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## ENDING THE REVENGE PORN EPIDEMIC: THE ANTI-REVENGE PORN ACT

TARYN PAHIGIAN\*

### I. INTRODUCTION

Imagine you are an eighth-grade teacher, in the middle of your lesson plan with your students. “So if Sally worked for twelve hours, how much did Willy owe for her service?” While your back is turned as you write on the chalkboard, you hear chuckling. “What are you all laughing at?” But no one speaks up. You continue the lesson, but you again hear laughter, and it continues until you turn around and catch the students with their phones out. You grab one of their phones and find a nude photo of yourself that you recall taking and sending to a past partner, with whom you shared a mutually respectful relationship at the time the photo was taken. That image is now embedded in the minds of your students.

Imagine you are five weeks into your Insanity 60-day workout, and you have been taking weekly pictures on your cell phone of your naked body to track your progress. Weeks later, while browsing the Internet, you visit a website and find the naked pictures you had taken of yourself. You know that you absolutely did not send those pictures to anyone because they were actually quite unflattering and merely for your eyes in order to assess your results. You have a lock on your phone, and your phone is with you at all times. You realize that someone you do not even know hacked into your phone and stole those pictures.

Imagine you and your husband were married for fifteen years and had three children together. During your loving marriage, you and your husband willingly made a homemade sex tape. Years later, your marriage fell apart and ended in divorce. His love for you quickly turned to hate, and he wanted revenge for stealing

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fifteen years of his life. One day, you arrive at your office and open your work email, and one of the emails you open immediately plays that homemade sex tape. You look up and your entire office is watching that same video. He sent the email to all your co-workers, including your boss and supervisors.

Imagine you are a very timid young man, still unsure about your sexuality and fighting the urges that your family raised you to believe were unforgivable sins. You join a dating site under a false name and you do not include images of yourself on the site. You begin chatting with a person of the same sex. After months of exchanging emails, you begin having conversations on the phone and through text messaging. You have contemplated meeting this person face-to-face, but he lives far away and you are not sure you are ready to officially meet. After a year of chatting, you send your first intimate image, with the intent and understanding that the image is private and only between you and this person. Over time, there are more exchanges of intimate photos. The image sharing through texts and emails helps you come to terms with and accept your homosexuality, and eventually you meet. Thereafter you officially become a couple. After three years of dating, you break up, and your ex-partner texts all the intimate images to your family, who are humiliated and refuse to forgive you.

These scenarios are more common than one might imagine. In fact, the common issue in this array of scenarios has become quite controversial in recent years, due in part to technological advances throughout the years. Technological advancement has made it much easier to share photos between multiple people. The new digital age has advanced society's forms of communication, but that advancement came with unfortunate consequences. Any person with access to a computer, phone, or device that connects to the Internet, can post any of his or her own content with ease. Of course, this has its advantages. It furthers society's goal of promoting freedom of speech and expression.<sup>1</sup> It also spreads knowledge and information and encourages the exchange of ideas.<sup>2</sup> On the other hand, it has introduced an epidemic of hate speech and obscene content that is not monitored or restricted, and

<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> *Roth v. U.S.*, 354 U.S. 476, 484 (1957).

can cause irreparable harm to those targeted and victimized by such content. For example, user-generated content<sup>3</sup> can be used for revenge porn, also known as non-consensual pornography.<sup>4</sup> Non-consensual pornography is the distribution of sexually graphic images of individuals without their consent, and it includes images obtained both with and without consent.<sup>5</sup> Thus, revenge porn encompasses, “(1) non-consensual photography or video recording, (2) consensual photography or video recording that is later stolen, or (3) consensual photography or video recording that is intentionally transmitted to an individual.”<sup>6</sup>

The harm caused by revenge porn is detrimental. When media is captured of a person in the nude, arguably a vulnerable state, and then spread without the person’s consent, the invasion and violation of that person’s privacy is difficult to explain in words. It is humiliating and is capable of going beyond harming one’s mental and emotional state; it can go so far as to cause people to get harassed and to even lose jobs.

In New York, very few civil remedies are available for the victims of revenge porn.<sup>7</sup> Victims can try to seek legal redress under traditional copyright law or common tort law, such as defamation, public disclosure of private information, or intentional infliction of emotional distress.<sup>8</sup> The problem, however, is that each of these areas of law that might offer a remedy do not apply to every, or even most, instances of revenge porn. Because there are few, if any, laws governing revenge porn offenses, vengeful people can sexually exploit others, by using their images, without consequence.

<sup>3</sup> User-generated content means any data or media that is contributed by individual users of a website. *User-generated content definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/user-generated+content> (last visited Feb. 20, 2015).

<sup>4</sup> Cyber Civil Rights Initiative, <https://www.cybercivilrights.org/welcome/> (last visited Feb. 8 2017).

<sup>5</sup> *Id.*

<sup>6</sup> Jenna K. Stokes, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929, 929 (2014).

<sup>7</sup> Danielle K. Citron and Mary A. Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 357 (2014).

<sup>8</sup> See Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 253-258 (2015).

In addition, New York criminal laws do not punish most acts of revenge porn and consequently provide little solace to victims, as perpetrators escape prosecution and punishment. In New York, a prosecution can be initiated for aggravated harassment<sup>9</sup> or for the public display of offensive sexual material.<sup>10</sup> In addition, a recently enacted law, dissemination of an unlawful surveillance image, makes it a criminal offense to disseminate, or post, sexual or nude images obtained through an unlawful surveillance.<sup>11</sup> However, few instances of revenge porn involve material obtained through an unlawful surveillance. Many times, the photo is taken with the consent of the individual being photographed, but then later disseminated without the photographed individual's consent. Under New York's most recently passed criminal statute, the perpetrator disseminating the image will not be prosecuted, and the victim is left not only without a civil remedy, but also without the satisfaction that justice was served.

Thus, this Note proposes a solution to the problem: The Anti-Revenge Porn Act (ARPA). Although the Act does not expand civil remedies, the ARPA would amend the New York Penal Law Code to extend privacy protections to cover sexually explicit media that was recorded with consent, but disseminated without consent. By enacting a law that specifically addresses revenge porn, law enforcement personnel and prosecutors will be armed with a statute that makes it easier to prosecute revenge porn behavior, and thus makes it more likely to obtain convictions. Easier prosecutions will deter future conduct and victims will have the comfort of knowing that criminal prosecutions can be brought against perpetrators.

Part I of this note will discuss revenge porn generally, explaining the nature of the problem and highlighting the negative effects. Part II will discuss civil and criminal law as it exists today and how existing law is inadequate to combat revenge porn. Part III will discuss the ARPA and its specific provisions and will address any potential counterarguments against enactment of the

<sup>9</sup> See N.Y. PENAL LAW § 240.30 (McKinney 2003).

<sup>10</sup> See N.Y. PENAL LAW § 245.11 (McKinney 2003).

<sup>11</sup> N.Y. PENAL LAW § 250.55 (McKinney 2003).

new law. Part IV concludes by arguing that New York should enact this new legal framework to address the revenge porn.

## II. BACKGROUND

### A. *The First Amendment & The Internet*

In 1973, the United States Defense Advanced Research Projects Agency (DARPA)<sup>12</sup> initiated a research program to develop technologies for communication protocols that would allow networked computers to communicate across multiple linked networks.<sup>13</sup> The system of networks developed from the research was known as the “Internet.”<sup>14</sup> Over time, the Internet advanced, and today an individual is capable of communicating an idea to any person with access to a computer-like device within minutes, sometimes even seconds.<sup>15</sup> Not only has the Internet advanced, but it has also become extremely popular and is commonly used by Americans.<sup>16</sup> As the Internet advanced, it became necessary to

<sup>12</sup> DARPA was created in 1958 in response to the political and defense communities’ recognition of the need for a high-level defense organization that could expand the frontiers of technology beyond the specific requirements of the Military Services. DARPA, *Where the Future Becomes Now*, <http://www.darpa.mil/about-us/darpa-history-and-timeline> (last visited Feb. 10, 2017).

<sup>13</sup> DARPA’s involvement in the creation of the internet began with an idea to link time sharing computers into a national system. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> An article explaining why the U.S. has slower Internet than other countries illustrates the rate at which the Internet works. “Downloading a high-definition movie takes about seven seconds in Seoul, Hong Kong, Tokyo, Zurich, Bucharest and Paris.” In Los Angeles, New York, and Washington, downloading the same movie takes 1.4 minutes for people with the fastest Internet available.” Although the article was trying to demonstrate how the U.S. has fallen behind other countries, for purposes of this note it demonstrates that Internet connection can work in a matter of seconds. See Mikey Burton, *Why the U.S. Has Fallen Behind in Internet Speed and Affordability*, THE NEW YORK TIMES, Oct. 30, 2014, available at [http://www.nytimes.com/2014/10/31/upshot/why-the-us-has-fallen-behind-in-internet-speed-and-affordability.html?\\_r=0&abt=0002&abg=1](http://www.nytimes.com/2014/10/31/upshot/why-the-us-has-fallen-behind-in-internet-speed-and-affordability.html?_r=0&abt=0002&abg=1); In 2013, 73.4 percent of U.S. households reported having high-speed Internet connection. See THE UNITED STATES CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORTS: COMPUTER AND INTERNET USE IN THE UNITED STATES: 2013 (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>.

