

THE ILL OF MISOGYNY ON THE INTERNET: WHY REVENGE PORN NEEDS FEDERAL CRIMINALIZATION

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This Note was written to address the lack of adequate legal remedies for revenge porn victims. Revenge porn is an example of online gender violence with severe offline consequences. This Note outlines current legal remedies in copyright, civil, and state criminal law that revenge porn victims could potentially use in an action against the poster of the material. However, this Note suggests that none of these existing potential remedies are optimal for the victim due to (1) impracticality, (2) incomplete restitution, or (3) lack of consistency or reach. This Note suggests that an absence of an adequate legal remedy implies that women’s rights are subordinate to men’s interests and internet productivity. Finally, this Note argues that a carefully articulated federal criminal statute would provide acceptable legal recourse for victims without harming internet vitality or impinging upon First Amendment rights.

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INTRODUCTION

Recently, revenge porn has made headlines on mainstream media and celebrity gossip sites, including *CNN*,¹ *RollingStone*,² *Time*,³ *People*,⁴ *PageSix*,⁵ *TMZ*,⁶ and *HighSnobility*.⁷ In spring 2017, an investigation began into the secret Facebook group “Marines United.”⁸ Members of the group published nude or provocative photos of female armed forces members to the page along with descriptions of rape fantasies, and the women’s names and addresses were included in a Google Doc.⁹ Each time the group was reported and shut down by Facebook, another iteration would pop up and its

1. *Revenge Porn: The Cyberwar Against Women*, CNN: MONEY, <http://money.cnn.com/technology/revenge-porn> [<https://perma.cc/SA5H-AYXX>] (last visited Oct. 29, 2017).

2. Katie Van Syckle, *How Two Marines Helped Bring Down Revenge Porn on Facebook*, ROLLING STONE (May 5, 2017), <http://rol.st/2pia9Cj> [<https://perma.cc/5WUN-FUGA>].

3. Charlotte Alter, *‘It’s Like Having an Incurable Disease’: Inside the Fight Against Revenge Porn*, TIME (June 13, 2017), <http://ti.me/2s0KoCe> [<https://perma.cc/6TC3-9844>].

4. Lindsay Kimble, *Rob Kardashian Could Face Revenge Porn Charges for Posting Explicit Photos of Blac Chyna, Experts Say*, PEOPLE: TV WATCH, (July 5, 2017, 1:36 PM), <http://people.com/tv/rob-kardashian-blac-chyna-instagram-rant-legal-expert-weighs-in-revenge-porn/> [<https://perma.cc/EH55-KLHU>].

5. See Search on “Revenge Porn” tag, PAGE SIX, <http://pagesix.com/tag/revenge-porn/> [<https://perma.cc/3FDD-SD6T>] (last visited Oct. 29, 2017).

6. *Blac Chyna: Victim of Revenge Porn*, TMZ, http://www.tMZ.com/videos/0_anu5sdg5/ [<https://perma.cc/UYQ4-T8NB>] (last visited Oct. 29, 2017).

7. See Jake Hall, *Why We Have to Care About Rob Kardashian’s Revenge Porn Attack on Blac Chyna*, HIGH SNOBIETY (July 25, 2017), <http://www.highsnobility.com/2017/07/25/rob-kardashian-blac-chyna-revenge-porn> [<https://perma.cc/S8KL-TL8Q>].

8. See Van Syckle, *supra* note 2.

9. *Id.*

members would continue their predatory behavior against their female Marines.¹⁰ The investigation broadened and prompted a congressional hearing and a full-scale Department of Defense Investigation.¹¹ One retired Marine who reported the group recalled seeing images of naked female soldiers accompanied with a comment saying: "I'd rape her, I'd bend her over, I'd make her choke."¹² One of the women whose photos appeared on the Marines United page spoke out at a press conference: "As a rape survivor, I can tell you that this exact behavior leads to the normalization of sexual harassment and even sexual violence."¹³

The female Marine's statement resonates with the ongoing media scandal between Angela Renee White (a.k.a. Blac Chyna) and her ex-fiancé Rob Kardashian. In December 2016, Kardashian used Instagram to announce that he and Ms. White had ended their relationship.¹⁴ In July 2017, Kardashian once again used the social media platform to post sexually explicit photos of Ms. White on his account.¹⁵ After reporting and removal, Kardashian continued to repost the photos on the platform multiple times alongside allegations of infidelity.¹⁶ The reactions of normal users and celebrities, such as 50 Cent and Snoop Dogg, to Ms. White's victimization were striking for implying that she could not be a victim, based on her history of baring her body to strangers as a former stripper and social media star.¹⁷ However, these reactions are based in a fundamentally misogynistic understanding of consent, which was well-stated by Ms. White's attorney, Lisa Bloom: "Any explicit photos that she may have chosen to post in the past, that's her choice. This is like saying that a woman can't be raped if she previously chose to have sex with someone. It's her body, it's her choice each and every single time."¹⁸

Revenge porn is neither a recent phenomenon nor restricted to female members of the military or celebrities. Women endure this traumatic experience every day.¹⁹ A 19-year-old girl in Texas was blackmailed into having sex with three other men after a former partner threatened to release an explicit video of her.²⁰ A woman in her 20s in Pennsylvania had men coming to her home after an ex-boyfriend posted her pictures and address with an invitation to "come hook up."²¹ A school superintendent in her 50s in Illinois was

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Kimble, *supra* note 4.

15. *Id.*

16. *Id.*

17. Hall, *supra* note 7.

18. *Id.*

19. Alter, *supra* note 3.

20. *Id.*

21. *Id.*

fired after her ex-husband sent an explicit video of her to the entire school board.²²

In January 2017 alone, Facebook received over 51,000 reports of revenge porn.²³ The first-ever national data available of the instance of revenge porn in the internet-user community revealed that approximately 10.4 million Americans had either been a victim of revenge porn or been threatened with publishing provocative images.²⁴ In fact, one in ten women under the age of 30 has had someone threaten to post explicit photos of them.²⁵ Notably, a Facebook survey in June 2017 by the Cyber Civil Rights Initiative found that 1 in 20 social media users admitted to posting a sexually graphic image without consent.²⁶

Here, the plan is to engage in a discussion about the current legal remedies for revenge porn victims, how revenge porn posters are currently held culpable for their actions, and what an ideal remedy for a revenge porn victim would be that also ensures culpability for those who post revenge porn, namely a federal criminal statute. The law defines a standard of conduct that we require our citizens to uphold. By federally criminalizing revenge porn, we can help reframe how women are viewed and treated in this country. Federal criminalization signals to perpetrators that this behavior against women will not be tolerated and, ideally, deters the behavior.²⁷

This Note will address the issue of revenge porn, available legal remedies, and the potential benefits and unintended consequences of creating a federal statute criminalizing revenge porn. Section I will define revenge porn for the purposes of this Note, including how images are created and how the poster accesses them. Then, it will emphasize the types of harm victims suffer because of having their nude images publicized on the internet. Often, the consequences that revenge porn can have on a victim's life can be lost in legal analysis. In Section II, this Note will address current remedies and defenses to revenge porn in copyright, civil, and criminal law. I intend to show that revenge porn posters often escape real liability, that the victims have inadequate remedies because of the permanent nature of the internet, and that, as a result, our legal system has not adequately discouraged this behavior. Section II will also analyze the potential

22. *Id.*

23. *Id.*

24. See, e.g., Seth Young, *New Report Shows that 4% of U.S. Internet Users have been a Victim of "Revenge Porn,"* DATA & SOCIETY (Dec. 13, 2016), <https://datasociety.net/blog/2016/12/13/nonconsensual-image-sharing/> [<https://perma.cc/8P23-NAN4>] (The Data & Society Research Institute conducted the survey with 3,002 Americans aged 15 and older).

25. *Id.*

26. DR. ASIA A. EATON ET AL., 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION: A SUMMARY REPORT 19 (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf> [<https://perma.cc/P2HG-5LYA>].

