NOTES

GETTING EVEN: EMPOWERING VICTIMS OF REVENGE PORN WITH A CIVIL CAUSE OF ACTION

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I. INTRODUCTION

When the "king of 'revenge porn'" Hunter Moore faced seven years in prison and a half million dollar fine, it was not because he plead guilty to California's criminal revenge porn law or any similar civil suit, but rather, he plead guilty to federal hacking and identity theft charges.[1] While some sort of justice is done by Moore's conviction, society should be alarmed that the founder of IsAnyoneUp.com[2]—one of the first and most notorious revenge porn websites—could only be held liable for his actions via laws that have virtually nothing to do with revenge porn itself. Technological advances and the Information Age have taken us from black and white photographs to real-time imaging in half of a century[3] and as a result, gone are the

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[1] *See* Abby Ohlheiser, *Revenge Porn Purveyor Hunter Moore is Sentenced to Prison*, WASH. POST (Dec. 3, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/ revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/; Nicky Woolf, *'Revenge Porn King' Hunter Moore Pleads Guilty to Hacking Charges*, GUARDIAN (Feb. 19, 2015), https://www.theguardian.com/technology/2015/feb/19/revenge-porn-hunter-moore-pleads-guilty-hacking-identify. Hunter Moore has since been sentenced to two and a half years in prison, three years of supervised release, a $2,000 fine, and a mental health evaluation. *See* Ohlheiser, *supra*.

[2] *See* Woolf, *supra* note 1.

[3] *See* Michael Archambault, *A Brief History of Color Photography, From Dream to Reality*, PETAPIXEL (Oct. 11, 2015), http://petapixel.com/2015/10/11/a-brief-history-of-color-photography-from-dream-to-reality/ ("Beginning in the 1960s . . . [color film] had begun to establish a presence in the market, but [it was] still much more expensive than standard black and white film. By the 1970s . . . color photography [was] accessible for the masses. And finally, by the 1980s, black and white film was no longer the dominant medium used for daily snapshots of

days in which reputational damage can easily be contained. Society has had to adapt to the Hunter Moores of the world and while many laws have kept pace, those regarding revenge porn are severely disappointing.

Let us start with a scenario[4]: Romeo believes that he and his star-crossed lover Juliet would rather die than live without each other, but one day Juliet decides that the family feuding is too much and she leaves Romeo. Instead of downing the poisonous vial, Romeo determines that the appropriate response is to post on the Internet sexually explicit photographs of Juliet that were consensually taken in private between the couple, and expected to stay between the couple. Romeo knows this will mortify Juliet. Further, Romeo spitefully uploads the photographs to a larger website—created specifically for this purpose—so that others may view them, along with Juliet's name, address, and social media sites. Romeo tells Juliet that if she wants the images taken down, she will have to pay the website handsomely for it. At this point, it doesn't matter if the images are taken down because Juliet's family, friends, and employer have already been made aware of the compromising photographs, bringing shame to the entire Capulet family. Juliet is consistently harassed by people contacting her who got her information from the website and she loses sleep at night, fears for her safety, and has started therapy. Juliet begs Romeo to take the photos down and finally resorts to legal action, but either she lives in one of the sixteen states that do not recognize a cause of action for her issue,[5] or Romeo

life."); Reg'l & Mesoscale Meteorology Branch, Nat'l Oceanic & Atmospheric Admin., *Real-Time Google Earth Satellite Imagery*, http://rammb.cira.colostate.edu/products/google_earth/ (last visited Aug. 28, 2016) (describing how in 2016, Google Earth uses real-time loops, adding in new imagery every five minutes).

[4] The following names and literary references are based on William Shakespeare's *Romeo and Juliet*. *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET. In addition, scenarios similar to the one this Note provides are the most common and are often utilized when putting "revenge porn" into context. *See, e.g.*, Pierre Grosdidier, *Texas 'Revenge Porn' Ban Brings Enforcement Challenges*, LAW360 (Aug. 25, 2015), https://www.law360.com/articles/695227/texas-revenge-porn-ban-brings-enforcement-challenges.

[5] At the time of this Note, the following sixteen states have not yet enacted legislation to combat revenge porn: Alabama, Indiana, Iowa, Kentucky, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New York, Ohio, Rhode Island, South Carolina, South Dakota, West Virginia, and Wyoming. The following thirty-four states and the District of Columbia do have laws targeting revenge porn: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota**,** Nevada, New Hampshire**,** New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma**,** Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. *See* ALASKA STAT. § 11.61.120(a)(6), (b) (2015) (making harassment in the second degree a class B misdemeanor); ARIZ. REV. STAT. ANN. § 13-1425(A), (C) (2016) (making the unlawful distribution of images depicting states of nudity or specific

has rightfully claimed First Amendment protections in states that do recognize this suit.[6] Society labels Romeo as a vindicated man for his

