prosecutor charged several minors who engaged in sexting with distributing child pornography and criminal use of a communication facility. Under Pennsylvania law, these crimes are felonies and carry a minimum seven-year prison term and registration as a sex offender for at least ten years.¹⁸

B. The Particular Effects and Complications of "Revenge Porn"

Of course, not only do these approaches fail to provide meaningful remedies to minor victims of revenge porn, but they also fail to deter any sexting or posting of revenge porn among adults.¹⁹ As a result, adult victims are also left without meaningful remedies.²⁰ Moreover, the effects of sexting and revenge porn can be especially harmful for women, who are

15. *Id.* at 361-62.

16. See generally Nicole A. Poltash, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH. 1, 4-6 (2013) (providing data from numerous studies that suggests, in part, that girls who "sext" are more likely to have engaged in unsafe sex, and that more boys and girls that had sent sexts reported having had intercourse compared to those who had not sexted).

17. FLA. STAT. ANN. § 847.0141 (West 2014). For example, a minor who commits sexting must complete community service and pay a fine after the first offense, which is considered a noncriminal violation. A second offense escalates to a first degree misdemeanor with a maximum 1-year prison sentence. A third offense becomes a third degree felony, with a maximum 5-year prison sentence.

18. Ryan, *supra* note 12, at 371 (internal citations omitted).

19. *Id.* at 362.

20. *Id.*

often the targets of these and other types of harassment over the Internet.²¹

This is significant particularly with revenge porn because of the unique set of challenges it poses to its (often female) victims.²² Unlike sexting, where the two parties that exchange content can be exposed to sanctions even without distributing that content to anyone else,²³ revenge porn necessarily involves a third party far beyond the two ex-lovers or friends—namely, websites that specialize in hosting this content.²⁴ Furthermore, some websites generate significant profit and earn considerable media attention from hosting this content.²⁵ In turn, “many other Internet users can spread the posted images or videos far and wide in a matter of hours, or less.”²⁶ To make matters worse, posters to revenge porn websites will often distribute the content “accompanied by disparaging descriptions and identifying details, including where the women live and work, as well as links to their Facebook pages.”²⁷

It is this final element of revenge porn that perhaps has the most crippling effect, as “[v]ictims say they have lost jobs, been approached in stores by strangers who recognized their photographs, and watched close friendships and family relationships dissolve.”²⁸ Some women have gone

21. Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 374-75 (2009).

22. *Id.* at 375 (stating that women are particularly affected by revenge porn, as it “interferes with their professional lives” and “raises their vulnerability to offline sexual violence”).

23. Ryan, *supra* note 12, at 361.

24. Sengupta, *supra* note 9.

25. Recent news publications have suggested that Hunter Moore, founder of the now-defunct revenge porn site IsAnyoneUp.com, earned somewhere between \$13,000 and \$20,000 per month as well as over 300,000 website hits per month. *See generally* Lee Moran & Beth Stebner, *Now FBI Launch Investigation into Founder of 'Revenge Porn' Site Is Anyone Up?*, THE DAILY MAIL ONLINE (May 23, 2012, 8:17 AM), <http://www.dailymail.co.uk/news/article-2148522/Hunter-Moore-founder-revenge-porn-site-Is-Anyone-Up-investigated-FBI.html>; David Kluff, *Revenge Porn: “Is Anyone Up” on Copyright Law?*, TRADEMARK & COPYRIGHT LAW BLOG (Dec. 20, 2011), <http://www.trademarkandcopyrightlawblog.com/2011/12/revenge-porn-is-anyone-up-on-copyright-law/>.

26. Sengupta, *supra* note 9.

27. Goode, *supra* note 5.

28. *Id.*

so far as to change their names or alter their appearance.²⁹

The effect of widespread dissemination of sexually explicit content is particularly damaging for women.³⁰ Mary Anne Franks, a law professor at the University of Miami, argued that women might suffer greater consequences as revenge porn victims “because of the sexual double standard.”³¹ Revenge porn can interfere with one’s professional life by branding women in general as “incompetent workers and inferior sexual objects,” as well as leaving them more vulnerable to offline sexual harassment or violence, both in and out of the workplace.³² Such harassment can cause considerable emotional distress and has led to some women committing suicide.³³

C. *As Revenge Porn Grows, Efforts to Fight Back*

To make matters worse, revenge porn is only growing as a type of online behavior.³⁴ A McAfee study, published in February 2013, revealed that though 94% of Americans believe their online and mobile phone data (and the revealing photos that data may contain) are safe in the hands of their partners, “13% of adults have had their personal content leaked to others without their permission.”³⁵ “Additionally, 1 in 10 ex-partners have threatened” to leak those explicit photos online, with the study estimating that nearly 60% of those threats are ultimately carried out.³⁶ Despite those

29. *E.g., id.*

30. *E.g., Citron, supra* note 21, at 375.

31. Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on Websites for Posting Photos They Didn't Consent to*, 99 A.B.A. J. 45 (2013), available at http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_the_y_didnt_c/ (“‘There’s really no way for involuntary porn to be effective unless there are certain misogynist perceptions about women and how they should handle themselves sexually,’ says Franks . . .”).

32. Citron, *supra* note 21, at 375.

33. *E.g., id.*

34. *See Lovers Beware, supra* note 6 (discussing how nearly 60% of threatened ex-lovers have been exposed by their exes).

35. *See id.*

36. *See id.*

risks, McAfee estimated that “36% of Americans still plan to send sexy or romantic photos to their partners via email, text and social media on Valentine’s Day.”³⁷

It is not surprising then, that NBC News recently said revenge porn “has become, especially for a younger generation, a cultural-technological phenomenon as normal as tweeting or texting.”³⁸ As the sites hosting this content and the damage caused by them³⁹ have increased⁴⁰, “legal scholars and women’s advocates have begun to push for criminal penalties for people who post on them.”⁴¹ On October 1, 2013, California Governor Jerry Brown signed into law a bill “making it a misdemeanor for a person to post online or otherwise distribute a nude image of another taken in circumstances where the parties expected the image to remain private.”⁴² The bill amends Section 647 of the California Penal Code that addresses invasion of privacy, a form of disorderly conduct.⁴³ First-time violations of California’s law are misdemeanors, and carry a penalty of up to six months in jail and a \$1,000 fine.⁴⁴ Not long after the California bill passed, several New York state legislators announced that they would introduce similar legislation.⁴⁵ New York State Senator Phil Boyle has stated that the

37. *See id.*

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

39. *See Citron, supra* note 21, at 375 (discussing how such harassment has a profound effect on women by interfering with their professional lives and making them vulnerable to offline sexual violence among other things).

40. *See Goode, supra* note 5 (discussing how ‘revenge porn sites’ are proliferating and are largely immune from criminal action).

41. *See id.*

42. David McAuley, *California Enacts, New York to Propose Criminal Laws Tackling ‘Revenge Porn’*, BLOOMBERG LAW (Oct. 9, 2013), <http://www.bloomberglaw.com/document/X356APQO000000?campaign=bnaemailink&issue=20131004&jcsearch=bna%2520a0e2e8w0p5&js=0&sitename=bna&subscriptiontype=bnaeipl#jcite>.

43. CAL. PENAL CODE § 647 (West 2014).

44. *See McAuley, supra* note 42 (discussing how the California law that bars revenge porn is punishable as a misdemeanor).

45. Chris Welch, *Following California’s Lead, New York Lawmakers Look to Criminalize ‘Revenge Porn’*, THE VERGE (Oct. 7, 2013, 5:36 PM), <http://www.theverge.com/2013/10/7/48136>

proposed legislation would make non-consensual disclosure of sexually explicit images a misdemeanor and impose a \$30,000 fine.⁴⁶

Legislators give several reasons for proposing criminal sanctions, as opposed to civil suits.⁴⁷ First, they argue that criminalizing revenge porn postings will be a better deterrent of future, nonconsensual uploading or disclosing of explicit images than a civil suit.⁴⁸ Indeed, there are several civil remedies already available to victims, such as suits for intentional infliction of emotional distress,⁴⁹ “copyright infringement, and invasion of privacy or, in some cases, child pornography.”⁵⁰ In addition, criminal sanctions are less expensive and not as emotionally exhausting as civil suits typically brought under any of these different causes of action, which can be lengthy and costly.⁵¹

Most significantly, however, these criminal laws target individuals who distribute or upload revenge porn to hosting websites because current federal law largely shields the hosting sites from liability under Section 230 of the Communications Decency Act.⁵² Section 230 states that “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.”⁵³ This means that legislators can only hope the websites will be indirectly affected by these new laws, which could theoretically deter many of the individuals who would provide their sites with the explicit content.⁵⁴

44/new-york-lawmakers-look-to-criminalize-revenge-porn.

