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# The Naked Truth: Insufficient Coverage for Revenge Porn Victims at State Law and the Proposed Federal Legislation to Adequately Redress Them

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# THE NAKED TRUTH: INSUFFICIENT COVERAGE FOR REVENGE PORN VICTIMS AT STATE LAW AND THE PROPOSED FEDERAL LEGISLATION TO ADEQUATELY REDRESS THEM

**Abstract**: The distribution of revenge porn is a cyber-bullying phenomenon that has proliferated on the Internet. The nonconsensual sharing of sexually explicit photographs and videos causes irreparable harm to revenge porn victims. The current state of the law, however, does little to redress the damage. Tort claims are often unsuccessful because many victims do not have the resources necessary to initiate a lawsuit. Furthermore, federal law grants operators of revenge porn websites immunity from state tort claims. In an effort to fill this gap in the law, many states have made changes or additions to their criminal statutes. To date, thirty-eight states have legislation prohibiting the distribution of nonconsensual pornography. Some states, including New Jersey and California, successfully passed anti-revenge porn legislation, while others, such as Arizona and Vermont, faced constitutional challenges. In July 2016, Congresswoman Jackie Speier introduced the Intimate Privacy Protection Act of 2016 ("IPPA"), a proposed federal law criminalizing revenge porn. This Note argues that the IPPA effectively balances the competing interests of revenge porn victims and Internet service providers and thus should be adopted by Congress.

## INTRODUCTION

In today's ever-evolving highly digitized world, one constant remains true—technology has changed the way people break up.[1] Drew Barrymore's character in the popular film, *He's Just Not That Into You*, quipped on her experience with the following:

> I had this guy leave me a voice mail at work, so I called him at home, and then he e-mailed me to my BlackBerry, and so I texted to his cell . . . . and now you just have to go around checking all these different

[1] Barbara Kantrowitz, *How Technology Has Changed the Way We Break Up*, NEWSWEEK (Aug. 2, 2010, 4:00 AM), http://www.newsweek.com/how-technology-has-changed-way-we-break-71657 [https://perma.cc/37EQ-SE2B]. Llana Gershon, an assistant professor of communication and culture at Indiana University, studied the role technology plays in romance. *Id.* In the study, the majority of students agreed that breaking up in person is more admirable, but most opted to break up with their significant other over the Internet. *Id.* For example, one student in Gershon's study discovered her boyfriend broke up with her by changing his relationship status on Facebook from "in a relationship" to "single." *Id.*

> portals just to get rejected by seven different technologies . . . . It's exhausting.[2]

Although Barrymore's remarks are satirical, they are not baseless.[3] More relationships now end digitally rather than personally.[4]

The aftermath of the modern-day break up can be equally distressing.[5] Consider the following hypothetical: Jane is in a long-term relationship with Joe.[6] Jane allowed Joe to photograph her in the nude so long as the photos were for Joe's viewing pleasure only.[7] A few months later, Jane and Joe break up and, in retaliation, Joe uploads the photographs accompanied by Jane's contact information to a "revenge porn" website.[8] Jane receives countless e-mails, calls, and Facebook friend requests from strangers soliciting sex.[9] Local police officers inform Jane that Joe's behavior is not criminal because the photographs were originally taken with consent, notwithstanding the fact that consent was conditioned on privacy.[10]

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[2] *Id.*

[3] *The New Online Breakup: What Are the Consequences?*, YOUR TANGO (July 24, 2008), http://www.yourtango.com/20085992/the-new-breakup [https://perma.cc/3LJX-BYJ4] (noting the frequency of digital break ups and explaining the devastating effects).

[4] Deni Kirkova, *You're Breaking Up with Me by TEXT? Don't Worry, You're Not the Only One Being Digitally Dumped—Most Splits Now Happen via SMS*, DAILY MAIL (Mar. 5, 2014, 1:52 PM), http://www.dailymail.co.uk/femail/article-2573879/Youre-breaking-TEXT-Dont-worry-youre-not-one-digitally-dumped-splits-happen-SMS.html [https://perma.cc/4P8L-XDLT]. A study of 2,712 American men and women revealed that more than half broke up with someone over the Internet in the last twelve months. *Id.* They explained that it was "less awkward" to break up digitally than in person. *Id.*

[5] Veronika A. Lukacs, It's Complicated: Romantic Breakups and Their Aftermath on Facebook (2012) (unpublished M.A. thesis, University of Western Ontario), https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1938&context=etd [https://perma.cc/32S9-6CQC]. Post-break up symptoms include depression, trouble concentrating, irritability, and withdrawal. *Id.* In a study conducted at the Western University of Graduate & Proctoral Studies, Lukacs found that 88.2% of participants spent time analyzing their ex's Facebook profile and that this behavior resulted in a significant amount of distress. *Id.* A study conducted at Columbia University found that the human brain reacts the same way during a break up as it does to physical pain. Melanie Greenberg, *This Is Your Brain on a Breakup*, PYSCHOL. TODAY (Mar. 29, 2016), https://www.psychologytoday.com/us/blog/the-mindful-self-express/201603/is-your-brain-breakup [https://perma.cc/8VER-K29L].

[6] Danielle K. Citron & Mary A. Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 345 (2014). Jane's story is based on an interview Citron conducted with a revenge porn victim. Danielle Keats Citron, *'Revenge Porn' Should Be a Crime in U.S.*, CNN (Jan. 16, 2014, 3:49 PM), http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/ [https://perma.cc/BQ8F-94X7].

[7] Citron & Franks, *supra* note 6, at 345.

[8] *Id.* Revenge porn websites are websites dedicated to posting defamatory material of former lovers. Layla Goldnick, Note, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 CARDOZO J.L. & GENDER 583, 585–86 (2015). These websites allow users to get "revenge" by posting intimate photographs of their former partners online accompanied by identifying personal information. *Id.*

[9] *See* Citron & Franks, *supra* note 6, at 345.

[10] *See id.* at 345–46 (noting that the state's criminal harassment law viewed one post as an isolated event and did not constitute a harassing course of conduct as required by the statute).

Unfortunately, Jane's story reflects the increasingly common cyber-bullying phenomenon known as "revenge porn."[11] Revenge pornography—also known as nonconsensual pornography—is the act of distributing sexually explicit photographs of individuals without their consent.[12] Many identify revenge porn as intimate photographs previously taken with consent during a relationship and later distributed by a vengeful ex-lover.[13] The term also comprises nude photographs or videos originally obtained without the victim's consent.[14]

As an additional means of harassment, many nonconsensual photographs are posted on popular revenge porn websites.[15] These websites specialize in hosting user-uploaded nonconsensual pornography with the implied or explicit purpose of humiliating an ex-lover.[16] The most damaging websites also divulge

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[11] Jessy Nations, *Revenge Porn and Narrowing the CDA: Litigating a Web-based Tort in Washington*, 12 WASH. J.L. TECH. & ARTS 189, 190 (2017); Aubrey Burris, Note, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2327–28 (2014); Apeksha Vora, Note, *Into the Shadows: Examining Judicial Language in Revenge Porn Cases*, 18 GEO. J. GENDER & L. 229, 229–30 (2017).

[12] Patel v. Hussain, 485 S.W.3d 153, 157 n.1 (Tex. App. 2016); *see* Citron & Franks, *supra* note 6, at 346 n.10 (noting that revenge porn is also referred to as "cyber rape" or "involuntary porn"); Nations, *supra* note 11, at 190 (using revenge porn and nonconsensual pornography interchangeably); Burris, *supra* note 11, at 2327 (stating that revenge porn is nonconsensual, involuntary pornography).

[13] Citron & Franks, *supra* note 6, at 346.

[14] *Id.* For example, dozens of nude photographs were distributed online after the iCloud accounts of one hundred female celebrities and one male celebrity were hacked in 2014. Alan Duke, *5 Things to Know About the Celebrity Nude Photo Hacking Scandal*, CNN (Oct. 12, 2014, 8:40 PM), http://www.cnn.com/2014/09/02/showbiz/hacked-nude-photos-five-things/ [https://perma.cc/GCM2-37AZ]. Jennifer Lawrence, an Oscar-winning actress and one of the victims of the above-mentioned hack, identified the sexually explicit images as photographs she sent while in a long-distance relationship with her boyfriend of four years. Sam Kashner, *Jennifer Lawrence Calls Photo Hacking a "Sex Crime,"* VANITY FAIR, Oct. 14, 2014, at 154. Lawrence called the hack a "sex crime," and a "sexual violation." *Id.* The Cyber Civil Rights Initiative agreed by regarding the celebrity iCloud hack as a form of nonconsensual pornography because the hacker obtained the images without consent. *Let's Call the Celebrity Nude Photo Hack What It Is: Nonconsensual Pornography*, CYBER C.R. INITIATIVE (Sept. 4, 2014), https://www.cybercivilrights.org/lets-call-nonconsensual-pornography/ [https://perma.cc/4FWT-ATPG]. In another highly publicized nonconsensual pornography case, a stalker secretly filmed Erin Andrews, a sports reporter, disrobing through the peephole in her hotel room. Andrews v. W. End Hotel, 2016 F. Jury Verdicts Rptr. 157 (Mar. 8, 2016) (accessible in Lexis by searching "2016 Federal Jury Verdicts Rptr. LEXIS 157"). The video has been viewed over seventeen million times since it was first posted in 2009. Natalie Finn, *Erin Andrews' Case Is a Reminder of How Difficult It Is for Sex Crime Victims to Come Forward*, E!NEWS (Mar. 3, 2016, 1:54 PM), http://www.eonline.com/au/news/745810/erin-andrews-case-is-a-reminder-of-how-difficult-it-is-to-come-forward-as-the-victim-of-a-sex-crime-and-she-deserves-more-credit [https://perma.cc/L2LJ-JWWU]. During an interview, Andrews discussed how the video has impacted her career and revealed she hears fans scream, "Hey, I've seen you naked!" while working as a sideline reporter at football games. Abigail Pesta, *The Haunting of Erin Andrews*, MARIE CLAIRE (July 13, 2011), http://www.marieclaire.com/celebrity/a6316/erin-andrews-interview/ [https://perma.cc/68CP-UAKT].

[15] Burris, *supra* note 11, at 2336, 2355. IsAnyoneUp.com, ShesAHomewrecker.com, and UGotPosted.com are all examples of revenge porn websites. *Id.* at 2326–27 nn.3–4.

[16] Emily Poole, Comment, *Fighting Back Against Non-Consensual Pornography*, 49 U.S.F. L. REV. 181, 185–87 (2015). For example, RealExGirlfriends.com advertises to "all [the] dudes out there who know what [I]'m talking about and have filmed themselves fucking. Did you save the footage?

personal information such as the person's full name, home and e-mail address, place of employment, telephone number, and links to their social media profiles.[17] For example, Hunter Moore, the 26-year-old founder of the now defunct revenge porn website IsAnyoneUp.com, encouraged users to include full names and other personal information when uploading explicit photographs.[18] As a result, many subjects receive solicitations for sex or even threats of violence from strangers who view the nonconsensual porn.[19]

Once these photographs are posted on the Internet, the consequences can be devastating to the victim's personal life.[20] Many isolate themselves from relationships, relocate to a different state, and some even change their name in an effort to distance themselves from the posted images.[21] The unbearable distress can also cause irreparable damage to a victim's psyche.[22] A study revealed that

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Well this is where you can get the ultimate revenge." *Id.* at 187. Another revenge porn website was described by a user as "a forum for exacting, sweet, anonymous revenge." Goldnick, *supra* note 8, at 586 n.8.

[17] Goldnick, *supra* note 8, at 585–86. Social media is a technological platform that facilitates online interaction through the use of words, photographs, audio, and video clips. Laura E. Diss, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841, 1842 (2013).

[18] Poole, *supra* note 16, at 187. At its height, Moore's website received nearly 350,000 hits a day. *Id.* In response to critics, Moore explained that his primary motive was to monetize the involuntary porn market, and he did, sometimes making up to $30,000 a month for operating the site. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE, Oct. 11, 2012, at 44, 46–48. Moore said, "If somebody killed themselves over being on the site, do you know how much money I'd make?" James T. Dawkins IV, Comment, *A Dish Served Cold: The Case for Criminalizing Revenge Pornography*, 45 CUMB. L. REV. 395, 401 (2015). Similar to Moore, Kevin Bollaert, the creator of another defunct revenge porn website called UGotPosted.com, used the personal information to inform subjects of the posted photos and offered image removal for a fee of up to $350. Poole, *supra* note 16, at 187–88.

[19] Adrienne N. Kitchen, Note, *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, 248 (2015). For instance, seventeen-year-old Norma received text messages from strangers soliciting oral sex after her ex-boyfriend posted nonconsensual photographs of her along with her full name, address, and bra size. Margaret Talbot, *Taking Trolls to Court*, NEW YORKER, Dec. 5, 2016, at 56.

[20] Nations, *supra* note 11, at 190; Goldnick, *supra* note 8, at 591. Revenge porn victims experience emotional distress, cyber bullying, and loss of employment, to name a few effects of revenge porn. Vora, *supra* note 11, at 229.