27. See *People v. Barber*, 2014 WL 641316 (N.Y. City Crim. Ct.); *People v. Stone*, 982 N.Y.S.2d 733 (N.Y. City Crim. Ct. 2014).

civil rights issues for revenge porn posters and victims, such as First Amendment implications of certain legal remedies. It will also focus in on the idea of creating a federal statute criminalizing revenge porn and implications for this kind of legal liability. Section III will address online impersonation. Section IV will address potential detrimental effects that gendered crimes, like revenge porn, have on internet vitality in the realm of federal criminalization. Finally, Section V will analyze potential unintended consequences of a federal criminal statute such as over-criminalization. This Note will argue that current remedies are scattered and inadequate when compared with defenses available to revenge porn posters. Consequently, the lack of a coherent legal remedy for revenge porn victims hurts internet safety for women, violates their civil rights, and ultimately harms e-commerce by alienating potential users, contributors, and consumers. Secondly, the potential benefits resulting from federal criminalization outweigh its potential consequences should legislatures draft a statute whose provisions prevent over-criminalization.

This Note will not address several relevant revenge porn issues. While revenge porn can and does occur to male victims, this Note focuses on revenge porn as an asymmetrically gendered crime typically involving women as victims.²⁸ While cyber harassment may affect many groups including, but not limited to, racial or religious minorities, non-heterosexual individuals, and gender-fluid persons, this Note will not address any of these important issues. However, a federal criminal statute could reach each victim of revenge porn, regardless of their identity.

I. BACKGROUND

A. *What Is Revenge Porn?*

Revenge porn is a recent phenomenon in which a poster publicizes nude or intimate images of a victim on the internet without that victim's consent.²⁹ These images can be posted on social media pages, popular websites, or revenge porn websites among other online locations. Perpetrators may also hack personal computer webcams,

28. See Soraya Chemaly, *There's No Comparing Male and Female Harassment Online*, TIME: FEMINISM (Sep. 9, 2014), <http://time.com/3305466/male-female-harassment-online> [<https://perma.cc/7EGZ-NABM>].

29. *Definitions*, CYBER CIVIL RIGHTS INITIATIVE (2017), <https://www.cybercivilrights.org/definitions/> [<https://perma.cc/26TZ-D7G2>] ("The term 'revenge porn,' though frequently used, is somewhat misleading. Many perpetrators are not motivated by revenge or by any personal feelings toward the victim. A more accurate term is nonconsensual pornography (NCP), defined as the distribution of sexually graphic images of individuals without their consent."); Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn", 49 WAKE FOREST L. REV. 345, 346 (2014) (defining revenge porn as the sexually explicit portrayal of one or more people that is distributed without their consent via any medium).

among other kinds of entirely nonconsensual filming.³⁰ The popularity of camera phones and computer webcams paired with almost ubiquitous online access make it very easy for a poster to spread a victim's naked image on the internet while maintaining their own anonymity.³¹ Depending on the circumstances surrounding a poster's access to the victim's image(s), different remedies may or may not be available.³²

There are three types of revenge porn images that are categorized by how they were captured.³³ The first type of image used in revenge porn involves the victim as the creator of her own image who willingly gives that image to the eventual poster.³⁴ The second type of image involves the victim as a consenting model where the victim agrees to the eventual poster capturing her image.³⁵ Finally, there is the type of image where the victim was a non-consenting model. This occurs when the victim either does not know or does not agree to having her image captured by the poster.³⁶ It is important to note that regardless of whether the victim willingly captures her own image or allows the poster to capture her image, there may be an issue regarding the scope of such consent. Even if a victim gives her image to the poster, if there is an understanding that the images are given only for personal or limited use, then a poster displaying the image to the online public violates the victim's personal consent. The image may have been given to a trusted partner, and she may not have allowed her intimate image to be captured if she knew the individual she gave it to would break that condition or fathomed that this could happen.

B. Harms Caused by Revenge Porn

Revenge porn can affect a victim severely and pervasively over time. Having intimate photos revealed to the online public without consent can be extremely damaging to the victim's emotional well-being, health, career, relationships, and even physical safety.³⁷ In addition to posting the intimate image, the poster often publishes the victim's contact information or address.³⁸ As a result, "victims are frequently harassed, stalked, and threatened," further contributing to the harm of having their bodies exposed to the public without their

30. Kaitlin M. Folderauer, *Not All Is Fair (Use) in Love and War: Copyright Law and Revenge Porn*, 44 U. BALTIMORE L. REV. 321, 326 (2015).

31. *Id.*

32. *Id.*

33. *Id.* at 325.

34. *Id.* at 326.

35. *Id.*

36. *Id.*

37. Aubrey Burris, *Hell Hath No Fury Like a Woman Porneed: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2337 (2014).

38. *Id.*

consent.³⁹ In addition to victims having to cope with the loss of privacy and control attributable to their most intimate moments subjected to the public eye, they are also potentially endangered both emotionally and physically by individuals who try to seek them out based on information the poster provides. The sense of betrayal for a victim is often overwhelming and some victims have been so negatively affected by the publicized image that they have committed suicide.⁴⁰ The sense of betrayal, real threats of violence, and “abuse [that] is often very sexualized—threats of rape, false prostitution ads, calling victims ‘sluts,’” all make revenge porn devastating for victims.⁴¹

Additionally, a nude image can affect a victim’s familial, social, and romantic relationships. Sometimes a poster will publish the victim’s intimate image on a social media platform, such as a Facebook page, to which the victim’s family, friends, or a significant other has access.⁴² In addition to cases where the poster attempts to publish the victim’s image in a place where someone important to her could discover it, someone close to the victim may encounter her image accidentally by going on a website where her image has been posted.⁴³ Or, an acquaintance of the victim’s loved one may alert the individual that there are nude images of the victim online.⁴⁴

39. *Id.*; Loretta Park, *Layton Revenge Porn Case Draws Utah Legislature’s Interest*, STANDARD EXAMINER (Feb. 28, 2014, 12:36 PM), <http://www.standard.net/frontpage/2014/01/29/layton-revenge-porn-case-draws-Utah-legislature-s-interest.html> [<https://perma.cc/PV46-PMXV>] (“Studies have shown that victims of revenge porn are harassed, stalked, threatened, they lose jobs, are forced to change schools and some commit suicide”).

40. Park, *supra* note 39 (“Both male and female victims have committed suicide, and surveys reveal that almost half of all victims have contemplated suicide after the nonconsensual dissemination ruined their lives”); Burris, *supra* note 37, at 2338.

41. Lorelei Laird, *Striking Back at Revenge Porn*, A.B.A. J. 44, 45-46 (2013) (describing how victims Holly Toups and Rebekah Wells have spoken out about suffering from revenge porn); Beth Stebner, *Revenge-Porn Victim Speaks Out*, N.Y. DAILY NEWS (May 3, 2013, 12:05 PM), <http://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147> [<https://perma.cc/T2BV-L7S9>] (noting the New Jersey “revenge porn law” was passed following the suicide of Rutgers student Tyler Clemente, who killed himself after his roommate posted an explicit video of him and another man); see 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, Anonymous and the FBI*, XOJANE (Nov. 21, 2013), <http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn> [<https://perma.cc/YQ3L-7EA3>] (“At least two women have killed themselves over revenge porn, and Cyber Civil Rights Initiative studies show that 47 percent of victims contemplate suicide.”).

42. See, e.g., Alex Cogen, *19 Victims Share Their Stories of Revenge Porn*, TEXTS FROM LAST NIGHT (Mar. 31, 2017), <http://tfln.co/19-victims-share-stories-revenge-porn/> [<https://perma.cc/9PUP-X9DV>] (a woman describes how her ex-boyfriend had her Facebook profile hacked and uploaded a nude image of her as her profile picture and all her family and friends saw it).

43. See, e.g., *id.* (one teenager was told by one of her friends in school that some of her other high school friends, including her ex, had posted naked images of her all over social media).

44. See, e.g., *id.* (A woman was drugged by a man who then took nude photos of her. When she rejected his advances, he posted a blog containing the photos to her coworkers, friends, teachers, and students. She became aware when one of her students came to her with a print out.).