46. Casey Seiler, *Boyle Will Introduce Bill to Fight ‘Revenge Porn’ (Updated)*, TIMES UNION CAPITOL CONFIDENTIAL BLOG (Oct. 3, 2013, 5:20 PM), <http://blog.timesunion.com/capitol/archives/196262/boyle-will-introduce-bill-to-fight-revenge-porn/>.

47. *See id.* (discussing how criminal sanctions, rather than civil suits, might be more effective in deterring ‘revenge porn’).

48. *Id.*

49. McAuley, *supra* note 42.

50. Goode, *supra* note 5.

51. Seiler, *supra* note 46.

52. *Id.*

53. 47 U.S.C. § 230(c)(1) (2012).

54. Seiler, *supra* note 46.

Further complicating the efforts to combat revenge porn is the fact that there is no universal agreement amongst scholars, legislators, and victims of revenge porn over the effectiveness of laws criminalizing the behavior.⁵⁵ Some scholars advocate for strengthening civil remedies instead of pushing for new criminal laws, in part because civil remedies would provide punishment without further crowding America's prison system.⁵⁶ Many oppose the laws on the grounds that they interfere with our commitment to free speech, pitting the First Amendment against the rights of revenge porn victims.⁵⁷ For example, the American Civil Liberties Union opposed the California measure when it was originally introduced, arguing that the law was unconstitutional because it lacked a requirement of actual harm.⁵⁸ Many also downplay the very acknowledgment of rights for victims of revenge porn, arguing individuals can protect themselves simply by making better choices and holding themselves more responsible for their own actions.⁵⁹

On one hand, state prosecutors have called on Congress to amend the scope of Section 230 of the Communications Decency Act so as to expose such revenge porn websites to liability.⁶⁰ But on the other hand, Internet and free-speech advocates have loudly criticized these considerations on the grounds that it will stifle the serendipity and innovation that make the Internet thrive.⁶¹

D. Primary Note Focus

This Note consists of three substantive parts. Part II examines the

55. Goode, *supra* note 5.

56. *Id.*

57. Citron, *supra* note 21, at 405.

58. Sengupta, *supra* note 9.

59. Citron, *supra* note 21, at 397; *see also* Goode, *supra* note 5 (citing a "blame-the-victim" attitude towards female victims of revenge porn, similar to blaming rape victims for what they wear or where they walk).

60. Seiler, *supra* note 46.

61. *See* Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?* (*Forbes Cross Post*), CYBERSPACE LAW (February 9, 2013), http://blog.ericgoldman.org/archives/2013/02/what_should_we.htm ("even if the law were more effective, there will always be uncomfortably anti-social behavior online."); *see also* Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 532-33 (2013).

history of lawmakers' responses to revenge porn, the various legal courses of action currently available to victims, and the rationale behind the development of new laws specifically aiming to criminalize this type of harassment. Part III argues that while these new criminal laws are necessary and can be effective deterrents of this behavior, they fail to properly address and remedy certain debilitating effects unique to revenge porn that fall outside the reach of criminal law. Part III then analyzes various proposals for regulation through civil laws and private market forces in much the same fashion. Finally, Part IV discusses viable, yet overlooked, responses to revenge porn that are based in federal copyright law. Part V then argues that the best regulatory balance of the various complex interests surrounding revenge porn will necessarily draw from slight changes to copyright law.

II. EFFORTS TO CRIMINALIZE REVENGE PORN FACE SEVERAL HURDLES AND ULTIMATELY FALL SHORT

A. *State Lawmakers Battle Underwhelming Precedent and Growing Trends*

Although some state lawmakers have recently noticed the growing trend of revenge porn⁶² and have responded with a call to draft specific criminal legislation combating the behavior, there is no clear legal avenue to penalizing posters of revenge porn.⁶³ Before California's law in October 2013, New Jersey was the only state with a law that came close to criminalizing revenge porn.⁶⁴ "[S]ince 2003, New Jersey has had an invasion of privacy law aimed at video voyeurs, people who secretly videotape others naked or having sex without their consent."⁶⁵ A spokesman for the New Jersey Attorney General's office said that while

62. Suzanne Choney, *'Revenge Porn' Law in California Could Pave Way for Rest of Nation*, NBCNEWS.COM TECHNOLOGY (Sept. 3, 2013, 4:34 PM), <http://www.nbcnews.com/technology/revenge-porn-law-california-could-pave-way-rest-nation-8C11022538>. (California Republican state Senator Anthony Cannella, who authored the California bill, told NBC News that revenge porn has "traumatized real victims; it's a growing problem . . . Technology moves much faster than our laws . . . When we identify a problem, it's our responsibility to deal with it.")

63. Lorelei Laird, *Striking Back at Revenge Porn: Victims are Taking on Websites for Posting Photos They Didn't Consent to*, 99 A.B.A. J. 45 (2013), available at http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_the_y_didnt_c/

64. Choney, *supra* note 62.

65. *Id.*

state legislators did not specifically discuss revenge porn in passing the law, “the language of the statute is quite broad and arguably applies to allow prosecution of an individual in a ‘revenge porn’ situation.”⁶⁶

In April 2013, Florida legislators unsuccessfully attempted to pass a revenge porn law.⁶⁷ One of the cited concerns for the failed bill centered on a requirement that the explicit content be paired with the revenge porn victim’s “descriptive information in a form that conveys . . . personal identification information.”⁶⁸ Requiring this personal information, such as a victim’s name or email address, seemed to some critics as a way for revenge porn posters to circumvent liability.⁶⁹ To others, the requirement of personal information accompanying the explicit photos ignored the fact that posting this content onto the Internet was incriminating and harmful *regardless* of whether personal information was attached.⁷⁰

In fact, some revenge porn websites have shown that including the victim’s personal information alongside the explicit content is not necessary for the poster to still achieve the desired humiliation.⁷¹ One website allows the revenge porn poster to assign the person in the photograph to different categories to allow for theme-based browsing, such as viewing by age, weight, or even “alleged STD status.”⁷² Other sites include space for visitors to anonymously post harassing comments to whatever photo is posted.⁷³ Most importantly, *images* tend to spread across

66. *Id.*

67. *Id.*

68. H.B. 787 (Fla. 2013), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0787c1.docx&DocumentType=Bill&BillNumber=0787&Session=2013; *see also* 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/>.

69. Choney, *supra* note 62.

70. Laird, *supra* note 63 (Florida resident and revenge porn victim Rebekah Wells said that the bill’s requirement that the postings were only crimes if they included the victim’s personal information was “ridiculous, because people recognize me by my face.”).

71. *See generally id.*

72. Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, JOLT DIGEST (May 28, 2013), <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters>.

73. *Id.*

the Internet faster than any accompanying personal *information*—as a result, activists urge revenge porn victims to use Google’s reverse image search engine⁷⁴ to track down all of the websites where the revenge porn images may have ended up.⁷⁵

B. California’s New Law Falls Short

For these reasons, advocates of criminal laws targeting revenge porn viewed the California bill as one full of precedent-setting potential that other states could follow in the future.⁷⁶ Unfortunately, while California’s bill was lauded as the first law to specifically target revenge porn, it was also almost immediately criticized.⁷⁷

“SB 255, codified as California Penal Code 647(j)(4) . . . says it is disorderly conduct for a defendant to take intimate and confidential recordings, such as photos or videos, and then distribute them to intentionally cause serious emotional distress to the victim.”⁷⁸ As previously mentioned, the bill amends Section 647 of the California Penal Code that addresses invasion of privacy, a form of disorderly conduct.⁷⁹ First-time violations of California’s law are misdemeanors, and carry a

74. Jacob Michael Kaufman & Aaron P. Rubin, *Keeping Privates Private: The Legal Landscape of Revenge Porn*, MONDAQ (Feb. 3, 2014), <http://www.mondaq.com/unitedstates/x/290608/Social+Media/Keeping+Privates+Private+The+Legal+Landscape+of+Revenge+Porn>. See generally GOOGLE INSIDE SEARCH, <http://www.google.com/insidesearch/features/images/searchbimage.html>.