<sup>16</sup> In 2013, 83.8 percent of U.S. households reported computer ownership, and 74.4 percent of all households reported Internet use. <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>.

recognize that individuals' rights offline would need to be protected online as well.

The First Amendment of the United States Constitution governs the core rights affected by the use of Internet, which include freedom of speech and expression, privacy, freedom of information, and access to information. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."<sup>17</sup> The protection given to speech and press under the First Amendment was created to promote the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>18</sup> Congress's objective was made clear as early as 1774, in a letter from the Continental Congress to the inhabitants of Quebec:

The last right . . . regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable [sic] and just modes of conducting affairs.<sup>19</sup>

Consistent with Congress's objective to promote the exchange of ideas, the development of the Internet was important as a new form of communicating and exchanging ideas and concepts and furthering the education of society.<sup>20</sup> The ease with which individuals can now post information and exchange ideas is remarkable and invaluable. Because of this, the First Amendment protects much of the information shared on the Internet,<sup>21</sup> and websites that serve as platforms hosting content are protected from intermediary liability for most claims that arise with respect to controversial content.<sup>22</sup> This furthers the goal of incentivizing websites to serve as platforms.

<sup>17</sup> U.S. CONST. amend. I.

<sup>18</sup> *Roth v. U.S.*, 354 U.S. 476, 484 (1957).

<sup>19</sup> *Id.* (citing 1 Journals of the Continental Congress 108 (1774)).

<sup>20</sup> *See Id.*; *See also* 47 USCS § 230(b)(1).

<sup>21</sup> *See generally* *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>22</sup> *See generally* 47 USCS § 230.

### B. First Amendment Protections

The First Amendment protection extends to many kinds of speech, including pornography.<sup>23</sup> Pornography is defined as material that depicts erotic behavior that is intended to cause sexual excitement.<sup>24</sup> The history of pornography and the First Amendment was controversial and contemplated the question of whether pornography was considered “obscene” material, and thus not afforded protection. The Supreme Court determined that obscene material is not protected by the First Amendment, but not all pornography was considered obscene and was generally protected unless considered obscene under the Court’s test for obscenity. The Court decided, for example, that child pornography was obscene material and thus not afforded First Amendment Protection.

In *Chaplinsky v. New Hampshire*, the Court carved the path for the exclusion of obscenity from First Amendment protection.<sup>25</sup>

*There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . includ[ing] . . . obscen[ity] . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*<sup>26</sup>

Embracing the judgment in *Chaplinsky*, the Supreme Court in *Roth v. United States* held that the First Amendment protection did not extend to obscene material.<sup>27</sup> The Court determined that

<sup>23</sup> *Id.* at 487 (explaining that the portrayal of sex is not itself sufficient reason to deny the material First Amendment protection).

<sup>24</sup> *Pornography definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/pornography> (last visited February 20, 2015).

<sup>25</sup> See generally *Chaplinsky v. N.H.*, 315 U.S. 568 (1942) (The appellant was publicly denouncing all religions as a “racket.” The Court called his words “fighting words,” meaning words that inflict injury or breach the peace. The Court went on to say that the words were of such little social value that any benefit they might produce was outweighed by their costs on social interests in order and morality.).

<sup>26</sup> *Id.* at 571-72.

<sup>27</sup> See *Roth v. U.S.*, 354 U.S. 476, 484 (1957); See also *Kois v. Wisconsin*, 408 U.S. 229 (1972); See also *United States v. Reidel*, 402 U.S. 351, 354 (1971).



obscenity was not “within the area of constitutionally protected speech or press.”<sup>28</sup> The Court said that the First Amendment was not intended to protect every utterance or form of expression, such as materials that were “utterly without redeeming social importance.”<sup>29</sup> The test to determine whether something was obscene was whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.<sup>30</sup> The Court went on to say, however, that “sex and obscenity are not synonymous.”<sup>31</sup> Rather, “[o]bscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.”<sup>32</sup>

Although the Court has upheld that the First Amendment does not protect obscene material, it has confined the scope of state regulation of works, that depict or describe sexual conduct. For example, in *Miller v. California*, the Court stated, “[a] state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”<sup>33</sup> The *Miller* standard was “an accommodation between the State’s interest in protecting the ‘sensibilities of unwilling recipients’ from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws.”<sup>34</sup> Thus, not all sexually explicit material is obscene, and there is in fact a difference

<sup>28</sup> *Roth v. U.S.*, 354 U.S. 476 at 485.

<sup>29</sup> *Id.* at 484.

<sup>30</sup> *Id.* at 489.

<sup>31</sup> *Id.* at 487.

<sup>32</sup> *Id.* Note that the question in *Roth* was whether federal and state obscenity statutes violated the First Amendment. There, the Court held that the statutes did not violate the First Amendment because the defendants were openly advertising graphic matter to appeal to the erotic interest of their customers and were commercially exploiting the shameful cravings for materials with prurient effect. The Court said State and Federal Governments could constitutionally punish such conduct.

<sup>33</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>34</sup> *New York v. Ferber*, 458 U.S. 747, 756 (1982).

between obscenity and constitutionally protected indecent expressions about sex and sexuality.<sup>35</sup>

But there are still limits on the protection. In *New York v. Ferber*, decided after *Miller*, the Court ruled that the First Amendment did not protect child pornography, where the subjects of the porn were children as opposed to adults.<sup>36</sup> The Court acknowledged the State's interest in "safeguarding the physical and psychological well-being of a minor,"<sup>37</sup> and in protecting the "physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."<sup>38</sup> The Court noted the high degree of importance of the government objective of prevention of sexual exploitation and abuse of children.<sup>39</sup> Therefore, not all pornography is protected by the First Amendment.

### C. *Revenge Porn*

In addition to child pornography, other pornographic material may be extremely harmful, such as "revenge porn." The state, therefore, would have a strong interest in protecting victims, just as it does in protecting children exploited for pornography. Revenge porn describes the distribution of nude or sexually explicit media of individuals without the consent of the individual depicted in the media.<sup>40</sup> Although revenge is often the motivating factor behind this distribution, many times the images are stolen and shared, meaning the perpetrator has never even met the victim.<sup>41</sup> Thus, revenge porn might more accurately be described as non-consensual pornography.<sup>42</sup> In any event, revenge porn includes all conduct where the dissemination of the sexually

<sup>35</sup> See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (acknowledging that nudity alone is not enough to make material legally obscene under the constitutional obscenity standards formulated in *Miller v. California*, 413 U.S. 15 (1973)).

<sup>36</sup> See generally *Ferber*, 458 U.S. 747.

<sup>37</sup> *Id.* at 756-757 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

<sup>38</sup> *Ferber*, 458 U.S. at 757.

<sup>39</sup> *Id.*

<sup>40</sup> Stokes, *supra* note 7, at 929.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

explicit media was without consent, even if the media was initially created with consent.

Although there are different ways sexually explicit material can be posted without consent, revenge porn typically arises subsequent to the exchange of sexually explicit images, a fairly common practice in today's society. In 2012, Match.com conducted a survey, which found that out "of 5,000 adults, 57% of men and 45% of women had received an explicit photo on their phone and 38% of men and 35% of women had sent one."<sup>43</sup> Because technology allows people to send and receive communications and images with such ease, people often use it to advance the intimacy of a relationship.<sup>44</sup>

Unfortunately, the misuse and abuse of these exchanges has also become more common. According to another study, called Love, Relationships, and Technology, one in ten ex-partners have threatened that they would expose risqué photos of their ex online, and 60% of those who threatened to expose intimate photos followed through with their threats.<sup>45</sup> Additionally, personal information is often attached to the sexually explicit material. In another study of 1,244 individuals, over 50% reported that their naked photos appeared next to their full name and social network profile; over 20% reported that their email addresses and telephone numbers appeared next to their naked photos.<sup>46</sup>

Of course, the misuse and abuse of such private and intimate content leads to many harms. Victims have "reportedly lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment, . . . [and] some victims have [even] committed suicide."<sup>47</sup> These harms affect the

<sup>43</sup> 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, 2 (2014) (citing More on Sexting and Texting from SIA 3, (Feb. 5, 2013), <http://blog.match.com/2013/02/05/more-on-sexting-and-texting-from-sia-3/>).

<sup>44</sup> See Citron and Franks, *supra* note 8, at 385-86.

<sup>45</sup> See Press Release, McAfee for Business, Lovers Beware: Scorned Exes May Share Intimate Data and Images Online (Feb. 4, 2013), <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx>.

<sup>46</sup> Cyber Civil Rights Statistics on Revenge Porn, at 2 (Oct. 11, 2013).