Finally, having intimate images unwillingly spread online can affect a victim's career. In addition to the potential for harassment at work that can ultimately coerce a victim to quit, the victim also risks being fired.⁴⁵ Not only does this affect a victim's pride in her career, it also puts the victim at financial risk.⁴⁶ State legislatures have only recently taken interest in criminalizing revenge porn after realizing that "many victims are fired from their jobs, forced to quit their careers, or required to change their names to escape the humiliation and exploitation of their personal information being posted online."⁴⁷ Through no fault of their own, victims all too often lose credibility or become the source of harassment at their work place should the employer or a fellow employee encounter her nude image.⁴⁸

Victims may find incomplete repair in legal remedies for all of the detrimental effects of revenge porn. Copyright is the least tenable remedy available because the revenge porn victim must have taken the image herself and have it registered, in addition to being on a tight timeline. Other civil remedies are available, but do not give revenge porn victims the satisfaction of holding their perpetrator morally culpable for their actions. Lastly, state criminal laws do offer retributive remedy, but are still unavailable in many states and punishments vary by state. While other criminal statutes could be contorted to address revenge porn, the technological and public aspects of revenge porn call for their own specialized statute. As such, a federal criminal statute may be the best remedy for revenge porn victims because it provides a uniform and universally available means of holding a perpetrator responsible for a crime that can often mean the victim's image is visible across the nation.

II. POTENTIAL LEGAL REMEDIES AND THEIR DEFENSES

A. *Copyright Remedies*

Copyright remedies are limited for revenge porn victims because they only protect victims who own the copyright of the image that was posted online without their consent.⁴⁹ If the victim does own a copyright of the image, then she may claim copyright infringement if her image is published online without her consent.⁵⁰ However, a victim who does sue the poster for copyright infringement cannot receive monetary damages unless she registers the

45. See Julia Marsh, *Revenge Porn Victim to Google: Make Me Disappear*, N.Y. POST (Jan. 3, 2017, 6:48 PM), <http://nypost.com/2017/01/03/revenge-porn-victim-wants-her-name-deleted-from-google/> [<https://perma.cc/QG7S-94PK>].

46. *See id.*

47. Park, *supra* note 39.

48. Marsh, *supra* note 45.

49. Folderauer, *supra* note 30, at 329.

50. *Id.*

image with the copyright office within ninety days of her knowledge of the infringement.⁵¹ Additionally, no statutory damages or attorney's fees are available to a victim before the registration of the image.⁵² The other available option is to send a takedown notice to the website that hosts the victim's image under the Digital Millennium Copyright Act ("DMCA").⁵³ There are two advantages to a takedown notice pursuant to the DMCA: (1) the victim does not have to have the image registered with the copyright office, and (2) website operators can be deprived of DMCA immunity if the victim files suit against the website operator.⁵⁴ However, it should be noted that these images must be self-created, so the victim must have taken the image herself.⁵⁵ Additionally, while a successful takedown notice may provide relief for the victim by removing her photo from public view, there are no means of receiving monetary damages.⁵⁶ This is certainly the least feasible legal remedy for many revenge porn victims, though it has theoretical appeal because there is the opportunity to slow or stop online circulation of the image.

1. The Digital Millennium Copyright Act ("DMCA")

The DMCA can affect the potential success of a victim's request to have an image removed from a website. The DMCA is a federal statutory scheme that provides victims with the ability to serve a takedown notice to a hosting website.⁵⁷ The DMCA also provides hosting websites with substantial immunity from copyright claims.⁵⁸

A victim may find a remedy in removing her image from a website by serving that website with a DMCA takedown notice. One benefit of this option is its availability even if the content is not copyrighted.⁵⁹ Considering the substantial barriers a victim faces in proving to websites that they have a copyright interest in their images and the great difficulty in enforcing a copyright more generally, this is perhaps a victim's most realistic remedy under copyright law. However, this option does not provide for any monetary damages and does not discourage the individual revenge porn poster. As such,

51. *Id.* at 330.

52. 17 U.S.C. § 412 (2012).

53. Folderauer, *supra* note 30, at 330; *Protecting Yourself Against Copyright Claims Based on User Content*, DIGITAL MEDIA PROJECT, <http://www.dmlp.org/legal-guide/protecting-yourself-against-copyright-claims-based-user-content> [https://perma.cc/2CFD-GFNG] (last visited Oct. 25, 2017) (Section 512 of the DMCA contains "safe harbor" provisions for ISPs that protect administrators from liability for copyright infringements of the site's users and linking copyright infringing material from other online sources).

54. Folderauer, *supra* note 30, at 330.

55. *Id.*

56. *Id.*

57. *Id.* at 331.

58. *Id.*

59. Mr. DMCA Helper, *Knowledge Base: What is a DMCA Takedown?*, DMCA.COM, (last updated Apr. 20, 2017), <http://www.dmca.com/FAQ/What-is-a-DMCA-Takedown> [https://perma.cc/8GTK-GZVJ].

while this can help the victim in terms of image removal or maybe financial restitution, this provides little retribution for the revenge porn victim.⁶⁰ The benefit of serving a website host with a takedown notice is that, if successful, the image will be removed from public, online view on that website.⁶¹ But, often an image makes its way to many websites, so removal may have to take place through several takedown processes and may ultimately still not relieve the victim of having her intimate image online.

Both internet service providers and websites that host revenge porn receive substantial immunity under the Communications Decency Act (“CDA”).⁶² Section 230 provides ISPs and hosting websites protection against obscenity and other criminal claims.⁶³ The benefit to a copyright claim is that Section 230 does not provide the same level of immunity to ISPs and websites hosting revenge porn.⁶⁴ Section 230 was intended to preserve First Amendment protections of free speech by protecting ISPs from violations of criminal law in cases of obscenity and child pornography.⁶⁵ An exception is made under Section 230, however, in copyright law violations.⁶⁶ However, the CDA does provide several safe harbor provisions to limit ISP liability for copyright infringement claims including: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools.⁶⁷ So, if an ISP removes the image when it receives a takedown notice, it can avoid secondary liability in an infringement claim.⁶⁸ While these immunities protect ISPs from legal responsibility for revenge porn content on sites, they limit a victim’s ability to find financial restitution and do not encourage ISPs to monitor for revenge porn content.

2. Copyright Infringement Claims

To preface, copyrights can be difficult to obtain and are not instantaneous, so the effectiveness of such a claim might only be nomi-

60. Folderauer, *supra* note 30, at 330.

61. *Id.*

62. *Id.* at 331; 47 U.S.C. § 230 (2012).

63. Folderauer, *supra* note 30, at 331.

64. *Id.* at 330–31.

65. *Id.*

66. *Id.* at 330–32.

67. *Id.* at 330 n.69; *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). Here, (a) transitory network communication refers to ISPs who act as passive conduits of material through their networks from a third party to a designated recipient, (b) system caching refers to ISPs who create copies of material for faster access so long as it does not interfere with reasonable copy protection systems, and (c) information location tools refer to tools such as a web search engine that an ISP uses to link users to an online location containing infringing material if the ISP does not know the material is infringing. See 17 U.S.C. § 512(b)-(d) (2016); *Protecting Yourself Against Copyright Claims Based on User Content*, DIGITAL MEDIA LAW PROJECT, *supra* note 53.

68. Folderauer, *supra* note 30, at 330 n.69; See 17 U.S.C. § 512(c)(1)(A) (2012).

nal. The two elements a copyright infringement claim are that a plaintiff show (1) ownership of a valid copyright, and (2) copying of protectable constituent elements of the work.⁶⁹ Copyright liability may be established by “direct copyright infringement, contributory copyright infringement, and vicarious copyright infringement.”⁷⁰ Direct infringement only requires a plaintiff to prove two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁷¹ Contributory infringement is established by demonstrating the defendant had actual or constructive knowledge of the infringing activity and he caused, induced, or “materially contribute[d] to the infringing conduct of *another*.”⁷² Vicarious liability may be established if the defendant “enjoys a direct financial benefit from *another’s* infringing activity and ‘has the right and ability to supervise’ the infringing activity.”⁷³

3. Impediments for Revenge Porn Victims Seeking Copyright Remedies

In addition to the complexity involved in copyrighting an image and the low likelihood that a copyright infringement claim will prevail, there are several other impediments for successful remedies under copyright law. First, the U.S. Code has a prerequisite registration requirement for infringement claims.⁷⁴ While registration is not necessary for copyright protection, a copyright owner is only entitled to statutory damages if the copyright is registered before or within three months of the infringement or within one month after the owner becomes aware of the infringement.⁷⁵ So, in addition to the difficulty of getting an image copyrighted, an untimely registration would exclude the victim from statutory damages. Therefore, copyright remedies are impracticable because a victim must essentially have all her intimate images registered to have an effective claim with a real possibility for monetary restitution.