75. Kaufman & Rubin, *supra* note 74.

76. Choney, *supra* note 62 (Holly Jacobs, a Florida resident and victim of revenge porn who later founded the organization End Revenge Porn, told NBC News that the California bill “is so important because it has the potential to set a precedent for other states considering to criminalize revenge porn.”).

77. Jessica Roy, *California’s New Anti-Revenge Porn Bill Won’t Protect Most Victims*, TIME (Oct. 3, 2013), <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/> (Natalie Webb, director of communications at the Cyber Civil Rights Initiative, a non-profit that confronts abuse online, called it a “good first step.” Holly Jacobs, the founder of the Cyber Civil Rights Initiative and early advocate of the bill, didn’t think it went far enough, calling it “weak . . . unfortunately due to victim-blaming on the part of other legislators,” and referring to a state legislator who told her people who take intimate photographs of themselves are “stupid.” Republican State Senator Anthony Canella, who sponsored the bill, said “at least we got people talking about it . . . Then we can do more in the future.”).

78. Eric Goldman, *California’s New Law Shows It’s Not Easy To Regulate Revenge Porn*, TECHNOLOGY & MARKETING LAW BLOG (Oct. 16, 2013), http://blog.ericgoldman.org/archives/2013/10/californias_new_1.htm; see also CAL. PENAL CODE § 647(j)(4) (West 2014).

79. CAL. PENAL CODE § 647 (West 2014).

penalty of up to six months in jail and a \$1,000 fine.⁸⁰

The law has been criticized for being too narrow,⁸¹ specifically in that the law does not offer protection to victims who took the photos themselves.⁸² “A person can only be charged under the [California] law if he or she published photos that they themselves had taken of [the] victim.”⁸³ A recent survey sheds light on how problematic it is for the California law to omit language that would protect victims who were also the photographers of the now-public images:⁸⁴ of the 864 revenge porn victims surveyed, 80 percent took the photos or videos of themselves that were later used.⁸⁵ Thus, the California law could, in practice, only end up reaching a minority of the victims it was intended to protect.⁸⁶

In addition, the law has been criticized for failing to apply to malicious third parties that obtain a photo or video by hacking into the victim’s mobile phone or computer, and then redistributing the image or recording.⁸⁷ Furthermore, the law has left itself open to “confidentiality disputes.”⁸⁸ The law is strict only in its application, in that it applies “under circumstances where the parties agree or understand that the image shall remain private.”⁸⁹ While this is not a problem in situations in which the victim clearly never gave his or her consent to being recorded at all, or to sharing the content with the public, in other cases the defendant and

80. David McAuley, *California Enacts, New York to Propose Criminal Laws Tackling ‘Revenge Porn’*, BLOOMBERG LAW (Oct. 9, 2013), <http://www.bloomberglaw.com/document/X356APQO00000?campaign=bnaemailink&issue=20131004&jcsearch=bna%2520a0e2e8w0p5&js=0&sitenam=bna&subscriptiontype=bnaeipl#jcite>.

81. Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED.COM (Oct. 28, 2013, 9:30 AM), <http://www.wired.com/opinion/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/>.

82. Roy, *supra* note 77; *see also* Goldman, *supra* note 78.

83. *Id.*

84. *Id.*

85. Press Release, The Cyber Civil Rights Initiative, Inc., *Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims* (Sept. 10, 2013), http://www.cybercivilrights.org/press_releases.

86. Roy, *supra* note 77.

87. Goldman, *supra* note 78.

88. *Id.*

89. CAL. PENAL CODE § 647(j)(4)(A) (West 2014).

victim may disagree about their expectations for the photo or video, which some posit would make conviction “difficult or impossible.”⁹⁰

The “intent” element has also spurred significant backlash and debate. The law requires that the defendant subsequently distribute the content “with the intent to cause serious emotional distress.”⁹¹ However, it may be difficult to prove such “intent without an admission from the defendant or a piece of ‘smoking gun’ evidence.”⁹² Some critics have argued that partly for this reason, the bill “only goes halfway” because focusing on the intent of the poster fails to treat the posting of explicit content without consent as “objectively harmful” conduct *itself*.⁹³

Lastly, the law has been criticized for making the unconsented distribution of the explicit content a mere misdemeanor.⁹⁴ For example, at least one prosecutor has cited difficulty in finding sufficient justification for seeking a warrant to search the suspected poster’s computer for further evidence⁹⁵ in a suit brought under a cyberstalking or anti-stalking state law, also a misdemeanor.⁹⁶ This is because a common defense in cyberstalking cases is claiming that the images in question were obtained and distributed by someone who had hacked into his or her computer.⁹⁷ “The main way to disprove [this claim] is for the police to get a warrant to search a defendant’s computer or home,”⁹⁸ but state prosecutors have difficulty

90. Goldman, *supra* note 78; see also Gary Marshall, *Revenge Porn Websites Such As yougotposted.com Raise Complex Legal Issues*, GARY MARSHALL’S TECHNOLOGY LAW BLOG (Jan. 14, 2013), <http://marshall2law.com/2013/01/14/yougotposted-com-website-raises-complex-legal-issues/> (Marshall notes that “there are not clear lines of what constitutes privacy,” and that any finding of liability “might depend on the facts and circumstances of each case.”).

91. CAL. PENAL CODE § 647(j)(4)(A).

92. Goldman, *supra* note 78.

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

94. Danielle Citron, *How to Make Revenge Porn a Crime*, SLATE (Nov. 7, 2013, 1:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/making_revenge_porn_a_crime_without_trampling_free_speech.html.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

justifying such a warrant when the crime is not listed as a felony.⁹⁹ The same defense, and therefore the same roadblock, can arise under California's law.¹⁰⁰

For all of these reasons, California's law is far from comprehensive when attempting to combat revenge porn, leading some scholars to question whether many prosecutions will even develop under the statute.¹⁰¹

III. IF CALIFORNIA'S NEW LAW FALLS SHORT, WHAT THEN IS THE BEST METHOD FOR COMBATING REVENGE PORN?

The criticism that descended upon California's law underscores one of the biggest hurdles that still plagues reform efforts—a lack of consensus over which areas of the law to use in combating revenge porn. Because of the many other areas of the law that already apply to involuntary porn categories, under which revenge porn is classified, scholars, activists, and legislators have had difficulty finding the common ground necessary to craft effective new laws targeting revenge porn.¹⁰²

To start, there is general disagreement over whether revenge porn cases should be pursued in criminal¹⁰³ or civil¹⁰⁴ courts. From there, revenge porn raises a number of legal issues, and thus a potential overlap with numerous state and federal laws already in existence.¹⁰⁵ Areas include extortion and blackmail, child pornography, invasion of privacy (and related causes of action like false light, intrusion on seclusion, public disclosure of private facts, appropriation of name and likeness, and

99. *Id.*

100. *See* Citron, *supra* note 94.

101. Goldman, *supra* note 78.

102. Eric Goldman, *California's New Law Shows It's Not Easy To Regulate Revenge Porn*, TECHNOLOGY & MARKETING LAW BLOG (Oct. 16, 2013), http://blog.ericgoldman.org/archives/2013/10/californias_new_1.htm.

103. *See* Amanda Marcotte, *How to Stop Revenge Porn? Make it a Crime*, SLATE (Sep. 24, 2013, 11:16 AM), http://www.slate.com/blogs/xx_factor/2013/09/24/revenge_porn_is_domes-tic_abuse_it_should_be_a_crime.html.

104. *See* Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED.COM (Oct. 28, 2013, 9:30 AM), <http://www.wired.com/opinion/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/>.

105. *See* Gary Marshall, *Revenge Porn Websites Such As yougotposted.com Raise Complex Legal Issues*, GARY MARSHALL'S TECHNOLOGY LAW BLOG (Jan. 14, 2013), <http://mars-hall2law.com/2013/01/14/yougotposted-com-website-raises-complex-legal-issues/>.

intentional infliction of emotional distress), copyright infringement, voyeurism, and violation of state consumer protection statutes regulating unlawful acts in the course of commerce or trade.¹⁰⁶ In addition, hacking into someone's computer (if the facts presented such a situation for a revenge porn victim) is already illegal.¹⁰⁷ "Anti-stalking and anti-harassment laws can apply to involuntary porn, especially where a defendant distributes the recordings to hurt the victim."¹⁰⁸ Less obvious, at least one advocate has asked whether a federal law prohibiting "obscene and harassing telephone calls" may apply because the law actually applies to any telecommunications device.¹⁰⁹ While some scholars have maintained that these existing laws sufficiently cover revenge porn,¹¹⁰ others point to serious shortcomings in those laws, too.¹¹¹

Which area of the law is best suited to the unique challenges of revenge porn, then? As previously stated, this Note suggests that copyright reform would yield the best result for all the affected parties of a revenge porn case—the victims, the individuals posting the content, and the websites hosting the content. Nonetheless, before copyright's virtues and shortcomings can be properly examined, the various reform proposals for both criminal laws and civil laws require a more in-depth analysis.