sexual activities a class 5 felony, or, if the image is disclosed by electronic means, a class 4 felony); ARK. CODE ANN. § 5-26-314(a), (c) (2016) (making the unlawful distribution of sexual images or recordings a class A misdemeanor); CAL. PENAL CODE § 647(j)(4) (West 2016) (making disorderly conduct a misdemeanor); COLO. REV. STAT. § 18-7-107(1) (2016) (making the posting of a private image for harassment a class 1 misdemeanor); CONN. GEN. STAT. § 53a-189c(a), (c) (2016) (making the unlawful dissemination of an intimate image a class A misdemeanor); DEL. CODE ANN. tit. 11, § 1335(a)(9), (c) (2016) (making the violation of privacy a class A misdemeanor, or, if certain aggravating factors are present, a class G felony); D.C. CODE § 22-3052 (2016) (making unlawful disclosure a misdemeanor punishable by fine, up to 180 days in prison, or both); FLA. STAT. § 784.049 (2016) (making sexual cyberharassment a misdemeanor in the first degree); GA. CODE ANN. § 16-11-90(b), (c) (2016) (making the electronic transmission of nude or sexually explicit images a misdemeanor of a high and aggravated nature); HAW. REV. STAT. § 711-1110.9(1)(b), (2) (2016) (making a violation of privacy in the first degree a class C felony); IDAHO CODE § 18-6609(2)(b), (3) (2016) (making the crime of video voyeurism a felony); 720 ILL. COMP. STAT. 5/11-23.5(b), (f) (2016) (making the nonconsensual dissemination of private sexual images a class 4 felony); KAN. STAT. ANN. § 21-6101(a)(8), (b)(2) (2016) (making a breach of privacy a felony); LA. STAT. ANN. § 14:283.2(A), (E) (2016) (making the nonconsensual disclosure of a private image punishable by up to a $10,000 fine, two years in prison, or both); ME. STAT. tit. 17-A, § 511-A(1), (4) (2016) (making the unauthorized dissemination of certain private images a class D crime); MD. CODE ANN., CRIM. LAW § 3-809(c), (d) (LexisNexis 2016) (making revenge porn a misdemeanor punishable by a fine of up to $5,000, two years in prison, or both); MICH. COMP. LAWS §§ 750.145e(1), (4) (2016) (making the intentional dissemination of sexually explicit material with the intent to intimidate a misdemeanor); MINN. STAT. § 617.261(1), (2) (2016) (making the nonconsensual dissemination of private sexual images a gross misdemeanor or, if aggravating factors are present, a felony); NEV. REV. STAT. § 200.780(1), (2) (2015) (making the unlawful dissemination of an intimate image a category D felony); N.H. REV. STAT. ANN. § 644:9-a(II), (VI) (2016) (making the nonconsensual dissemination of private sexual images a class B felony); N.J. STAT. ANN. § 2C:14-9(c) (West 2016) (making the invasion of privacy in the third degree a criminal offense punishable by up to a $30,000 fine); N.M. STAT. ANN. § 30-37A-1(A), (C) (2016) (making the unauthorized distribution of sensitive images a misdemeanor); N.C. GEN. STAT. § 14-190.5A(b), (c) (2016) (making the disclosure of private images a class H felony); N.D. CENT. CODE § 12.1-17-07.2(2), (5) (2016) (making the distribution of intimate images without or against consent a class A misdemeanor); OKLA. STAT. tit. 21, § 1040.13b(B), (F) (2016) (making the nonconsensual dissemination of sexual images a misdemeanor); OR. REV. STAT. § 163.472(1), (2) (2016) (making the unlawful dissemination of an intimate image a class A misdemeanor); 18 PA. CONS. STAT. § 3131(a)–(c) (2016) (making the unlawful dissemination of an intimate image a misdemeanor in the second degree); TENN. CODE ANN. § 39-17-318(a), (d) (2016) (making the unlawful exposure of another a class A misdemeanor); TEX. PENAL CODE ANN. § 21.16(b)–(d), (g) (2015) (making the unlawful disclosure or promotion of intimate visual material a class A misdemeanor); UTAH CODE ANN. § 76-5b-203(2), (5) (LexisNexis 2016) (making the distribution of an intimate image a class A misdemeanor); VT. STAT. ANN. tit. 13, § 2606(b)(1) (2015) (making the disclosure of sexually explicit images without consent a criminal act punishable by up to a $2,000 fine, two years in prison, or both); VA. CODE ANN. § 18.2-386.2(A) (2016) (making the unlawful dissemination or sale of the image of another a class 1 misdemeanor); WASH. REV. CODE § 9A.86.010(1), (7) (2016) (making the disclosure of intimate images a gross misdemeanor); WIS. STAT. § 942.09(3m) (2016) (making representations depicting nudity a class A misdemeanor).

[6] For example, Arizona's original revenge porn statute was found unconstitutional. *See* Final Decree at 2, Antigone Books LLC v. Brnovich, No. 2:14-cv-02100-PHX-SRB (D. Ariz. July 10, 2015) [hereinafter Antigone Final Decree]. Arizona has since enacted new legislation in accordance with the District Court's ruling. *See* ARIZ. REV. STAT. ANN. § 13-1425(A), (C) (making the unlawful distribution of images depicting states of nudity or specific sexual

heartbreak and Juliet as a harlot who should have known better. Juliet is told that she either should have never taken the photographs in the first place or should have stayed with Romeo so that this would have never happened—after all, this *is* her fault, right?[7]

This situation, most commonly known as "revenge porn,"[8] can happen to anyone, anywhere.[9] While definitions of revenge porn vary widely across the United States, this Note defines it as the nonconsensual dissemination of sexually explicit photographs of another, taken or given consensually between the individuals with the reasonable expectation that the photographs would remain only between those individuals.[10]

Both the public and private sector have been slow to respond to the notorious revenge porn phenomenon. Private sector online platforms, such as Twitter and Reddit, took action in 2015 to explicitly ban revenge porn from their sites;[11] however, not all websites have followed suit and some people have even built online empires by capitalizing on scorned lovers thirsting for payback.[12] The federal government has yet to enact any policy outlawing revenge porn, and about two-thirds of the states have taken action while the other one-third may have legislation in the works, but no laws yet.[13] State laws that do address this issue vary incredibly, with some states making revenge porn violations a misdemeanor[14] and others a felony carrying heavy fines and jail time.[15] This lack of continuity

activities a class 5 felony, or, if the image is disclosed by electronic means, a class 4 felony).

[7] "Victim blaming" is common in these situations even though victims have nothing to do with disseminating the images and are often shocked and betrayed upon learning of their ex-lover's hateful actions. *See* Lauren Panariello, *The Women Who Want to Make Revenge Porn Illegal*, COSMOPOLITAN (Sept. 25, 2013), http://www.cosmopolitan.com/sex-love/advice/a4825/revenge-porn-shutting-it-down/.

[8] "Revenge porn" is also more formally known as "nonconsensual pornography," but this Note utilizes the colloquial term. *See, e.g.*, Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 & n.10 (2014).

[9] *See Revenge Porn and its Victims*, NOBULLYING, http://nobullying.com/revenge-porn/ (last updated July 26, 2016) ("Anyone can be a victim of revenge porn including women and men of all ages.").

[10] This Note intentionally omits an "intent to harm" element for reasons discussed later. *See infra* Part IV(B).

[11] *See Twitter Latest to Ban 'Revenge Porn,'* PHYS.ORG (Mar. 12, 2015), http://phys.org/news/2015-03-twitter-latest-revenge-porn.html.

[12] *See* Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113.

[13] *See supra* note 5.

[14] *See, e.g.*, ARK. CODE ANN. § 5-26-314(a), (c) (2016) (making the unlawful distribution of sexual images or recordings a class A misdemeanor).

[15] *See, e.g.*, 720 ILL. COMP. STAT. 5/11-23.5(b), (f) (2016) (making the nonconsensual dissemination of private sexual images a class 4 felony).

holds offenders to different standards across the country, thus lowering the gravity of the offense and creating additional issues—such as lack of notice—that permit offenders to escape liability altogether.[16]

One theme is consistent among these laws, though: they all create a criminal cause of action against revenge porn offenders.[17] Utilizing a criminal approach to address revenge porn has led to a plethora of other issues, however, the most common being a First Amendment violation of free speech.[18] Some states have attempted to cure this issue by drafting their revenge porn statutes very carefully, but as discussed in Part II, doing so does not necessarily address the inherent constitutional violations.[19] This Note believes these First Amendment arguments to be valid and does not contend otherwise.

This Note does argue, though, that because of the valid First Amendment violations present, criminalizing revenge porn is not the best method by which to seek redress against an offender, but rather, states should enact civil causes of action specifically against revenge porn. Further, this Note argues that an affirmative consent standard should apply, in which *only* the victim's consent to distribute each image would be sufficient to permit another to do so. This affirmative consent approach would act as a means by which to encourage potential disseminators—if they wished to disseminate the explicit photographs of another—to take appropriate steps to avoid liability for themselves and harm to their victims. This Note proposes that failure to take the appropriate steps should trigger a civil cause of action, which ultimately provides a practical approach that empowers victims as individuals—rather than as members of society at large, as would be the case in a criminal cause of action—to pursue and receive adequate justice. To expand upon these concepts, this Note uses New York State as a model.