[21] Sarah Bloom, Note, *No Vengeance for 'Revenge Porn' Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense Is Still Legal, and Why We Should Criminalize It*, 42 FORDHAM URB. L.J. 233, 241 (2014) (commenting that Holly Jacobs, a revenge porn victim turned activist, changed her name after her ex-boyfriend posted nonconsensual images of her, but her efforts proved futile when he re-posted the photographs under her changed legal name); Amanda L. Cecil, Note, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2523–24 (2014).

[22] Citron & Franks, *supra* note 6, at 347; Kitchen, *supra* note 19, at 249. Many revenge porn victims suffer psychological harm, experience stalking, and some resort to suicide. Vora, *supra* note 11, at 229.

93% of revenge porn victims suffer significant emotional distress.[23] More than half consider suicide and, sadly, some follow through.[24]

The professional costs of involuntary porn are equally grim.[25] The sexually explicit images are often distributed to or discovered by employers and co-workers.[26] The distribution of these images swiftly undermines a victim's professional reputation, and some are even terminated as a result.[27] Moreover, job prospects for victims are severely limited by the fact that the photographs readily appear with a simple Google search.[28] Nearly 80% of employers Google prospective employees and reject candidates based on their findings about 70% of the time.[29] Employers frequently cite concerns about an applicant's inappropriate online image as a reason for rejecting someone's candidacy.[30] Unfortunately for victims, recruiters do not contact them to ascertain whether the posting was consensual or not.[31] This can lead to the perverse choice of accepting a wrongful rejection or volunteering private information with no guarantee of a different outcome.[32]

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[23] CYBER CIVIL RIGHTS INITIATIVE, CCRI'S 2013 NONCONSENSUAL PORNOGRAPHY (NCP) RESEARCH RESULTS 1 (2013) [hereinafter CYBER RIGHTS INITIATIVE].

[24] *Id.* at 2; Bloom, *supra* note 21, at 242 (stating that Audrie Potts, a high school sophomore, hung herself in the school bathroom after her classmates photographed her naked when she passed out from intoxication at a party); Goldnick, *supra* note 8, at 591 (noting that revenge porn victim Jessica Logan committed suicide after her ex-boyfriend forwarded her intimate photos to other high school students).

[25] *See* Citron & Franks, *supra* note 6, at 352 (noting that employers have fired their employees after discovering nude images of them online). Many revenge porn victims file lawsuits alleging loss of employment and educational opportunities. Burris, *supra* note 11, at 2337.

[26] Bloom, *supra* note 21, at 240–41.

[27] *Id.* at 241 (stating that a revenge porn victim lost sales after her harasser posted photos of her and described her as lustful and promiscuous). One school fired a teacher after discovering sexually explicit images online. Citron & Franks, *supra* note 6, at 352. A government employee was terminated after her co-worker distributed nude photographs of her online. *Id.*

[28] *See* Citron & Franks, *supra* note 6, at 352 (noting that many employers Google search candidates). A Google search of the subject's name can generate sexually explicit images because many perpetrators include the subject's personal information when uploading the photographs or videos. Cecil, *supra* note 21, at 2522–23. Thirty-nine percent of victims found the existence of their nonconsensual pornography negatively impacted their professional advancement and ability to network. CYBER RIGHTS INITIATIVE, *supra* note 23.

[29] Citron & Franks, *supra* note 6, at 352; Kitchen, *supra* note 19, at 250; Susan P. Joyce, *What 80% of Employers Do Before Inviting You for an Interview*, HUFFINGTON POST (May 1, 2014), http://www.huffingtonpost.com/susan-p-joyce/job-search-tips_b_4834361.html [https://perma.cc/ESZ8-B7SS] (finding that eighty percent of employers Google candidates and review their social network profiles before deciding whether to extend an interview offer).

[30] Citron & Franks, *supra* note 6, at 352. These concerns include questions about a candidate's suitability for the position based on questionable photographs or videos. *Id.*

[31] *Id.*

[32] *See* CYBER RIGHTS INITIATIVE, *supra* note 23 (finding forty-two percent of revenge porn victims had to explain the situation to supervisors or co-workers); Citron & Franks, *supra* note 6, at 352 (noting that employers do not want to hire candidates with a distasteful online presence so as to avoid a poor reflection on the employer).

Although it may be easy to disregard nonconsensual pornography as isolated acts of revenge, studies indicate that an alarming number of people are at risk.[33] A recent survey conducted by McAfee revealed that two-thirds of smartphone owners have intimate information on their phone, but only 40% protect their information with passwords.[34] In addition, the study found that 1 in 10 ex-partners have threatened to expose intimate photos of an ex, and 60% actually carried through with their threats.[35] Despite these disturbing statistics, 94% of Americans still believe their private photos are safe in the hands of their ex-lovers.[36]

The glaring research begs the question: why is there so little discussion about nonconsensual pornography and even less legal protection for victims?[37] Perhaps the answer is a product of the general apathy towards revenge porn victims.[38] The all too common response is to blame the victim for sending the photograph in the first place.[39] In effect, this response is simply a modern twist on the antiquated notion that a rape victim "asked for it" by wearing promiscuous clothing.[40] Moreover, this view ignores the reality that involuntary porn includes

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[33] Justin Pitcher, *The State of the States: The Continuing Struggle to Criminalize Revenge Porn*, 2015 BYU L. REV. 1453, 1438 ; *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 [https://perma.cc/J8TU-L6UM].

[34] *Lovers Beware*, *supra* note 33. McAfee, a computer security software company, conducted a survey entitled "2013 Love, Relationships, and Technology" to identify the risks of sharing personal online information with friends and family. *Id.* The study found that many users risk having their private information shared online after a break up. *Id.*

[35] *Id.*

[36] *Id.* The study found that many people continue to share personal information with others on the internet despite the risk that this intimate information could be leaked. *Id.*

[37] *See* Citron & Franks, *supra* note 6, at 347 (noting the lack of legal protection for revenge porn victims).

[38] *See id.* (arguing that society is delayed in understanding the complexity of involuntary porn and its harmful effect on victims); Vora, *supra* note 11, at 231 (commenting that several theorists argue that the internet proliferates gender discrimination and harassment).

[39] Rachel B. Patton, Note, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 410 (2015) (commenting that many people lack sympathy for victims because, but for the victim taking the nude photograph, the revenge porn would not exist in the first place). Eric Goldman, a professor at Santa Clara University School of Law, summarized the common viewpoint by stating that "[s]till, for individuals who would prefer not to be a revenge porn victim or otherwise have intimate depictions of themselves publicly disclosed, the advice will be simple: don't take nude photos or videos." Bloom, *supra* note 21, at 250–51.

[40] *See* Bloom, *supra* note 21, at 251–52. John Oliver, a television host, opined that victim blaming is "hard-wired into mainstream culture." Ryan Reed, *John Oliver Takes on Revenge Porn on 'Last Week Tonight,'* ROLLING STONE (June 22, 2015), http://www.rollingstone.com/tv/news/john-oliver-internet-is-haven-for-harassment-against-women-20150622 [https://perma.cc/G9TA-RWRG]. Oliver argues that telling people not to take nude photos if they do not want them to appear on the Internet is the equivalent to telling people not to live in a house if they do not want to be burglarized. *Id.*

pornography originally taken without any consent at all.[41] Another explanation is that many simply do not know such a problem exists because victims are often too embarrassed or afraid to speak out.[42] A third possibility is that the legislature and judiciary are ill equipped to combat the novel issue because tortious behavior committed over the Internet presents complex evidentiary and liability barriers.[43]

Whatever the reason, victims of revenge porn are largely unprotected under state and federal law.[44] Many tort claims fail to hold liable those who post revenge porn online because most civil laws were enacted prior to the emergence of the Internet and subsequent rise of cybercrime.[45] Even if a tort claim proves successful, however, there is still little guarantee that the explicit images will be removed from the Internet, as many third-party providers are granted immunity from civil liability.[46]

Given the lack of meaningful civil remedies, recent strides have been made to criminalize revenge porn at the state level.[47] To date, thirty-eight states have laws criminalizing nonconsensual pornography, up from a mere six in 2014.[48] Although state laws have certainly aided in combatting the crime, there are substantial issues in their application.[49] For this reason, a federal criminal statute has

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[41] *See supra* note 14 and accompanying text. Involuntary pornography includes intimate images that were not originally obtained with consent, as was the case with Erin Andrews. *See id.*

[42] *See* Citron & Franks, *supra* note 6, at 347 (commenting that society does not understand the grave risks of revenge porn because many victims are afraid to come forward with their stories in fear of experiencing further harm). Often, speaking out against the harasser can result in further harm to the victim, such as physical stalking or continued cyber harassment. Vora, *supra* note 11, at 229–30.

[43] *See* Citron & Franks, *supra* note 6, at 347 (noting that because revenge porn looms on the internet and social media, law enforcement is unable to grasp the mechanics of the issue); Bloom, *supra* note 21, at 245 (stating that revenge porn is a relatively new cyber bullying phenomenon).

[44] Cecil, *supra* note 21, at 2517 (noting the inadequacy of current legal claims to redress the harms caused by nonconsensual pornography).

[45] *See* Nations, *supra* note 11, at 190 (referring to revenge porn as a "uniquely modern phenomena"); Kitchen, *supra* note 19, at 253–54 (commenting that tort law fails to address the novel harms of revenge porn); Kai Jia, *From Immunity to Regulation: Turning Point of Internet Intermediary Regulatory Agenda*, JOLTT (Oct. 8, 2016), http://sites.utexas.edu/joltt/2016/10/08/61/ [https://perma.cc/J8H4-XFNY] (stating that cyber-tort law is still developing).

[46] Burris, *supra* note 11, at 2341–42. Additionally, a successful civil lawsuit against an ex-lover may prove futile as many of these defendants have insufficient financial resources to satisfy a judgment. *Id.*

[47] *See* Citron & Franks, *supra* note 6, at 371 (noting that as of May 2014, only New Jersey, Alaska, Texas, California, Idaho, and Utah had laws criminalizing revenge porn). As of 2018, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin have criminalized nonconsensual pornography. *38 States + DC Have Revenge Porn Laws*, CYBER RTS. INITIATIVE (2017) [hereinafter *38 States*], https://www.cybercivilrights.org/revenge-porn-laws/ [https://perma.cc/W4RX-PS79].

[48] *38 States*, *supra* note 47.

[49] S*ee* Taylor Linkous, *It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 RICH. J.L. & TECH. 14, 36–37 (2014),

recently been proposed to criminalize the distribution of nonconsensual pornography.[50]

Part I of this Note provides an overview of existing civil remedies for nonconsensual porn victims, and explains the inadequacy of such remedies.[51] It also discusses the successful and unsuccessful state efforts at criminalizing revenge porn.[52] Part II introduces the proposed federal legislation to criminalize involuntary porn and identifies counter-arguments from its opponents.[53] Finally, Part III argues that the Bill prohibiting nonconsensual pornography represents a successful balance between the need to protect Internet intermediaries safeguarded by Section 230 of the Communications Decency Act ("Section 230") and revenge porn victims.[54] It concludes that the proposed federal legislation is the only effective remedy to redress victims of nonconsensual pornography and therefore should be enacted.[55]

## I. EXISTING CIVIL AND CRIMINAL REMEDIES FAIL TO PROVIDE ADEQUATE SOLUTIONS FOR VICTIMS OF NONCONSENSUAL PORNOGRAPHY

Revenge porn victims are largely unprotected under existing civil and criminal law.[56] Most torts fail to address the unique harm caused by the recent phenomenon of nonconsensual pornography.[57] Likewise, states have had limited success in their efforts at criminalizing revenge pornography.[58] Section A of this

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http://jolt.richmond.edu/v20i4/article14.pdf [https://perma.cc/62UY-VFJN] (explaining that the interstate dissemination of involuntary porn via the Internet posits jurisdictional issues because state criminal statutes impose varying degrees of proof and punishment).

[50] *Id.* A federal criminal law would have a far-reaching impact and could apply to both those who upload and host revenge porn on the internet. Citron & Franks, *supra* note 6, at 365.

[51] *See infra* notes 65–118 and accompanying text.

[52] *See infra* notes 119–156 and accompanying text.

[53] *See infra* notes 157–197 and accompanying text.

[54] *See infra* notes 198–246 and accompanying text.

[55] *See infra* notes 242–246 and accompanying text.

[56] *See supra* notes 47–50 and accompanying text.

[57] *See* Citron & Franks, *supra* note 6, at 347 (noting the lack of laws prohibiting nonconsensual pornography and suggesting that it is due to the fact that society does not fully understand the harm caused by the dissemination of nonconsensual pornography); Amanda Burris, *supra* note 11, at 2340 (hypothesizing that existing tort remedies fail to redress revenge porn victims because their position does not "fit well into any existing civil remedy"); Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 431–32 (2014) (stating that tort remedies for invasion of privacy are ill equipped to remedy the harm caused by nonconsensual pornography).