A. *The Advantages and Disadvantages of Reforming Criminal Laws to Fight Revenge Porn*

As previously mentioned, revenge porn can be combated through state criminal laws in a variety of ways, including laws prohibiting extortion and blackmail, child pornography, voyeurism, or stalking and harassment.¹¹² One activist noted that even though revenge porn violates

106. *Id.*

107. Goldman, *supra* note 102.

108. *Id.*

109. Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on Websites for Posting Photos They Didn't Consent To*, 99 A.B.A. J. 45 (2013), available at http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/.

110. Goldman, *supra* note 102 ("Indeed, we have so many laws and crimes already on the books, it's challenging to find any examples of incivil or anti-social behavior that isn't already illegal under multiple overlapping laws.").

111. See Marcotte, *supra* note 103.

112. See Marshall, *supra* note 105; see also Marcotte, *supra* note 103.

some criminal law in many states, the police “are used to ‘brick-and-mortar crime scenes’ and may not think to apply those to online behavior”¹¹³ and worst of all, police may tell victims to be ashamed for taking the pictures in the first place as they turn down their case.¹¹⁴

The problems with trying to overlap existing criminal laws at the state level to the unique threat of revenge porn are well documented. For example, it is not clear whether state extortion laws would apply to third-party websites that encourage people to post explicit, compromising photos then insist that the subjects of those photos pay money (sometimes to different websites that are linked to the site hosting the images) to have the photos removed.¹¹⁵

Furthermore, voyeurism laws mostly do not apply to revenge porn because those laws focus on the recording of photographs or videos without the subject’s permission while most of the pictures on revenge porn websites were taken by the subject or with their knowledge.¹¹⁶ Even if voyeurism laws were to apply, they would only be effective after a “formal determination . . . that the pictures were in fact taken without the subject’s permission,” likely involving a lengthy, inefficient, and costly court intervention.¹¹⁷

The applicability of anti-stalking and anti-harassment laws, which would punish the distribution of sexually explicit images when there is

113. Laird, *supra* note 109.

114. *Id.*; see also Danielle Citron, *How to Make Revenge Porn a Crime*, SLATE (Nov. 7, 2013, 1:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/making_revenge_porn_a_crime_without_trampling_free_speech.html. (noting that police may refuse to get involved, instead telling victims that “the behavior is not serious enough for in-depth investigation” because “[the victims] are to blame for the whole mess, since they chose to share their intimate pictures.”).

115. Marshall, *supra* note 105 (noting that in the state of Washington, a local extortion law holds that it is “illegal knowingly to obtain or attempt to obtain by threat property or services of the owner.” But it remains difficult to properly classify the conduct of websites because of the unclear distinction between blackmail and extortion, leading to confusion and therefore stifling attempts to convict the sites.).

116. *Id.* (noting that while voyeurism laws may not immediately appear to apply to revenge porn, it could be quite common to envision a scenario in which “it would be impossible to distinguish between pictures [on revenge porn websites] that were truly taken without permission, and pictures that were taken with permission, but now that they are posted online, the subject has had a change of heart and has changed the facts to try to get the pictures taken down.”).

117. *Id.*

intent to harm, has also been questioned.¹¹⁸ However, “[h]arassment laws only apply if the defendant is persistent in his or her” behavior over the course of several weeks or months.¹¹⁹ Persistence from the poster is not required for revenge porn to harm the victims—a few postings, especially with the victim’s name and address accompanying the explicit image, can be seriously damaging even though the distribution of the images has not amounted to a “harassing course of conduct” usually required under the criminal anti-harassment or anti-stalking laws.¹²⁰ Even worse, a revenge porn post can go viral over the Internet, but the original poster could escape liability because his or her own conduct has not met the threshold of the persistence requirement under these laws.¹²¹

Currently, trying to fit revenge porn under the existing federal criminal laws creates many of the same problems seen at the state level where those laws have the potential to reach some but not all of revenge porn conduct.¹²² For example, 18 U.S.C. 2257, which sets out record-keeping requirements for producers of pornography, has a definition of “producer” that “does not seem to include websites that solicit images from third-party users, which are the websites most likely to include nonconsensual pornography.”¹²³ The Interstate Anti-Stalking Punishment and Prevention Act makes it a crime “to use . . . any interactive computer service . . . to engage in a course of conduct that causes substantial emotional distress to a person.”¹²⁴ Critics argue that while this statute has not been interpreted to specifically target revenge porn, it would still not capture all forms of the conduct even if interpreted more favorably.¹²⁵

118. Danielle Citron, *How to Make Revenge Porn a Crime*, SLATE (Nov. 7, 2013, 1:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/making_revenge_porn_a_crime_without_trampling_free_speech.html.

119. *Id.*

120. *Id.*

121. *Id.*

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

123. *Id.*

124. 18 U.S.C. § 2261A (2012)

125. Franks, *supra* note 122 (noting that many revenge porn perpetrators may not fulfill the statute’s intent requirement: “to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner.” This is because some perpetrators claim their sole intention was to gain notoriety

Another example of an insufficient federal law is the Video Voyeurism Prevention Act of 2004.¹²⁶ Under this law, it is a crime to intentionally “capture an image of a private area of an individual without their consent, and knowingly [do] so under circumstances in which the individual has a reasonable expectation of privacy.”¹²⁷ This act would not cover the common revenge porn scenario where the victim consented to the initial image being produced or exchanged but not to the subsequent distribution over the Internet.¹²⁸ Almost by definition, most revenge porn victims consented to being photographed nude,¹²⁹ or even took the photograph themselves,¹³⁰ and further consented to sharing it with their former partner—but not necessarily beyond that partner. This raises what one scholar calls the “consent in context” issue—a boxer consents to being punched in the ring, but not outside it; similarly, someone sending an explicit image to a partner does not therefore consent to sending it to anyone else, let alone the Internet at large.¹³¹

Nonetheless, scholars advocating for criminal law reform have called for the implementation of new criminal legislation at the federal level, using existing federal cyberstalking and hate crime legislation as models.¹³² They point out several potential advantages of new federal criminal legislation that would specifically target revenge porn. First, federal

or increase traffic to their websites, among other reasons. Also, many revenge porn perpetrators are not a “spouse or intimate partner of” the victim, as the statute requires).

126. 18 U.S.C. § 1801 (2012).

127. *Id.*

128. Franks, *supra* note 122.

129. Jacob Michael Kaufman & Aaron P. Rubin, *Keeping Privates Private: The Legal Landscape of Revenge Porn*, MONDAQ (Feb. 3, 2014), <http://www.mondaq.com/unitedstates/x/290608/Social+Media/Keeping+Privates+Private+The+Legal+Landscape+of+Revenge+Porn>; see generally GOOGLE INSIDE SEARCH, <http://www.google.com/insidesearch/features/images/searchbyimage.html>.

130. See 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/> (noting that more than eighty percent of revenge porn photos were “selfies,” or photos where the subject of the photograph is also the photographer).

131. Laird, *supra* note 109.

132. See Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 687 (2012); see also Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 124 (2009); Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1118 (2011).

criminal laws serve as arguably the strongest deterrents of behavior society deems deplorable.¹³³ Second, the state's ability to investigate and detect the conduct in order to enforce the law far exceeds a private citizen's ability to do the same.¹³⁴ Third, the stigma that attaches to federal criminal sanctions would help create an important symbolic statement about how society views another form of violence against women, similar to federal criminal laws against domestic violence or sexual harassment.¹³⁵

Crucially, federal criminal laws targeting revenge porn also would have the advantage of working within the legal boundaries that protect online intermediaries, such as the websites that host the revenge porn content, while still prohibiting the conduct that leads to such material being posted in the first place.¹³⁶ Section 230 of the Communications Decency Act grants website owners and operators broad immunity from any illegal or offensive material that third-party users post to their sites stating that "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."¹³⁷ This "cornerstone of internet law" has been said to act as a "shield" protecting Web platforms that, within the context of revenge porn, publish and host the nude images.¹³⁸ Section 230 preempts state criminal laws by holding that "no cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section,"¹³⁹ which means that a state law prohibiting a form of online speech that Section 230 subsequently protects will not be an effective remedy.¹⁴⁰

Thus far, courts have been generally unwilling to validate plaintiffs' attempts to break through the shield of Section 230 and impose liability on websites for hosting the content posted by a third party. For example, in

133. Franks, *supra* note 122.

134. *See generally* Derek E. Bambauer, *Exposed*, ARIZ. LEGAL STUDIES, Discussion Paper No. 13-39, 56 (2013).