<sup>47</sup> Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CALIF. L. REV. 1309, 1305 (2014) (citing Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, Concurring Opinions (Feb. 1, 2013),

victims for the remainder of their lives. The humiliation of having an image of your naked body emailed to your entire family and co-workers is likely unimaginable, until it has happened to you personally. In addition, including personal identifying information with the photo threatens the physical safety of the victim and increases the likelihood of being stalked and harassed. The Cyber Civil Rights Initiative's "Effects of Revenge Porn Survey" revealed that: (1) 90% of the revenge porn victims were women, (2) 93% of the victims said they suffered significant emotional distress as a result, and (3) 49% said they were harassed or stalked online by individuals who saw the material.<sup>48</sup>

To illustrate these harms, consider the story of Amanda Todd, a victim of revenge porn. Amanda Todd committed suicide at age 15, after years of cyber bullying that all started after a photo of her naked breasts was distributed over the Internet.<sup>49</sup> Amanda electronically communicated with a man on Facebook, who flattered the vulnerable young girl enough to persuade her to flash her naked breasts on her web camera.<sup>50</sup> Not realizing the man on the other end of the computer was recording the intimate exchange, she was surprised and terrified to hear from an anonymous person one year later threatening to distribute the photo online.<sup>51</sup> Subsequently, the image went viral.<sup>52</sup> She changed schools multiple times.<sup>53</sup> She was constantly teased, bullied, and beaten up by classmates.<sup>54</sup> After she could not take the torture any more, she took her own life.<sup>55</sup>

<http://www.concurringopinions.com/archives/2013/02/adventurs-in-victim-blaming-revenge-porn-edition.html>).

<sup>48</sup> Cyber Civil Rights Initiative, *2013 NCP Study Results*, <https://www.cybercivilrights.org/ncpstats/> (last visited Feb. 10, 2017).

<sup>49</sup> *See Man Charged in Netherlands Amanda Todd Suicide Case*, BBC NEWS EUROPE, April 18 2014, <http://www.bbc.com/news/world-europe-27076991>; *See also* NoBullying.com, *The Amanda Todd Story*, December 9, 2014 <http://nobullying.com/amanda-todd-story/>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See Man Charged in Netherlands Amanda Todd Suicide Case*, BBC NEWS EUROPE, April 18 2014, <http://www.bbc.com/news/world-europe-27076991>; *See also* NoBullying.com, *The Amanda Todd Story*, December 9, 2014 <http://nobullying.com/amanda-todd-story/>.

Tragically, websites have been created with the objective of being a source for this kind of sexually explicit material.<sup>56</sup> In recent years, websites, such as Is Anyone Up, were actually created for the purpose of hosting revenge porn.<sup>57</sup> In fact, some sites even solicited the revenge porn, as opposed to merely remaining a platform for individuals to post the revenge porn on their own.<sup>58</sup> Hunter Moore, sometimes referred to as the “Revenge Porn King,” ran the infamous Is Anyone Up site, which is now no longer operating.<sup>59</sup> The website encouraged vengeful exes to post sexually explicit images of their former partners, particularly girlfriends.<sup>60</sup> Allegedly, Moore hired a hacker to steal nude photographs from email accounts to post on his site.<sup>61</sup> Fortunately, this site has been shut down, but Is Anyone Up was merely the beginning.<sup>62</sup>

Sites dedicated to posting revenge porn are not the only problem. Individuals have posted sexually explicit content on social media, such as Twitter; emailed the content to family members or employers; and even texted the content to a friend.<sup>63</sup> There are

<sup>56</sup> See Amanda L. Cecil, Taking Back the Internet: Imposing Civil Liability to Interactive Computer Services in an Attempt to Provide Adequate Remedy to Victims of Nonconsensual Pornography, 71 Wash & Lee L. Rev. 2513, 2520-2521 (2014) (listing revenge porn websites, such as UGotPosted.com, IsAnyoneUp.com, and Texxxan.com).

<sup>57</sup> *Id.*

<sup>58</sup> See Linkous, *supra* note 44, at 15.

<sup>59</sup> See Kitchen, *supra* note 9, at 265, n. 159 (citing Kashmir Hill, How Revenge Porn King Hunter Moore Was Taken Down, Forbes (Jan. 24, 2014), <http://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/>); See also Sarah Fruchtnicht, Revenge Porn King Hired Hacker To Steal Nude Pics From Emails, FBI Says (January 24, 2014), <http://www.opposingviews.com/i/society/crime/revenge-porn-site-owner-hired-hackers-steal-nude-pics-emails-fbi-says>.

<sup>60</sup> Sarah Fruchtnicht, Revenge Porn King Hired Hacker To Steal Nude Pics From Emails, FBI Says (January 24, 2014), <http://www.opposingviews.com/i/society/crime/revenge-porn-site-owner-hired-hackers-steal-nude-pics-emails-fbi-says>.

<sup>61</sup> See Linkous, *supra* note 44, at 16 (citing Jessica Roy, *Revenge-Porn King Hunter Moore indicted on Federal Charges*, TIME (Jan. 23, 2014)).

<sup>62</sup> Even Hunter Moore created another Revenge Porn website, HunterMoore.TV, after IsAnyoneUp.com was shut down. See David Gray and Danielle K. Citron, Fighting Cybercrime After United States v. Jones, 103 J. CRIM. L. & CRIMINOLOGY 745, 794 (2013).

<sup>63</sup> A defendant posted sexually explicit images of the victim on Twitter and sent the photos to the victim’s employer and sister. See *generally* People v. Barber, No. 2013-NY059761, 992 N.Y.S.2d 159 (N.Y. Crim. Ct. N.Y. County 2014); A defendant sent sexually explicit photos of the victim to the victim’s employer; See *generally* State v. Parsons, No. A-3856-10T3, 2011 N.J. Unpub. LEXIS 2972 (N.Y. Super. Ct. Dec. 8, 2011).

numerous platforms allowing this private information to be communicated and shared, and this disturbing material is made available to the public within seconds, causing extreme harm to the unfortunate victims.

### III. THE LAW TODAY

Revenge porn victims face high hurdles in attempting to remedy their harm through civil lawsuits, whether they try going after the individual perpetrators or the websites hosting the material. Victims attempt to bring lawsuits under a variety of laws including copyright laws and tort laws. The biggest hurdle is that victims most often cannot go after the “big fish.” The websites, which serve as a host for the content, are the big fish in the sense that the websites typically have deeper pockets than the individual perpetrator who uploaded the material. Unfortunately, the victim often cannot go after those websites because, under the Communications Decency Act (CDA), the Internet Service Providers (ISPs)<sup>64</sup> are typically immune from liability for any content shared on their platforms.<sup>65</sup>

Without the option of suing the ISP for damages, the victim can still attempt to sue the individual perpetrator; however, this often fails as well. If the victim wants to initiate a civil lawsuit, he or she often is denied that option because he or she does not have the financial means to bring the lawsuit. Even in cases where the victim can afford to sue and where a perpetrator might be held liable for copyright infringement, often those perpetrators are judgment proof,<sup>66</sup> once again leaving the victim without remedy.

Not only are victims often left without the option of monetary relief, but the few New York criminal laws that might afford the

<sup>64</sup> Internet Service Provider means a company which provides other companies or individuals with access to, or presence on, the Internet. *Internet Service Provider Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/internet%20service%20provider?s=t>.

<sup>65</sup> See 47 USCS § 230(c)(1).

<sup>66</sup> Judgment proof means unable to satisfy a judgment for money damages because the person has no property, does not own enough property within the court's jurisdiction to satisfy the judgment, or claims the benefit of statutorily exempt property. BLACK'S LAW DICTIONARY 921 (9th ed. 2009).

victim comfort from a criminal prosecution<sup>67</sup> often are inadequate to address the overwhelming majority of revenge porn cases. New York's current criminal laws are inadequate to bring justice because most revenge porn scenarios do not satisfy all of the elements of the existing crimes, simply because none of the laws were enacted with the purpose of combating this type of behavior.

A. *Communications Decency Act § 230*

In 1995, the New York Supreme Court held that an ISP was liable for defamation after it exercised editorial control and active moderation over the bulletin board on which the third party posted the initial defamatory statements.<sup>68</sup> In *Stratton v. Prodigy*, the defendant, Prodigy, was a web services company with about two million subscribers that hosted online platforms.<sup>69</sup> Prodigy monitored some of the online message boards from the subscribers and even deleted messages that appeared offensive.<sup>70</sup> Although Prodigy received too many postings per day to review all of them, it attempted to moderate at least some of the posts.<sup>71</sup> The court decided that the editorial control and active moderation made the ISP a publisher, as opposed to a mere distributor.<sup>72</sup> The distinction is an important one because if found to be a mere distributor, the ISP could only be held liable for the defamatory statements of others if it knew or had reason to know of the statements.<sup>73</sup> But because Prodigy attempted to moderate some of the posts, it was deemed a publisher, not a distributor, and consequently liable for all of the posts.

"The ruling sparked apprehension among Internet companies."<sup>74</sup> To avoid liability, ISPs had to refrain from engaging in any moderating activity and instead act as mere passive hosts

<sup>67</sup> See Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. OF INTELL. PROP. & ENT. LAW 422, 431-437 (2014).

<sup>68</sup> See generally *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 031063/94, 1995 N.Y. Misc. LEXIS 712 (N.Y. Sup. Ct. Dec. 15, 1995).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Stokes, *supra* note 7, at 933.

for content. The decision essentially discouraged Internet companies from monitoring the hosted content and instead to remain a mere distributor rather than a publisher of content.<sup>75</sup>

Congress created the Communications Decency Act (CDA) of 1996 in an effort to:

- (1) promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) 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) encourage the development of technologies that maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.<sup>76</sup>

The Act was a response to the rapidly developing array of Internet and other interactive computer services available to individual Americans and the open forum that the Internet provided between individuals wanting to share information.<sup>77</sup>

Congress added section 230 to the CDA in response to Internet service providers' concerns that they would be held liable for the acts of their users in situations involving third party generated content.<sup>78</sup> Section 230 states, "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."<sup>79</sup> Since the addition of section 230, courts have interpreted the statute to (1) expand the class who may claim its protections, (2) limit the class statutorily excluded from its

<sup>75</sup> *Id.*

<sup>76</sup> *See* 47 USCS § 230(b)(1)-(5).