[58] Citron & Franks, *supra* note 6, at 357–58 (commenting that tort law is not always successful to combat revenge pornography because of the uniqueness of online harassment). Some object to state criminal statutes because of First Amendment concerns. Danielle Citron, *Debunking the First Amendment Myths Surrounding Revenge Porn Laws*, FORBES (Apr. 18, 2014, 11:19 AM), https://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/#71fed81e25c8. These opponents of state criminal statutes argue that laws crimi-

Part explores available civil causes of action and their shortcomings.[59] Section B of this Part introduces successful and unsuccessful state criminal legislation prohibiting nonconsensual pornography.[60]

### *A. Civil Claims*

Civil claims, and their remedies, exist to make a victim whole again.[61] As such, many revenge porn victims file civil lawsuits to obtain redress for the harm caused by nonconsensual pornography.[62] Subsection 1 of this Section outlines possible causes of action and their limitations.[63] Subsection 2 describes the federal roadblocks to pursuing these state tort claims.[64]

#### 1. State Tort Law Is Not an Effective Option for Revenge Porn Victims

In theory, there are a number of tort claims available to revenge porn victims.[65] Victims could bring claims for invasion of privacy, intentional infliction of emotional distress ("IIED"), or defamation.[66] In reality, though, these privacy-based torts are insufficient to effectively redress the harm caused by the dissemination of revenge porn.[67]

Invasion of privacy is insufficient to combat revenge porn because it presupposes privacy.[68] To bring a successful claim for invasion of privacy, a victim

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nalizing revenge porn are unconstitutional, because revenge porn is protected speech and therefore has First Amendment protection. *Id.*

[59] *See infra* notes 61–118 and accompanying text.

[60] *See infra* notes 119–156 and accompanying text.

[61] Adams v. Aidoo, No. 07C-11-177 (MJB), 2012 Del. Super. LEXIS 135, at *13 (Super. Ct. Mar. 29, 2012); *see* Sarah E. Driscoll, Comment, *Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech*, 21 ROGER WILLIAMS U. L. REV. 75, 111 (2016) (stating that tort law compensates the victim for pain and suffering instead of imposing criminal sanctions).

[62] Cecil, *supra* note 21, at 2529. Victims pursue civil remedies from claims like Intentional Infliction of Emotional Distress ("IIED") and other privacy torts in an attempt to redress the harm caused by nonconsensual pornography. *Id.* at 2529–30.

[63] *See infra* notes 65–94 and accompanying text.

[64] *See infra* notes 95–118 and accompanying text.

[65] *See* Cecil, *supra* note 21, at 2529–31 (commenting that civil law provides various causes of action for revenge porn victims, but noting the inadequacies of tort law to redress the harm); Dawkins, *supra* note 18, at 423 (stating that tort law is "hypothetically" available to victims).

[66] Dawkins, *supra* note 18, at 424. Victims pursue privacy torts like IIED and Public Disclosure of Private Facts. *Id.* In addition, defamation is available when the sexually explicit photograph is accompanied by false and defamatory statements. Driscoll, *supra* note 61, at 112.

[67] Burris, *supra* note 11, at 2340. Many existing tort remedies do not provide adequate redress for revenge porn victims, because revenge porn is a recent phenomenon. *Id.* Even if a civil remedy exists, many victims do not have the requisite resources to pursue a civil case. *Id.*

[68] Cecil, *supra* note 21, at 2530 (explaining the difficulty in proving that images, which were originally shared consensually, are within a protected zone of privacy). For example, a privacy tort like the tort of false light requires the image to falsely portray a victim in a manner that is highly offensive to a reasonable person. Alexis Fung Chen Pen, Note, *Striking Back: A Practical Solution to*

must prove that a reasonable expectation of privacy exists with regard to the photographs.[69] This requirement effectively bars the majority of victims who originally consented to share the photographs with their ex-partners in the first place.[70]

IIED is also difficult to prove because it requires a manifestation of harm.[71] Under this cause of action, individuals must prove that the defendant engaged in (1) extreme and outrageous behavior as to go beyond all bounds of human decency (2) with intent to (3) cause severe emotional harm, and (4) such harm transpired.[72] The conjunctive elements coupled with the requirement of demonstrating harm make proving a claim for IIED incredibly difficult for victims of revenge porn.[73]

Defamation is not viable because it is impossible to claim the published images falsely depict the victim.[74] Defamation is the unauthorized publication of defamatory statements.[75] A successful defamation claim requires a showing that the published material is false.[76] In contrast, the finding of substantial truth provides a complete defense to a defamation claim.[77] Thus, the substantial truth

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*Criminalizing Revenge Porn*, 37 T. JEFFERSON L. REV. 405, 426 (2015). This proves difficult for revenge porn victims because the images usually do not portray them falsely, because it is undeniable they are the subject in the images. *See id.* at 427 (commenting that the disclosure of nonconsensual pornography usually does not portray victims in a false light, but merely an "unfavorable or undesirable light").

[69] Cecil, *supra* note 21, at 2530.

[70] *Id.*

[71] *Id.* at 2529–30. To pursue a claim for IIED, most laws require the victim to demonstrate suffering from a disabling emotional response. *Id.* at 2530. In 2002, the U.S. Court of Appeals for the Fifth Circuit held that anger and embarrassment from sexual and physical harassment did not constitute a disabling emotional response. *Id.* (citing Smith v. Amedisys Inc., 298 F.3d 434, 450 (5th Cir. 2002)). Accordingly, many revenge porn victims fail to satisfy this element of the tort. *Id.*

[72] Dawkins, *supra* note 18, at 424. *See generally* Agis v. Howard Johnson Co., 355 N.E.2d 315, 318–19 (1976) (articulating the elements of an IIED claim in Massachusetts).

[73] *See* Cecil, *supra* note 21, at 2529–30 (stating that, because IIED requires proof of a "severely disabling emotional response" or "unendurable" emotional distress, mere anger, humiliation or embarrassment will not suffice); Driscoll, *supra* note 61, at 113–14 (noting the difficulty of proving emotional distress because it requires the manifestation of actual harm and cannot simply be embarrassment).

[74] *See* Alix Iris Cohen, Note, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300, 322 (2016) (stating that defamation requires proof of falsity). Victims of nonconsensual pornography do not dispute the fact that the images accurately depict them. *Id.*

[75] *Id.* The cause of action comprises two different torts: libel, in the case where the defamatory statement is written, or slander, where the defamatory statement is made orally. *Id.*

[76] Driscoll, *supra* note 61, at 113. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–81 (1964) (holding that a defamation claim requires proof the statement is false).

[77] *Patel*, 485 S.W.3d at 173. A statement need not be literally true, but only substantially true in order to preclude liability. Klentzman v. Brady, 312 S.W.3d 886, 899 (Tex. App. 2009). Therefore, victims of nonconsensual pornography have issues pursuing a defamation claim, despite the fact that the text accompanying the image may not be true. *See* Taryn Pahigian, *Ending the Revenge Porn Epidemic: The Anti-Revenge Porn Act*, 30 J.C.R. & ECON. DEV. 105, 122–23 (2017) (explaining the

doctrine precludes liability because it is undeniable that the victim is depicted in the images.[78]

For example, in *Patel v. Hussain*, the Court of Appeals of Texas for the Fourteenth District found the defendant was entitled to a Judgment Notwithstanding the Verdict ("JNOV") in a claim for defamation where the jury found substantial truth.[79] In *Patel*, Patel sent nude photographs of Hussain, his former girlfriend, to Hussain's family and co-workers, which were originally sent by Hussain to Patel consensually over the course of their seven-year relationship.[80] Patel also recorded Hussain, without her knowledge, while she undressed and masturbated during video chat conversations with him.[81] Patel frequently text-messaged Hussain threatening to send the video to a number of e-mail addresses, including her grandfather's.[82] When Hussain responded by saying that the video was taken without her consent, Patel responded that he intended to teach Hussain a lesson for being unfaithful during their relationship.[83] Eventually, Patel followed through with his threats by uploading the thirty minute video to YouTube and sending the link to Hussain's friends, family, and co-workers.[84] He also posted the video on various porn websites, where it received thousands of views.[85]

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truth defense in defamation claims). This is because the image accurately depicts the victim, satisfying the truth defense. *Id.* Despite this, in a non-binding opinion, a federal district court in Hawaii ruled that the nonconsensual distribution of pornographic images could constitute a cause of action for defamation. Taylor v. Franko, No. 09-00002 JMS/RLP, 2011 WL 2118270, at *9 (D. Haw. May 2, 2011); Driscoll, *supra* note 61, at 113.

[78] Bloom, *supra* note 21, at 256 n.189.

[79] *Patel*, 485 S.W.3d at 174.

[80] *Id.* at 158. Hussain asked Patel to erase the photographs after receiving them, but Patel did not. *Id.*

[81] *Id.*

[82] *Id.* at 158, 162–64. Hussain testified that she received twenty to thirty text messages and phone calls a day from Patel threatening to expose her. *Id.* at 165. For example, Patel messaged, "Tomorrow your mom is going to find out what you did. And so is your nana[,] nani[,] and uncle." *Id.* at 164.

[83] *Id.* at 161, 163–64. After learning of the video, Hussain text messaged Patel, "[y]ou recorded me [Patel] . . . without my consent, do you know how bad that is? And [o]n top of that you threaten to expose me with it?" *Id.* at 161–62. Patel responded, "[t]hose videos were taken when we were together, when you said you were faithful, and you were not." *Id.*

[84] *Id.* at 160. Patel titled the video "Pakistani Nadia Houston." *Id.* at 165. He told Hussain that the Internet is "huge" and she would never be able to find where the video is posted. *Id.* 168.

[85] *Id.* at 165. After uploading the video, Patel messaged Hussain:

> Your vid is up online. Congrats to you and your family . . . . [O]ver 2000 ppl have viewed what you do in your bed. You seem to be very popular amongst the guys, they can't stop watching you! . . . . Not only did 5000 men and women watch you, 300 downloaded your videos! All I asked for was respect and you couldn't do that . . . . The biggest question is what kind of explanation are you going to have for nana and nani . . . . Blame yourself and your attitude for everything that is happening.

*Id.* Patel also uploaded the video on Apple store computers at a local mall. *Id.* at 168.

The *Patel* court ruled that the trial court erred in denying Patel's motion for JNOV after the jury returned a verdict for defamation despite finding the published material to be substantially true.[86] Because substantial truth is an affirmative defense to defamation, the trial judge was required to disregard the jury's award of $50,000 in damages for the defamation claim as a matter of law.[87]

In addition to the difficulties of proving a prima facie case, revenge porn victims encounter a number of other constraints limiting their ability to successfully pursue a tort claim.[88] First, many revenge porn victims do not have the time or financial resources necessary to initiate a civil lawsuit.[89] Second, those victims with adequate resources have difficulty identifying their perpetrators because websites shield their anonymous users.[90] Third, unwanted publicity ensues upon initiating a lawsuit.[91] Revenge porn victims are required to file lawsuits using their given name, not a pseudonym, which ultimately brings more attention to the very images they hope to hide.[92] Fourth, and most importantly, civil lawsuits only provide the possibility of a monetary award.[93] They do not ensure the underlying content will be removed, which is often the only effective remedy in restoring a victim's damaged reputation.[94]

### 2. Federal Law Creates Further Roadblocks to Meaningful Civil Recovery

In addition to the confines of privacy torts, federal law further narrows a victim's recovery options.[95] The Digital Millennium Copyright Act of 1998 ("DMCA") provides the ability for copyright holders to remove the incriminat-

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[86] *Id.* at 174. The appellate court found that the trial court erred in denying Patel's Judgment Notwithstanding the Verdict because the finding of substantial truth precluded liability for defamation. *Id.*

[87] *Id.*

[88] Peter W. Cooper, Comment, *The Right to Be Virtually Clothed*, 91 WASH. L. REV. 817, 824 (2016). There are a number of possible privacy claims available to revenge porn victims, but they remain inadequate to redress the harm caused by the dissemination of revenge porn. *Id.* Many victims do not have the financial resources or time to pursue a civil claim. Citron & Franks, *supra* note 6, at 358. Moreover, victims may be wary of commencing civil litigation, as it guarantees even more unwanted publicity. *Id.*

[89] Kitchen, *supra* note 19, at 251–52 (commenting on the high emotional and financial cost that victims must weigh against the probability of winning a civil lawsuit against their perpetrators). Civil litigation is often not a possibility for revenge porn victims "[h]aving lost their jobs due to the online posts, they cannot pay their rent, let alone cover lawyer's fees." Citron & Franks, *supra* note 6, at 358.

[90] Cecil, *supra* note 21, at 2531; Kitchen, *supra* note 19, at 251–52 (noting that revenge porn websites are under no obligation to identify their anonymous users).

[91] Citron & Franks, *supra* note 6, at 358. Courts are reluctant to allow plaintiffs to sue under a pseudonym because it denies defendants the ability to confront their accusers. *Id.*

[92] *Id.*; Kitchen, *supra* note 19, at 254.

[93] Kitchen, *supra* note 19, at 254.

[94] Cooper, *supra* note 88, at 824.