135. Jeong, *supra* note 104.

136. Bambauer, *supra* note 134.

137. 47 U.S.C. § 230(e)(1), (3) (2012).

138. Jeong, *supra* note 104.

139. 47 U.S.C. § 230.

140. *See* Franks, *supra* note 122.

Jones v. Dirty World Entertainment Recordings, LLC, a federal district court permitted a woman to sue the site operator of the website “Dirty.com” for defamation, arguing that Section 230 is forfeited if the site owner “invites the posting of illegal materials or makes actionable postings itself.”¹⁴¹ The judge in that case was relying principally on a 2008 ruling made by the U.S. Court of Appeals for the Ninth Circuit, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, that held Section 230 failed to immunize a classified online ad service that assisted in finding people apartment roommates.¹⁴² There, the infringing website made subscribers complete an online questionnaire that included questions about their gender, race, and sexual orientation.¹⁴³ One question asked subscribers to choose a roommate preference, such as “Straight or gay” males, only “Gay” males, or “No males.”¹⁴⁴ Fair housing advocates sued the site, arguing that its questionnaires violated federal and state discrimination laws.¹⁴⁵

The Ninth Circuit held Section 230 failed to protect the website from liability because it created the questions and answer choices making it an “information content provider” under Section 230.¹⁴⁶ “By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, [the website] became much more than a passive transmitter of information provided by others.”¹⁴⁷ Instead, it was viewed as the “developer, at least in part, of that information,”¹⁴⁸ and consequently, Section 230 “provides immunity only if the interactive computer service does not ‘creat[e] or develop[]’ the information ‘in whole or in part.’”¹⁴⁹

141. *Jones v. Dirty World Entm't Recordings, LLC*, 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011).

142. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008).

143. *Id.* at 1161.

144. *Id.* at 1165.

145. *Id.* at 1162.

146. *Id.* at 1164 (citing 47 U.S.C. § 230(f)(3) (2012)).

147. *Id.* at 1166.

148. *Roommates.com*, 521 F.3d at 1166.

149. *Id.* (citing 47 U.S.C. § 230(f)(3)).

At first, the Ninth Circuit's reasoning seems like the necessary foundation upon which several revenge porn victims can base their own attacks on malicious websites.¹⁵⁰ But some critics argue that the Ninth Circuit only arrived at its holding by rewriting the statute.¹⁵¹ Section 230 defines "information content provider" as a person or entity that is responsible for the "creation or development of information provided through the Internet or any other interactive computer service."¹⁵² In contrast, the Ninth Circuit found the website liable because it helped create and develop *illegal* information, which surely was not within the bounds of the immunity provision outlined in Section 230, specifically the clause granting safe harbor status to an "information content provider."¹⁵³ As a result, however, these rulings may provide hope for revenge porn victims. Scholars believe the reasoning upon which the rulings are based will prevent sweeping change, keeping influential court decisions rare.¹⁵⁴

Though Section 230 is a significant obstacle for revenge porn victims, advocates for specific federal criminal legislation prohibiting revenge porn counter with another noteworthy advantage to their reform proposals: though Section 230 preempts state criminal laws, that same preemption does not apply to federal criminal laws.¹⁵⁵ This means that with targeted federal legislation, prosecutors would be able to pressure the various entities that create, host, and fund online Web platforms that contain revenge porn content.¹⁵⁶

Though federal criminal laws against revenge porn seem to offer

150. See Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html> ("As the Ninth Circuit held (and as a few courts have followed), Section 230 does not grant immunity for helping third parties develop *unlawful conduct*." (Emphasis in original).

151. *Id.*

152. 47 U.S.C. § 230(f)(3).

153. See Citron, *supra* note 150.

154. See Franks, *supra* note 122.

155. 47 U.S.C. § 230(e)(1); see Bambauer, *supra* note 134, at 52-53. Section 230 holds that "nothing in this section shall be construed to impair the enforcement of section 223 [referring to obscene or harassing telephone calls] or 231 [restricting access of harmful materials online to minors] of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute."

156. See Bambauer, *supra* note 134, at 52-53.

many advantages, they are not without significant disadvantages as well. Some scholars contend that federal criminal legislation is the best deterrent of unacceptable behavior.¹⁵⁷ In theory, individuals posting revenge porn would weigh their actions against the expected penalties under an applicable criminal statute.¹⁵⁸ “In practice, people tend to respond more to levels of enforcement (the chance of being caught)” rather than the level of punishment.¹⁵⁹ The level of enforcement by federal prosecutors would be debatable, especially with issues such as national security, narcotics, and white-collar crime taking up a significant portion of their resources.¹⁶⁰

Moreover, victims of revenge porn also must grapple with law enforcement and prosecutors who are generally unwilling to enforce the current laws that could provide some relief.¹⁶¹ It is unclear whether a more clearly worded statute would alleviate that apathy and unfamiliarity within the enforcement and prosecutorial ranks.¹⁶²

Lastly, federal criminal law prohibiting revenge porn postings may not stand up to a First Amendment challenge.¹⁶³ The Supreme Court has held that “when the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption.”¹⁶⁴ “A criminal statute would impose sanctions upon use and distribution of truthful information”¹⁶⁵—after all, the images were often produced and possibly exchanged with the victim’s consent.¹⁶⁶ Consequently, “the courts

157. *See id.*

158. *Id.* at 53.

159. *Id.*

160. *Id.*

161. *See Laird, supra* note 109.

162. *See Bambauer, supra* note 134, at 54.

163. *See id.* at 54-55.

164. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000) (internal quotations and citations omitted).

165. *Bambauer, supra* note 134, at 54.

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

have traditionally scrutinized such laws with particular care.”¹⁶⁷ At best, as some advocates note, revenge porn postings may not be afforded the custom constitutional protections.¹⁶⁸ But even then, the language of new statutes must be drafted delicately to avoid “vagueness and overbreadth” that may subject it to First Amendment violations.¹⁶⁹

New federal criminal legislation offers revenge porn victims many powerful tools for imposing liability against those responsible for their suffering. However, because of the many noted disadvantages (and potential challenges) that would come with such legislation, many believe distribution of revenge porn images would best be regulated through a variety of civil laws.

B. The Advantages and Disadvantages of Reforming Civil Laws to Fight Revenge Porn

Most civil law proposals for regulation focus on a variety of privacy and harassment-related doctrines.¹⁷⁰ Recently, in a Petition for Damages filed in Texas, a group of revenge porn victims attempted to obtain class action status in a suit against GoDaddy.com for hosting the revenge porn website Texxxan.com.¹⁷¹ There, the causes of action listed included invasion of privacy, intrusion upon seclusion, public disclosure of private facts, false light, appropriation of name or likeness, gross negligence, and intentional infliction of emotional distress.¹⁷² Other possible claims

167. Bambauer, *supra* note 134, at 54 (citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002); *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489 (1982)) (noting that the “Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”).

168. 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/> (Volokh argues “courts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value,” and that “historically and traditionally, [nonconsensual depictions of nudity] would likely have been seen as unprotected obscenity.”).

169. Franks, *supra* note 122.

170. See Bambauer, *supra* note 134, at 3-4.

171. See Pls.’ Original Pet. for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction at 7, *Toups v. GoDaddy.com*, No. D130018-C (Orange Cty. Dist. Ct., Tex., Jan. 18, 2013).