Additionally, the website or online service provider has two defenses at hand against a copyright infringement claim: the implied license defense and the fair use defense.⁷⁶ The implied license defense may be invoked where the poster can prove (1) the licensee requests the creation of an image, (2) the licensor makes the image and delivers it to the licensee who requested it, and (3) the licensor intends that

69. *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1177–78 (10th Cir. 2009) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

70. *Ellison*, 357 F.3d at 1076.

71. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

72. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt. Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

73. *Ellison*, 357 F.3d at 1076; see Folderauer, *supra* note 30.

74. 17 U.S.C. § 412 (2012).

75. Folderauer, *supra* note 30, at 337; 17 U.S.C. § 412 (2012).

76. Folderauer, *supra* note 30, at 337.

the licensee copy and distribute the image.⁷⁷ If a victim consented to the creation of an image, an incorrect determination may be made that she gave implied consent to the image's distribution.⁷⁸ The fair use defense is determined by balancing four factors: (1) the purpose and character of the image's use; (2) the nature of the image; (3) the amount and substantiality of the image used; and the effect of the image's use on the potential market or value of the image.⁷⁹ These factors do not fit well with what would be an already unlikely situation: a copyrighted intimate image. Because revenge porn is not often distributed for commercial use, one of the main signifiers of unfair use, and is by nature often unpublished by the copyright owner, another sign of unfair use, the defense's success will vary case-by-case.⁸⁰

B. *Civil Liability Remedies*

A Texas appeals court made headlines when it "mostly" upheld a revenge porn verdict.⁸¹ Nadia Hussain broke up with Akhil Patel.⁸² Patel secretly recorded naked videos of Ms. Hussain while they were in a relationship and posted them online after she ended the relationship.⁸³ Patel also harassed her through text messages and phone calls.⁸⁴ A jury awarded Ms. Hussain \$500,000 for defamation, intentional infliction of emotional distress, and intrusion on seclusion and public disclosure of private facts claims.⁸⁵ On appeal, the Court eliminated \$155,000 of Ms. Hussain's award because the existing civil claims she brought were not suited for a revenge porn case.⁸⁶ First, Patel successfully argued that the videos were substantially true, an affirmative defense to a defamation claim.⁸⁷ Next, Patel argued that Hussain's intentional infliction of emotional distress ("IIED") claim should fail because it mimicked her intrusion and disclosure claims.⁸⁸ The Court agreed because, in Texas, IIED is only available when there are no other theories of redress.⁸⁹

There are several civil liability claims that could provide remedies for revenge porn victims including invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, unjust enrichment, and breach of

77. *Id.*

78. *Id.*

79. *Id.* at 338.

80. *Id.* at 337.

81. *Texas 'revenge porn' verdict mostly upheld on appeal (Tex. App. Ct.)*, WESTLAW INTELLECTUAL PROPERTY DAILY BRIEFING (Feb. 1, 2016), www.westlaw.com (search "2016 WL 367974").

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

contract. However, there are a few impediments that limit the availability or scope of a civil remedy for a victim of revenge porn. First, if the victim consented to the image's creation or willingly provided the poster with the image, the victim fights an uphill battle. Second, the Communications Decency Act ("CDA") protects ISPs and websites from liability when revenge porn has been posted because they were not the content provider.⁹⁰ In many cases, this lessens the appeal of pursuing a civil remedy for revenge porn victims because they cannot pursue the parties with the deepest pockets for adequate monetary damages.⁹¹

1. Available Remedies

There are several civil statutes that make websites or individual posters liable for publishing a victim's intimate images. First, a victim may make an invasion of privacy claim.⁹² Unlike available copyright remedies, civil remedies are practically more actionable because the victim need not register her intimate images or have knowledge that someone has taken her intimate images. Invasion of privacy claims such as unreasonable intrusion, public disclosure of private facts, appropriation of name or likeness, or false light may be available to some revenge porn victims.⁹³ Additionally, a revenge porn victim may seek other tort claims like intentional or negligent infliction of emotional distress.⁹⁴ Finally, revenge porn victims may have success with other civil causes of action like defamation, unjust enrichment, or breach of contract.⁹⁵

First, in an invasion of privacy claim, a revenge porn victim must prove one of four interests: (1) unreasonable intrusion upon the seclusion of another, or into another's private affairs; (2) unreasonable publicity given to the other's private life; (3) appropriation of another's name or likeness for the appropriator's advantage; and (4) publicity that unreasonably places the other in a false light before the public.⁹⁶ Some revenge porn victims can benefit from an invasion of privacy claim because some states guarantee a right to privacy in their constitutions.⁹⁷ The latter two actionable interests concern using a person's likeness for "commercial purposes and/or may concern libel and slander," but revenge porn victims use these two the least.⁹⁸

90. See Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CAL. L. REV. 1303 (2014).

91. See *id.*

92. See Elizabeth Williams, *Cause of Action for Internet Posting of "Revenge Porn,"* 72 CAUSES OF ACTION, 2D 537 (2016).

93. See *id.*

94. See *id.*

95. See *id.*

96. See *id.* § 4; RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW. INST. 1977).

97. Williams, *supra* note 92, at § 4.

98. *Id.*

In an unreasonable intrusion/invasion of privacy claim, a revenge porn victim must prove: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable person.⁹⁹ This particular claim is concerned with how the information was obtained rather than the fact that it was published.¹⁰⁰ A revenge porn victim may not raise this claim if the images were taken with her consent if the only issue is that the images were disclosed or published without her consent.¹⁰¹

A revenge porn victim raising a cause of action for invasion of privacy under public disclosure of private facts must prove: (1) the facts disclosed are private in nature; (2) the facts were disclosed to the public; (3) the disclosure is one that would be highly offensive to a reasonable person; (4) the facts disclosed are not of a legitimate concern to the public; and (5) the defendant acted with reckless disregard of the private nature of the facts disclosed.¹⁰² However, some jurisdictions do not recognize the tort of invasion of privacy based on public disclosure of private facts.¹⁰³ Additionally, the public disclosure element has often been construed to mean publicity rather than mere publication.¹⁰⁴ In other words, there is not a clear standard for when a revenge porn post has seen sufficient publicity to give rise to tort liability.¹⁰⁵ In revenge porn cases, however, harm occurs with mere publication, not just publicity, leaving some victims without an actionable case even though real harm may have occurred even if it reached only one or two individuals.¹⁰⁶

Second, a victim may make a claim for intentional or negligent infliction of emotional distress.¹⁰⁷ For intentional infliction of emotional distress, a revenge porn victim must show: “(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress.”¹⁰⁸ Unless a revenge porn victim can show that the perpetrator went beyond any semblance of human decency, this claim cannot succeed.¹⁰⁹ In order to prove emotional stress beyond a preponderance of the evidence, the general standard

99. *Id.*; *Lewis v. LeGrow*, 670 N.W.2d 675, 687 (Mich. Ct. App. 2003).

100. *Williams*, *supra* note 92, at § 4.

101. *Id.*

102. *Id.*; *Purzel Video GmbH v. St. Pierre*, 10 F. Supp. 3d 1158 (D. Colo. 2014).

103. *Williams*, *supra* note 92, at § 4.

104. Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 720 (2016).

105. *Id.*

106. *Id.*

107. *Williams*, *supra* note 92, at § 4.

108. *Id.* at § 12; *See, e.g., Lewis*, 670 N.W.2d at 687; *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008); *Del Mastro v. Grimado*, 2005 WL 2002355 (N.J. Super. Ct.).