[95] *See infra* notes 98–118 and accompanying text.

ing content from the Internet.[96] This remedy, however, is limited by the Communications and Decency Act ("CDA"), which grants Internet service providers ("ISPs") federal immunity from state claims.[97]

The DMCA provides a path to obtaining removal of revenge pornography from the Internet.[98] The DMCA allows the legal holder of a copyright to file a "takedown notice" against the website posting infringing material.[99] The ISP will not be liable for copyright infringement of nonconsensual pornography so long as it complies with Section 512 of the Online Copyright Infringement Liability Limitation Act's "notice and takedown" procedure.[100]

This remedy, however, is limited in scope.[101] First, copyright redress is only available to victims who qualify as legal holders of the material.[102] A revenge porn victim is the legal holder only if she took the photograph of herself.[103] Second, a takedown notice does not guarantee the photograph will be removed in a timely manner or even at all.[104] Websites may refuse to remove the material

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[96] *See infra* notes 98–108 and accompanying text.

[97] *See infra* notes 109–118 and accompanying text.

[98] Digital Millennium Copyright Act, 17 U.S.C. § 512 (2012). Congress enacted the Online Copyright Infringement Liability Limitation Act ("Section 512") of the Digital Millennium Copyright Act ("DMCA") in order to provide notice to Internet service providers ("ISP") about their possible liability for claims of copyright infringement. Levendowski, *supra* note 57, at 442. Section 512 of the DMCA sets out a "notice and takedown" regime, which protects ISPs from copyright infringement if they comply with a copyright holder's takedown request. *Id.* at 442–43.

[99] 17 U.S.C. § 512(c)(3). The takedown request for claimed infringement must include the following: identification of the content claimed to have been infringed, reasonably sufficient information to identify the material on the service provider's website, the signature and contact information of the complaining party, a statement that there is a good faith belief the material is not authorized by the copyright owner, and a statement that the included information is correct. *Id.* § 512(c)(3)(A)(i)–(vi). A revenge porn victim may file a Section 512 takedown request without hiring a lawyer or registering their copyright. Levendowski, *supra* note 57, at 442.

[100] *See* 17 U.S.C. § 512(c)(1)(A)(iii) (providing that an ISP is not liable for copyright infringement if it obtains knowledge of infringement and "acts expeditiously to remove, or disable access to, the material"); Levendowski, *supra* note 57, at 443 (ISPs "that comply with Section 512's 'notice and takedown' procedures are protected from liability for copyright infringement").

[101] Bloom, *supra* note 21, at 256 (explaining the limitations of this remedy for revenge porn victims).

[102] *See* 17 U.S.C. § 512 (c)(3) (requiring the owner to hold an exclusive right); Bloom, *supra* note 21, at 256 (noting that only the legal holder of a copyright may pursue action under the DMCA). A copyright holder is a person who owns exclusive rights to reproduce, distribute, display, and duplicate work. *Copyright Terms & Definitions*, COPYRIGHT SOC'Y USA, http://www.csusa.org/?page=Definitions [https://perma.cc/YWW9-DMMJ].

[103] Citron & Franks, *supra* note 6, at 360 (acknowledging that if someone else took the photograph, then the photographer, and not the revenge porn victim, is the legal holder of the material); Bloom, *supra* note 21, at 256 (stating that a revenge porn victim may only file a Section 512 takedown request if she originally took the photograph or video). Many victims are the legal holder of the sexually explicit content, however, because the majority of intimate photographs are selfies. Burris, *supra* note 11, at 2342. A "selfie" is a picture where the photographer is also the subject of the photo. Levendowski, *supra* note 57, at 426.

[104] *See* Citron & Franks, *supra* note 6, at 360 (noting that revenge porn websites often ignore takedown notices because many website operators know that victims do not have the resources to hire

without proper proof of ownership.[105] This requires victims to actually register the nude photographs with the U.S. government.[106] Third, a successful takedown only ensures the photograph will be removed from the named website.[107] It does not prevent other revenge porn websites from re-posting the infringing material, effectively defeating the purpose of a takedown request.[108]

Section 230 of the CDA further limits a victim's ability to adequately redress harm caused by the dissemination of nonconsensual porn.[109] Generally speaking, Section 230 shields ISPs from civil liability for failing to remove nonconsensual pornography published on its website by third-party users.[110] ISPs also have no obligation to assist victims in identifying the user who posted the incriminating material.[111] Section 230, in essence, bars victims from suing re-

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a lawyer); Linkous, *supra* note 49, at 17 (explaining that websites can refuse to comply with take down notices and force victims to sue for copyright infringement).

[105] Cecil, *supra* note 21, at 2527.

[106] Andrea Peterson, *John Oliver Explains the Awfulness That Is 'Revenge Porn,'* WASH. POST (June 22, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/06/22/john-oliver-explains-the-awfulness-that-is-revenge-porn/?utm_term=.eb1f42744ad0 [https://perma.cc/5ZPR-GUU3]. John Oliver commented, "Yes, to stop strangers from seeing their naked bodies, some women have had to send more strangers more pictures of their naked bodies." *Id.*

[107] Kitchen, *supra* note 19, at 259. A successful copyright action provides an injunction against the named website, and does not protect victims from un-named websites reposting the material. *Id.*

[108] See Bloom, *supra* note 21, at 256; Kitchen, *supra* note 19, at 259 (noting that it is nearly impossible to completely remove infringing material from the Internet once posted).

[109] The Communications Decency Act, 47 U.S.C. § 230(c)(1) (2012) (The Communications Decency Act ("CDA") is commonly referred to as Section 230). Section 230 grants ISPs legal immunity for user-uploaded content. *Id.*; *see* Cecil, *supra* note 21, at 2517 (explaining that the CDA grants immunity to website operators for content posted by third parties); Patton, *supra* note 39, at 423 (commenting that the CDA "poses a significant barrier" for revenge porn victims filing lawsuits based on content posted by users of websites, as opposed to operators of websites).

[110] 47 U.S.C. § 230 (c)(1) (providing 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"). An "interactive computer service" is an information service or software that enables access by multiple users. *Id.* § 230(f)(2). In contrast, an "information content provider" is a person or entity that is responsible for the creation of information provided by an interactive computer service on the Internet. *Id.* § 230(f)(3). The statute differentiates between two types of websites: websites that host user-uploaded material, and websites that create content. Patton, *supra* note 39, at 423; *see* 47 U.S.C. § 230(f)(2)–(3). Whether the website could face liability or be immune under Section 230 depends on its role in publishing the content. Goldnick, *supra* note 8, at 601. If the website is merely a "passive conduit" for content provided by its users, and is not responsible for its creation, it is granted immunity from civil liability as an information content provider. *Id.*

[111] *See* Bloom, *supra* note 21, at 253 (stating that websites have no incentive to assist revenge porn victims because Section 230 immunizes them for the conduct of their users); Kitchen, *supra* note 19, at 259 (noting that website operators have no obligation to assist revenge porn victims because Section 230 grants them immunity from any illegal activities stemming from third-party posts on their websites); Patton, *supra* note 39, at 423 (commenting that courts interpret Section 230's immunity broadly because of the clear congressional intent to encourage Internet growth and open communication even if such communication includes offensive speech).

venge porn websites and provides no recourse for the removal of the explicit content.[112]

Congress passed Section 230 in order to effectuate its legislative purpose of promoting Internet growth.[113] Congress affords ISPs tort immunity in order to promote the free flow of information on the Internet.[114] Otherwise, service providers would have to screen millions of posts, and this burden would severely restrict the free flow and exchange of information on the Internet.[115] For example, in 2013, the Texas Court of Appeals for the Ninth District in *GoDaddy.com v. Toups* held that the plaintiffs, a class action of revenge porn victims, failed to state a valid claim against GoDaddy.com ("GoDaddy").[116] The court character-

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[112] Patton, *supra* note 39, at 423–24. Because nonconsensual pornography is user-created, the websites that host the content will generally be immune from claims because they are considered interactive computer services under Section 230. *Id.*

[113] 47 U.S.C. § 230(a). The congressional finding indicates that (1) the growth of interactive computer services on the Internet advances the number of educational and informational resources available to citizens, (2) interactive service providers offer users a vast degree of control over the information and content they receive, (3) these services provide a diverse forum for political, intellectual, and cultural discourse, (4) the Internet flourishes without government intervention and regulation, and (5) a growing number of Americans are relying on the use of interactive media as sources for political, educational, cultural, and entertainment. *Id.* § 230(a)(1)–(5). Subsection (b) of Section 230 outlines the policy of the United States:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services; unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services . . . .

*Id.* § 230(b)(1)–(3).

[114] Goldnick, *supra* note 8, at 599. Congress enacted the CDA to protect the development of the Internet by preventing endless legal claims against interactive media providers for the content its users post. *Id.* Immunity is not absolute, however, and it does not shield service providers from criminal or federal liability. Citron & Franks, *supra* note 6, at 367–68.

[115] Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997). The court in *Zeran v. America Online, Inc.*, found that:

> The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

*Id.* at 331; *see* 47 U.S.C. § 230(b) (2012) (describing a policy favoring the free flow of information on the Internet and minimizing regulations that block or filter access to online material); Patton, *supra* note 39, at 423.

[116] GoDaddy.com v. Hollie Toups, 429 S.W.3d 752, 759 (Tex. App. 2014). In *GoDaddy.com v. Hollie Toups*, the plaintiffs, a putative class action of women, sued GoDaddy.com ("GoDaddy") for hosting sexually explicit depictions of the plaintiffs despite knowing the images were posted without

ized GoDaddy as an interactive computer service because the website merely published, and did not create, the content uploaded by a third party.[117] As such, the website was entitled to immunity under Section 230 as a matter of law.[118]

### *B. Criminal Law*

Due to the inadequacy of tort law, criminal law remains the only viable legal option to end revenge porn.[119] Well-drafted criminal legislation provides the effective enforcement and deterrence necessary to combat nonconsensual pornography.[120] Subsection 1 of this Section introduces successful state legislation.[121] Subsection 2 describes unsuccessful state efforts to criminalize revenge porn.[122]

#### 1. Successful State Legislation

New Jersey, the pioneer state to criminalize nonconsensual pornography in 2004, has one of the strictest statutes to date.[123] The legislation makes it a crime to knowingly observe, record, or disclose pornographic images or recordings without a person's consent.[124] For the purposes of the statute, "disclose" is de-

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consent. *Id.* at 753. The nonconsensual pornography was posted on GoDaddy by two owners of revenge porn websites. *Id.* In response, GoDaddy contested liability on the grounds that the website is an interactive service provider, and not an information content provider. *Id.* at 755. GoDaddy argued that the revenge porn websites, not GoDaddy, were information service providers with respect to the sexually explicit material, and thus were the correct party to be sued. *Id.*

[117] *Id.* at 759. The court found GoDaddy acted as an interactive computer service provider and not an information content provider of the nonconsensual pornography posted on its website. *Id.* The plaintiffs agreed that the revenge porn websites created the offensive content and GoDaddy only published it. *Id.* at 753.

[118] *See id.* at 759 (holding GoDaddy to be an interactive service provider that published the content). The court supported its holding by reiterating the congressional purpose behind Section 230, which is to promote the free flow of information and eliminate any restraints on communication. *Id.*

[119] *See* Citron & Franks, *supra* note 6, at 349 (arguing in favor of a criminal law because civil remedies fail to redress the harm caused by nonconsensual pornography).

[120] *Id.*

[121] *See infra* notes 123–136 and accompanying text.

[122] *See infra* notes 137–156 and accompanying text.

[123] *See* Citron & Franks, *supra* note 6, at 371 (characterizing New Jersey's statute prohibiting nonconsensual pornography as the broadest); Talbot, *supra* note 19 (noting the first state to criminalize revenge porn was New Jersey).

[124] N.J. STAT. ANN. § 2C:14-9 (West 2016). Section 2C:14-9 provides:

> a. An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.
>
> b. (1) An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are ex-

fined as the act of publishing, distributing, sharing, or making nonconsensual images available on the Internet by any other means.[125] A defendant convicted of the crime faces up to a $30,000 fine and a prison sentence of three to five years.[126] The legislation is regarded as the toughest revenge porn statute because of its breadth in criminalizing a wide range of behavior.[127]

California also passed a statute criminalizing revenge porn in 2013.[128] The legislation makes it a crime to intentionally distribute nonconsensual pornography with the intent to cause serious emotional distress, and the victim actually suffers serious emotional distress.[129] A violation of the statute constitutes a misdemeanor with up to six months imprisonment and a $1,000 fine.[130] In 2014, Noe Iniguez was the first person to be convicted under California's nonconsensual pornography statute for distributing a private image.[131] Iniguez posted a

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> posed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

*Id.*

[125] *Id.* The New Jersey statute provides the following definitions:

> (1) "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise, offer, share, or make available via the Internet or by any other means, whether for pecuniary gain or not; and (2) "intimate parts" has the meaning ascribed to it in N.J.S.2C:14-1. Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine not to exceed $30,000 may be imposed for a violation of this subsection.

*Id.*

[126] *Id.*; Patton, *supra* note 39, at 430.

[127] Citron & Franks, *supra* note 6, at 371. It is often regarded as a model statute for criminalizing nonconsensual pornography. Patton, *supra* note 39, at 430.