<sup>77</sup> *See* 47 USCS § 230(a)(1)-(5).

<sup>78</sup> *Id.*

<sup>79</sup> 47 U.S.C.A. § 230(c)(1).



protections, and (3) expand the causes of action for which immunity is provided.<sup>80</sup> In other words, the expanded class for immunity includes “web hosting services, email service providers, commercial websites like eBay and Amazon, individual and company websites, Internet dating services, privately-created chat rooms, and Internet access points in copy centers and libraries.”<sup>81</sup> The limitation means that the class excluded from protection does not consist of providers who make “minor alterations” or “take some affirmative steps to edit the material” so long as the providers retain the material’s “basic form and message.”<sup>82</sup> The third expansion listed extended the immunity beyond defamation, to now apply to a variety of other claims, including negligent assistance in the distribution of child pornography, misappropriation of the right of publicity, and invasion of privacy.<sup>83</sup>

Because of the addition of section 230, victims of revenge porn often are left without a remedy. If the perpetrator who uploaded the content cannot be identified, the victim would likely want to find recourse by legally pursuing the website hosting the offensive material. Most of the time, however, the websites hosting the material are immune from liability under section 230. All websites need to do to remain immune, is act as a passive distributor and not actively monitor, solicit, or moderate the content. With those simple steps, an ISP can easily host revenge porn with a blind eye and be immune from liability if sued by a victim. Thus, victims are precluded from successfully suing the host websites in most situations.

<sup>80</sup> See *Id.*; See also *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (extending § 230 immunity to a case involving invasion of privacy claims and defamation claims); See also *Barrett v. Rosenthal*, 146 P.3d 510, 527 (Cal. 2006) (holding that a newsgroup user was not liable for redistributing libel messages written by a third party); See also *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001) (extending § 230 immunity in a child pornography case).

<sup>81</sup> Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56. KAN. L. REV. 369, 374 (2008).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 375.

### B. Copyright Law

Although section 230 often protects the hosts of the material, copyright laws can sometimes be used to remedy the victim in instances where the elements of the claim can be satisfied. Congress is granted power to pass copyright legislation under Article I, Section 8, Clause 8 of the Constitution: “Congress shall have the power to promote the progress of Science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.”<sup>84</sup> Copyright law provides an intellectual property right. Title 17 of the United States Code addresses copyrights. Pursuant to 17 U.S.C. § 102, “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated.”<sup>85</sup> The Supreme Court stated, “the immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”<sup>86</sup> Copyright laws, in turn, allow for the original authors to remedy situations where their original works have been stolen or copied illegally.

It has been suggested that copyright laws are sufficient to combat revenge porn.<sup>87</sup> In situations where the victim being exposed in the image is the person who took the picture, copyright law will provide a civil remedy<sup>88</sup> where it is determined that an infringement has occurred.<sup>89</sup> These images are often referred to as “selfies.”<sup>90</sup>

<sup>84</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>85</sup> 17 U.S.C.A. § 102(a).

<sup>86</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

<sup>87</sup> See *Levendowski*, *supra* note 68, at 439-444.

<sup>88</sup> “In General . . . an infringer of copyright is liable for either 1) the copyright owner’s actual damages and any additional profits of the infringer . . . or, 2) statutory damages.” 17 U.S.C.S. § 504(a)(1)-(2).

<sup>89</sup> “Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright.” 17 U.S.C.S. § 501(a).

<sup>90</sup> “A selfie is a photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media.” Oxford Dictionaries, [http://www.oxforddictionaries.com/us/definition/american\\_english/selfie](http://www.oxforddictionaries.com/us/definition/american_english/selfie), (last visited Feb. 15, 2017).

On the one hand, copyright law is a potentially fertile basis for compensatory remedies because it includes a provision with regards to online material. The Digital Millennium Copyright Act amended Title 17 of the U.S. Code by adding section 512, Limitations on liability relating to material online, which governs the “takedown” process.<sup>91</sup> The takedown process is the formal name for the process of removing content from the website hosting the content.<sup>92</sup> The Act provided for potential liability on the part of an ISP upon notification of claimed infringement, if it did not respond expeditiously to remove, or disable access to, the material.<sup>93</sup> This provision governs a critical component, the takedown process of a victim’s remedy because it is of the utmost importance to the victim to have the content removed from the Internet and no longer accessible by the public.<sup>94</sup> Thus, copyright law can be beneficial in that manner.

On the other hand, there is still the likelihood that the perpetrator being sued under copyright infringement for distributing the image will be judgment proof. Additionally, copyright lawsuits are very costly and lengthy. More importantly, not all sexually explicit images are “selfies.” Often an ex-partner took the image, or even a friend. In those cases, copyright laws provide no remedy because they only protect the author of the work, and in that situation, the ex-partner would actually be the copyright holder.<sup>95</sup> Thus, copyright laws are insufficient to combat a significant portion of revenge porn cases.

### *C. Tort Law*

In some cases, victims can file civil lawsuits under existing tort laws, such as defamation, public disclosure of private information, harassment, or intentional infliction of emotional distress. Too

<sup>91</sup> See generally 17 U.S.C.S. § 512.

<sup>92</sup> *Id.*

<sup>93</sup> See 17 U.S.C.S. § 512(c)(1)(C).

<sup>94</sup> See Kitchen, *supra* note 9, at 251.

<sup>95</sup> Note that copyright laws do not create affirmative rights to the copyright holders. In other words, simply because a person is the copyright holder, does not mean they legally can reproduce the work. Instead it means that the copyright holder can preclude others, who are not the copyright holders, from reproducing the work. Thus, if a criminal law were to be adopted, copyright laws would not protect a copyright holder’s illegal use of a photo.

often, though, the tort laws provide no real remedy. In addition to the actual laws being inadequate when applied to the facts of most revenge porn situations, often victims do not even make it to court. Many victims simply do not have the financial means to bring a lawsuit, especially after they just lost their job because their employer found sexually explicit photos of them on the Internet. Further, as mentioned earlier, even if the victim has the financial means to sue and is able to prove the elements of a civil claim, the perpetrator might be judgment proof, meaning the perpetrator is financially insolvent making it difficult, or even impossible, for the claimant to satisfy a judgment against the perpetrator. Additionally, some victims might even be too humiliated and embarrassed to bring a lawsuit because they know that that lawsuit will only bring more publicity and loss of privacy and draw further attention to the issue that they are in fact trying to forget and erase from their past.

Victims have sued revenge porn perpetrators under the theory of defamation; however, the truth defense is available to the perpetrators and makes it difficult to prove the falsity element. “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>96</sup> In order to succeed in a defamation case, a plaintiff must prove that there was:

- (a) a false and defamatory statement concerning another,
- (b) an unprivileged publication to a third party, (c) fault amounting at least to negligence on the part of the publisher, and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>97</sup>

Truth, although difficult to prove, is a defense to defamation claims.<sup>98</sup>

<sup>96</sup> RESTATEMENT (SECOND) OF TORTS § 559.

<sup>97</sup> RESTATEMENT (SECOND) OF TORTS § 558.

<sup>98</sup> See Kitchen, *supra* note 9, at 255, n. 77.

False statements regarding fornication are per se defamation<sup>99</sup> in several states; however, the truth defense will likely result in a perpetrator avoiding liability. Considering revenge porn relates to fornication in the sense that the content is sexual in nature, a court could potentially find that revenge porn is per se defamatory. The challenge, however, arises with the truth defense because the victim consented to being the object of the image. In other words, “she [or he] committed the depicted acts,” and thus the perpetrators posting or distributing the material will avoid liability by using the truth defense.<sup>100</sup>

A victim may also bring a suit for public disclosure of private information, but the victim is unlikely to prevail because the objective behind this law was not to deter and punish revenge porn perpetrators. Rather, the objective was to prevent a person from making a matter known to the public at large instead of, for instance, a single person. The law was to make matters actionable where something private was posted on, for example, a billboard or in a newspaper.

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.<sup>101</sup>

This privacy tort will likely fail in many revenge porn cases because it requires “publicity.” Publicity differs from publication.<sup>102</sup> Publicity means that “the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”<sup>103</sup> Essentially, if a perpetrator sends the sexually explicit photo to the victim’s employer, but does not post it online, it is likely the privacy tort will be inadequate to remedy

<sup>99</sup> See *Van Horne v. Muller*, 705 N.E.2d 898, 903 (Ill. 1998); See also *Schivarelli v. CBS, Inc.* 776 N.E.2d 693, 697 (Ill App. 1st Dist. 2002); See also *Gorman v. Swaggart*, 524 So. 2d 915 (La. Ct. App. 4th Cir. 1988).

<sup>100</sup> *Id.* at 255-256.

<sup>101</sup> RESTATEMENT (SECOND) OF TORTS § 652D(a)-(b).