172. See *id.*

include breach of implied confidentiality, defamation, and cyberstalking.¹⁷³ Any damages claimed under these and other causes of action would be based on emotional suffering.¹⁷⁴

Many states also have consumer protection statutes that could be used to target the websites that profit from revenge porn.¹⁷⁵ According to one advocate, some of the advantages to civil, rather than criminal, court are that “the amount of compensation awarded to plaintiffs is determined on a case-by-case basis, defendants are only brought to trial when victims feel seriously harmed, police have less room to discriminate, and offenders pay out-of-pocket rather than in a jail cell.”¹⁷⁶

In practice, however, many lawyers will not take such a case because of their unfamiliarity with the areas of the law and the “trickiness” of much of the evidence existing online.¹⁷⁷ The fact that in most cases defendants do not even have enough money to recover much in the way of damages also makes recovery more problematic for a revenge porn victim.¹⁷⁸ Because most victims are also usually individuals without serious economic means, attorneys often have to handle revenge porn cases pro bono or with limited expectations for compensation.¹⁷⁹ Victims considering a civil suit must also weigh the practical and emotional costs of generally having to proceed with the action under their real names, which could bring more unwanted publicity.¹⁸⁰ For these reasons, advocates have also been calling for more anonymous-plaintiff civil lawsuits for some

173. Bambauer, *supra* note 134, at 4-5.

174. *See* Citron, *supra* note 118.

175. Marshall, *supra* note 105.

176. Jess Remington, *Should Government Ban Revenge Porn?*, REASON.COM (Oct. 9, 2013, 1:30 PM), <http://reason.com/blog/2013/10/09/should-government-ban-revenge-porn> (Remington also points to “numerous victims” that have successfully sued in civil court).

177. *See* Citron, *supra* note 118.

178. *See id.*

179. Laird, *supra* note 109 (quoting an attorney who says that partly because of the lack of financial incentive to represent revenge porn victims, “there are only about four or five of us in the whole country [who take on this type of case].”).

180. *See* Citron, *supra* note 118; *see also* Laird, *supra* note 109 (quoting an attorney who says that to make matters worse, oftentimes the websites hosting the revenge porn will respond to a woman’s filing of a lawsuit by spreading the images to other websites in retaliation).

time,¹⁸¹ and nonprofit activist group *Without My Consent*, provides attorneys with both federal and state-by-state guides for proceeding anonymously with these civil actions.¹⁸²

And while many states have broadly worded consumer protection laws, it is only likely that those laws prohibit a website's conduct if the site uses the revenge porn to engage in any trade or commerce, such as generating money from victims and advertisers.¹⁸³

Most importantly, all of these laws hold one crucial element in common, which scholars note as the principal shortcoming of attempting to regulate revenge porn through civil laws: none of the claims mentioned can reach the ongoing distribution of the revenge porn content throughout the Internet after it has been published there by the former boyfriend or girlfriend.¹⁸⁴ The initial disclosure of the intimate images forms only part of the injury.¹⁸⁵ A successful suit can provide an injunction against the original poster further spreading the content online, which attorneys say is often what most victims want.¹⁸⁶ However, the other part of the injury from revenge porn is the "ongoing, repeated dissemination of the sensitive content."¹⁸⁷ Indeed, digital photos are easy to reproduce, so the original poster (or an angry site operator) can easily resubmit photos to another site.¹⁸⁸ This creates what one activist has called the "Whac-a-Mole" problem—once a photo is removed from one revenge porn site, it often pops back up in two or three other places.¹⁸⁹ Once revenge porn makes its way into cyberspace, there is very little one can do to keep it from

181. Emily Bazelon, *How to Unmask the Internet's Vilest Characters*, N.Y. TIMES (Apr. 22, 2011), http://www.nytimes.com/2011/04/24/magazine/mag-24lede-t.html?_r=0&loadDynamically=false&ribbonAdDisabled=true&pagewanted=print.

182. See generally *Without My Consent*, <http://www.withoutmyconsent.org/attorneys> (last visited Apr. 6, 2014).

183. See Marshall, *supra* note 105.

184. See Bambauer, *supra* note 134, at 5.

185. See *id.*

186. Laird, *supra* note 109.

187. Bambauer, *supra* note 134, at 5.

188. Laird, *supra* note 109.

189. *Id.*

spreading.¹⁹⁰

This inability to prevent images from spreading is a result of the same roadblocks established by Section 230 that protect websites from content uploaded by third-party users. However, unlike federal criminal legislation, which is specifically exempt from Section 230's safe harbors, privacy and harassment-based doctrines are not afforded any exemptions.¹⁹¹ As a result, proponents of revenge porn reform must, through civil law, propose changes to Section 230, whether it is through amendments circumventing Section 230¹⁹² or more extreme, wholesale changes to the statute.¹⁹³ Such proposals are immediately criticized as crippling to online intermediaries and stifling to online innovation.¹⁹⁴ Of course, in addition, modified harassment or privacy-based civil laws would be subject to the same First Amendment challenges that pose as problems for criminal legislation reform.¹⁹⁵

C. "The Right to Be Forgotten" and Revenge Porn

Given the described shortcomings of both criminal and civil legislative efforts to best regulate revenge porn, it is not surprising that some activists have looked to international law when searching for a solution. The "right to be forgotten . . . prevents one from identifying an individual in relation to past events such as criminal activities or particularly humiliating instances."¹⁹⁶ Scholars differ over the right's origins, with some calling it a French "universal right,"¹⁹⁷ and others claiming it developed in a variety of other European and Latin American

190. Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 45 (2012).

191. See Bambauer, *supra* note 134, at 56.

192. See Citron, *supra* note 150.

193. See Bambauer, *supra* note 134, at 56.

194. See *id.* (explaining that "efforts to alter the 230 safe harbor have proved politically non-viable" and that "[s]ection 230 is a barrier, but it is one worth keeping"); see also Peter Fleischer, *Foggy Thinking About the Right to Oblivion*, PETER FLEISCHER: PRIVACY...? (Mar. 9, 2011), <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>.

195. Bambauer, *supra* note 134, at 56.

196. Meg Leta Ambrose, *A Digital Dark Age and the Right to Be Forgotten*, 17 NO. 3 J. INTERNET L. 1, 9 (2013).

197. See Fleischer, *supra* note 194.

countries.¹⁹⁸ In either case, the right developed traction in Europe: the European Union proposed implementing the right into a draft of its Data Protection Regulation in January 2012,¹⁹⁹ aiming to update the 1995 Draft Protection Directive.²⁰⁰

Called “an attempt to give people the right to wash away digital muck, or delete the embarrassing stuff, or just start fresh,”²⁰¹ the right to be forgotten is based on the assumption and concern that digital information will linger permanently without intervention.²⁰² Thus, such information would also pose a permanent risk to tarnish an individual’s records or reputation at a moment’s notice.²⁰³ It gives the “data subject the right to” object to the processing of data, and possibly erase or block that data, “if the objection is based on ‘compelling and legitimate grounds.’”²⁰⁴

This has led to a debate over what is more valuable: “[t]he social and individual interest in rehabilitation” and moving on from past mistakes preserved forever on the Internet; or “[t]he public’s right” to all the information available about a particular individual²⁰⁵—and in the case of a revenge porn victim, the “information” is explicit content that was never intended to be made public in the first place.²⁰⁶ The debate also focuses on whether an individual should have the absolute right to direct a website to delete a picture of that person, or whether an individual should have the

198. Ambrose, *supra* note 196, at 9 n.3.

199. See Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Art. 17(1), at 51, COM (2012) 11 final (Jan. 25, 2012), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

200. Ambrose, *supra* note 196, at 9 n.3.

201. Fleischer, *supra* note 194.

202. Ambrose, *supra* note 196, at 9 n.3.

203. *Id.*

204. *Id.* at 10 n.3 (citing Council Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 14, 1995 O.J. (L281), available at, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:3199_5L0046&from=en).

205. *Id.* at 17 n.3.

206. Laird, *supra* note 109, at 45.

right to delete a post that another person has made to a website.²⁰⁷ Similarly, the right to be forgotten begs the question of whether the Internet should have an “auto-expire” feature, where pictures or other information about an individual will automatically delete from the Internet after a certain period of time.²⁰⁸

Within the United States, proposals for the right to be forgotten are countered with the argument that such a right will threaten free speech, information rights, and the very transparency that makes the Internet such an innovative tool.²⁰⁹ The potential to mis-regulate or over-regulate a wide range of civil liberties poses serious risks.²¹⁰ While scholars have been slow to connect the right to be forgotten with revenge porn, the pairing seems inevitable should the right to be forgotten build momentum with privacy advocates.