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[16] *See* Grosdidier, *supra* note 4 ("An out-of-state revenge pornographer would not likely know that the revenge porn website's server used to post the intimate pictures is located in [a particular state]. In [that] case, it might be hard to charge the pornographer with 'knowledge of the forum at which his conduct is directed.'").

[17] *See supra* note 5. It is also important to note that at the time of this Note, nine states in particular have also adopted civil causes of action in addition to criminal causes of action. *See* CAL. CIV. CODE § 1708.85(a) (West 2016); FLA. STAT. § 784.049(5) (2016); N.C. GEN. STAT. § 14-190.5A(g) (2016); N.D. CENT. CODE § 32-03-58 (2016); 42 PA. CONS. STAT. § 8316.1(a) (2016); TEX. CIV. PRAC. & REM. CODE ANN. §§ 98B.002 (2015); VT. STAT. ANN. tit. 13, § 2606(e) (2015); WASH. REV. CODE § 4.24.795(1)–(2) (2016); WIS. STAT. § 995.50(1), (2)(d) (2015).

[18] *See, e.g.*, Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 662 (2016) ("Laws prohibiting revenge pornography . . . violate the First Amendment as the Court now understands it.").

[19] *See infra* Part II.

Part II discusses criminal revenge porn statutes further and why they are problematic against the First Amendment. Part III discusses why current New York State law, both civil and criminal, is inadequate to provide revenge porn victims with justice. Part IV(A) argues that creating a civil cause of action for revenge porn specifically is the appropriate response to the revenge porn issue, and Part IV(B) advocates for an affirmative consent standard in furtherance of the civil cause of action.

II. CRIMINAL REVENGE PORN STATUTES AND FIRST AMENDMENT IMPLICATIONS

As previously stated, a universal definition of "revenge porn" does not exist.[20] Moreover, the definitions of revenge porn that do exist are vastly inconsistent.[21] The federal government and its agencies have not taken action against revenge porn, leaving the states with immense discretion on this issue, and because of significant pressure received from the anti-revenge porn lobby, many states quickly enacted knee-jerk reactionary criminal statutes in order to not be the last state to take action.[22] As a result of the haste, every single statute in the thirty-four states and the District of Columbia that have enacted revenge porn-like statutes is different in some respect, and most have yet to be tested for durability.[23] Some statutes categorize the act as a misdemeanor;[24] others a felony.[25] Many

[20] *See supra* notes 13–16 and accompanying text.

[21] *See supra* note 5. To exemplify the disparity, note the differences in depth and detail between Colorado's statute and Pennsylvania's statute. *Compare* COLO. REV. STAT. § 18-7-107(1)(a) (2016) ("An actor who is eighteen years of age or older commits the offense of posting a private image for harassment if he or she posts or distributes through the use of social media or any website any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person eighteen years of age or older . . . [w]ith the intent to harass the depicted person and inflict serious emotional distress upon the depicted person[,] . . . [w]ithout the depicted person's consent . . . [or w]hen the actor knew or should have known that the depicted person had a reasonable expectation that the image would remain private[,] and . . . [t]he conduct results in serious emotional distress of the depicted person."), *with* 18 PA. CONS. STAT. § 3131(a) (2016) ("[A] person commits the offense of unlawful dissemination of [an] intimate image if, with intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.").

[22] *See* Steven Brill, *The Growing Trend of 'Revenge Porn' and the Criminal Laws that May Follow*, HUFFINGTON POST, http://www.huffingtonpost.com/steven-brill/the-growing-trend-of-revenge-porn_b_4849990.html (last updated Apr. 27, 2014).

[23] *See supra* note 5.

[24] *See, e.g.*, ARK. CODE ANN. § 5-26-314(c) (2016).

[25] *See, e.g.*, 720 ILL. COMP. STAT. 5/11-23.5(f) (2016).

include an "intent to harm" element[26] while others find it irrelevant.[27] Further still, some have been criticized for being vague, overbroad, and a significant impediment to the First Amendment, especially regarding media, education, and public interest providers.[28]

While some groups such as the American Civil Liberties Union ("ACLU") and the Motion Picture Association of America ("MPAA") are vocally opposed to criminal revenge porn statutes due to what they view as inherent First Amendment violations,[29] those at the forefront of the anti-revenge porn lobby support only the criminalization of revenge porn.[30] Criminalizing an act in general may have its advantages;[31] for one, some believe that a potential offender may be more strongly deterred from committing an offense if that person knows that he or she could serve jail time and a conviction could remain on his or her permanent record indefinitely.[32] Further, prosecuting an act criminally can provide access to the justice system for people who may not have the means to pursue a suit civilly, and can also provide victims with a sense of justice even if a perpetrator is judgment-proof.[33]

Despite these potential advantages, one potential disadvantage of criminalizing an act—and which is problematic for purposes of this discussion—stems from the significant difference between a criminal and civil case, which is the nature of the parties.[34] When a criminal act is tried, the two parties involved are the government on behalf of society as prosecution and a private citizen as defendant.[35] When a

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[26] *See, e.g.*, ME. STAT. tit. 17-A, § 511-A(1) (2016) (providing that an "intent to harass" is a necessary element of the crime).

[27] *See, e.g.*, MD. CODE ANN., CRIM. LAW § 3-809(c) (LexisNexis 2016) (providing that an "intent to harass" is not a necessary element of the crime).

[28] *See, e.g.*, H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014), *invalidated by* Antigone Final Decree, *supra* note 6, at 2; *see also* Complaint for Declaratory and Injunctive Relief at 2–3, 5, Antigone Books LLC v. Horne, No. 2:14-cv-02100-SRB (D. Ariz. Sept. 23, 2014), 2014 WL 4784248 [hereinafter Antigone Complaint] (criticizing Arizona's first revenge porn statute for impeding on media and education providers' First Amendment rights).

[29] *See* Karen Turner, *Why Hollywood Studios are Taking a Stand Against an Anti-Revenge-Porn Bill*, WASH. POST (Apr. 11, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/04/11/why-the-mpaa-has-taken-a-stand-against-an-anti-revenge-porn-bill/.

[30] *See* Citron & Franks, *supra* note 8, at 349 ("Current civil law remedies . . . are an ineffective deterrent to revenge porn . . . [and] a response from the criminal justice system is essential.").

[31] Civil causes of action have comparable, albeit different, advantages, as discussed later in this Note. *See infra* Part IV(A).

[32] *See* Citron & Franks, *supra* note 8, at 349.

[33] *See id.*

[34] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

[35] *See id.* ("[P]ublic wrongs, or crimes . . ., are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity.").

civil suit is brought, the two parties involved are a private citizen as prosecution and a private citizen as defendant.[36] As discussed below, because of the nature of the parties, First Amendment issues are only implicated in criminal, but not in civil, proceedings.