<sup>102</sup> Publication, in connection with liability for defamation, includes any communication by the defendant to a third person. RESTATEMENT (SECOND) OF TORTS § 577.

<sup>103</sup> RESTATEMENT (SECOND) OF TORTS § 652D, Cmt. a.

the victim. And often courts do not consider photos that have been shared with others to be private.<sup>104</sup>

Intentional infliction of emotional distress (IIED) is likely the best existing claim for legal recourse for revenge porn victims because it “originated as a catchall to permit recovery in the narrow instance when an actor’s conduct exceeded all permissible bounds of a civilized society but an existing tort claim was unavailable.”<sup>105</sup> “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”<sup>106</sup> “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”<sup>107</sup> Although this law is the most likely of the tort laws to provide a remedy for the victim,<sup>108</sup> the victim still faces the challenges of section 230 immunity for content hosts, inability to find the individual perpetrators distributing the content, lack of financial means to bring a lawsuit, and finally the potential of judgment proof perpetrators. Also, although IIED may be a source of financial redress for the victims in some situations, the victim would still be left knowing that the individual perpetrator is free to commit the same behavior again. True justice could not be served until the victim knows that the perpetrator is being punished for the criminal behavior.

#### *D. New York Criminal Laws*

Although not a source of financial redress for victims of revenge porn, a successful prosecution under criminal law will provide victims with a measure of justice, and at the same time deter

<sup>104</sup> Woodrow Hartzog, How to Fight Revenge Porn (May 10, 2013), <http://cyberlaw.stanford.edu/blog/2013/05/how-fight-revenge-porn>.

<sup>105</sup> See Stokes, *supra* note 7, at 947.

<sup>106</sup> RESTATEMENT (SECOND) OF TORTS § 46.

<sup>107</sup> Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993).

<sup>108</sup> See, e.g., Brian Rogers, Jury Awards \$500,000 in ‘revenge porn’ Lawsuit, Houston Chronicle (February 21, 2014), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php>.

others from committing similar criminally punishable behavior. In New York, criminal laws exist that may apply to revenge porn cases. These laws include harassment, public display of offensive sexual material, and dissemination of an unlawful surveillance image. Often, however, they do not apply to the specific facts of a revenge porn case, and the prosecution cannot prove all of the crime's essential elements. Typically, the cases are not successful because the current laws were not established with the objective of preventing this type of situation and punishing this type of harm.

Harassment often provides no legal redress for revenge porn victims. In New York, harassment occurs when a person, "with intent to harass, annoy or alarm another person . . . engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person."<sup>109</sup> Harassment often provides no legal recourse for victims because in most cases the perpetrator only posts the image once. If the offending act only occurs once, the victim will not be able to satisfy the "course of conduct" element of harassment.<sup>110</sup>

A second form of harassment in New York is Aggravated Harassment. Aggravated harassment is similar to harassment, but largely focuses on the communication between the harasser and the victim. Under NY CLS Penal Law § 240.30(1)(a) and (b), aggravated harassment requires the actor communicate directly with the victim, or cause a communication to be initiated with the victim. Aggravated harassment is inadequate to combat revenge porn because often perpetrators do not directly communicate with the victim.<sup>111</sup> In fact, victims often do not even realize the criminal behavior has occurred until the damage has already been done. Often victims discover the offending material after friends and family – or sometimes stalkers who seek out victims – have

<sup>109</sup> N.Y. PENAL LAW § 240.26(3) (McKinney 1965).

<sup>110</sup> The Court of Appeals has repeatedly held that to establish that a defendant engaged in a "course of conduct," there must be evidence that the defendant's act was not an isolated incident. *See, e.g.,* *People v. Wood*, 59 N.Y.S.2d 811, 812 (1983); *See also* *People v. Valerio*, 60 N.Y.S.2d 669 (1983); *See also* *People v. Chasserot*, 30 N.Y.S.2d 898 (1972); *but see* *People v. Tralli*, 387 N.Y.S.2d 37 (1976) (holding that a one-time deliberate act could constitute a "course of conduct" in a harassment case).

<sup>111</sup> *See* *People v. Barber*, No. 2013-NY059761, 992 N.Y.S.2d 159 (N.Y. Crim. Ct. N.Y. County 2014).

already seen it and then warn the victim. Because the perpetrator never directly communicated with the victim, and never intentionally caused a third party to communicate with the victim, aggravated harassment is inapplicable.

Prosecuting for public display of offensive sexual material is similarly unlikely to be successful because the evil at which this offense is aimed is not revenge porn.

A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any . . . viewing screen . . . in such manner that the display is easily visible from or in any . . . place accessible to members of the public . . . visual representation of a person or a portion of the human body that predominantly appeals to prurient interest in sex and the depicts nudity, or actual or simulated sexual conduct.<sup>112</sup>

This statute was created to protect people, specifically minors, against viewing pornography unwillingly from a public place.<sup>113</sup> Because the statute was developed with the objective of protecting unwilling people from viewing pornographic material, and not the victims depicted in the pornographic material, the statute often fails in revenge porn cases.<sup>114</sup>

Dissemination of an unlawful surveillance image may at times be available and successful in proceedings against revenge porn perpetrators, but the statute does not target a large portion of revenge porn incidents, which involve images that were initially taken with consent despite their later nonconsensual distribution.

A person is guilty of dissemination of an unlawful surveillance image . . . when . . . [h]e or she, with knowledge of the unlawful conduct by which an image or images of the sexual or other intimate parts of another person or persons were obtained and such unlawful conduct would satisfy the essential elements of the crime of unlawful surveillance in

<sup>112</sup> N.Y. PENAL LAW § 245.11 (McKinney 1985).

<sup>113</sup> *Id.* at Ch. 231, § 1.

<sup>114</sup> See e.g. *People v. Barber*, No. 2013-NY059761, 992 N.Y.S.2d 159 (N.Y. Crim. Ct. N.Y. County 2014).



the first or second degree, sells or publishes such image or images.<sup>115</sup>

The statute requires that the disseminated images be taken without consent, in other words taken surreptitiously.<sup>116</sup> Although some cases of revenge porn might include images that were taken surreptitiously, many of the victims consented to the images being taken or even took the images themselves, and thus, this law is often inadequate.

A recent New York case, *People v. Barber*, illustrates the shortcomings of these laws. In *Barber*, a young woman found naked pictures of herself posted on her ex-boyfriend's Twitter account.<sup>117</sup> In addition, the ex-boyfriend sent the same pictures to the woman's employer and sister. The young woman claimed to never have consented to the boyfriend posting or sharing the private images with anyone.<sup>118</sup> The boyfriend was charged with Aggravated Harassment in the Second Degree, in violation of Penal Law § 240.30(1)(a),<sup>119</sup> Dissemination of an Unlawful

<sup>115</sup> N.Y. PENAL LAW § 250.55 (McKinney 2003).

<sup>116</sup> Initially, dissemination of an unlawful surveillance image only covered situations where the victim in the image or recording was "dressing or undressing," or where the image consisted of the "sexual or other intimate parts of such person." Stephanie's Law, 2003 N.Y.S.N. 3060 (250.55). The law provided that a person was guilty of the crime when they disseminated an image of a person "dressing or undressing or the sexual or other intimate parts of such person" when the image or recording was taken surreptitiously and without consent. *Id.* The law did not cover instances where the victim was identifiable in a photo of a sexual act but the only nudity visible was of the other person in the photo. *Id.* In response to an incident in Clarkstown, Rockland County, where a woman found a compromising photo of herself posted online, and police could not press charges simply because the woman's intimate areas were not exposed in the image, new legislation was proposed to close the loophole. Press, Release, NY Senate, Senator Carlucci Passes Internet Privacy Bill in Legislature (July 22, 2014), <http://www.nysenate.gov/press-release/senator-carlucci-passes-internet-privacy-bill-legislature>. As of November 1, 2014, New York amended the penal law to include a situation where the victim in the image is "engaging in sexual conduct, in the same image with the sexual or intimate part of any other person, and at a place and time when such person has a reasonable expectation of privacy." N.Y. PENAL LAW § 250.45 (McKinney 2003). According to the new law, anyone who posts a sexual or nude image taken surreptitiously will face a charge of second-degree dissemination of an unlawful surveillance image, a misdemeanor. *Id.* Although the new language addresses situations where the victim in the image appears to be engaged in a sexual act, regardless of whether the victim's intimate areas are exposed, the law still does not apply to most revenge porn situations.

<sup>117</sup> See generally *People v. Barber*, No. 2013-NY059761, 992 N.Y.S.2d 159 (N.Y. Crim. Ct. N.Y. County 2014).

<sup>118</sup> *Id.* at \*1.