And that momentum has built faster than some may think. For example, in California, Governor Jerry Brown signed Senate Bill (SB) No. 568 into law on September 23, 2013.²¹¹ Set to become effective January 1, 2015,²¹² SB 568 will require operators of certain websites, online services, online applications, and mobile applications to allow a minor to “remove, or, if the operator prefers, to request and obtain removal of content or information posted on the operator’s Internet website, online service, online application or mobile application by the user” if the minor so requests.²¹³ Operators must notify minors of these rights and must also provide notice that “the removal described . . . [d]oes not ensure complete or comprehensive removal of the content or information posted on the operator’s Internet Website, online service, online application, or mobile application by the registered user.”²¹⁴

207. See Fleischer, *supra* note 194.

208. See *id.*

209. See Lothar Determann, *Social Media Privacy: A Dozen Myths and Facts*, 7 STAN. TECH. L. REV. 2 (2012).

210. See Meg Leta Ambrose, *It’s About Time: Privacy, Information Life Cycles, and the Right to be Forgotten*, 16 STAN. TECH. L. REV. 369, 397 (2013).

211. See S.B. 568, 2013–14 Reg. Sess. (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0551-0600/sb_568_bill_20130923_chaptered.pdf.

212. *Id.*

213. CAL. BUS. & PROF. CODE § 22581(a)(1) (West 2014).

214. *Id.*; see also CAL. BUS. & PROF. CODE § 22581(b)(3), 22581(d)(1).

The law bears some resemblance to the broader “right to be forgotten” proposals seen in Europe, especially in how the law requires operators to notify minors that removal may not be “complete or comprehensive,” which indicates the law has taken into consideration the public’s desire to have an ability to achieve total erasure of requested information, much like the stated policy goals underlying the European proposal.²¹⁵ Of course, the California law has a smaller scope because it only protects California minors who are registered users on the site in question.²¹⁶ The law is also less intrusive.²¹⁷ Minors can delete or request deletion of only their own posts, and not those of third parties, even when such a third-party posting only republishes the minor’s original post.²¹⁸ The law would allow violations to be enforced in civil lawsuits by the government and private parties as violations of California’s unfair competition law.²¹⁹

In short, the right to be forgotten would allow revenge porn victims to circumvent many of the stated shortcomings of other civil lawsuits and criminal lawsuits. Victims would not have to be concerned with the difficulties of the various “intent” requirements of criminal statutes, or endure a lengthy, costly civil lawsuit only to obtain an injunction and see the images reappear on another site. However, just like the Section 230 and First Amendment concerns that the other reform proposals face, implementing a right to be forgotten into the current Internet landscape will be difficult to accomplish without violating several civil liberties protected through the American legal system.²²⁰ Concerns over how the right to be forgotten would affect freedom of expression and freedom of speech, in particular, make it difficult to imagine how it could be effectively incorporated into American culture.²²¹ There is natural skepticism over

215. See CAL. BUS. & PROF. CODE § 22581(a)(4); see also Ambrose, *supra* note 196, at 10.

216. See Lothar Determann, Diana Francis & Oliver Zee, *New California Privacy Laws*, BLOOMBERG LAW (Nov. 5, 2013), <http://www.bloomberglaw.com/document/XEE79DRC000000?campaign=bnaemailink&issue=20131104&jcsearch=bna%2520a0e2z4f5c7&js=0&sitename=bna&subscriptiontype=bnasmlr#jcite>.

217. *Id.*

218. *Id.*

219. *Id.*

220. See Bazelon, *supra* note 181.

221. See Jeffrey Rosen, *Free Speech, Privacy, and the Web that Never Forgets*, 9 J. ON TELECOMM. & HIGH TECH. L. 345, 345 (2011); see also Matt Warman, *Vint Cerf Attacks*

allowing some online content to be deleted not because it is actually defamatory or violates privacy, but because someone has merely complained. That skepticism is felt perhaps most notably by big Internet companies such as Google, Facebook, and Twitter, which do not want to be held responsible for managing user content, given the ever-growing volume and pace of the Internet.²²²

D. *The Power of Market Forces to Influence Revenge Porn*

Scholars are also slow to point out the ways in which private companies can directly combat revenge porn by attacking the bottom lines of the several parties that can potentially profit from revenge porn. The methods used by operators of revenge porn websites are discussed above. A similarly deplorable online practice was recently dealt a significant blow by the companies that process their “pay to remove” schemes: the credit card companies themselves.²²³

In early 2011, websites that profited from publishing humiliating mug shots of regular citizens began appearing with regularity.²²⁴ Again, much like with the right to be forgotten, legislators were forced to balance difficult competing interests.²²⁵ Individuals wanted to guard against their reputations and remove the mug shots,²²⁶ but site operators argued that the news media’s right to publish gave them the ability to host such sites.²²⁷ As journalists argued, mug shots were public information along the lines of “school safety records,” house sales, and “restaurant health inspections.”²²⁸

European Internet Policy, TELEGRAPH (Mar. 29, 2012, 1:00 PM), <http://www.telegraph.co.uk/technology/news/9173449/Vint-Cerf-attacks-European-internet-policy.html> (noting that one critic of the right to be forgotten said “[y]ou can’t go out and remove content from everybody’s computer just because you want the world to forget about something.”).

222. See Bazelon, *supra* note 181; see also Fleischer, *supra* note 194 (noting that it is “debatable whether, as a public policy matter, we want to have platforms arbitrate [dilemmas between one user’s privacy claim and another’s claim for freedom of expression].”).

223. See David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html>.

224. *Id.*

225. *See id.*

226. *See id.*

227. *See id.*

228. *Id.*

Sure enough, the sites were drawing great rankings on Google's search results, a sign of both relevance and popularity among online users.²²⁹ Google's ability to draw larger crowds to such sites is legally significant because Google could do the exact opposite: do what "no legislator could" and "demote mug-shot sites" from the tops of its search rankings.²³⁰

In fact, Google did just that, and the results were instantaneous.²³¹ Less than a day after introducing a new algorithm to combat against the popularity of these sites, two mug shot images that had previously appeared at the tops of an image search were no longer featured on the first page.²³² When viewers are not drawn to the sites, the sites' power to stigmatize and then charge large sums to remove the photos goes away too.²³³ To make matters worse, MasterCard, American Express, Discover, and PayPal all eventually severed their relationships with mug shot sites.²³⁴ The combination of efforts from Google and the payment processing companies has had a sustained impact on the ability of mug shot websites to remain relevant and profitable.²³⁵

Consequently, it is easy to see how the same efforts could have a devastating effect on the revenge porn industry. If anything, the efforts could be easier: unlike mug shots, which are arguably public information, the intimate images used in revenge porn were almost never intended to be public. Websites charge money for victims to remove their images from their pages, and some operators earn money from advertising on the site due to the large traffic of viewers. Google and various credit card companies certainly have the potential to damage the revenge porn industry faster than the rounds of drafting that accompany new legislation.

229. See Segal, *supra* note 223; see also Seema Ghatnekar, *Injury by Algorithm: A Look into Google's Liability for Defamatory Autocompleted Search Suggestions*, 33 LOY. L.A. ENT. L. REV. 171, 180 (2013).

230. See Segal, *supra* note 223.

231. See *id.*

232. *Id.*

233. See *id.*

234. See *id.*

235. See David Segal, *Mug-Shot Websites, Retreating or Adapting*, N.Y. TIMES (Nov. 9, 2013), <http://www.nytimes.com/2013/11/10/your-money/mug-shot-websites-retreating-or-adapting.html>.

IV. THE CASE FOR COPYRIGHT

A. *Copyright's Underlying Rationale
Balances Production and Regulation*

Thus far, all of the proposed criminal, civil, and market reforms proposing to regulate revenge porn fail to prevent one common characteristic.²³⁶ Laws or market forces that swing too far in the opposite direction, and regulate revenge porn too much, risk undercutting the actual production of the intimate images in the first place.²³⁷ Though intimate photos can have debilitating effects when stripped of their intimacy and disseminated over the Internet, this does not mean legislators should discourage the creation of the content to begin with.

Copyright law attempts to balance between providing a limited bundle of rights²³⁸ in “[o]riginal works of authorship fixed in any tangible medium of expression.”²³⁹ Conflicting policy positions provide the basis for much tension and evolution of copyright law.²⁴⁰ On one hand, society recognizes a goal of supplying the author of a work with rewards for and control over the work for a limited time.²⁴¹ But on the other hand, there is also the goal of ensuring the public’s right to access, use, and build on prior work.²⁴² As such, the “copyright doctrine can encourage production, and dissemination through legitimate channels” of many types of information by providing sufficient remedies against improper distribution, reproduction, and other acts.²⁴³

Moreover, with regards to intimate images, “infringement” can take the form of a revenge porn post.²⁴⁴ This has the unwanted effect of

236. See Derek E. Bambauer, *Exposed*, ARIZ. LEGAL STUDIES, Discussion Paper No. 13-39, 5 (2013).

237. *Id.* at 23-24.