The First Amendment, in relevant part, states: "Congress shall make no law . . . abridging the freedom of speech."[37] When the government criminalizes speech and has the ability to prosecute that speech as a violation against society, a private citizen's First Amendment rights may be infringed.[38] In the context of criminalizing revenge porn, state statutes have given the government the authority to prosecute a person based only on the content of his or her "speech" (i.e., sexually explicit photographs), which is an unconstitutional restriction.[39] While most content-based restrictions are unconstitutional, the United States Supreme Court recognizes certain categories of speech that by their very nature are "unprotected" and therefore fall outside the scope of First Amendment safeguards.[40] For example, child pornography and obscenity that has no legitimate artistic, cultural, or educational purpose are unprotected categories of speech and the government may criminalize and prosecute accordingly.[41]

Some argue that revenge porn should become one of these unprotected categories of speech,[42] thereby permitting the government to prosecute revenge porn offenders without violating their constitutional rights. Not every speech-related act that is appalling or heinous, however, can be deemed "unprotected," and looking into recent precedent may shed some predictive light on revenge porn's ability to become an unprotected category of speech.

In *United States v. Stevens*,[43] the Court discussed the limitations of

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[36] *See id.* ("[P]rivate wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals[.]").

[37] U.S. CONST. amend. I.

[38] *See, e.g.*, R. A. V. v. St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed." (internal citations omitted)).

[39] *See* Antigone Complaint, *supra* note 28, at 5.

[40] *See* Koppelman, *supra* note 18, at 662.

[41] *See* New York v. Ferber, 458 U.S. 747, 761 (1982) (providing the child pornography exception); *see also* Miller v. California, 413 U.S. 15, 23–24 (1973) (providing the obscenity exception).

[42] *See* Alix Iris Cohen, Note, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300, 305 (2015); *see also* Danielle Citron, *Debunking the First Amendment Myths Surrounding Revenge Porn Laws*, FORBES (Apr. 18, 2014), http://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/#52624d6d4b89.

[43] United States v. Stevens, 559 U.S. 460 (2010).

creating unprotected categories of speech by holding that unless speech is that which has been "historically unprotected," it is fully protected.[44] In *Stevens*, Congress had attempted "to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty," claiming that the statute was constitutional "because the banned depictions of animal cruelty, as a class, [were] categorically unprotected by the First Amendment."[45] The Court disagreed.[46]

In declining to create this new—or any new—category of unprotected speech, the Court rejected the government's "startling and dangerous" test that determined the value of speech by balancing it against current societal values.[47] Unwilling to curtail the First Amendment's protections and "permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary"[48] based on the whims of society, the Court ultimately "reject[ed] the Government's highly manipulable balancing test."[49] The Court did not argue that the subject matter of the animal fighting videos was not horrific enough to be considered unprotected; rather, the Court focused on the shortfalls of the test employed by the government in reaching its conclusion.[50] Similarly, those who advocate against criminalizing revenge porn do not do so because they believe the offense should be permissible; rather, much like the Court, they are unwilling to weaken the First Amendment's protections for any and every new issue with which society has a problem.[51]

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[44] *See id.* at 472, 480 ("[T]he protection of the First Amendment presumptively extends to many forms of speech . . . [and o]ur decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

[45] *Id.* at 464, 468.

[46] *Id.* at 468. Moreover, the Court was nearly unanimous in its decision, with only Justice Alito dissenting. *Id.* at 463, 482.

[47] *See id.* at 470.

[48] *Id.* at 471.

[49] *Id.* at 472.

[50] *See id.* ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.").

[51] *See* Press Release, Am. Civil Liberties Union, First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images (Sept. 23, 2014), https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images ("The lawsuit charges that [Arizona's first revenge porn] law [was] so broad and vague that it could send people to prison for sharing material that is fully protected by the First Amendment, [but it is possible that] . . . '[s]tates can address malicious invasions of privacy without treading on free

Though future rulings of the Court cannot be definitively discerned,[52] under a *Stevens* analysis, it is unlikely that the Court would make revenge porn its own unprotected category of speech. First, revenge porn is not historically unprotected conduct, no matter how destructive it may be, if for no other reason than the ability to perpetrate the offense has existed for less than a decade.[53] Certain principles related to revenge porn may be unprotected, such as obscenity or an invasion of privacy rights,[54] but the offense as a whole is not a nation-wide historically recognized evil. Second, the Court is unlikely to carve out a new category of unprotected speech for revenge porn because the argument for doing so relies largely on balancing the value of the speech against society's values[55]—the very test that the *Stevens* Court rejected.

In a similar vein, advocates for criminalizing revenge porn have also attempted to align revenge porn with a current unprotected category of speech, namely, child pornography, claiming that revenge porn should be provided the same analysis regarding dissemination as *New York v. Ferber*,[56] a child pornography case decided two decades prior to *Stevens*.[57] Significant differences exist, though, that prevent this comparison from being properly drawn. The *Ferber* Court created a new unprotected category of speech for child pornography for two reasons: first, the Court balanced the competing interests, but also, second, the Court recognized that the underlying activity itself depicted in the speech, prior to any distribution, was

speech' with laws that are carefully tailored to address real harms.").

[52] At the time of this Note, Justice Antonin Scalia's death in early 2016 has left a vacancy on the Court well into the beginning of 2017. *See* Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html. Although President Trump has nominated Judge Neil M. Gorsuch to the Court, he has not yet been confirmed. *See id.* As such, the composition of the Court and the predictability of its future decisions is still largely unknown.

[53] *See* Michael Salter & Thomas Crofts, *Responding to Revenge Porn: Challenges to Online Legal Impunity*, *in* NEW VIEWS ON PORNOGRAPHY: SEXUALITY, POLITICS, AND THE LAW 233, 239 (Lynn Comella & Shira Tarrant eds., 2015) (describing how the revenge porn phenomenon really came into the spotlight in 2010 with Hunter Moore's website).

[54] *See* Citron & Franks, *supra* note 8, at 375.

[55] *See id.* at 349 ("Criminalizing nonconsensual pornography is . . . appropriate and necessary to convey the proper level of social condemnation for this behavior.").

[56] New York v. Ferber, 458 U.S. 747 (1982). In *Ferber*, New York State criminalized the knowing distribution of material that depicted sexual performances by children under the age of sixteen. *Id.* at 749. The statute was challenged on the grounds that prohibiting the distribution of this material violated the First Amendment—more specifically, the statute was challenged for being both underinclusive and overbroad—but the U.S. Supreme Court upheld the statute, finding it not in violation of the First Amendment. *Id.* at 752–53, 765–66, 774.