[128] *See* CAL. PENAL CODE § 647 (West 2013) (criminalizing nonconsensual pornography); Lauren Williams, *California's Anti-revenge Porn Legislation: Good Intentions, Unconstitutional Result*, 9 CAL. LEGAL HIST. 297, 308 (2014) (stating that California's anti-revenge porn legislation became effective on October 1, 2013).

[129] CAL. PENAL CODE § 647(j)(4). Specifically, the statute provides:

> Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

*Id.*

[130] *Id.* If the victim is a minor, the California anti-revenge porn law imposes a greater punishment of less than one year in jail and/or a $2,000 fine. *Id.* § 774(l)(2).

[131] *See* People v. Iniguez, 202 Cal. Rptr. 3d 237, 240–41 (Cal. App. Dep't Super. Ct. 2016) (affirming the jury's finding that Iniguez violated California's anti-revenge porn statute by distributing a private image); Veronica Rocha, *'Revenge Porn' Conviction Is a First Under California Law,* L.A. TIMES (Dec. 4, 2014, 5:00 PM), http://www.latimes.com/local/crime/la-me-1204-revenge-porn-2014

topless image of his ex-girlfriend along with the comment "slut" on her employer's Facebook page.[132] The image was taken while the two were in a relationship, and the ex-girlfriend testified that Iniguez promised to erase all images in the event they broke up.[133]

Despite successful efforts to prosecute perpetrators, the California anti-revenge porn law was swiftly criticized.[134] Critics argue that requiring prosecutors to prove the defendant intended to cause serious emotional harm is too high of a burden.[135] Additionally, critics assert that even if prosecutors are successful in proving the requisite mens rea, the punishment is too lenient compared to other revenge porn statutes.[136]

### 2. Failed State Efforts

In 2016, in *Vermont v. VanBuren*, a Vermont Superior Court deemed the state's anti-revenge porn statute unconstitutional just one year after its enactment.[137] The statute imposes up to a five-year prison sentence for knowingly

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1205-story.html [https://perma.cc/TT7B-EJVR] (stating that Iniguez was the first person to be convicted under California's revenge porn law and commenting that sharing a private image was outside the scope of the law before the law was enacted in California).

[132] *Iniguez*, 202 Cal. Rptr. 3d at 240–41.

[133] *Id.* at 240.

[134] Driscoll, *supra* note 61, at 100–02; *see* Williams, *supra* note 128, at 301–02 (noting that California's legislation has been criticized for possible constitutional violations). Conversely, proponents of anti-revenge porn laws characterize California's law as too weak. Heather Kelly, *New California 'Revenge Porn' Law May Miss Some Victims*, CNN (Oct. 3, 2013, 3:01 PM), https://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/index.html [https://perma.cc/DMG9-RYZ5]. They note that California's law only provides redress when the person who posted the nonconsensual pornography is also the photographer, and does not cover instances when the victim took the photo of herself and later shared the image. *Id.*

[135] Citron & Franks, *supra* note 6, at 373–74; *see* Cynthia Barmore, Note, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 STAN. L. REV. 447, 452 (2015) (referring to California's intent requirement as "demanding"). California's legislation, Danielle Keats Citron and Mary Anne Franks argue, is the weakest because it requires prosecutors to prove both intent to cause serious emotional distress, and also that such harm actually resulted. Citron & Franks, *supra* note 6, at 373–74.

[136] Citron & Franks, *supra* note 6, at 374. The dissemination of nonconsensual pornography in California is a misdemeanor with up to six months of imprisonment and a $1,000 fine, whereas New Jersey's statute makes the crime a felony. *Id.* California's decision to classify nonconsensual pornography as a misdemeanor deters potential perpetrators less than a felony because a misdemeanor carries a lower punishment and is not viewed as negatively. Diane Bustamante, Comment, *Florida Joins the Fight Against Revenge Porn: Analysis of Florida's New Anti-Revenge Porn Law*, 12 FLA. INT'L U. L. REV. 357, 382 (2017).

[137] *See* State v. VanBuren, No. 1144-12-15Bncr, at 3–4 (Vt. Super. Ct., July 1, 2016), https://assets.documentcloud.org/documents/2998410/State-v-VanBuren-1144-12-15-Bncr.pdf [https://perma.cc/W9A8-UFP3] (expressing concerns about the constitutionality of Vermont's anti-revenge porn law); Mark Davis, *Vermont's Revenge Porn Law Under First Amendment Challenge*, SEVEN DAYS (Aug. 2, 2016, 9:33 AM), http://www.sevendaysvt.com/OffMessage/archives/2016/08/02/vermonts-revenge-porn-law-under-first-amendment-challenge [https://perma.cc/Z8X7-NJ2Q] (noting that the Vermont Supreme Court will review the decision); Elizabeth Hewitt, *Judge Finds 'Revenge Porn'*

disclosing sexually explicit photographs of another without their consent.[138] The legislation was passed in an attempt to create liability for ex-lovers motivated by vengeance and third parties motivated by profit.[139]

Rebekah VanBuren was the first person to be charged under Vermont's anti-revenge porn statute.[140] In October 2015, an unidentified woman privately messaged nude photographs of herself to the Facebook account of Anthony Coon, who was her ex-boyfriend.[141] At the time he received the pictures, Coon was in a relationship with VanBuren.[142] VanBuren accessed Coon's messages, posted the photographs to his public Facebook page, and "tagged" the woman depicted in them.[143] She also called the woman a "moral-less pig" and threatened to reveal

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*Law Unconstitutional*, VT DIGGER (Aug. 1, 2016), https://vtdigger.org/2016/08/01/judge-finds-revenge-porn-law-unconstitutional/ [https://perma.cc/WN7A-E3XA] (stating that Judge Howard declared the law unconstitutional one year after its enactment). The case is currently under review by the Vermont Supreme Court. *See generally* Brief for Appellant, *VanBuren*, No. 1144-12-15Bncr. The Vermont Supreme Court will address whether Superior Court Judge Howard erred in holding that the statute violates the First Amendment of the United States Constitution. *Id.*

[138] 13 V.S.A. tit. 13, § 2606 (2016). Specifically, the statute provides:

> (b)(1) A person violates this section if he or she knowingly discloses a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm. A person may be identifiable from the image itself or information offered in connection with the image. Consent to recording of the visual image does not, by itself, constitute consent for disclosure of the image. A person who violates this subdivision (1) shall be imprisoned not more than two years or fined not more than $ 2,000.00, or both.
> (2) A person who violates subdivision (1) of this subsection with the intent of disclosing the image for financial profit shall be imprisoned not more than five years or fined not more than $10,000.00, or both.

*Id.* § 2606(b)(1)–(2).

[139] Sam Heller, *Shumlin Signs Revenge Porn Bill*, VT DIGGER (June 17, 2015), http://vtdigger.org/2015/06/17/shumlin-signs-revenge-porn-bill/ [https://perma.cc/NBQ5-SUVV]. The legislative purpose of Vermont's law against nonconsensual pornography is to provide redress for victims against both former lovers and hosts of revenge porn websites. *Id.*

[140] *See* Hewitt, *supra* note 137 (reporting that this was the first application of Vermont's legislation criminalizing revenge porn).

[141] *VanBuren*, No. 1144-12-15Bncr at 1. The complainant privately messaged these photographs to Coon's Facebook Messenger account so that only Coon could access them. Brief for Appellant, *supra* note 137, at 4.

[142] *See VanBuren*, No. 1144-12-15Bncr at 1 (stating that at the time the photographs were sent, the complainant was not in a relationship with Coon); Brief for Appellant, *supra* note 137, at 4 (noting that the complainant was previously in a relationship with Coon, but was not in a relationship with him at the time the images were shared).

[143] *VanBuren*, No. 1144-12-15Bncr at 1; Brief for Appellant, *supra* note 137, at 4. Coon had previously accessed his Facebook account on VanBuren's phone, which automatically saved his account information and allowed VanBuren to later access Coon's account without his knowledge. Brief for Appellant, *supra* note 137, at 4. The brief states that the victim's sister and co-workers viewed the sexually explicit images. *Id.* at 5. Tagging someone on Facebook links the tagged person's Facebook page to the photo. Elise Moreau, *What Is 'Tagging' on Facebook?*, LIFEWIRE (Jan. 25, 2018), https://www.lifewire.com/what-is-tagging-on-facebook-3486369 [https://perma.cc/2QTH-B5Z3].

the images to the woman's employer.[144] VanBuren admitted she posted the nude photographs in an effort to harm the woman's reputation and teach her a lesson.[145]

In 2016, the *VanBuren* court held the Vermont statute to be an unconstitutional restriction on free speech protected by the First Amendment of the U.S. Constitution.[146] The court recognized that freedom of expression is not an absolute right, and states are permitted to prohibit certain categories of expression that violate public policy.[147] For example, governments may regulate "obscenities," which are the depiction of sexual conduct that appeal to morbid sexual fantasies.[148] The court rejected the State's argument that revenge porn falls into this exception because such photographs do not necessarily depict sexual acts and can be sent without intent to elicit shameful desires.[149] To rule otherwise, the court reasoned, would unconstitutionally enlarge the narrow categorical exception for regulation of obscenities.[150]

At least one state has invalidated nonconsensual porn statutes on the doctrine of vagueness alone.[151] In 2014, Arizona enacted a criminal law prohibiting

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[144] Hewitt, *supra* note 137. At the time, the complainant worked at a child care facility. Brief for Appellant, *supra* note 137, at 4–5. VanBuren informed the complainant that she intended to tell the complainant's employer about the photographs because VanBuren believed the complainant should not be able to work with children. *Id.*

[145] Brief for Appellant, *supra* note 137, at 5. After admitting that she posted the photographs, VanBuren allegedly asked a Vermont state trooper if he thought the victim "learned her lesson." *Id.*

[146] *VanBuren*, No. 1144-12-15Bncr at 3–5.

[147] *Id.* at 2. The Judge noted that the First Amendment protects freedom of expression, but is limited by its exceptions for obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.*

[148] *Id.* at 2–3; *see, e.g.*, Miller v. California, 413 U.S. 15, 20–21 (1973) (articulating the standard for obscenity); Roth v. United States, 353 U.S. 476, 484–85 (1957) (holding that obscenity is outside the bounds of First Amendment protection).

[149] *VanBuren*, No. 1144-12-15 Bncr at 3. The Judge held that nudity is not automatically equated to obscenity, and therefore, does not automatically fall into one of the categorical exceptions to First Amendment protection. *Id.*

[150] *Id.* Even if the court assumed that nonconsensual pornography falls into the obscenity exception, the judge reasoned, the state of Vermont failed to prove there are no other less restrictive alternatives to combat this behavior. *Id.* Hence, the statute was facially invalid because it was not narrowly drafted to advance the state's interest in protecting the privacy of citizens. Brief for Appellant, *supra* note 137, at 6. The court also expressed concern about the statute being overly vague but did not rule on the issue. *VanBuren*, No. 1144-12-15Bncr at 3. Characterizing the facts of the present revenge porn case as atypical, the court seemingly denounced the statute's ability to criminalize the behavior of a third party and not a former partner. *Id.* Additionally, the court disapproved of the statute's potential to criminalize a spouse who discovers unsolicited sexually explicit photographs and forwards them in anger or disgust. *Id.*

[151] *See* Antigone Books, L.L.C. v. Brnovich, No. 2:14-vs-02100-SRB, at 1 (D. Ariz. July 10, 2015), https://www.aclu.org/sites/default/files/field_document/antigone_v_horne_final_decree.pdf [https://perma.cc/ZPQ5-QAKF] (issuing an injunctive decree from enforcing Arizona's overly broad anti-revenge porn law). The doctrine of vagueness prohibits laws that do not clearly define what the legislation aims to prohibit. Grayned v. City of Rockford, 408 U.S. 104, 106–09 (1972) (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).

the disclosure of sexually explicit images if the person "knew or should have known" that the subject did not consent to disclosure.[152] In 2015, after objections claimed the statute was overly broad, a United States District Court Judge for the District of Arizona issued a decree, in *Antigone Books, L.L.C. v. Brnovich,* prohibiting prosecutors from enforcing the law.[153] Similarly, a Rhode Island governor exercised her veto power to reject a bill aimed at prohibiting nonconsensual pornography.[154] The governor warned that the breadth of the proposed legisla-

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[152] *See* ARIZ. REV. STAT. ANN. § 13-1425 (2014), *invalidated by Antigone Books*, No. 2:14-vs-02100-SRB. Specifically, the statute provided:

> It is unlawful to intentionally disclose, display, distribute, publish, advertise, or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.