109. *Williams*, *supra* note 92, at § 12; *Lewis*, 670 N.W.2d at 687; *Del Mastro*, 2005 WL 2002355 (citing Restatement (Second) of Torts § 46 (AM. LAW INST. 1977)).

requires the distress be “so severe that no reasonable man could be expected to endure it.”¹¹⁰

Next, a victim may make a claim for defamation.¹¹¹ To have a substantive cause of action under defamation, “the revenge porn victim must prove that without privilege or authorization, and with fault as judged, at minimum, by a negligence standard, the defendant published to a third party a false statement.”¹¹² Therefore, defamation hinges on the information or images being substantially false. If the images posted of the revenge porn victim are substantially true, then a jury cannot award damages because that is an affirmative defense. The way the images were obtained or published is irrelevant. It only matters that the images were not altered or photo-shopped to make them substantially false.

Fourth, unjust enrichment is an available claim for victims of revenge porn.¹¹³ If no express contract exists between the victim and the poster, there may be the opportunity for an unjust enrichment claim if the poster realized some material or financial gain from publishing the victim’s nude images.¹¹⁴

Finally, a victim may make a breach of contract claim.¹¹⁵ Theoretically, “[i]f a couple has agreed that neither will publish any images of the other, and one party violates that agreement, the other may seek remedies for breach of contract.”¹¹⁶ However, case law has acknowledged a breach of contract only in cases where there was a written separation agreement disallowing either party from distributing the other’s image.¹¹⁷ So, this form of legal civil remedy may prove difficult for an individual who had either an implicit or explicit understanding that the photos were for personal use without any indication of a formal agreement.

2. Impediments: The Communications Decency Act

In terms of civil remedies, there are several impediments that may prevent a victim from receiving damages or holding the poster accountable. The first impediment is consent. Any consent the victim gave regarding the production or maintenance of the image may impede a revenge porn victim from being able to successfully find a remedy under civil liability.

Second, and most important, is Section 230 of the Communications Decency Act. Congress included their findings in Section 230 that the internet has offered a highly user-friendly plethora of

110. Williams, *supra* note 92, at § 12; Del Mastro, 2005 WL 2002355.

111. Williams, *supra* note 92.

112. Weinstock v. Sanders, 144 A.D.3d 1019, 1020 (N.Y. Sup. Ct. 2016).

113. Williams, *supra* note 92, at § 12.

114. *Id.*

115. *Id.*

116. *Id.* at § 13.

117. *Id.*; Davis v. Spriggs, 2010 WL 4881491 (Ohio Ct. App.).

“educational and informational resources” to Americans which is open to much more advancement in coming years.¹¹⁸ Congressional findings supported the internet as a “forum for a true diversity of political discourse ... [and] unique opportunities for cultural development” which benefits *all* Americans.¹¹⁹ As such, Congress found that

[t]he rapidly developing array of Internet and other interactive computer services ... represent an extraordinary advance in the availability of educational and informational resources ... [which] offer users a great degree of control over the information that they receive ... The Internet and other interactive computer services have flourished, to the benefit of *all* Americans, with a minimum of government regulation. Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.¹²⁰

Congress made clear its intent to immunize ISPs and other interactive computer services from liability to continue the trend of online entrepreneurial progress.¹²¹ However, this prevents certain victims, like those of revenge porn, from seeking meaningful civil remedies. While the individual who posted the victim’s image may not be held directly responsible in either case, robbing the victim of some retribution, ISP immunization prevents any recompense for the victim. Both the inability to hold the direct perpetrator responsible and the inability to find financial recompense from ISPs, or the sense that the financial accountability is misplaced, are reasons that criminal prohibition is more logical and effective.

C. *State Criminal Law Remedies*

Ian Barber and his girlfriend broke up.¹²² Over several weeks following their breakup, Barber sent nude photos of his ex-girlfriend to her employer and her sister.¹²³ Her naked images were also posted to the millions of users at large on Twitter.¹²⁴ Barber was charged with aggravated harassment, dissemination of unlawful surveillance, and public display of offensive sexual material.¹²⁵ However, the judge dismissed the case because none of the charges’ elements could be satisfied.¹²⁶ Even though the judge called Barber’s actions “reprehensible,” he had not violated any of the criminal statutes under which

118. 47 U.S.C. § 230(a)(1)-(5) (2012).

119. *Id.*

120. *Id.* (emphasis added).

121. *Id.*

122. *People v. Barber*, 42 Misc.3d 1225(A) (N.Y. Crim. Ct. 2014).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

he was charged.¹²⁷ Because New York state had no criminal statute specific to the crime of revenge porn, Barber was not held culpable in a court of law for his actions.¹²⁸ Barber's ex-girlfriend was not granted any retribution for his actions. Twelve states still lack any criminal statute prohibiting an individual from posting intimate images of another person against their will.¹²⁹ For these people, legal recourse is rare because state criminal statutes are currently the most effective remedies available to revenge porn victims. This gap in state criminal law was best articulated by Emily Shire:

Lost in all of this legal analysis is the nature of intent. Why else would Barber share naked photos of his girlfriend with her sister, her employer, and, more importantly, the millions of people on Twitter? You do something so twisted to shame a woman, hurt her career, and bombard her with a cyber stream of sexual and malicious remarks.¹³⁰

The assumption that Barber's ex-girlfriend gave him consent to publish her images to the world at large, her sister, and her employer when she allowed him to have the images for personal use is dangerous.¹³¹ Because she allowed Barber to take the photos, she implicitly gave him consent to publish the images under the existing New York statutory scheme.¹³² However, this legal outlook disserves women in our country and clings to the outdated idea that women should fastidiously guard their chastity from even their most intimate and trusted partners.¹³³

While there is no federal statute criminalizing revenge porn, many states have proposed and adopted statutes to their criminal codes prohibiting revenge porn.¹³⁴

1. Available Remedies

More than half of the states have passed statutes criminalizing revenge porn. In total, thirty-eight states, and Washington, D.C., have passed such statutes.¹³⁵ However, the states that have criminalized

127. Erin Donaghue, *Judge Throws Out New York "Revenge Porn" Case*, CBS NEWS (Feb. 25, 2014, 4:42 PM), <http://www.cbsnews.com/news/judge-throws-out-new-york-revenge-porn-case/> [https://perma.cc/673L-LXUL].

128. *Id.*

129. *38 States + DC Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> [https://perma.cc/5RBC-CRD8] (last visited Oct. 16, 2017).

130. Emily Shire, *New York Can't Kick Its Revenge Porn Habit*, DAILY BEAST (Feb. 25, 2014, 5:45AM), <http://www.thedailybeast.com/articles/2014/02/25/i-heart-revenge-porn-new-york-fails-its-first-revenge-porn-case.html> [https://perma.cc/2947-VN6W].

131. *Id.*

132. *See id.*

133. ROBERT A. HINDE, *WHY GOOD IS GOOD: THE SOURCES OF MORALITY* 103–127 (2002).

134. COLO. REV. STAT. ANN. § 18-7-107 to -108 (2017).

135. *38 States + DC Have Revenge Porn Laws*, *supra* note 129.

revenge porn have classified it in different ways.¹³⁶ Essentially, the magnitude of a potential punishment for a revenge porn poster varies by state.¹³⁷

If an individual is accused of posting intimate images of a victim, the charge will have a different name, but more importantly, classification depending on the state in which charges are filed. For example, in California, a person who posts intimate images may be charged with disorderly conduct, a misdemeanor.¹³⁸ In Alaska, the same perpetrator would be charged with harassment in the second degree.¹³⁹ In New Jersey, the perpetrator would be charged with invasion of privacy, third degree.¹⁴⁰ In North Carolina, a perpetrator would be charged with disclosure of private images, a class H felony or class one misdemeanor if the poster is under eighteen.¹⁴¹ In Florida, the perpetrator would be charged with sexual cyberharassment, a first degree misdemeanor, or a third degree felony on subsequent violations.¹⁴²

Direct comparison between state criminal statutes proscribing revenge porn makes one thing clear: the only commonality between many states is that legislatures are unsure how to deal with this kind of crime. First, there is the difficulty of the crime taking place online or through phone messaging. Second, different state legislatures have varied the seriousness of the crime and a victim's suffering through misdemeanor or felony classification. This variable set of prohibitions against publishing revenge porn is unfair and confusing to revenge porn victims, especially because the ramifications of the poster's actions will often result in the image crossing state lines. So, even if a revenge porn victim comes to find that her image has been published from a national website or loved one from another state, the state with jurisdiction may either have no criminal prohibition or a prohibition in name only.