[57] *See* Citron & Franks, *supra* note 8, at 363–64.

historically illegal throughout the country.[58] Moreover, in reaching its decision the Court not only recognized the underlying activity as "illegal," but also that it was severely morally reprehensible, evil, and should not be tolerated under any circumstances.[59] More specifically, the Court was not even so much concerned with the recording of the act (i.e., the "pornography" aspect), but rather, with the acts leading up to the recording (i.e., the rape, sodomy, and assault of children), which are the true "underlying activities" involved.[60] Recognizing the underlying acts as "evil" is how the Court ultimately rationalized creating a new category of unprotected speech, subsequently asserting that prohibiting the distribution of the resulting child pornographic images—images now void of First Amendment protections—was permissible.[61]

Although advocates attempt to draw a similarity between the nonconsensual distribution of child pornography and revenge porn—thus warranting the criminalization of both[62]—the underlying acts prior to the distribution are *not* inherently similar, and preventing the underlying act is really what swayed the *Ferber* Court.[63] To adequately align the dissemination of revenge porn with a *Ferber* analysis of disseminating child pornography, what would be required is a showing that the underlying activity involved in creating the images used for the revenge porn is morally reprehensible and evil.[64] With revenge porn, though, the underlying activity prior to dissemination is the consensual taking of sexually explicit photographs, and consensual adult sex is neither illegal nor is it in and of itself a morally reprehensible or evil act that should be prevented.[65] Because revenge porn is significantly different from child pornography in this respect, criminalizing the dissemination of revenge porn is not likely to pass constitutional muster under a

[58] *See* United States v. Stevens, 559 U.S. 460, 471 (2010); *Ferber*, 458 U.S. at 758–60.

[59] *Ferber*, 458 U.S. at 763–64 ("[T]he evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.").

[60] *See id.* at 756–58.

[61] *See id.* at 763–64.

[62] *See* Citron & Franks, *supra* note 8, at 363–64.

[63] *See Ferber*, 458 U.S. at 763–64.

[64] *See id.*

[65] Causes of action, of course, already exist for cases in which adult rape or assault is involved, and any images that could be taken and disseminated from those atrocities would fall outside of the revenge porn definition provided in this Note and are therefore not applicable to this discussion.

Ferber analysis any more than it is under a *Stevens* analysis.

Despite the *Stevens* and *Ferber* decisions discussed above, states have still passed laws criminalizing the dissemination of revenge porn.[66] In doing so, states have endeavored to be exceedingly careful in crafting criminal revenge porn statutes as to not offend the First Amendment[67]—some states have been more careful than others. States such as Colorado,[68] Georgia,[69] and Maine,[70] to name a few, crafted lengthy, in-depth statutes that include an "intent to harm or harass" element and require that the depicted person has not consented to the distribution. Other state statutes, such as Arizona's original statute,[71] are the exact opposite—short and imprecise—and have already been struck down for being overbroad and vague.[72] The original Arizona statute criminalized *any* disclosure of *any* kind of

[66] *See supra* note 5.

[67] Although recognizing that states have attempted to craft these statutes carefully, this Note still maintains that criminal revenge porn statutes will always offend the First Amendment as unconstitutional content-based restrictions on speech, regardless of how well they may be crafted. *See* Koppelman, *supra* note 18, at 662–63, 665.

[68] COLO. REV. STAT. § 18-7-107 (2016) ("An actor who is eighteen years of age or older commits the offense of posting a private image for harassment if he or she posts or distributes through the use of social media or any web site any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person eighteen years of age or older . . . [w]ith the intent to harass the depicted person and inflict serious emotional distress upon the depicted person[,] . . . [w]ithout the depicted person's consent[,] or . . . [w]hen the actor knew or should have known that the depicted person had a reasonable expectation that the image would remain private[,] and . . . [t]he conduct results in serious emotional distress of the depicted person.").

[69] GA. CODE ANN. § 16-11-90 (2016) ("A person violates this [c]ode section if he or she, knowing the content of a transmission or post, knowingly and without the consent of the depicted person . . . [e]lectronically transmits or posts, in one or more transmissions or posts, a photograph or video which depicts nudity or sexually explicit conduct of an adult when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person[,] or . . . [c]auses the electronic transmission or posting, in one or more transmissions or posts, of a photograph or video which depicts nudity or sexually explicit conduct of an adult when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person.").

[70] ME. STAT. tit. 17-A, § 511-A (2016) ("A person is guilty of unauthorized dissemination of certain private images if the person, with the intent to harass, torment or threaten the depicted person or another person, knowingly disseminates, displays or publishes a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in a sexual act or engaged in sexual contact in a manner in which there is no public or newsworthy purpose when the person knows or should have known that the depicted person . . . [i]s identifiable from the image itself or information displayed in connection with the image[,] and . . . [h]as not consented to the dissemination, display or publication of the private image.").

[71] H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014) ("It is unlawful to intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure."), *invalidated by* Antigone Final Decree, *supra* note 6, at 2.

[72] *See* Antigone Final Decree, *supra* note 6, at 1–2.

any person in *any* state of nudity as long as the person depicted did not consent to the disclosure.[73] Because, among many other reasons, the statute did not contain an intent to harass element, any mention of a reasonable expectation of privacy, or any mention of the role the person depicted played in the creation of the photograph, the statute essentially encompassed works of art, books, and baby pictures shared between and among family members.[74]

Regardless of how carefully states have crafted their statutes or how hard activists have advocated for either expanding or limiting current revenge porn laws,[75] one thing still stands with each of these criminal statutes: they are still content-based restrictions on speech, which the U.S. Supreme Court has ruled are impermissible unless the speech falls within a historically unprotected category.[76] The fact that some states are still hesitant to follow suit and enact criminal revenge porn statutes may be a testament to the strength of the First Amendment challenges that other states have faced.[77] Unfortunately, this has led to these states enacting *no* laws to combat revenge porn, which ultimately leaves victims of revenge porn without recourse in about one-third of the country.

The First Amendment issues inherent to criminalizing the dissemination of revenge porn carry significant weight but in the same breath, revenge porn is not an act that society should condone. This Note argues for a different approach to holding individuals accountable for committing these indecorous acts. Instead of criminalizing revenge porn, this Note proposes that states enact a civil cause of action and more specifically, a "yes means yes" affirmative consent approach, to hold offenders liable. The remainder of this Note examines the inadequacies of current law,

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[73] *See* Ariz. H.B. 2515, *invalidated by* Antigone Final Decree, *supra* note 6, at 2.

[74] *See* Antigone Complaint, *supra* note 28, at 2–4.

[75] For example, even after California's successful prosecution of a criminal revenge porn case, advocates on both sides of the issue were dissatisfied with California's statute—groups such as the ACLU argued that revenge porn speech should not be restricted unless it falls within one of the current unprotected categories of speech or another already illegal act such as harassment; other groups such as the Cyber Civil Rights Initiative ("CCRI") argued that only an all-encompassing federal criminal law will suffice in the future. *See* Veronica Rocha, *'Revenge Porn' Conviction is a First under California Law*, L.A. TIMES (Dec. 4, 2014), http://www.latimes.com/local/crime/la-me-1204-revenge-porn-20141205-story.html.

[76] *See* Koppelman, *supra* note 18, at 662 ("There are exceptions to the ban on content-based restrictions: the Court has held that the First Amendment does not protect incitement, threats, obscenity, child pornography, defamation of private figures, criminal conspiracies, and criminal solicitation, for example. None of those exceptions is applicable [to revenge porn].").

[77] *See id.* at 661–62 ("[Thirty-four] states [and the District of Columbia] have passed laws prohibiting [revenge porn], and others are considering them. . . . The constitutionality of such laws is uncertain, however.").

both civil and criminal (beyond the First Amendment concerns just discussed in this section), and argues that a separate civil cause of action against revenge porn is the best route to ensure that victims receive justice while keeping the First Amendment intact. Because New York State recently enacted its "Enough is Enough" affirmative consent sexual assault policy on all college campuses[78] and is a state that currently has proposed—but not yet enacted—revenge porn legislation,[79] this Note uses New York State as a model.