*Id.*

[153] *Antigone Books*, No. 2:14-vs-02100-SRB at 1. The order approved a settlement agreement between the defendants and the Arizona Attorney General, who agreed not to enforce the 2014 anti-revenge porn law. *Id.* at 1–2. The American Civil Liberties Union ("ACLU") filed a lawsuit against the state of Arizona claiming the law criminalizes use of non-obscene images protected by the First Amendment. Complaint at 2, *Antigone Books*, No. 2:14-vs-02100-SRB. In its complaint, the ACLU argued the law is unconstitutionally vague because it does not require malicious intent, proof of resulting harm, a reasonable expectation of privacy with respect to the images, or an identifiable subject. *Id.* at 20–21. The complaint further criticized the "should have known" consent standard as unclear. *Id.* at 24 n.66. The ACLU also noted that the legislation could criminalize the display of the 1972 Pulitzer Prize-winning image, often called the "Napalm Girl," where a nine-year-old girl was captured fleeing from a Vietnamese village after it was bombed with napalm, because she was not voluntarily nude. *Id.* at 8 n.19. The state agreed to halt enforcing the anti-revenge porn law until it was revised. Bob Christie, *Arizona House Approves Revisions to 'Revenge Porn' Law*, WASH. TIMES (Mar. 3, 2015), http://www.washingtontimes.com/news/2015/mar/3/arizona-house-sets-vote-on-revisions-to-revenge-po/ [https://perma.cc/3WMC-DKKR]. In 2016, the Arizona legislature successfully passed a revised version of the law with these criticisms in mind. *See* ARIZ. REV. STAT. ANN. § 12-1425 (2016). The statute provides:

> A. It is unlawful for a person to intentionally disclose an image of another person who is identifiable from the image itself or from information displayed in connection with the image if all of the following apply:
>
> 1. The person in the image is depicted in a state of nudity or is engaged in specific sexual activities.
>
> 2. The depicted person has a reasonable expectation of privacy. Evidence that a person has sent an image to another person using an electronic device, does not, on its own, remove the person's reasonable expectation of privacy for that image.

*Id.*

[154] Katherine Gregg, *Raimonda Vetoes 'Revenge Porn' Bill*, PROVIDENCE J. (June 21, 2016, 7:43 PM), http://www.providencejournal.com/news/20160621/raimondo-vetoes-revenge-porn-bill [https://perma.cc/W9Y7-6YBC]. The Bill criminalizes the unauthorized dissemination of indecent material in cases where:

> (1) The person captures, records, stores, or receives a visual image depicting another person eighteen (18) years of age or older engaged in sexually explicit conduct or of the intimate areas of that person;

tion could chill free speech.[155] The governor recommended a more carefully drafted statute with internal limitations, such as requiring a minimum mens rea of intent to harass.[156]

## II. The Proposed Federal Legislation Criminalizing Revenge Porn

A federal criminal law prohibiting nonconsensual pornography is necessary to resolve the challenges state legislators have faced in this area.[157] Anti-revenge porn activists emphasize the need for a well-drafted, uniform piece of legislation in order to ensure effective enforcement.[158] Recognizing the growing need to protect revenge porn victims, Congresswoman Jackie Speier introduced the IPPA, a federal bill criminalizing the dissemination of revenge pornography.[159] This Part explains the IPPA and its response from supporters and critics.[160] Section A of this Part introduces and interprets the text of the IPPA.[161] Section B of

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(2) The visual image is captured, recorded, stored, or received with or without that person's knowledge or consent and under such circumstances in which a reasonable person would know or understand that the image was to remain private; and
(3) The person by any means, intentionally disseminates, publishes, or sells such visual image without the affirmative consent of the depicted person or persons in the visual image for no legitimate purpose. (b) A third-party recipient of any visual image described in subsection (a) of this section does not violate this section if, they did not have actual knowledge that the visual image was intentionally disseminated, published, or sold in violation of subsection (a) of this section.

H. 7537, Gen. Assemb., Jan. Sess. (R.I. 2016).

[155] *See* Driscoll, *supra* note 61, at 105–06 (commenting on First Amendment concerns that the Rhode Island law raised such as overbreadth); Gregg, *supra* note 154 (stating that the Rhode Island Governor mentioned the statute would criminalize all work of the human body).

[156] Gregg, *supra* note 154. The Rhode Island Governor suggested a more carefully drafted piece of legislation to avoid overbreadth concerns. *Id.*

[157] Linkuous, *supra* note 49, at 36–37; Burris, *supra* note 11, at 2340; Cecil, *supra* note 21, at 2519. As mentioned previously, state efforts to legislate a prohibition of nonconsensual pornography have been met with varying degrees of success. *See supra* notes 119–156.

[158] *See* Citron & Franks, *supra* note 6, at 386 (noting criminal laws are subject to constitutional challenges if they are vague or over-broad); Linkuous, *supra* note 49, at 36–37 (emphasizing the need for a uniform federal legislation to resolve the constitutionality challenges states like Arizona and Rhode Island have encountered).

[159] Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016); Mary Anne Franks, *It's Time for Congress to Protect Intimate Privacy*, Huffington Post (July 18, 2016, 1:32 PM), http://www.huffingtonpost.com/mary-anne-franks/revenge-porn-intimate-privacy-protection-act_b_11034998.html [https://perma.cc/H8E8-HFHD]. Congresswoman Jackie Speier (D-CA) introduced the bipartisan Bill on July 14, 2016. *See* H.R. 5896 (stating the Bill is co-sponsored by the following representatives: Katherine Clark (D-MA), Ryan Costello (R-PA), Gregory Meeks (D-NY), Thomas Rooney (R-FL), John Katko (R-NY), Walter Jones (R-NC), Patrick Meehan (R-PA), Ted Yoho (R-FL), and David Joyce (R-OH)).

[160] *See infra* notes 163–197 and accompanying text.

[161] *See infra* notes 163–175 and accompanying text.

this Part addresses the influence major technology companies played in shaping the bill.[162]

### *A. Congresswoman Speier's Proposal to Put an End to the Dissemination of Nonconsensual Pornography*

On July 14, 2016, Congresswoman Jackie Speier introduced the IPPA to combat the distribution of nonconsensual pornography.[163] This proposed legislation, Speier has stated, is a direct response to the disturbing reality that most revenge porn victims cannot afford to bring civil lawsuits and are largely unprotected under criminal law.[164] The bill aims to alleviate this harsh legal landscape by providing meaningful remedies to otherwise helpless revenge porn victims.[165] The proposed bill, just four pages long, targets whoever "knowingly" distributes sexually intimate images with "reckless disregard" for the subject's lack of consent.[166] Specifically, the proposed bill reads, in part:

> Whoever knowingly uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of the person, with reckless disregard for the person's lack of consent to the distribution, shall be fined under this title or imprisoned not more than 5 years, or both.[167]

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[162] *See infra* notes 176–197 and accompanying text.

[163] *See* H.R. 5896 (criminalizing the dissemination of nonconsensual pornography).

[164] Press Release, Congresswoman Jackie Speier, Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn (July 16, 2016), https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual [https://perma.cc/3XZQ-NATS]. Congresswoman Jackie Speier noted that many perpetrators of nonconsensual pornography acknowledge that their victims usually do not have the time or money to pursue civil litigation. *Id.*

[165] *Id.* In her press release, Congresswoman Jackie Speier acknowledges that many victims of nonconsensual pornography do not have the resources to seek redress, and that the Intimate Privacy Protection Act ("IPPA") attempts to fill this gap in the law with a federal criminal law. *Id.* The Bill is a culmination of Congresswoman Speier's battle to end revenge pornography by legislating a federal criminal law. *See* Steven Nelson, *Federal 'Revenge Porn' Bill Will Seek to Shrivel Booming Internet Fad*, U.S. NEWS (Mar. 26, 2014, 6:01 PM), http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shrivel-booming-internet-fad (discussing Speier's efforts to introduce legislation in early 2014).

[166] H.R. 5896. The Bill purports to amend Title 18 of the United States Code, the federal criminal code. *Id.*

[167] *Id.* The proposed legislation defines "visual depiction" as any photograph, film, or video. *Id.* "Sexually explicit conduct" is defined as actual or stimulated sexual intercourse, bestiality, masturba-

The legislation, however, is inapplicable in a number of circumstances.[168] First, the IPPA does not apply to law enforcement or legal proceedings.[169] Second, individuals who voluntarily or commercially engage in the visual depiction of their genitalia are not protected.[170] Third, the bill does not apply in the event that there is a bona fide public interest in the disclosure of such images.[171] Fourth, the bill provides immunity for otherwise innocent ISPs, who are protected under Section 230.[172]

Most importantly, the safe harbor provision upholds Section 230's immunity for third-party content posted to Internet intermediaries' websites.[173] This provision protects innocent websites like Facebook and Twitter who host, and do not create, their own content.[174] The IPPA, however, targets salacious revenge porn websites that specifically solicit nonconsensual pornography.[175]

### *B. Gaining Silicon Valley's Support by Narrowing the Bill's Applicability to ISPs*

As noted, the proposed IPPA legislation includes a safe harbor provision for Section 230 ISPs.[176] The bill grants operators of interactive platforms, like Facebook and Twitter, immunity from criminal liability if nonconsensual pornography is disseminated on their websites.[177] The immunity, however, does not apply

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tion, sadistic or masochistic abuse, or the exhibition of genitals or pubic area of any person. *See* 18 U.S.C. § 2265(2)(a) (2012).

[168] *See* Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016) (providing exceptions for: (1) law enforcement, (2) individuals who commercially engage in the visual depiction of pornography, (3) where there is a bona fide public interest, and (4) ISPs as defined under Section 230 of the CDA).

[169] *Id.* The IPPA provides exceptions for lawful behavior conducted by law enforcement, correctional, or intelligence officers. *Id.* Specifically, the Bill provides exceptions for the following scenarios: lawful law enforcement, individuals reporting unlawful activity, and court orders or subpoenas. *Id.*

[170] *Id.* Voluntary public or commercial exposure applies to those individuals who voluntarily expose their own genitalia or female nipple and the voluntary engagement in sexually explicit conduct during a lawful commercial setting. *Id.* In essence, this excepts consenting individuals in the porn industry. *See id.* (providing exceptions for consensual nudity in a commercial setting).

[171] *Id.* For instance, this exception allows the dissemination of involuntary porn where there is serious artistic or literary value. *See id.* (excepting involuntary porn for a bona fide public interest).

[172] *Id.* The immunity, however, only extends to ISPs who innocently disseminate the content on their websites, and do not intentionally promote revenge porn. *Id.*

[173] *Id.*

[174] *Id.* (excepting Section 230 Internet intermediaries who do not solicit nonconsensual porn).

[175] *Id.* (imposing liability on Internet intermediaries who solicit nonconsensual porn).

[176] *See id.* (providing an exception for Section 230 ISPs); *supra* notes 109–110 and accompanying text.

[177] H.R. 5896. The section provides that "[t]his section does not apply to any provider of an interactive computer service as defined in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. [§] 230(F)(3)) unless such provider of an interactive computer service intentionally promotes or solicits content that it knows to be in violation of this section." *Id.* The safe harbor applies to social media websites because they are ISPs who host, and do not create, content published on their websites. *See* Communications Decency Act, 47 U.S.C. § 230(c)(1) (2012); Mario Trujillo, *Revenge Porn Bill Un-*

if the provider "intentionally promotes or solicits" content that would otherwise be in violation of the IPPA.[178]

Large technology firms in Silicon Valley are strong supporters of the IPPA's prohibition against nonconsensual pornography.[179] Representatives from Facebook and Twitter issued public statements commending the IPPA and its work to fight cyber bullying.[180] This support, however, was not steadfast at the outset.[181] The first draft, circulated for discussion in 2015, imposed a hefty burden on website operators.[182] The discussion draft compelled ISPs to resolve nonconsensual pornography takedown requests within forty-eight hours of receiving the notice.[183] Website and search engine operators were required to remove the in-

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*veiled After Struggle to Bring Tech on Board*, HILL (July 14, 2016, 2:40 PM), http://thehill.com/policy/technology/287773-revenge-porn-bill-unveiled-after-struggle-to-bring-tech-on-board?utm_campaign=HilliconValley&utm_source=twitterfeed&utm_medium=twitter [https://perma.cc/V3V9-3QA9] (stating technology companies were responsible for the delay in introducing the revised Bill). This exception ensures the Bill does not violate Section 230 of the CDA yet provides redress for interactive platforms that specifically promote the dissemination of nonconsensual pornography. Trujillo, *supra*.

[178] Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016). In other words, the IPPA would criminalize interactive platforms whose primary purpose is to publish involuntary porn, but would not punish interactive platforms, like Facebook and Twitter, that post third-party content but do not intentionally solicit involuntary porn. *See id.* (providing exceptions to ISPs that do not intentionally solicit revenge porn); Press Release, *supra* note 164 (acknowledging that the IPPA provides a safe-harbor to online intermediaries who post third-party content, but do not solicit nonconsensual pornography).

[179] Press Release, *supra* note 164. Silicon Valley giants Facebook and Twitter support the IPPA because they are granted immunity for third-party content. *Id.*

[180] *Id.* Erin Egan, Vice President of U.S. Public Policy for Facebook, characterized revenge porn as "abhorrent," and the reason why Facebook proudly joins Speier's effort to combat the issue. *Id.* Similarly, Amanda Faulkner, U.S. Public Policy Manager for Twitter, regarded nonconsensual pornography as a form of abuse and extolled Twitter's support in the fight against it. *Id.*

[181] *See* Amanda Hess, *Reddit Has Banned Revenge Porn. Sort of.*, SLATE (Feb. 25, 2015, 11:36 AM), http://www.slate.com/blogs/the_slatest/2015/02/25/reddit_bans_revenge_porn_victims_advocates_and_the_aclu_react_to_the_new.html (opining that Reddit may have changed their privacy policy on revenge porn takedown requests in an attempt to avoid government regulation like the IPPA); Lily Hay Newman, *Twitter Moves to Prohibit Revenge Porn*, SLATE (Mar. 12, 2015, 7:09 PM), http://www.slate.com/blogs/future_tense/2015/03/12/twitter_updates_its_privacy_policy_against_revenge_porn_and_rep_katherine.html [https://perma.cc/2REC-2KZC] (suggesting that Twitter's policy against revenge porn may be an effort to avoid government regulation and handle the problem privately).