<sup>119</sup> Aggravated Harassment in the Second Degree requires that a person, "with intent to harass, annoy, threaten or alarm another person . . . communicates with a person,

Surveillance Image in the Second Degree, in violation of Penal Law § 250.55, and Public Display of Offensive Sexual Material, in violation of Penal Law § 245.11(a).<sup>120</sup> The defendant admitted to posting the naked pictures, but he claimed to have obtained permission to do so.<sup>121</sup> The court dismissed all counts, finding that the information was facially insufficient to support a conviction under any of the laws charged.<sup>122</sup>

The aggravated harassment charge was dismissed because the mere posting of offensive content on a social networking site does not show that the defendant either communicated directly with the victim or that he induced others to communicate with the victim.<sup>123</sup> The court acknowledged the requirement that the defendant undertake some form of communication with the complainant.<sup>124</sup> The facts did not allege any form of communication between the defendant and the complainant. Instead, the defendant merely posted the images online and sent them to the victim's employer and sister. Additionally, the defendant did not suggest or initiate any communication with the victim.<sup>125</sup> The court held that the statute was intended to punish harassing communications directly to the complainant, and it was not intended to prevent dissemination or publication of content about an individual.<sup>126</sup>

With regards to count two, Dissemination of an Unlawful Surveillance Image in the Second Degree, the court broke the statute into three parts: (1) dissemination, (2) unlawful conduct,

anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm." N.Y. PENAL LAW 240.30(1)(a) (McKinney 2014).

<sup>120</sup> *Id.*

<sup>121</sup> See *People v. Barber*, No. 2013-NY059761, 992 N.Y.S.2d 159 (N.Y. Crim. Ct. N.Y. County 2014).

<sup>122</sup> *Id.* at \*8.

<sup>123</sup> *Id.* at \*7.

<sup>124</sup> *Id.*

<sup>125</sup> See *People v. Kochanowski*, 719 N.Y.S.2d 461, 463 (2d Dept. 2000) (holding the defendant violated N.Y. PENAL LAW § 240.30(1)(a) when the defendant created a website that displayed suggestive photographs of the defendant's ex-girlfriend, along with her address and telephone number and suggested that third parties contact her for sex, which they in fact did).

<sup>126</sup> *People v. Barber*, No. 2013-NY059761, 992 N.Y.S.2d 159, 6\* (N.Y. Crim. Ct. N.Y. County 2014).

and (3) knowledge.<sup>127</sup> Although the first element was satisfied because the defendant intentionally disseminated an image of sexual parts of another person, the prosecution could not establish the second element, which requires that the image be obtained unlawfully.<sup>128</sup> There were no facts presented alleging how the images were obtained and whether the images were initially obtained with the victim's consent or whether they were obtained unlawfully. Thus, the charge was dismissed as facially insufficient.

The third count, Public Display of Offensive Sexual Material, was dismissed because "public display" did not include posting a picture on Twitter, which is a subscriber-based social networking service, nor did it include sending images to a small number of private individuals.<sup>129</sup> The court noted that statutes "punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed."<sup>130</sup> The court said that there was no "public display" of the pictures because posting the images on Twitter and sending them to a small number of private individuals were private acts. The court referred to the New York Court of Appeals observation that "article 245 was aimed at protecting the public – in essence, unsuspecting, unwilling, nonconsenting, innocent, surprised or likely-to-be offended or corrupted types of viewers' . . . from the sight of offensive activities and materials."<sup>131</sup> The court continued, "[E]ven taking into account the vast technological changes since 1971, when § 245.11 was enacted, the actions alleged here simply do not constitute the 'indiscriminate thrust upon unwilling audiences,' that the statute was intended to cover."<sup>132</sup>

<sup>127</sup> *Id.* at \*3.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at \*7 (quoting *People v. Price*, 33 N.Y.2d 831, 832, 307 N.E.2d 46, 351 N.Y.S.2d 973 (1973)).

<sup>131</sup> *People v. Barber*, No. 2013-NY059761, 992 N.Y.S.2d 159, \*7 (N.Y. Crim. Ct. N.Y. County 2014 (quoting *People v. McNamara*, 78 N.Y.2d 626, 631 (1991)).

<sup>132</sup> *Barber*, 992 N.Y.S.2d 159, at \*7 (quoting *People v. Isaac*, 69 Misc 2Dd 758, 760-61, 331 N.Y.S.2d 322 (Crim. Ct. Bronx County 1972)).

Thus, the court dismissed all counts as facially insufficient.<sup>133</sup> Despite the reprehensible conduct that the ex-boyfriend had engaged in, and despite the irreparable harm the victim suffered, the conduct went unpunished and the victim was left both without compensation and without the satisfaction a victim gets when the criminal is found guilty.<sup>134</sup> This injustice further illustrates New York's need for a law specifically addressing revenge porn.

*People v. Barber* prompted renewed calls for a ban on revenge porn in New York.<sup>135</sup> Various bills have been proposed in the Assembly and Senate, some even addressing images taken with consent of the individual, but none have been passed.<sup>136</sup> It is clear though, that the laws as they exist today in New York are falling short of protecting the victims and deterring the perpetrators, and there is a definite need for a new law to combat this criminal behavior. In fact, other states have been joining the movement towards criminalizing revenge porn and New York must get on the same page.

#### *E. Other State Laws Attempting To Combat Revenge Porn*

As revenge porn became a hot issue in recent years, and victims spoke up, advocating for criminal sanctions to address the problem, some states reacted by enacting laws criminalizing the act.<sup>137</sup> Additionally, many states without current laws

<sup>133</sup> *Barber*, 992 N.Y.S.2d 159, at \*8.

<sup>134</sup> *Id.* at \*1.

<sup>135</sup> See Oren Yaniv, *Revenge-Porn Fuels Calls for Ban on Sending Explicit Photos without Consent*, DAILY NEWS, Feb. 23, 2014, <http://www.nydailynews.com/new-york/nyc-crime/revenge-porn-ruling-fuels-calls-ban-article-1.1699436>.

<sup>136</sup> Compare N.Y. Assemb. 8311, 236 Legis. Sess. (N.Y. 2013) (proposing to criminalize revenge porn by amending the Penal Law. "A person is guilty of revenge porn . . . when he or she knowingly disseminates . . . a photography, film, videotape, recording, or any other reproduction of an image that depicts nudity or actions of a sexually explicit nature of another identifiable person . . . without the consent of the depicted individual, under circumstances in which the individual has a reasonable expectation of privacy"), with N.Y. Assemb. 8214, 236 Legis. Sess. (N.Y. 2013) (proposing to criminalize revenge porn but requiring an element of intent. "A person is guilty of non-consensual disclosure of sexually explicit images when he or she intentionally and knowingly discloses a photograph, film, videotape, recording, or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual contact without such person's consent, and under circumstances in which the person has a reasonable expectation of privacy.").

<sup>137</sup> See, e.g., Del. Code tit. 11 § 1335(a)(9) (2014) (stating "a person is guilty of violation of privacy when . . . the person . . . knowingly reproduces . . . or otherwise disseminates a

criminalizing revenge porn are considering such legislation.<sup>138</sup> Some legal scholars argue that criminal law is drastic and unnecessary, as victims can already address the problem through existing civil remedies.<sup>139</sup> Nevertheless, over thirteen states have enacted some form of legislation to attempt to combat revenge porn.<sup>140</sup> The leading states to enact legislation are New Jersey and California.<sup>141</sup>

In 2004, New Jersey, the leading state to take a stand against revenge porn, adopted an invasion of privacy statute that criminalized the act of distributing sexually explicit images without the victim's consent.<sup>142</sup> The law states,

[a]n actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.<sup>143</sup>

The provision goes on to define disclose as, "to sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer."<sup>144</sup> Any person who is found guilty of this crime may be fined up to \$30,000<sup>145</sup> and may be sentenced to imprisonment between three and five years.<sup>146</sup> New Jersey's law remains the broadest and harshest among the states.

visual depiction of a person who is nude, or who is engaging in sexual conduct, when the person knows or should have known that the reproduction . . . or other dissemination was without the consent of the person depicted and that visual depiction was created or provided to the person under circumstances in which the person depicted has a reasonable expectation of privacy").

<sup>138</sup> See Linkous, *supra* note 44, at 3.

<sup>139</sup> See *Id.*

<sup>140</sup> See Kaitlan M. Folderauer, *Not All is Fair (Use) in Love and War: Copyright Law and Revenge Porn*, 44 U. BALT. L. REV. 321, 328, N. 52 (2015).

<sup>141</sup> See Linkous, *supra* note 44, at 32.

<sup>142</sup> N.J. STAT. ANN. § 2C:14-9(c) (West 2004).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (Notwithstanding the provisions of subsection b. of N.J. Stat. § 2C:43-3(b)(1)).

<sup>146</sup> N.J. STAT. ANN. § 2C:43-6(a)(3) (West 2004).

In acknowledging the issues and establishing a law to prevent the crime, New Jersey has been able to prosecute victims in ways that states without such laws, such as New York, cannot. In 2011, a man was sentenced to eighteen months of imprisonment under New Jersey's revenge porn laws.<sup>147</sup> In *State v. Parsons*, the defendant and the victim, a school teacher, met through an online dating service, and developed a relationship over phone conversations, text messages, and Internet conversations.<sup>148</sup> Additionally, the parties exchanged photos, including photos of them unclothed.<sup>149</sup> The parties understood that the photos were private and not to be sent or displayed to anyone but each other.<sup>150</sup> After the parties ended their relationship, the defendant threatened to send the nude photos to the victim's employer at the public school where she taught.<sup>151</sup> The defendant followed through with his threat.<sup>152</sup>

The defendant was charged with violating N.J.S.A. 2C:14-9(c).<sup>153</sup> The court identified the elements of the charge: (1) the defendant must know that he is not licensed or privileged to disclose a photograph; (2) a person must actually disclose the photograph; (3) the photograph must be of another whose intimate parts are exposed; and (4) the individual depicted in the photograph has not consented to the disclosure of the photograph.<sup>154</sup> The defendant conceded that he sent the photos to the school, the photos depicted the victim's intimate parts, and the victim did not consent to the dissemination of the photos.<sup>155</sup>

The defendant focused on challenging the first element of the crime, which was whether the defendant was licensed or privileged to disclose the photos.<sup>156</sup> The evidence illustrated, however, that

<sup>147</sup> See generally *State v. Parsons*, No. A-3856-10T3, 2011 N.J. Super. Unpub. LEXIS 2972 (Super. Ct. App. Div. Dec. 8, 2011).