III. THE INADEQUACIES OF CURRENT LAW

Revenge porn is "about humiliation, about anger, [and] about revenge."[80] Unfortunately for victims, these circumstances, among others, unique to revenge porn do not afford protection under current causes of action that exist in New York State criminal law, tort law, and regulations.[81]

A. Criminal Law

The unique circumstances of revenge porn permit offenders to evade current New York State criminal law—namely, voyeurism, harassment, and hate crimes—because one or more of the elements needed to prove the offenses listed is missing or inapplicable in a revenge porn context. For example, New York State's voyeurism laws prohibit both the act of unlawful surveillance and unlawful dissemination of the images obtained from the surveillance.[82] Like most states that have anti-voyeurism-esque statutes,[83] New York's

[78] *See* Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs "Enough Is Enough" Legislation to Combat Sexual Assault on College and University Campuses (July 7, 2015), https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university [hereinafter Governor Cuomo Press Release].

[79] *See* S. B. 2725-A, 240th Reg. Sess. (N.Y. 2017).

[80] Panariello, *supra* note 7.

[81] *See infra* Parts III(A), (B), (C).

[82] N.Y. PENAL LAW §§ 250.45, 250.50, 250.55, 250.60 (McKinney 2016) (proscribing unlawful surveillance in the first and second degrees and the dissemination of an unlawful surveillance image in the first and second degrees).

[83] *See, e.g.*, DEL. CODE ANN. tit. 11, § 1335(a)(2) (2016) ("A person is guilty of violation of privacy when, except as authorized by law, the person . . . [i]nstalls in any private place, *without consent of the person or persons entitled to privacy there*, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place." (emphasis added)); WASH. REV. CODE § 9A.44.115(2) (2016) ("A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films . . . [a]nother person *without that person's knowledge and consent* while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy[,] or . . . [t]he intimate areas of another person *without that person's knowledge and consent* and under circumstances where the person

limits the unlawful surveillance offense to only images or videos that were obtained by an offender *without* the consent of the person being recorded.[84] Problematic for revenge porn victims here is that a key element of revenge porn is that the images were either self-taken or taken and shared consensually, which automatically knocks revenge porn outside the scope of voyeurism.[85] Further, New York's separate voyeurism dissemination offense only applies to the images obtained from the unlawful surveillance,[86] which again, does not fit the revenge porn context. Last, New York has another anti-dissemination statute—not limited to voyeurism—by which offenders may be prosecuted for sharing private photographs or videos, yet this statute only applies if the images are given to minors.[87]

New York's harassment law[88] at first glance appears to cover revenge porn, but in fact does not. A person may be prosecuted for second-degree harassment if, "with [the] intent to harass, annoy or alarm another person . . . [h]e or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."[89] The issue with this definition in relation to revenge porn is that many times a victim cannot prove the perpetrator's intent, and perpetrators have even claimed that their intent was not to harass or annoy the person, but was in fact to provide amusement for others.[90] A second issue is that the statute requires a "course of conduct or repeatedly

has a reasonable expectation of privacy, whether in a public or private place." (emphasis added)).

[84] *See, e.g.*, N.Y. PENAL LAW § 250.45 ("A person is guilty of unlawful surveillance in the second degree when . . . he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, *without such person's knowledge or consent* . . . ." (emphasis added)).

[85] *See* Brill, *supra* note 22; Erin Donaghue, *Judge Throws out New York 'Revenge Porn' Case*, CBS NEWS (Feb. 25, 2014), http://www.cbsnews.com/news/judge-throws-out-new-york-revenge-porn-case/.

[86] N.Y. PENAL LAW §§ 250.55, 250.60 (stating that in order to be liable for disseminating a private image, that image must first be obtained via unlawful surveillance as described in section 250.45 or section 250.50).

[87] *Id.* § 235.21 (making the dissemination of indecent material to minors in the second degree a class E felony).

[88] *Id.* § 240.26.

[89] *Id.*

[90] *See* Mary Anne Franks, *Drafting an Effective 'Revenge Porn' Law: A Guide for Legislators*, CYBER CIV. RTS. INITIATIVE 5–6 (Nov. 2, 2015), http://www.cybercivilrights.org/guide-to-legislation/.

commit[ted] acts."[91] Revenge porn can occur with the posting of one photograph or video and although that image may be viewed and shared by hundreds over the Internet,[92] these "repeated" acts do not link directly to the offender, unlike, for example, in the case of defamation.[93] Perhaps the facts of a particular case may align with New York's definition of harassment, thus permitting prosecution, but the definition as a whole precludes many if not most revenge porn lawsuits.

Last, New York's hate crime law[94] falls short. The statute requires that an offender either intentionally selects the person or commits the acts constituting the offense "in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person . . . ."[95] Even if a revenge porn victim could prove that he or she was targeted for one of the reasons specified in the statute, the claim would fail because the statute also requires that a "specified offense" be committed, which is further defined in the statute via fifty-three listed offenses.[96] Since "revenge

[91] N.Y. PENAL LAW § 240.26(3).

[92] *See* Franks, *supra* note 90, at 2.

[93] *See* Citron & Franks, *supra* note 8, at 365–66.

[94] N.Y. PENAL LAW § 485.05.

[95] *Id.* § 485.05(1)(a).

[96] *Id.* § 485.05(1), (3) ("A 'specified offense' is an offense defined by any of the following provisions of this chapter: section 120.00 (assault in the third degree); section 120.05 (assault in the second degree); section 120.10 (assault in the first degree); section 120.12 (aggravated assault upon a person less than eleven years old); section 120.13 (menacing in the first degree); section 120.14 (menacing in the second degree); section 120.15 (menacing in the third degree); section 120.20 (reckless endangerment in the second degree); section 120.25 (reckless endangerment in the first degree); section 121.12 (strangulation in the second degree); section 121.13 (strangulation in the first degree); subdivision one of section 125.15 (manslaughter in the second degree); subdivision one, two or four of section 125.20 (manslaughter in the first degree); section 125.25 (murder in the second degree); section 120.45 (stalking in the fourth degree); section 120.50 (stalking in the third degree); section 120.55 (stalking in the second degree); section 120.60 (stalking in the first degree); subdivision one of section 130.35 (rape in the first degree); subdivision one of section 130.50 (criminal sexual act in the first degree); subdivision one of section 130.65 (sexual abuse in the first degree); paragraph (a) of subdivision one of section 130.67 (aggravated sexual abuse in the second degree); paragraph (a) of subdivision one of section 130.70 (aggravated sexual abuse in the first degree); section 135.05 (unlawful imprisonment in the second degree); section 135.10 (unlawful imprisonment in the first degree); section 135.20 (kidnapping in the second degree); section 135.25 (kidnapping in the first degree); section 135.60 (coercion in the second degree); section 135.65 (coercion in the first degree); section 140.10 (criminal trespass in the third degree); section 140.15 (criminal trespass in the second degree); section 140.17 (criminal trespass in the first degree); section 140.20 (burglary in the third degree); section 140.25 (burglary in the second degree); section 140.30 (burglary in the first degree); section 145.00 (criminal mischief in the fourth degree); section 145.05 (criminal mischief in the third degree); section 145.10 (criminal mischief in the second degree); section 145.12 (criminal mischief in the first degree); section 150.05 (arson in the fourth degree); section 150.10 (arson in the third degree); section 150.15 (arson in the second

porn" is not its own cause of action nor does it fall within one of the offenses listed in the statute, a victim's claim would not survive.