[182] JACKIE SPEIER, DISCUSSION DRAFT 5–7 (2015), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2006&context=historical [https://perma.cc/QJ9H-GNFE].

[183] *Id.* The Discussion Draft of the Intimate Privacy Protection Act of 2015 (the "Discussion Draft") included provisions requiring website and search engine operators to remove the material within forty-eight hours after receiving notice that the website contains "a visual depiction, the reproduction, distribution, exhibition, publication, transmission, or dissemination of which is in violation of this section." *Id.* at 5–6. The person depicted, the legal representative of the person depicted, or law enforcement were authorized to provide ISPs notice that the website contains material in violation of the Act. *Id.* at 7.

criminating content or to inform the user of their apparent consent to disseminate the material.[184]

Silicon Valley firms generally objected to these cumbersome provisions as being starkly in conflict with Section 230 of the CDA.[185] Section 230 grants ISPs immunity for user-uploaded nonconsensual pornography.[186] The original version of the IPPA did not only eliminate this immunity, but also imposed a burdensome and unprecedented procedure on ISPs.[187] In theory, the 2015 bill required interactive platforms, like Facebook and Google, to dedicate tremendous resources to developing and executing an entirely new scheme for proactively resolving takedown requests or face criminal liability.[188]

The 2016 draft notably excludes these provisions, thereby alleviating the burden on ISPs to monitor nonconsensual pornography on their websites.[189] In fact, the current bill affirms Section 230's safe harbor so long as the computer service does not intentionally promote nonconsensual pornography on its site.[190] A number of sources hypothesize that the lobbying efforts of major technology

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[184] *Id.* at 4–8. The Discussion Draft required ISPs to either remove the incriminating content or inform the user about their right to distribute the material. *Id.* In making a determination about whether a violation occurred, the 2015 draft provided as follows:

> In determining whether consent was given to publicly disseminate visual depictions of the private area of sexually explicit conduct of an individual covered in [the] section, the operator of a website or search engine must be provided credible information that affirmative consent was given. This may include contacting the individual that uploaded the content.

*Id.* at 7.

[185] Trujillo, *supra* note 177; *see* Sarah Jeong, *New Revenge Porn Bill Shows Silicon Valley's Influence in Politics*, MOTHERBOARD (July 15, 2016, 4:28 PM), https://motherboard.vice.com/en_us/article/new-revenge-porn-bill-shows-silicon-valleys-influence-in-politics [https://perma.cc/NV82-YCCF] (commenting that lobbying efforts by major social media platforms helped eliminate liability in the 2016 draft of the IPPA).

[186] 47 U.S.C. § 230(c)(1) (2012).

[187] *See* SPEIER, *supra* note 182, at 3–7; Jeong, *supra* note 185 (stating that the initial draft imposed liability on ISPs). The 2015 Discussion Draft required ISPs to respond to takedown requests within forty-eight hours. *See* Jeong, *supra* note 185.

[188] Jeong, *supra* note 185 (commenting that the 2016 bill omits portions of the Discussion Draft that weakened Section 230's protections of Internet intermediaries that host third-party content); Adam Clark Estes, *This Is the Revenge Porn Law We Need in America*, GIZMODO (Feb. 25, 2015, 1:15 PM), http://gizmodo.com/so-what-happens-if-you-have-a-talented-with-photoshop-c-1688021532 [https://perma.cc/E7P4-556W] (stating that, websites like Facebook are generally immune from illegal content they host, "[b]ut making revenge porn a federal crime would strip away this safe harbor, as Section 230 'does not apply to federal criminal law'").

[189] *See* Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016); Jeong, *supra* note 185 (noting the absence of the aforementioned provisions). Google, among other ISPs, would have been greatly affected by the Discussion Draft requirements. Jeong, *supra* note 185. Although major companies like Google, Facebook, and Twitter have announced private efforts to combat revenge pornography, the Discussion Draft would have introduced criminal liability for failing to do so. *Id.*

[190] Jeong, *supra* note 185.

companies were responsible for the amendment.[191] Upholding the safe harbor, it seems, was necessary to gain the approval of major technology companies in Silicon Valley.[192]

Despite their legal immunity, many major websites have voluntarily adopted policies to combat revenge porn.[193] Search engines Google, Bing, and Yahoo have also agreed to "de-index" revenge porn, so the content does not appear when searching the subject's name.[194] Social media platforms, including Facebook, Twitter, and Reddit, updated their privacy policies to prohibit nonconsensual pornography as early as 2015.[195] Notably, in October 2015, PornHub, a popular porn website, announced its new procedure to honor subject's requests to take down nonconsensual pornography.[196] These private efforts evidence that Internet intermediaries are willing to combat revenge porn.[197]

## III. THE SAFE HARBOR PROVISION EFFECTIVELY BALANCES THE COMPETING INTERESTS OF SECTION 230 OPERATORS AND REVENGE PORN VICTIMS

The IPPA aims to regulate certain content on the Internet by prohibiting the dissemination of nonconsensual pornography.[198] Previous efforts to draft a federal law prohibiting revenge porn, however, have been resisted by advocates of

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[191] *Id.* Although many social media platforms have a private system for dealing with revenge porn takedown requests, many objected to the Discussion Draft's notice and takedown procedures because it would have imposed liability for failing to do so. *Id.*

[192] *See* SPEIER, *supra* note 182, at 5 (imposing liability on service providers for failing to remove the content within forty-eight hours); Jeong, *supra* note 185 (commenting that the technology industry's lobbying shaped the Bill's final text).

[193] Talbot, *supra* note 19. Beginning in 2015, many social media platforms adopted procedures enabling victims to fill out online forms requesting the content be removed. *Id.* Reddit, Twitter, Facebook, and Instagram each have policies combating the dissemination of nonconsensual pornography. *Id.*

[194] *Id.* Despite the re-indexing, the image will still appear with the correct URL address. *Id.*

[195] Charlie Warzel, *Twitter Takes Steps to Combat Stolen Nudes and Revenge Porn*, BUZZFEED NEWS (Mar. 11, 2015, 5:55 PM), https://www.buzzfeed.com/charliewarzel/twitter-tackles-revenge-porn?utm_term=.seb27D2K#.liZm9rmA [https://perma.cc/BFK3-ZTEP]. Twitter's nonconsensual pornography policy warns users that they "may not post or share intimate photos or videos of someone that were produced or distributed without their consent." *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/48H2-6M9Y]. Similarly, Reddit's privacy policy prohibits revenge porn. *Account and Community Restrictions: Do Not Post Involuntary Pornography*, REDDIT, https://www.reddithelp.com/en/categories/rules-reporting/account-and-community-restrictions/do-not-post-involuntary-pornography [https://perma.cc/F5GB-RG3C]. The policy provides: "Reddit prohibits the dissemination of images or video depicting any person in a state of nudity or engaged in any act of sexual conduct apparently created or posted without their permission, including depictions that have been faked." *Id.*

[196] Talbot, *supra* note 19.

[197] Jeong, *supra* note 185.

[198] *See* Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016) (prohibiting the dissemination of sexually explicit photographs with reckless regard towards the subject's lack of consent towards the distribution of such photograph).

Section 230 of the CDA.[199] This Part argues that the IPPA's safe harbor provision is necessary to balance the concerns of Section 230 hosts and revenge porn victims alike.[200] Section A of this Part contends the inclusion of the safe harbor provision is necessary to avoid displacing Section 230.[201] Section B of this Part argues the "intentional" mens rea requirement provides revenge porn victims with adequate redress against the egregious behavior of third-party hosts.[202]

### *A. The Safe Harbor Provision Is Necessary to Harmonize the IPPA and Section 230 of the CDA*

The safe harbor provision of the IPPA is necessary to uphold Section 230 of the CDA's legislative purpose to promote the free exchange of information on the Internet.[203] Unlike earlier versions of the bill, the IPPA does not penalize Internet intermediaries for failing to remove nonconsensual pornography.[204] The inclusion of this provision is essential to harmonizing the legislative purpose of the CDA and silencing earlier criticisms purporting the bill to over-regulate the Internet.[205]

At first glance, the IPPA's legislative purpose appears to conflict with the goals of Section 230.[206] For one, the IPPA attempts to regulate Internet content by prohibiting the dissemination of nonconsensual pornography.[207] On the other hand, Section 230 aims to promote the free flow of information on the Internet by shielding many technology companies from liability stemming from user-

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[199] DANIEL CASTRO & ALAN MCQUINN, WHY AND HOW CONGRESS SHOULD OUTLAW REVENGE PORN 5 (2015), http://www2.itif.org/2015-congress-outlaw-revenge-porn.pdf [https://perma.cc/FR6N-TSW5] (commenting that federal legislation should not displace Section 230's immunity for ISPs); Alex Jacobs, Comment, *Fighting Back Against Revenge Porn: A Legislative Solution*, 12 NW. J.L. & SOC. POL'Y 69, 77 (2016) (commenting that Section 230 creates obstacles to the enforcement of a federal law prohibiting revenge porn because it provides immunity to Internet providers).

[200] *See infra* notes 203–246 and accompanying text.

[201] *See infra* notes 203–228 and accompanying text.

[202] *See infra* notes 229–246 and accompanying text.

[203] *See* Jeong, *supra* note 185 (commenting that Section 230 is responsible for enabling the growth of many start-up technology companies because they are shielded from lawsuits against their user-created material); Trujillo, *supra* note 177 (noting technology companies did not originally support the Bill until the safe harbor was introduced).

[204] *Compare* H.R 5896 (excepting internet intermediaries), *with* SPEIER, *supra* note 182, at 5, 8–9 (requiring notice and takedown procedures).

[205] *See supra* notes 185–192 and accompanying text.

[206] *See* The Communications Decency Act, 47 U.S.C. § 230(c) (2012) (providing immunity to interactive computer services for the content posted by third-party users); H.R. 5896 (regulating the content on the Internet by criminalizing nonconsensual pornography).

[207] *See* Press Release, *supra* note 164 ("Technology today makes it possible to destroy a person's life with the click of a button or a tap on a cell phone. That is all anyone needs to broadcast another person's private images without their consent."). In response to this issue, the IPPA criminalizes knowingly distributing sexually explicit content of another with reckless disregard towards the victim's lack of consent. *Id.*

uploaded content.[208] The IPPA's safe harbor provision, however, explicitly affirms the efficacy of Section 230's immunity.[209] The proposed legislation grants immunity to ISPs for user-uploaded nonconsensual pornography.[210] Specifically, the bill states liability does not extend to Section 230 ISPs for content uploaded by another information content provider.[211] This provision is necessary to avoid a chilling effect on free speech and, consequently, protect the important function of Section 230.[212]

In comparison, the 2015 discussion draft of the bill obliterated the protections afforded under Section 230.[213] The prior draft obliged websites to respond to takedown requests within forty-eight hours or face criminal liability for user-uploaded content.[214] If they did not remove the content, websites were required to conduct a consent determination and inform the individual of the website's

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[208] Jia, *supra* note 45. Congress enacted Section 230 to promote the idea of a self-governed and largely unregulated Internet by providing immunity to Internet intermediaries. *Id.*

[209] *See* Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016) (granting Section 230 ISPs immunity for publishing third-party created and uploaded content); Jeong, *supra* note 185 (commenting that the 2016 draft of the IPPA more closely reflects the interests of technology companies).

[210] H.R. 5896.

[211] *Id.* § 1802(b)(4) (providing that "[t]his section shall not apply to any provider of an interactive computer service as defined in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. [§] 230(f)(2)) with regard to content provided by another information content provider, as defined in section 230(f)(3) of the Communications Act of 1934 (47 U.S.C. [§] 230(f)(3)) unless such a provider of an interactive computer service intentionally promotes or solicits content that it knows to be in violation of this section").

[212] *See* Steven Nelson, *Congress Set to Examine Revenge Porn*, U.S. NEWS (July 30, 2015, 11:32 AM), https://www.usnews.com/news/articles/2015/07/30/congress-set-to-examine-revenge-porn (addressing the concerns of Internet activists). In 2013, Matt Zimmerman, previously a senior staff attorney at the Electronic Frontier Foundation, warned that adoption of the Discussion Draft may result in over-censorship because "websites would reflexively take down nonoffending content to free themselves of potential problems." *Id.* The legislative purpose of the CDA is to promote the free exchange of ideas on the internet with minimum government regulation. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). If liability were imposed upon service providers for failing to remove content after a takedown request, service providers would be incentivized to simply remove the material whether or not it was in violation of a government regulation. *Id.* at 333. Hence, imposing liability creates a chilling effect on free speech because service providers are incentivized to remove content in direct contrast with Section 230's protections. *Id.*

[213] *See* Jeong, *supra* note 185 (arguing that the Discussion Draft "would have shattered" Section 230 immunity by imposing a new notice-and-take down system on ISPs).