One expanded example of state criminalization of revenge porn is Colorado. Colorado has added a criminal statute proscribing revenge porn.¹⁴³ Colorado prohibits individuals from posting intimate photos for either harassment or pecuniary gain.¹⁴⁴ Under these provisions, the individual who posts the intimate image of the victim is charged with a class one misdemeanor and may face up to a ten-thousand dollar fine in addition to any other punishment the court

136. *Id.*

137. *Id.*

138. CAL. PENAL CODE § 647(j)(4) (2017).

139. ALASKA STAT. § 11.61.120(6) (2016).

140. N.J. STAT. ANN. § 2C:14-9(c) (West 2016).

141. N.C. GEN. STAT. § 14-190.5A (West 2016).

142. FLA. STAT. ANN. § 784.049 (West 2017).

143. COLO. REV. STAT. §§ 18-7-107 to -108 (2017).

144. COLO. REV. STAT. § 18-7-107 (2017).

imposes.¹⁴⁵ Importantly, Colorado included a section explicitly stating that:

[n]othing in this section shall be construed to impose liability on the provider of an interactive computer service, as defined in 47 U.S.C. sec. 230(f)(2), an information service, as defined in 47 U.S.C. sec. 153, or a telecommunications service, as defined in 47 U.S.C. sec. 153, for content provided by another person.¹⁴⁶

Because the CDA has preempted the field, states must be careful not to conflict with the CDA in their penal codes; otherwise, they will be deemed unconstitutional. By providing a section stating that the penal statute in Colorado is not to be interpreted as conflicting with the CDA, Colorado protects itself from a constitutional challenge as well as revenge porn victims who must rely on state criminal statutes to hold their posters accountable. However, Colorado does allow an individual convicted of posting intimate photos to have the record sealed after five years if he or she has not committed an additional crime.¹⁴⁷

There is one federal criminal remedy currently available for victims of revenge porn: criminal infringement. Criminal infringement can be charged under 17 U.S.C. § 506.¹⁴⁸ However, this is a criminal charge that applies only when an individual has “willfully infringe[d] a copyright”.¹⁴⁹ In other words, for this federal criminal statute to provide a real remedy for a revenge porn victim, the victim must have a copyright for the intimate image. There may also be some difficulty with the knowledge element of this federal statute. Criminal infringement requires that the poster was willful, or knew that the conduct was unlawful.¹⁵⁰ This means that the government must show that a poster voluntarily, intentionally violated a known legal duty in order to prove that defendant knew he was acting illegally, despite the general rule that ignorance of the law is no defense to prosecution.¹⁵¹

As mentioned in the sections above, describing the relationship between victims of revenge porn and copyright law, this is a difficult process with no assurance of getting a copyright. This federal statute would likely only be applicable in very unusual circumstances. So, this is a remedy in name only.

145. *Id.* at § 18-7-107(1)(c).

146. *Id.* at § 18-7-107(5).

147. *Id.* at § 24-72-709.

148. 17 U.S.C. § 506 (2012).

149. *See id.* at § 506(a)(1).

150. *United States v. Liu*, 731 F.3d 982, 989 (9th Cir. 2013).

151. *Id.*

2. Impediments

The main impediment for victims pursuing criminal charges against posters is the federal preemption of the Communications Decency Act.¹⁵² The federal preemption for section 230, among other provisions, requires states to limit criminal liability to the individual who posted the content and from conflicting with any provisions of the CDA. Otherwise, a state risks any criminal statute it passes being struck down as unconstitutional.

III. REVENGE PORN AND ONLINE IMPERSONATION

Another recent widespread online phenomenon is online impersonation. Online impersonation and revenge porn intersect when the individual who posts the victim's intimate image also poses as the victim online to persons trying to contact the person in the image. Outside of the intersection with revenge porn, online impersonation has been popularized as "catfishing."¹⁵³ A "catfish" is an individual who assumes another person's identity online by taking their photos and creating social media profiles or interacting with other people online as if they were the individual in the photo.¹⁵⁴ Here, when an individual posts a woman's intimate image and then contacts and talks with individuals online as if they were the woman, the poster becomes an impersonator. Those revenge porn posters who pose as their victims and engage in online correspondence with viewers add another layer of a revenge porn victim being denied agency. By participating in this behavior, posters become even more sinister by deceiving other individuals online.¹⁵⁵ This may be an instance where a victim could use the last two interests in an invasion of privacy claim: appropriation of another's name or likeness for the appropriator's advantage, and publicity that unreasonably places the other in a false light before the public

IV. FEDERAL CRIMINALIZATION ANALYSIS

Existing legal remedies for revenge porn victims each have faults that require the victim to compromise restitution, retribution, removal, or any legal remedy. Copyright law's registration requirements and ISP immunities for secondary copyright infringement

152. 47 U.S.C. § 230(e)(3) (2012).

153. Molly McHugh, *It's Catfishing Season! How to Tell Lovers from Liars Online, and More*, DIGITAL TRENDS (Aug. 23, 2013, 3:00 AM), <http://www.digitaltrends.com/web/its-catfishing-season-how-to-tell-lovers-from-liars-online-and-more/> [<https://perma.cc/BF6T-PLZ6>].

154. *Id.*

155. See Maksim Reznik, *Identity Theft on Social Networking Sites: Developing Issues of Internet Impersonation*, 29 TOURO L. REV. 455 (2013); Kori Clanton, *We Are Not Who We Pretend To Be: ODR Alternatives to Online Impersonation Statutes*, 16 CARDOZO J. CONFLICT RESOL. 323 (2014).

liability can make it difficult for the victim to have the image removed, hold the perpetrator accountable, or receive financial restitution. The civil remedies, while likely more effective than copyright remedies, are not tailored to the online and harmful nature of revenge porn. Finally, state criminal prohibitions are not uniform, with some penal consequences only amounting to a slap on the wrist. The lack of deterrence and uniformity provided by state statutes matter where revenge porn often crosses state lines on social media platforms or websites. Though states are charged with devising their own criminal statutory schemes, the federal government may create federal criminal statutes prohibiting conduct that “might interfere with the exercise of an enumerated power.”¹⁵⁶

A. *Potential Civil Rights Implications of a Federal Statute Criminalizing Revenge Porn*

The main concern with civil rights regarding revenge porn is the First Amendment right to freedom of speech.¹⁵⁷ The First Amendment’s protections of the right to free speech extend to the internet.¹⁵⁸ Some First Amendment concerns arise in statutes proscribing revenge porn due to its nature, including whether actual harm, identification, and emotional distress occur.¹⁵⁹ If statutes do not include these requirements with specificity, there is a worry that the statutory scheme will criminalize too much speech.¹⁶⁰ First Amendment defenders also argue that when a law prohibits speech intended to annoy, harass, or cause emotional distress, courts find the statutory restriction unconstitutional.¹⁶¹ However, not all speech is protected by the First Amendment, and speech that “defame[s] others or invade[s] their privacy by disseminating nude or sexually explicit images without consent” should be excluded from that protection.¹⁶² Revenge porn could qualify as obscene and could fall under a “categorical exception” to the First Amendment.¹⁶³ Even without implicat-

156. *United States v. Comstock*, 560 U.S. 126, 147 (2010).

157. See Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 673 (2015); Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 *EMORY L.J.* 661 (2016).

158. *Doe v. Shurtleff*, 628 F.3d 1217, 1222 (10th Cir. 2010) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)); 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, 274 (2015).

159. Kitchen, *supra* note 158, at 274–75.

160. *Id.*

161. *Id.* at 274; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (discussing “our longstanding refusal to allow damages to be awarded because the speech in question may have adverse emotional impact on the audience.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.”).