B. Tort Law

New York State's tort laws—namely, intentional infliction of emotional distress, defamation, and copyright infringement—also do not provide revenge porn victims with adequate justice.

New York's common law offense of intentional infliction of emotional distress ("IIED") "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress."[97] Claims against revenge porn may fail under this cause of action because of the "extreme and outrageous" element, the most difficult element to demonstrate according to the New York State Court of Appeals.[98] Though the lower courts do not have a specific list of acts that are "extreme and outrageous," they have identified parameters.[99] The issue, however, is that the plaintiff's burden in substantiating these parameters is steep and is exceptionally more difficult in a society in which "[t]he fight to recognize domestic violence, sexual assault, and sexual harassment as serious issues has been long and difficult, and the tendency to tolerate, trivialize, or dismiss these harms persists."[100]

Though courts may recognize that the resulting harm from a revenge porn post is great, the act itself of posting an explicit photograph is not the type of atrocious conduct that an IIED statute was meant to protect against, especially when pornographic images and videos are now commonplace on the Internet, have led to

degree); section 150.20 (arson in the first degree); section 155.25 (petit larceny); section 155.30 (grand larceny in the fourth degree); section 155.35 (grand larceny in the third degree); section 155.40 (grand larceny in the second degree); section 155.42 (grand larceny in the first degree); section 160.05 (robbery in the third degree); section 160.10 (robbery in the second degree); section 160.15 (robbery in the first degree); section 240.25 (harassment in the first degree); subdivision one, two or four of section 240.30 (aggravated harassment in the second degree); or any attempt or conspiracy to commit any of the foregoing offenses.").

[97] Howell v. New York Post Co., 612 N.E.2d 699, 702 (N.Y. 1993).

[98] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (AM. LAW INST. 1965); Daniel Givelbar, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42–43 (1982)).

[99] *See Howell*, 612 N.E.2d at 702 ("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." (quoting Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 90 (N.Y. 1983))).

[100] *See* Citron & Franks, *supra* note 8, at 347.

celebrity careers, and are even idolized.[101] Until and unless society is prepared to recognize that an individual's right of sexual privacy is something that should be protected and the unauthorized disclosure of such information is completely intolerable, a victim's revenge porn suit is likely to be an uphill battle if framed in an IIED context.

Next, New York's common law definition of defamation is "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'"[102] While this definition dates back to the 1920s,[103] it is still utilized by New York courts today.[104] The obvious issue for victims of revenge porn here is that the statement made (i.e., the image disseminated) is not false, which precludes victims from suing the individual posting the image. Victims have also tried to sue the host website itself for wrongdoing, yet even if a defamation claim could be made, § 230 of the federal Communications Decency Act, which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"[105] precludes these lawsuits as well.[106] What § 230 means is that creators and their websites—such as Hunter Moore and IsAnyoneUp.com—cannot be held legally

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[101] *See* Samantha H. Scheller, Comment, *A Picture is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV 551, 582 (2015) ("[A] poster may argue that posting of sexually explicit content online is not extreme and outrageous considering the number of pornographic sites on the Internet."); Donaghue, *supra* note 85 ("While the judge ruled that the conduct of [the accused] was 'reprehensible,' he nonetheless did not 'violate any of the criminal statutes under which he [was] charged.'"); *see, e.g.*, Madeline Wahl, *Why It's Unfortunate that 'Sex Sells' in Advertising and in Life*, HUFFINGTON POST, http://www.huffingtonpost.com/madeline-wahl/why-its-unfortunate-that-sex-sells_b_5433251.html (last updated Aug. 2, 2014) (describing that when it comes to advertising, "sex sells," and the most efficient way to get consumers to purchase a magazine is by displaying a scantily-clad image of an attractive celebrity on the front cover); Kim Kardashian West (@kimkardashian), INSTAGRAM (Mar. 30, 2016), https://www.instagram.com/p/BDloqtVuSzr/?taken-by=kimkardashian&hl=en (depicting a topless but censored "mirror selfie" of the celebrity and a friend, giving the camera the middle finger).

[102] Foster v. Churchill, 665 N.E.2d 153, 157 (N.Y. 1996) (quoting Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E.2d 1299, 1305 (N.Y. 1977)).

[103] *See* Sydney v. MacFadden Newspaper Publ'g Corp., 151 N.E. 209, 210 (N.Y. 1926).

[104] *See, e.g.*, Elias v. Rolling Stone LLC, No. 15-cv-5953 (PKC), 2016 U.S. Dist. LEXIS 83875, at *10–11 (S.D.N.Y. June 28, 2016) (quoting Stepanov v. Dow Jones & Co., 987 N.Y.S.2d 37, 41 (App. Div. 1st Dep't 2014)).

[105] 47 U.S.C. § 230(c)(1) (2012).

[106] *See* Citron & Franks, *supra* note 8, at 359 ("Courts have interpreted § 230 to largely immunize from liability website owners and operators for tortious material submitted by third-party users.").

responsible for what others post on the site, even if the creator made the website for the specific purpose of perpetuating the harm.[107] Overall, because the material depicted is not false and because host websites are largely protected, victims are unlikely to be successful bringing defamation claims as a means by which to ameliorate their revenge porn problems.

Last, copyright infringement law could provide victims with the authority to issue a takedown notice to a website, but only if the victim took the photograph of him or herself and only if he or she first owned a copyright.[108] State laws, including New York's, are preempted by the federal Copyright Act of 1976, which recognizes that certain "pictorial, graphic . . . [and] motion pictures and other audiovisual works[]"[109] may be copyrighted by the "authors of the work."[110] As previously discussed, many times the photographs or images are taken by the victim, in which case the victim becomes the author of the images and may obtain a copyright. Issues arise for victims attempting to copyright this material, though, when the other person in the relationship is the one who actually took the images, in which case that person is the author of the material and the material cannot be copyrighted by the victim, even though the victim is the subject matter of the images.[111]

In addition, it is highly unlikely that victims will be willing to register for a copyright because in order to do so, the government requires a fee per transaction ranging from thirty-five dollars to eighty-five dollars for single applications, and also requires that the image or video itself be sent to the United States Copyright Office for inspection.[112] In general, the argument does not follow that just because a person may be willing to send an explicit image to a current lover that the person should therefore be willing to also share the image with a government agency for the sake of protecting him or herself;[113] forcing a person to expose his or her private photographs

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[107] *See id.* ("If a user hacks into a person's computer to obtain sexually explicit photographs and submits the photos, unsolicited, to a revenge porn website, the site owner would not be liable for displaying it.").