238. See generally 17 U.S.C. § 106 (2012).

239. 17 U.S.C. § 102(a) (2012).

240. See CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI, TYLER OCHO, & MICHAEL CARROLL, *COPYRIGHT LAW* 3 (9th ed. 2013).

241. See *id.*

242. See *id.*

243. Bambauer, *supra* note 236, at 7.

244. *Id.*

threatening future production of such images because creators are wary of the potential risks involved.²⁴⁵ Part of the basis for finding regulative potential in copyright law, then, requires a belief “that consensual production and distribution of intimate [images is] desirable,” worth encouraging, and most importantly, worth protecting.²⁴⁶

For these reasons, this Note finds that copyright law offers the most potential for the ideal regulation of revenge porn, because not only will it provide victims with powerful courses of legal action, it will also continue to facilitate and encourage the production of the images, as opposed to suppressing the desire to create altogether.

B. Regulating Through Copyright Is Not Without Its Disadvantages

It is important to first analyze some of the shortcomings of the current copyright framework, and how it would apply to a revenge porn victim seeking relief. If a person is the subject of the image, but not the photographer or videographer of it, he or she is unlikely to be considered the work’s author.²⁴⁷ If the victim took the photo or video as a self-portrait, he or she automatically owns the copyright in that recording.²⁴⁸ Without registering the recording, he or she is then free to send takedown notices to a revenge porn website’s operator under the Digital Millennium Copyright Act (DMCA).²⁴⁹ In order to qualify for the protection, an operator must establish a system for accepting claims of copyright infringement on its website and establish a procedure to remove materials from its website that infringe upon someone else’s copyright, and then post that procedure on the site.²⁵⁰ If these site operators do not respond to the takedown notices,

245. *See id.*

246. *Id.* at 6 (Such images “bring[] people, particularly those in intimate relationships, closer together, and allow[] them to express romantic and sexual feelings in new ways.”).

247. *See id.* at 19.

248. Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on Websites for Posting Photos They Didn’t Consent To*, 99 A.B.A. J. 45 (2013), available at http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_the_y_didnt_c/.

249. *Id.* *See also* 17 U.S.C. §512(c)(3), (g) (2012).

250. Gary Marshall, *Revenge Porn Websites Such As yougotposted.com Raise Complex Legal Issues*, GARY MARSHALL’S TECHNOLOGY LAW BLOG (Jan. 14, 2013), <http://marshall2law.com/2013/01/14/yougotposted-com-website-raises-complex-legal-issues/>.

they risk losing their “safe harbor” immunity under the DMCA.²⁵¹ A copyright lawsuit may provide the victim with an injunction against the infringing website, prohibiting the site from posting the photos online, which is often the victim’s ultimate goal.²⁵²

However, this avenue of protection against revenge porn only applies if the victim can claim ownership of the content in question.²⁵³ Furthermore, even when the victim does own the content, many issues prevent a smooth and successful outcome under copyright law. A copyright lawsuit may not net the victim any damages because it is uncommon for victims to have registered their copyright in the explicit content within ninety days of first publication²⁵⁴ in order to be eligible for statutory damages.²⁵⁵

C. *New Reform Proposals Offer Potential*

Several recent arguments for slight reforms to copyright law could achieve effective regulation within a manageable scope. Using the right to be forgotten as a contextual basis, copyright can offer revenge porn victims similar remedies without threatening the larger makeup of the Internet. For example, one scholar has proposed creating a new right within copyright for individuals that appear in, and can be reasonably identified by, intimate images that then are used for revenge porn attacks.²⁵⁶ This would operate similarly to the moral rights provisions given to visual artists in the Visual Artists Rights Act (“VARA”),²⁵⁷ which enable authors of visual art works “to prevent intentional distortion, mutilation, or modification of the work” if harmful to the author’s reputation, among other rights.²⁵⁸

The new right would in turn create a new form of copyright infringement: “distribution or display of intimate media, from which a

251. Laird, *supra* note 248.

252. *Id.*

253. *See generally id.*

254. *See* 17 U.S.C. § 412(2) (2012).

255. Laird, *supra* note 248.

256. *See* Bambauer, *supra* note 236, at 7.

257. 17 U.S.C. § 106A(a)(3)(A) (2012).

258. *See* Bambauer, *supra* note 236, at 26.

living person captured in it can be identified, without the written consent of that person.”²⁵⁹ The underlying policy behind such infringement would allow defendant service providers to still secure immunity and escape liability under “a notice-and-takedown system similar to that of the DMCA.”²⁶⁰ Furthermore, aside from written consent, “defendants could also escape liability if the distribution were newsworthy,”²⁶¹ which would also alleviate First Amendment concerns.²⁶²

Other reforms could follow from such a proposal. For example, Congress could agree to waive the 90-day deadline for registering copyrighted works after initial publication in order to qualify for statutory damages under 17 U.S.C. §412(2). Also, Congress could revise the definition of a “joint work” for purposes of determining authorship of an intimate image.²⁶³ Courts have described the requirements for each potential joint author and could slightly alter them to better accommodate the revenge porn phenomenon.²⁶⁴ The Second Circuit in *Thomson v. Larson* noted that the Copyright Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”²⁶⁵ These two elements—mutual intent²⁶⁶ and independently copyrightable contributions²⁶⁷—could be reworked so that any intimate image in which an individual can be reasonably recognized as the subject would automatically result in joint authorship for the subject as an independently copyrightable contribution. Then, intimate images could carry the rebuttable presumption of mutual intent to become a joint work, perhaps only rebuttable through writing or another similarly tough standard.

Reformed copyright laws would have the added benefit of acting in

259. *Id.* at 28.

260. *Id.*

261. *Id.*

262. *Id.* at 37.

263. *See* 17 U.S.C. § 101 (2012) (defining “joint work”); 17 U.S.C. § 201(a) (2012) (providing each joint author with an equal, undivided interest in the entire work).

264. *See Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998) (providing each joint author with an equal, undivided interest in the entire work).

265. *Id.* (citing 17 U.S.C. § 101).

266. *See id.* at 201.

267. *See id.* at 200.

harmony with Section 230 of the Communications Decency Act. Similar to federal criminal legislation, intellectual property law is exempt from the protections of Section 230 that extend to online intermediaries.²⁶⁸ Unlike criminal laws, though, which are also exempt from Section 230's safe harbors, copyright law would not serve as a harmful deterrent of content creation that helps shape our increasingly digital, online life.

V. CONCLUSION

The revenge porn phenomenon will likely only continue to grow as society's dependency on mobile phones and online services intensifies. Reforming the area of the law best suited to target this new type of harassing, harmful behavior—whether it be through federal criminal legislation, federal civil privacy-based legislation, market forces, or federal copyright law—is not only needed, but necessary. The law must catch up to technology in this regard, or else victims are left to mix and match imperfect remedies and courses of action to their particular anguish and injury. As a result, victims have not found much success pursuing justice against their harassers and the sites that host the revenge porn.²⁶⁹ This is largely because courts are faced with a startling lack of precedent with revenge porn cases, and must confront a web of laws that perhaps unintentionally trips up efforts for relief.²⁷⁰ Most troublesome is that victims lose much more than just their legal fight—they lose their trust in the legal system and their trust in the people they date.²⁷¹

Copyright law, if properly adjusted to accommodate this new behavior, will not only remain harmonious with other laws regulating the Internet and our civil liberties, but will also combat a problem that falls squarely within its underlying policies for which it currently has no good answer. Perhaps most importantly, if victims are afforded efficient, proper avenues of relief, they will be able to protect themselves without appearing

268. See 47 U.S.C. § 230(e)(2) (2012).

269. See Elizabeth M. Ryan, *Sexing: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 375 (2010).

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

271. Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on Websites for Posting Photos They Didn't Consent To*, 99 A.B.A. J. 45 (2013), available at http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_the_y_didnt_c/.

in mass media as defenseless and stigmatized. It is not difficult to envision how the business models for revenge porn websites would evaporate if entities like Google, Facebook, and various credit card companies joined in step with the legal reform and altered their business relationships with the sites. It is quite shocking to trace all this change both in and out of the legal system back to such a small device, the mobile phone. The various reform possibilities discussed offer the potential to finally, perhaps just once, curtail a mobile-generated problem before it gets any bigger.