<sup>148</sup> See *Id.* at \*1.

<sup>149</sup> See *Id.* at \*2.

<sup>150</sup> See *Id.*

<sup>151</sup> See *Id.*

<sup>152</sup> See *Id.*

<sup>153</sup> See *State v. Parsons*, No. A-3856-10T3, 2011 N.J. Super. Unpub. LEXIS 2972, \*1 (Super. Ct. App. Div. Dec. 8, 2011).

<sup>154</sup> *Id.* at \*4-5.

<sup>155</sup> See *Id.* at \*5.

<sup>156</sup> See *Id.*

the defendant acknowledged that the photos were for the parties' use only and were not to be disclosed to anyone else.<sup>157</sup> The court said that acknowledgment was sufficient to satisfy the first element that the defendant knew he was neither licensed nor privileged to disseminate the photos.<sup>158</sup> Thus, the indictment was affirmed and the defendant was sentenced on the grounds of violating New Jersey's invasion of privacy law N.J. Stat. §2C:14-9(c).<sup>159</sup>

California also took a position in fighting revenge porn.<sup>160</sup> Under its current criminal law, a person is guilty of a misdemeanor if that person

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 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.<sup>161</sup>

Any person who commits a second violation of this crime may be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding \$2,000, or by both the fine and the term of imprisonment.<sup>162</sup>

<sup>157</sup> *See Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See State v. Parsons*, No. A-3856-10T3, 2011 N.J. Super. Unpub. LEXIS 2972, \*6 (Super. Ct. App. Div. Dec. 8, 2011).

<sup>160</sup> In 2013, California was the second state to take a stand against revenge porn, however, the language in its law contained a loophole and thus it was amended in 2014.

<sup>161</sup> CAL. PENAL CODE § 647(j)(4)(A) (West 2014).

<sup>162</sup> *Id.* The California criminal law includes an amendment that was made after Congress realized the initial law was significantly flawed. Prior to the 2014 amendment, the law stated that a person is guilty of a misdemeanor where "[the] person who photographs or records . . . the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers seriously emotional distress." CAL. PENAL CODE § 647(j)(4)(A) (West 2013) (amended 2014). The law was flawed because it only applied to photos or videos captured by the perpetrator who was

As a result of the enactment of this law, a Los Angeles man was convicted and sentenced to imprisonment.<sup>163</sup> Noe Iniguez was the first person sentenced to imprisonment under California's new law.<sup>164</sup> Mr. Iniguez was sentenced to one year in jail for posting a topless photo of his ex-girlfriend on her employer's Facebook page.<sup>165</sup> The City Attorney, Mike Feuer, who secured the conviction, stated the conviction "sends a strong message that this type of malicious behavior will not be tolerated."<sup>166</sup>

New Jersey and California have recognized the need for criminalization of this type of behavior, and New York must follow in their footsteps. Given that over the past few years about thirteen states have enacted new legislation to punish this criminal behavior, New York legislation needs to catch up and recognize the severe harm that revenge porn causes, and it needs to act quickly to fill the void.

#### IV. THE ANTI-REVENGE PORN ACT

##### A. *Solution: New Law*

New York needs a law that will deter future perpetrators from distributing private sexually explicit media content. To that end, New York Penal Law should be amended to include the Anti-

the individual distributing the content. Fortunately, the California legislature responded to the critics, realizing the need for an amendment, and enacted changes that broadened the scope of images covered by the law. In other words, the law did not apply to situations where the victim took a "selfie," a photo taken of oneself. According to a survey by the Cyber Civil Rights Initiative, up to 80% of revenge porn victims took the explicit photos of themselves. Cyber Civil Rights Statistics on Revenge Porn, at 2 (Oct. 11, 2013).

<sup>163</sup> See Press Release, Office of the City Attorney, City Attorney Feuer Secures Conviction Under State's "Revenge Porn" Law (Dec. 1, 2014), [http://atty.lacity.org/stellent/groups/electedofficials/@atty\\_contributor/documents/contributor\\_web\\_content/lacityp\\_029467.pdf](http://atty.lacity.org/stellent/groups/electedofficials/@atty_contributor/documents/contributor_web_content/lacityp_029467.pdf).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*



Revenge Porn Act (ARPA). Here is some proposed language for the ARPA:

§ 250.70<sup>167</sup> Revenge porn; declaration of policy and statement of purpose

The Legislature, recognizing the devastating effects of revenge porn and the profound need for a new law specifically addressing the issue, hereby enacts the Ant-Revenge Porn Act (ARPA). The overall purpose of the act is to criminalize the non-consensual distribution of sexually explicit or nude photographs, commonly known as “revenge porn.” This law is aimed at protecting the victims, who consent to the initial creation of the images or create the images themselves, with a reasonable expectation of privacy, but then find that those very images were later distributed without their consent. This law is aimed at punishing the individuals who take it upon themselves to distribute private photos with utter disregard for a victim’s reputation. The law will provide two levels of the crime to distinguish between two common revenge porn situations. The first addresses distribution by hackers, who often do not personally know the victim and likely are not intending to cause any sort of distress. Thus, to combat this form of revenge porn, there must not be a requirement of intent. The second addresses distribution by ex-partners, who intend to cause the distress because of harsh feelings towards the victim. Although the law punishes both forms of revenge porn, the law provides harsher punishment for situations where there was a harmful intent or a motive for monetary gain.

§ 250.75 Revenge porn; definitions

The following definitions shall apply to sections 250.80 and 250.85 of this article:

1. “Disseminates” means to distribute, sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, transmit,

<sup>167</sup> This provision will fall under Article 250 Offenses Against the Right to Privacy. It will follow the provisions regarding dissemination of an unlawful surveillance image because the nature and purpose of the law is somewhat comparable to the nature and purpose of having a law precluding revenge porn.

publish, circulate, disclose, advertise, offer, send, forward, electronically or otherwise.

2. “Sexual or other intimate parts” means sexual organs, genital area, anal area, inner thigh, groin, buttock, female breast, or pubic area of a person.
3. “Actions of a sexually explicit nature” means masturbation or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal.

§ 250.80 Revenge porn in the second degree

A person is guilty of revenge porn in the second degree when:

1. He or she knowingly disseminates a photo, film, videotape, recording, or any other reproduction of an image of an identifiable person whose sexual or other intimate parts are exposed or that depicts actions of a sexually explicit nature of another identifiable person without the person’s consent and if an individual would have a reasonable expectation of privacy.

Revenge porn in the second degree is a class A misdemeanor and the person who disseminates the photograph is also subject to a fine not to exceed \$5,000, notwithstanding the fines for misdemeanors and violations stated in § 80.05(1)<sup>168</sup> of this chapter.

§ 250.85 Revenge porn in the first degree

A person is guilty of revenge porn in the first degree when:

1. He or she commits the crime of revenge porn in the second degree in violation of section 250.80 of this article, and has previously been convicted of that crime; or
2. With intent to cause serious emotional distress or humiliation, he or she knowingly disseminates a photo, film, videotape, recording, or any other reproduction of an image of an identifiable person whose sexual or other intimate parts are exposed or that depicts actions of a sexually explicit nature of another identifiable person without the person’s consent and if an individual would have a reasonable expectation of privacy; or

<sup>168</sup> N.Y. PENAL LAW, Article 80, “Fines,” determines the array of applicable fines for the crimes covered in this chapter, and § 80.05 specifically deals with the fines for misdemeanors and violations.

3. To obtain a profit, he or she knowingly disseminates a photo, film, videotape, recording, or any other reproduction of an image of an identifiable person whose sexual or other intimate parts are exposed or that depicts actions of a sexually explicit nature of another identifiable person without the person's consent and if an individual would have a reasonable expectation of privacy.

Revenge porn in the first degree is a class E felony and the person who disseminates the photograph is also subject to a fine not to exceed \$25,000, notwithstanding the provisions in § 80.00(1)(a).<sup>169</sup> Notwithstanding this provision, the person convicted is subject to the provision in § 80.00(1)(b).

### *B. ARPA is the Best Solution*

The amendment to New York's Penal Law will have various benefits and will more efficiently deter future perpetrators than current existing civil and criminal laws. It is neither too broad nor too narrow and will in effect apply to most, if not all, revenge porn situations. While the criminal sanctions will not resolve the issue of judgment proof perpetrators in civil lawsuits, it will still bring perpetrators to justice. Not only are the existing civil laws inadequate to resolve the issue because they simply do not cover most revenge porn cases, but adding a new civil law would be insufficient to solve the problem as well. Criminalizing this conduct allows victims to be at ease and find peace, knowing that their perpetrators are behind bars. And the behavior is so reprehensible and contrary to society's morals that it should be criminal, just as distributing images captured unlawfully during a time when there would be a reasonable expectation of privacy is criminal. The carefully drafted language addresses loopholes in other states' revenge porn laws.