162. Kitchen, *supra* note 158, at 276.

163. *Id.* at 277.

ing the categorical exception of obscenity, a sufficiently cogent and limited statutory scheme could avoid many potential First Amendment implications.¹⁶⁴ Importantly, one of the First Amendment's most important functions is promoting an individual's autonomy.¹⁶⁵ Forerunner in cyber civil rights, Danielle Citron, explains that "restraining a mob's most destructive assaults is essential to defending the expressive autonomy and equality of its victims . . . [because] their actions also implicate their victims' autonomy and ability to participate in political and social discourse."¹⁶⁶

Additionally, keeping the identity behind a person's explicit images would have little impact on a poster's expression of ideas under the First Amendment.¹⁶⁷ Revenge porn does not promote civic character or education for the public's benefit.¹⁶⁸ Lack of a proper legal remedy for revenge porn, however, would have a chilling effect on private expression because without an expectation of privacy, victims would not be inclined to engage in that intimacy, even among committed couples.¹⁶⁹

First Amendment defenders and revenge porn victims would benefit from a federal criminal law proscribing revenge porn because it would be a unified scheme that, if drafted correctly, would provide retribution for the revenge porn victim, ensure free speech protections, and avoid over-criminalization.

B. Existing Scattered Remedies Are Inadequate and Demand a Federal Criminal Statute

While a federal cyber stalking statute exists, it has only been invoked in ten cases between 2010 and 2013.¹⁷⁰ The National Conference of State Legislatures defines cyberstalking as "the use of the Internet, email, or other electronic communications to stalk, and generally refers to a pattern of threatening or malicious behaviors," involving a "credible threat to harm."¹⁷¹ Under the federal cyberstalking statute, any conduct taken by the perpetrator online that places the victim in reasonable fear of death or serious bodily injury, or "causes, attempts to cause, or would be reasonably expected to cause

164. *Id.*

165. Daniel J. Solove & Paul M. Schwartz, *Restricting Speech to Protect Speech: Cyber Civil Rights*, in INFORMATION PRIVACY LAW 162–163 (5th ed.) (citation omitted).

166. *Id.*

167. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).

168. *Id.*

169. *Id.*

170. Solove & Schwartz, *supra* note 165, at 164–166; See 18 U.S.C. § 2261A (2012); e.g., *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) (holding that a defendant was properly convicted of cyber stalking because he posted revenge porn of his ex-wife online and then tried to extort money from her to remove it).

171. National Conference of State Legislatures, "State Cyberstalking and Cyberharassment Laws" (Jan. 12, 2015).

substantial emotional distress” to the victim or the victim’s immediate family.¹⁷²

While some revenge porn victims could make a case under these requisite elements, not all victims experience the kind of pervasive interaction with the poster that would constitute cyberstalking under the federal statute. While this element may be absent in some cases of revenge porn, any instance of revenge porn is an extreme invasion of privacy that causes serious and irreversible harm to the victim. Mary Anne Franks, a law professor who has helped draft several state revenge porn laws, posed it best: “As modern societies, we impose criminal punishments for far less. We punish theft, drug possession and destruction of property. So why don’t we punish revenge porn?”¹⁷³

1. Potential Federal Criminal Statute

A bill entered the House of Representatives in the 114th Congress known as the Intimate Privacy Protection Act of 2016.¹⁷⁴ The summary for the bill describes it as an amendment to the federal criminal code,

to make it unlawful to knowingly distribute a photograph, film, or video of a person engaging in sexually explicit conduct or of a person’s naked genitals or post-pubescent female nipple with reckless disregard for the person’s lack of consent if the person is identifiable from the image itself or from information displayed in connection with the image.¹⁷⁵

The bill was a good initial draft, as it explicitly did not forbid use of explicit images in reports to law enforcement, the courts, corrections officers, intelligence officers, or any other cases of public interest.¹⁷⁶ Further, platform providers, such as Facebook, are not held for third party liability if users upload something that violates the bill, unless the platform explicitly invites the content.¹⁷⁷ However, it would be important to parse through the intent element, specified as “reckless disregard,” in order to ensure that persons not really culpable cannot be prosecuted under a federal statute.

172. Joey L. Blanch & Wesley L. Hsu, *An Introduction to Violent Crime on The Internet*, in 64 U.S. ATT’Y’S BULL. 2, 5 (2016), <https://www.justice.gov/usao/file/851856/download> [<https://perma.cc/D56U-RBPP>]; 18 U.S.C. § 2261A (2012).

173. Mary Anne Franks & Danielle Citron, *It’s Simple: Criminalize Revenge Porn, or Let Men Punish Women They Don’t Like*, GUARDIAN (Apr. 17, 2014, 11:40 AM), <http://www.theguardian.com/commentisfree/2014/apr/17/revenge-porn-must-be-criminalised-laws> [<https://perma.cc/5LC5-QWTE>].

174. Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

175. *Id.*

176. *Id.* (as drafted in the Discussion Draft, June 9, 2016).

177. *Id.*

A parallel bill was introduced into the House of Representatives in the 115th Congress entitled the Servicemember Intimate Privacy Protection Act.¹⁷⁸ It amends the Uniform Code of Military Justice to prohibit the nonconsensual distribution of private sexual images. A person is guilty of the offense if they (1) knowingly broadcast or distributed a visual image of another person who is at least 18 years of age, who is identifiable from the image itself or from information displayed in connection with the image, and who is engaged in a sexual act or exposes a private area, (2) obtained the image under circumstances in which a reasonable person would know or understand that the image was to remain private, and (3) knew, or reasonably should have known, that the person depicted in the image has not consented to its broadcast or distribution.¹⁷⁹

2. Potential Increase in Internet Use and Vitality

The lack of criminal liability for posting intimate photos of women prevents women's safe and equal internet use and contribution because they are subject to gendered violence online. Additionally, the internet and e-commerce suffer economic and demographic harm if there is no federal criminal remedy for victims of revenge porn.¹⁸⁰

Some groups oppose criminalization of revenge porn and discount gender discrimination online as "not real."¹⁸¹ However, countless articles have been written on the very tangible effects of online gender discrimination and violence.¹⁸² Although actions taken online may be one step removed from a physical assault, gender discrimination, and violence-like-posting, revenge porn does endanger women by subjecting them to harassment, threats, sexual

178. Servicemember Intimate Privacy Protection Act, H.R. 1588, 115th Cong. (2017).

179. *Id.*

180. See Martha Lane Fox, *Gender Equality in the Tech Sector Will Benefit the Global Economy*, FIN. TIMES (Jan. 18, 2016), <https://www.ft.com/content/e2f8ad0a-bdd6-11e5-9fdb-87b8d15baec2> [<https://perma.cc/N8HW-6N3H>]; Dalberg Advisors, *Decoding Diversity: The Financial and Economic Returns to Diversity in Tech*, DALBERG (June 23, 2016), <https://www.dalberg.com/our-ideas/decoding-diversity-financial-and-economic-returns-diversity-tech> [<https://perma.cc/SV5A-97YE>].

181. See *Online Violence: Just Because it's Virtual Doesn't Make it Any Less Real*, GLOBAL FUND FOR WOMEN, <https://www.globalfundforwomen.org/online-violence-just-because-its-virtual-doesnt-make-it-any-less-real/#.WfwB8WhSxyw> [<https://perma.cc/38D5-NCGD>] (last visited Oct. 25, 2017).