[214] *See* SPEIER, *supra* note 182, at 4–5 (providing Section 230 immunity unless the ISP did not respond to take down requests within forty-eight hours). The Discussion Draft provided, in part:

> In the case of an operator of a search engine, the operator, after receiving notice from a person described in clause (ii) that a search result on that search engine directs the user to a website that contains a visual depiction, the reproduction, distribution, exhibition, publication, transmission, or dissemination of which is in violation of this section, does not, within 48 hours after receiving such notice, remove that search result from the search engine . . . .

*Id.* at 5.

authority to host the content.[215] This overly burdensome requirement impinged on the vital role of interactive websites in promoting free exchange of information.[216] Section 230 provides Internet intermediaries broad immunity in order to allow individuals to communicate directly with one another instead of relying on skewed traditional media sources.[217] The original draft undermined Section 230's legislative purpose by obliging websites like Facebook and Twitter to exhaustively monitor and censor their content.[218]

The discussion draft blatantly ignored the practical realities of today's online world.[219] Obliging major websites to respond to takedown requests within forty-eight hours of receiving notice is unreasonable.[220] Websites like Facebook, for instance, would theoretically have to dedicate an entire department to monitoring and completing these requests daily.[221] Furthermore, requiring major so-

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[215] *Id.* The Discussion Draft allowed ISPs to forgo removing the material within forty-eight hours if they provided notice to the individual who requested the content be removed of their right to publicly disseminate the content. *Id.*

[216] *See* Laura Cannon, Comment, *Indecent Communications: Revenge Porn and Congressional Intent of § 230(c)*, 90 TUL. L. REV. 471, 473 (2016) (commenting that the congressional intent of the CDA was to protect the Internet from regulation); Jia, *supra* note 45 (stating the purpose of Section 230 is to offer immunity to Internet intermediaries in order to provide a self-governed Internet). In *Zeran v. America Online, Inc.*, the court explained that imposing liability on Internet intermediaries for failing to respond to takedown requests would restrict speech, and consequently, defeat the purpose of Section 230 of the CDA to promote the free exchange of information on the Internet. 129 F.3d at 333.

[217] *See* Jia, *supra* note 45 (noting that "[t]he rise of Internet intermediaries enabled individuals to speak directly to the masses without having to rely on traditional intermediaries, who had long determined the substance of media content"). By granting Internet intermediaries immunity for third-party content, Section 230 promotes the free exchange of information. *Zeran*, 129 F.3d at 331–33. The *Zeran* court explained that it would be impractical to require ISPs to screen posts made by millions of users utilizing interactive computer services to exchange information. *Id.* at 331.

[218] *See Zeran*, 129 F.3d at 330–31 (stating the impossibility of requiring Internet intermediaries to screen millions of postings for issues); Samantha H. Scheller, Comment, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 586–87 (2015) (commenting that creating an exception to Section 230 for revenge porn defeats the congressional purpose of the CDA, which is to protect ISPs); Scott H. Greenfield, *How Long Before the Safe Harbor, Article 230, Falls?*, SIMPLE JUST. (Oct. 13, 2013), http://blog.simplejustice.us/2013/10/13/how-long-before-the-safe-harbor-article-230-falls/ [https://perma.cc/398Y-7HAU] (criticizing a revenge porn law for undermining Section 230); Sarah Jeong, Opinion, *Revenge Porn Is Bad. Criminalizing It Is Worse,* WIRED (Oct. 28, 2013, 9:30 AM), https://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/ [https://perma.cc/K2ZJ-82VZ] (noting the tension between a revenge porn law and Section 230).

[219] *See Zeran*, 129 F.3d at 330–31 (commenting on size of the Internet). Because Internet intermediaries have tens of millions of users, it would be impossible for them to screen user uploaded content to avoid liability for each takedown request. *Id.* at 331.

[220] Jeong, *supra* note 185.

[221] *See Zeran*, 129 F.3d at 331 (noting that Internet intermediaries host millions of users); Jeong, *supra* note 185 (stating that interactive platforms would have to expend huge resources on screening posts to flag nonconsensual pornography); Michelle Goldberg, *Revenge Porn Is Malicious and Reprehensible. But Should It Be a Crime?*, THE NATION (Oct. 20, 2014), https://www.thenation.com/article/

cial media websites to conduct an ad-hoc consent based determination is untenable.[222] The 2015 discussion draft obligated interactive websites, who did not remove the requested material, to notify the individual of their authority to post the content.[223] The issue is that interactive website providers, by definition, host content that is user, not provider, uploaded.[224] Hence, these Internet intermediaries do not possess the information necessary to make such a determination.[225] Without the capabilities to elect the consent determination option, Internet intermediaries only have one option—remove the content.[226] The resulting effect chills speech and plainly subverts Section 230's congressional purpose to promote Internet exceptionalism.[227] For this reason, it is necessary to uphold the safe harbor provision in the most recent draft of the proposed bill.[228]

### *B. Revenge Porn Victims Are Nonetheless Protected Despite Heightening the Mens Rea Required for Internet Intermediaries*

The IPPA provides a safe harbor for Internet intermediaries so long as they do not intentionally solicit nonconsensual pornography.[229] Unlike earlier versions of the bill that imposed a "negligence" mens rea, the 2016 version of the IPPA requires an "intentional" mens rea for criminal prosecution.[230] Heightening the mens rea is necessary to avoid unduly restricting ISPs.[231] Revenge porn victims are nonetheless protected by the legislation's ability to target revenge porn

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war-against-revenge-porn/ [https://perma.cc/T7EU-85GX] (explaining that a takedown request on Google could take up to a couple of months or it could be rejected without explanation).

[222] *See Zeran*, 129 F.3d at 330–31 (commenting on the tremendous amount of information communicated via the Internet and the impracticalities for Internet intermediaries to screen every posting).

[223] *See* SPEIER, *supra* note 182, at 5 (granting ISPs the ability to forego removing the requested content so long as they provide notice of their ability to republish the material). In order to determine whether consent was granted to the ISP, the Discussion Draft provides that "the operator of a website or search engine must be provided credible information that affirmative consent was given. This may include contacting the individual that uploaded the content." *Id.* at 7.

[224] *See* 47 U.S.C. § 230(f)(2)–(3) (2012) (defining an interactive computer service as a publisher of third-party created content and an information content provider as a person responsible for creating content).

[225] *See* Goldnick, *supra* note 8, at 601 (explaining that an interactive service provider acts as a "passive conduit" with regard to user-created content, and is not liable under Section 230). Internet intermediaries merely host third-party content. *Zeran*, 129 F.3d at 330–31.

[226] *See* Nelson, *supra* note 165 (addressing the concerns of Internet activists that the Discussion Draft would result in websites over-censoring their content to avoid criminal liability).

[227] *Id.* (commenting that a federal revenge porn law requiring Internet intermediaries to respond to takedown requests conflicts with Section 230's protections).

[228] *See* Jeong, *supra* note 185 (noting that including the safe harbor in the IPPA was necessary to uphold Section 230 of the CDA).

[229] Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016). The criminal prohibition does not apply to Section 230 ISPs unless they intentionally promote or solicit nonconsensual pornography. *Id.*

[230] *Id.*; Discussion Draft, *supra* note 182.

[231] Jeong, *supra* note 185; *see* 47 U.S.C. § 230(c) (2012) (granting immunity to ISPs).

websites and the voluntary efforts of major social media companies who solicit revenge porn.[232]

The 2016 IPPA bifurcates the requisite mens rea for lack of consent.[233] Prosecutors must prove that an individual perpetrator intentionally disseminated nonconsensual pornography with "reckless disregard" for the subject's lack of consent.[234] The mens rea for ISPs, however, is higher and requires an "intentional" solicitation of involuntary pornography.[235] This is a welcomed changed from the 2015 discussion draft for ISPs.[236] The earlier version of the bill touted a mens rea of "knew or should have known" for both individual perpetrators and ISPs.[237] Heightening the mens rea for ISPs protects the legislative purpose of Section 230, which is to promote the free flow of information.[238] Ascribing a higher mens rea in order to impose liability on ISPs shields websites from criminal liability for negligently publishing nonconsensual pornography.[239] In turn, websites will not be incentivized to over-censor user-uploaded content because they are not liable for third-party content.[240] Therefore, the "intentional" mens rea advances the goals of Section 230.[241]

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[232] Jeong, *supra* note 185.

[233] *See* H.R. 5896 (requiring a mens rea of "intentional" promotion or solicitation of revenge pornography); SPEIER, *supra* note 182, at 2–3 (imposing a "knew or should have known" mens rea standard with regard to the perpetrators knowledge that the subject did not consent). With regard to this discussion, mens rea refers to the awareness of the victim's lack of consent for the images to be disseminated. Jacobs, *supra* note 199, at 87.

[234] H.R. 5896.

[235] *Id.* Increasing the requisite mens rea narrows the scope of ISP behavior subject to criminal prosecution. Priyanka Nawathe, *Congresswoman Speier's Revenge Pornogrphy Bill: Crossing the First Amendment Line?*, JOLT DIGEST (July 25, 2016), http://jolt.law.harvard.edu/digest/congresswoman-speiers-revenge-pornography-bill-crossing-the-first-amendment-line [https://perma.cc/638Q-KHWB].

[236] Mike Masnick, *Federal Revenge Porn Bill Not as Bad as It Could Have Been, Still Probably Unconstitutional*, TECH DIRT (July 15, 2016, 10:39 AM), https://www.techdirt.com/articles/20160714/17282334978/federal-revenge-porn-bill-not-as-bad-as-it-could-have-been-still-probably-unconstitutional.shtml/ [https://perma.cc/FPF9-B926]. The 2015 Discussion Draft imposed liability on ISPs for failing to remove content within forty-eight hours of a take-down request. SPEIER, *supra* note 182, at 5.

[237] SPEIER, *supra* note 182, at 2–3.

[238] *See* 47 U.S.C. § 230(c) (2012) (providing immunity to ISPs in order to promote the free flow of information on the Internet); Nawathe, *supra* note 235 (stating that a higher mens rea narrows the scope of behavior subject to criminal liability). Thus, only websites that intentionally solicit nonconsensual pornography will be liable under the IPPA. H.R. 5896.

[239] *See* Burris, *supra* note 11, at 2355 (commenting that an intentional mens rea avoids criminalizing the accidental or unintentional publication of revenge porn); Nelson, *supra* note 212 (commenting that the IPPA does not punish for the unintentional disclosure of nonconsensual pornography for Section 230 ISPs).

[240] *See* Nelson, *supra* note 165 (addressing the concerns of Internet activists that the Discussion Draft would result in websites over-censoring their content to avoid criminal liability).

[241] *See* Nelson, *supra* note 212 (stating that the IPPA, in its final form, upholds the CDA's protection for ISPs).

Nonetheless, the IPPA protects revenge porn victims from the dissemination of involuntary pornography by Internet intermediaries.[242] The bill explicitly targets revenge porn websites that solicit nonconsensual pornography.[243] Without this legislation, Section 230 of the CDA completely shields revenge porn websites from liability arising out of user-uploaded content.[244] The IPPA closes this legal loophole by imposing criminal liability on websites that intentionally publish nonconsensual pornography.[245] Hence, the bill pierces Section 230's immunity only for egregious conduct by revenge porn websites without over-criminalizing the innocent behavior of other ISPs.[246]

## CONCLUSION

Revenge porn is an epidemic that can only be effectively remedied by adopting the proposed federal legislation. The IPPA delicately balances the tension between victims of nonconsensual pornography and ISPs. The IPPA was introduced in response to the legal ambivalence towards revenge porn victims and little deterrence in the way of its perpetrators. Previous efforts to legislate a national prohibition of involuntary porn were halted by claims that imposing criminal sanctions on websites would violate Section 230 of the CDA. The most recent draft, however, addresses these criticisms by upholding Section 230 unless a website "intentionally" solicits revenge porn. This compromise is necessary to combat the prior pitfalls of Section 230, which shielded revenge porn websites from criminal liability, but also provides redress for revenge porn victims.

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[242] *See* Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016); Cooper, *supra* note 88, at 838 (discussing the balance needed in a law to target revenge porn websites without over-censoring all third-party hosts). Although the IPPA upholds Section 230 of the CDA, it narrows its protections and imposes liability on Internet intermediaries who solicit revenge porn. H.R. 5896.

[243] *See* H.R. 5896 (creating legal liability for Internet intermediaries who solicit nonconsensual pornography).

[244] *See* 47 U.S.C. § 230(c)(1) (2012); Dawkins, *supra* note 18, at 407–08.

[245] *See* H.R. 5896; Dawkins, *supra* note 18, at 407–08.

[246] *See* Jeong, *supra*, note 185 (noting the IPPA upholds Section 230's protections for Internet intermediaries, but criminalizes websites that solicit revenge porn).