The language used to draft the ARPA was carefully chosen to avoid any loopholes that have been recognized in other state's revenge porn legislation. First, the Act includes photographs taken by anyone, including the victim.<sup>170</sup> Second, it does not

<sup>169</sup> N.Y. PENAL LAW § 80.00 specifically deals with the fines for felonies.

<sup>170</sup> This was recognized as a loophole in California's enactment of its law criminalizing revenge porn, after it was realized that the initial law only mentioned photographs taken

require that the photograph be initially taken or obtained without consent.<sup>171</sup> Also, the act strategically separates the offenses into two categories to distinguish between perpetrators who knowingly disseminated the images without any intent and perpetrators who intended to cause harm by disseminating the images. This structure of elevation is similar to other New York crimes, such as Dissemination of an Unlawful Surveillance Image, which elevates the crime to the first degree when the dissemination (1) is for the purpose of making a profit, (2) is with intent, or (3) occurs after the defendant has been convicted of Dissemination of an Unlawful Surveillance Image in the first or second degree within the past ten years.<sup>172</sup> It is important to cover both categories of the offense. Many types of criminal behavior carry heightened penalties for acts done with intent to inflict personal harm, and revenge porn cases should be no different. Additionally, it is important to include as proscribed behavior, cases where the perpetrator did not have intent, because it is still harmful and wrong for a perpetrator to disseminate a sexually explicit image even when he did not intend the humiliation.

Many have criticized some of the new state laws criminalizing revenge porn for being too broad and thus abridging free speech. An attorney for the Electronic Frontier Foundation<sup>173</sup> stated, “statutes that try to do this type of thing overreach; . . . [t]he concern is that they’re going to shrink the universe of speech that’s available online.”<sup>174</sup>

It is true that an overly broad law might in fact violate the First Amendment by not allowing people to express themselves and speak freely; however, the ARPA is carefully drafted so as to only

by individuals other than the person depicted. The law was amended in 2014 to address the loophole. CAL. PENAL CODE § 647(j)(4)(A) (West 2013) (amended 2014).

<sup>171</sup> New York’s Dissemination of an Unlawful Surveillance Image addresses situations where an image is taken surreptitiously, which is why it is inadequate to address the bulk of revenge porn cases.

<sup>172</sup> N.Y. Penal Law § 250.55; N.Y. Penal Law § 250.60.

<sup>173</sup> The Electronic Frontier Foundation is the leading nonprofit organization defending civil liberties in the digital world. Electronic Frontier Foundation, <https://www.eff.org/about> (last visited February 24, 2015).

<sup>174</sup> Linkous, *supra* note 44, at 40 (quoting Steven Nelson, Federal ‘Revenge Porn’ Bill Will Seek to Shriveled Booming internet Fad (March 26, 2014), <http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-look-to-shriveled-booming-internet-fad>).

apply to criminal speech and expression that should not be afforded First Amendment protection. For example, defamation damages the reputation of another through false writings or false words, and the First Amendment does not protect defamation. Revenge porn damages a person's reputation through visual imagery.

Consider the following two scenarios. In the first scenario, your ex-partner posts a message on Facebook that says you were involved in multiple occasions of group sex with men and women, and that message is in fact a lie. In the second scenario, your ex-partner posts a photo of an isolated incident where you took a photo of yourself nude and, of course, that isolated incident did in fact happen.

These two scenarios are distinguishable because the defamation is a lie, and the photo actually occurred; however, they both are capable of causing an equal degree of harm to the victim's reputation if seen by family, employers, and friends. In addition, they may cause other harms, such as humiliation, depression, and emotional distress. The revenge porn could likely cause more harm. If the defamation lawsuit is successful, at least the public will know that the material posted was a lie, as that is one of the required elements. On the other hand, if the revenge porn case succeeds, whether under a civil claim or a criminal charge, that person must live with the fact that her nude body was publicly displayed.

In addition, the ARPA is somewhat similar to New York's criminal law, Dissemination of an Unlawful Surveillance Image. This crime punishes people who capture videos or images without consent. The ARPA will take that law a step further by punishing people who distribute media without consent that was initially created with consent. This is also the reason that the law will be included in the Penal Law directly following the section, Dissemination of an Unlawful Surveillance Image.

It is also important that the image was created with the reasonable expectation of privacy. The goal of the Fourth Amendment is to protect a person's right to privacy. A person in a relationship expects that intimate moments shared with one another remain private. If a person were not afforded this reasonable expectation, it would make certain degrees of intimacy

very difficult to achieve. For example, criminal laws prohibiting voyeurism rest on the assumption that “observing a person in a state of undress or engaged in sexual activity without that person’s consent not only inflicts dignitary harms upon the individual observed, but also inflicts a social harm serious enough to warrant criminal prohibition and punishment.”<sup>175</sup> We, as a society, value privacy and discourage intrusions from a third party. The Supreme Court has even determined the importance of privacy and the right to engage in private conduct without the intrusion of a third party.<sup>176</sup> Although the third party is sometimes the one who never had an understanding with the victim, for instance the government intruding on a private matter between two consenting individuals, there have been instances where all parties were consenting. For example, we have made bigamy illegal because, even though it involves an understanding between three consenting adults, society believes that it exploits the privacy of one’s partner in a way that is detrimental to them. This likely stems from society’s general understanding of relationships and privacy. Bigamy involves a consensual relationship, but it opposes our society’s morals and values. As a result, we established a law against it to preserve moral decency. Similarly, we hold privacy as sacred, and as illustrated in *Lawrence v. Texas*, history has proven that intruding on that privacy is not morally accepted by our society.

Moreover, revenge porn should not be protected speech because it is obscene material. In *Miller v. California*, the Court laid out a test for determining whether material is obscene:

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . .
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state

<sup>175</sup> Citron and Franks, *supra* note 8, at 363 (citing 18 U.S.C. § 1801 (2012)).

<sup>176</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (The Court held that the Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violated the Due Process Clause. The Court said that the adults were free to engage in the private conduct in the exercise of their liberty. The Court decided that the intervention of the government did not further any legitimate state interest which would justify the intrusion into the personal and private life of the individuals).

law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>177</sup>

Revenge porn, where a perpetrator has disseminated sexually explicit photographs without the person's consent, would likely be considered patently offensive and appealing to the prurient interest because it exploits the victim in such a detrimental manner and serves no legitimate interest or value.

Many critics argue that people simply should refrain from taking and sending these sexually explicit images in the first place. First, often the photographs are obtained by hacking into an individual's cell phone. Imagine a situation where an individual was taking naked photos of himself or herself to track their weight loss. In that situation, the individual never meant for anyone to see those images, and that expectation of privacy seems more than reasonable.

Even if the image was shared with another person, it does not mean that the victim intended for the whole world to see the image. Consider a situation where a person is in a long-distance relationship. Supporters of the argument that people should refrain from sending intimate images suggest that a couple in that situation should not have any means of sexual intimacy with one another. But people should be able to freely express themselves through intimate images without threat of those images being exploited. People should be allowed to share intimate images with their significant other with a reasonable expectation of keeping the images private. One of the benefits of the digital age is the ability to communicate easily with others. Exploitation of the images that are used as a means of communicating one's intimacy hinders that free flow of information. Instead of making people refrain from expressing themselves, the law should punish the exploitation of that expression.

It is important to remember the social value of consenting partners sharing intimate images. "Intimate media can bring people together [because] it allows them to express romantic and sexual feelings in new ways."<sup>178</sup> Another reason to share these

<sup>177</sup> *Miller v. California*, 413 U.S. 15, 24 (1973); *See also Linkous, supra* note 44, at 43.

<sup>178</sup> Derek Bambauer, *Law and Revenge Porn* (October 1, 2013), <http://blogs.law.harvard.edu/infolaw/2013/10/01/law-and-revenge-porn/>.

intimate images is that people with minority sexual preferences may create and share these images in order to challenge prevailing sexual norms.<sup>179</sup> Sharing the intimate media may actually be a temporary substitute for face-to-face interaction because it “empower[s] them to engage with others while protected by greater anonymity and psychological distance.”<sup>180</sup> Society has evolved drastically over the years and has become somewhat less conservative and more open about sex. Instead of backtracking and attempting to halt society’s growth and changes, the laws should be adapting to those changes.

#### V. CONCLUSION

New York’s existing laws are insufficient to address the growing issue of revenge porn. Although New York has attempted to address the issue by amending its current laws regarding dissemination of unlawful surveillance, the law simply does not reach the majority of revenge porn cases. Too many perpetrators are getting away with this criminal behavior without consequence, and thus the scope of New York Penal Law must be extended. The ARPA will extend the scope just enough to reach most revenge porn cases without violating the Constitution.

The effects of revenge porn are serious. Society must realize sooner rather than later that the laws are not up-to-date regarding this issue. Society has changed drastically as a result of technology, especially the Internet. At this point, social media and the Internet have changed the way humans live their lives on an everyday basis. To preserve the right to access information via the Internet, the laws need to provide some sort of protection for situations where intimate information is being exploited. The ARPA is the perfect solution to address this issue.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*