182. See Adrienne LaFrance, *When Will the Internet Be Safe for Women?*, ATLANTIC (May 20, 2016), <http://www.theatlantic.com/technology/archive/2016/05/when-will-the-internet-be-safe-for-women/483473/> [<https://perma.cc/W5EH-ELNU>]; Tracey Lien, *Why are Women Leaving the Tech Industry in Doves?*, L.A. TIMES (Feb. 22, 2015, 5:00 AM), <http://www.latimes.com/business/la-fi-women-tech-20150222-story.html> [<https://perma.cc/SBJ8-6RBQ>]; Martha Lane Fox, *Gender Equality in the Tech Sector will Benefit the Global Economy*, FIN. TIMES (Jan. 18, 2016), <https://www.ft.com/content/e2f8ad0a-bdd6-11e5-9fdb-87b8d15baec2> [<https://perma.cc/BU3K-6QML>]; Dalberg Advisors, *supra* note 180.

assaults, and stalking.¹⁸³ While criminal statutory schemes exist to address harassment, sexual assaults, and stalking, these only treat the subsequent harmful effects of the original harm—nonconsensual sexual exploitation of a woman’s image. A law that supports the premise that no violence against women will be tolerated can help cease the normalization and legitimatization of sexual exploitation, and sexually violent behavior towards women both online and in life. Further, online gender discrimination and violence affects the internet’s economic and demographic vitality.¹⁸⁴ There have been several studies conducted which attribute the lack of women participating in online commerce, both as creators and consumers, to a lack of internet vitality.¹⁸⁵

In other words, because of disproportionate internet use between genders, an opportunity is lost to create a safer, more diverse online environment for all individuals. Lack of regulation may have contributed to certain online giants like Facebook and Google because it allowed for a certain level of insulation at inception.¹⁸⁶ The argument for low regulation and high innovation can be made by comparisons of the U.S. technological sector development and countries like Chile, the Netherlands, and Brazil, which have much more stringent internet regulations and have seen fewer developments.¹⁸⁷ However, moving forward, more developments can be facilitated with higher regulation because (1) technological development is not directly stagnated by FCC regulations,¹⁸⁸ (2) more capable women will enter the field without fear of consequences, and (3) preventing the publication of revenge porn is irrelevant to technological innovation.¹⁸⁹

183. See Soraya Chemaly, *There’s No Comparing Male and Female Harassment Online*, TIME (Sept. 9, 2014), <http://ti.me/1rTRhQL>; Maeve Duggan, *Online Harassment*, PEW RESEARCH CTR. (Oct. 22, 2014), <http://pewrsr.ch/1wtypb7> [<https://perma.cc/7JQ8-83C3>].

184. See Bruce Bimber, *Measuring the Gender Gap on the Internet*, 81 SOC. SCI. Q. 868 (2000); Jennifer Lynn Gossett & Sarah Byrne, “Click Here,” *A Content Analysis of Internet Rape Sites*, 16 GENDER & SOC’Y 689 (2002).

185. *Id.*

186. Sean Moran, *FCC Internet Regulations Are a Bad Bet*, AMERICANS FOR PROSPERITY (Nov. 10, 2015), <https://americansforprosperity.org/fcc-internet-regulations-are-a-bad-bet/> [<https://perma.cc/P8AA-4HX8>].

187. *Id.*

188. See FROST & SULLIVAN, *NET NEUTRALITY: IMPACT ON THE CONSUMER AND ECONOMIC GROWTH* (2010), http://internetinnovation.org/files/special-reports/Impact_of_Net_Neutrality_on_Consumers_and_Economic_Growth.pdf [<https://perma.cc/8DJ7-896M>].

189. See Bonnie Marcus, *New York Women in Tech Boost the City’s Economy*, FORBES (Mar. 2, 2016, 9:27 AM), <http://www.forbes.com/sites/bonniemarcus/2016/03/02/new-york-women-in-tech-boost-the-citys-economy/#5e128c261cf41> [<https://perma.cc/7A6S-JHFC>]; Derek Khanna, *We Need More Women in Tech: The Data Prove It*, ATLANTIC (Oct. 29, 2013), <https://www.theatlantic.com/technology/archive/2013/10/we-need-more-women-in-tech-the-data-prove-it/280964/#> [<https://perma.cc/SJU8-ZULM>].

3. Potential Unintended Consequences of a Federal Criminal Statute

One concern in enacting a federal criminal statute prohibiting revenge porn is what unintended consequences such a statute might have on internet service providers and individuals. A specific example of an unintended consequence would be over criminalizing behavior. The provisions of a federal statute criminalizing revenge porn must be crafted with enough specificity to prevent prosecutors from charging parties that do not fall within the true parameters of such a charge. One example of a federal statute expanding its breadth beyond its original purpose is the federal Mail and Wire Fraud statutes.¹⁹⁰ Prosecutors often rely on the mail and wire fraud statutes to get a party on the hook when evidence for another criminal offense is lacking because (1) the statutory language is broad, and (2) the offenses are inchoate.¹⁹¹ Additionally, the mail and wire fraud statutes have received such a broad interpretation that individuals may be charged under the statutes who have not committed mail or wire fraud in any real sense.¹⁹²

However, there are at least three ways to mitigate any potential for inappropriate, overbroad prosecutorial discretion. First, the statute should be tailored to allow prosecution of revenge porn posters without overbroad language found in the mail and wire fraud statutes.¹⁹³ By eliminating language that can serve as a blanket charging tool, prosecuting for the wrong reasons may be avoided.¹⁹⁴ Second, the Department of Justice (“DOJ”) releases memoranda guiding federal prosecutors on who, when, and how to charge individuals under certain federal statutes.¹⁹⁵ Should the statutory language be overbroad, the DOJ has been known to self-impose limits on charging instruments.¹⁹⁶ Lastly, should the statute’s language fail to be specific and the DOJ does not implement limited charging procedures, the federal judiciary may limit the statute’s application to avoid over-prosecution.¹⁹⁷

4. Federal Criminalization Provides the Best Means of Making the Victim Whole and Deterring Would-Be

190. Julie R. O’Sullivan, *Mail and Wire Fraud*, in *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 391 (6th ed. 2016).

191. *Id.*; 18 U.S.C. §§ 1341, 1343 (2012).

192. O’Sullivan, *supra* note 190, at 391–92.

193. *Id.* at 392–93 (“Prosecutors may choose to ‘...prosecute under the more general theory of fraud codified in the mail or wire fraud statutes, thereby outflanking special defenses, minimum loss requirements or other procedural or substantive obstacles that the legislature believed were necessary to establish a fair balance of advantage.’”).

194. *Id.* at 393 (stating that more judicial opinions are calling into question a prosecutor’s choice in pushing the limit against an already overused charging tool).

195. *Id.* at 401.

196. *Id.*

197. *Id.* at 392–402.

Revenge Porn Posters

Despite the potential for unintended consequences and civil rights implications, the benefits of a federal statute criminalizing revenge porn far outweigh the risks.

First, no other existing remedy achieves real justice for revenge porn victims. Existing remedies like copyright or civil remedies do not fit the peculiarities of revenge porn and so the victim is often left without restitution for any suffering, retribution against the perpetrator, or the image's removal. Copyright remedies are difficult to obtain because it requires that the victim own and register a naked image of herself.¹⁹⁸ Then, copyright remedies have little value because images are notoriously difficult to remove from public sites and the CDA protects internet service providers, leaving no real source for monetary restitution.¹⁹⁹ Civil remedies can provide monetary restitution, but do not hold the revenge porn poster criminally liable.²⁰⁰ Additionally, most civil remedies are hard to obtain because revenge porn does not easily fit into any one civil claim.²⁰¹ Finally, state criminal law is inadequate because it is not ubiquitous throughout the United States.²⁰² Many states have not addressed the issue of revenge porn at all, leaving victims in many states without any opportunity to find relief by holding their poster responsible.²⁰³ In other states, the statute does not offer hardly any punishment, providing an inadequate deterrent effect for would-be posters.²⁰⁴ Without indication that these remedies could or would be changed in order to serve justice for revenge porn victims, there is simply no adequate remedy unless a federal criminal statute is implemented.

CONCLUSION

Although there are some scattered legal remedies available to revenge porn victims, these options, even when successful, are often inadequate because they do not account for the differences between cybercrime and physical crime. For example, a criminal statute that proscribes robbery might provide for restitution to help make the injured party whole, but once an image has been posted, it would be nearly impossible to remove it from the internet. As such, women suffer inadequate remedies for the harms suffered as revenge porn victims. Second, perpetrators are not always held accountable for posting revenge porn and there is less deterrence for those who would post revenge porn in the future. Third, while there is a First

198. *See supra* Section II(A).

199. *See supra* Section II(A).

200. *See supra* Section II(B).

201. *See supra* Section II(B).

202. *See supra* Section II(C).

203. *See supra* Section II(C).

204. *See supra* Section II(C).

Amendment argument to be made for revenge porn posters, women's civil rights and physical safety are at risk and require some tempering of a broad First Amendment reading. Fourth, revenge porn negatively affects internet vitality and e-commerce because women are alienated as potential or actual users, contributors, and consumers. Finally, while it may be difficult to draft a federal criminal statute that takes care to prevent over-criminalization, it is certainly feasible and will result in greater protections for women's safety in a country that needs to live up to the gender equality of which it boasts.