[108] *See* Citron & Franks, *supra* note 8, at 359–60.

[109] 17 U.S.C. § 102(a)(5)–(6).

[110] *Id.* § 201(a).

[111] *See* Citron & Franks, *supra* note 8, at 360.

[112] *See* U.S. COPYRIGHT OFF., COPYRIGHT OFFICE FEES 6 (2014), http://copyright.gov/circs/circ04.pdf; U.S. COPYRIGHT OFF., ECO STANDARD APPLICATION TUTORIAL: A GUIDE FOR COMPLETING YOUR ELECTRONIC COPYRIGHT REGISTRATION 2, http://www.copyright.gov/eco/eco-tutorial-standard.pdf (last visited Sept. 14, 2016).

[113] *See* Citron & Franks, *supra* note 8, at 355 ("Consent to share information in one context does not serve as consent to share this information in another context.").

for a copyright to avoid those same photographs from being exposed elsewhere is circular and counterintuitive. Society should fundamentally disagree with limiting the sole mechanism by which victims of revenge porn can gain recourse to "copyright infringement" because registering a copyright is an involved, costly procedure that requires someone to expose the very thing that they are trying to keep private.[114] Instilling such a policy would allow offenders to continue to evade legal action and be prosecuted only for offenses wholly unrelated to revenge porn itself.

C. Regulations

Last, New York State regulations, namely, New York's sexual harassment policy, do not offer recourse for victims of revenge porn. In concurrence with Title VII of the federal Civil Rights Act of 1964, in 1983 New York State adopted by Executive Order a definition of sexual harassment; however, New York's policy applies only to sexual harassment in the workplace.[115] Under this definition and similar definitions utilized by other states, revenge porn victims can only take action if somehow the offense is related to the workplace or a workplace violation.[116] Because workplace violations are inapplicable in most revenge porn scenarios,[117] New York's sexual harassment policy leaves most victims again without remedy.

Overall, some argue that all civil causes of action—no matter which ones—are inadequate to combat the severe harm caused by revenge

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[114] *See supra* notes 112–13 and accompanying text.

[115] N.Y. COMP. CODES R. & REGS. tit. 9, § 4.19 (2016) ("Executive Order No. 19: New York State Policy Statement on Sexual Harassment in the Workplace.").

[116] *See id.*; *see also* IOWA CODE § 19B.12 (2016) ("A state employee shall not sexually harass another state employee, a person in the care or custody of the state employee or a state institution, or a person attending a state educational institution."); MASS. GEN. LAWS ch. 151B, § 3A (2016) ("All employers, employment agencies and labor organizations shall promote a workplace free of sexual harassment. . . . [Employers must] adopt a policy against sexual harassment which shall include . . . a statement that sexual harassment in the workplace is unlawful[.]"); 28 R.I. GEN. LAWS § 28-51-2 (2016) ("All employers and employment agencies shall promote a workplace free of sexual harassment. . . . [Employers must a]dopt a policy against sexual harassment that shall include . . . [a] statement that sexual harassment in the workplace is unlawful[.]").

[117] *See, e.g.*, Caroline Davies, *Revenge Porn Cases Increase Considerably, Police Figures Reveal,* GUARDIAN, (July 15, 2015), https://www.theguardian.com/technology/2015/jul/15/revenge-porn-cases-increase-police-figures-reveal (indicating that suspects of revenge porn violations are mainly former partners, rather than co-workers or other acquaintances); *Revenge Porn Statistics,* END REVENGE PORN, http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/12/RPStatistics.pdf (last visited Sept. 14, 2016) (indicating that a study revealed that over sixty percent of revenge porn victims said their sexually explicit photos were posted by an ex-boyfriend or girlfriend, rather than a co-worker or other acquaintance).

porn.[118] These arguments, however, only take into consideration *existing* civil causes of action, but do not consider the option of creating a *new* violation under which victims may state a claim. The following and final section discusses the merits of creating a new civil cause of action specifically for revenge porn offenses.

IV. A NEW APPROACH

A. Creating a Civil Cause of Action against Revenge Porn

Creating a civil cause of action against revenge porn specifically is a practical approach to combat revenge porn and is a means by which to empower a victim against his or her offender. First and foremost, as previously discussed, civil causes of action can provide victims with an opportunity to receive redress without first facing the steep challenge of overcoming a defendant's First Amendment claims, which have previously prevailed in the criminal suit context.[119] In addition, in a civil suit context—namely, in a defamation suit—the United States Supreme Court has recognized that a person has a right to protect his or her reputation from irreparable damage, even in the face of another person's First Amendment claims.[120] In a revenge porn context, the damage is almost wholly reputational,[121] making a civil cause of action the most appropriate, if not the only, way to combat revenge porn without violating an offender's First Amendment rights.

Second, a civil cause of action can provide victims with adequate justice,[122] albeit in a different manner than justice provided by a

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[118] *See* Citron & Franks, *supra* note 8, at 357, 358–59. Both Citron and Franks are highly critical of all current civil causes of action against revenge porn, claiming that civil suits are wholly ineffective in providing both justice for victims and punishment for offenders. *Id.* In addition, the authors do not believe that enacting a new civil cause of action would "do justice" to the severity of the offense at hand, and that only criminalizing the dissemination of revenge porn can address the serious consequences of the act. *Id.* For reasons explained in Part IV, this Note disagrees. *See infra* Part IV.

[119] *See supra* Part II.

[120] *See* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). In *Rosenblatt*, the Court discussed that a private citizen has a compelling interest in protecting his or her reputation from false claims, and that the "First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars." *Id.* at 93 (Stewart, J., concurring).

[121] *See infra* note 124 and accompanying text.

[122] *See, e.g.*, Mike Martindale, *Oakland Woman Wins Revenge Porn Suit Under New Statute*, DET. NEWS (Aug. 26, 2016), http://www.detroitnews.com/story/news/local/oakland-county/2016/08/26/woman-wins-revenge-porn-ruling/89437728/ (providing an example in which a woman was awarded $500,000 in the first revenge porn civil suit won in the state of Michigan); *see also* Beth Dalbey, *Michigan Woman Wins $500,000 Award in Revenge Porn Case,* PATCH (Aug. 26, 2016), http://patch.com/michigan/troy/michigan-woman-wins-500-000-award-revenge-porn-

criminal suit. Advocates for criminalizing revenge porn are largely focused on the punishment aspects of bringing a criminal suit and argue that the most adequate remedy for a revenge porn violation is a high prison sentence—the higher, the better.[123] This perspective, however, shifts the conversation away from the nature of a victim's justice to the nature of an offender's punishment. Instead of focusing on an offender's punishment, society should be focused on providing the kind of justice that empowers victims, and in that framework, civil causes of action can have comparable ramifications to criminal causes of action in a revenge porn context.

As previously stated, when an offender disseminates a revenge porn image, the goal is most usually to cause reputational damage to a victim,[124] so it only seems fitting that instead of focusing on sending an offender to jail, a victim should have the power to cause an equal amount of reputational damage to that offender. Civil lawsuits can cost a defendant a significant amount of time, money, and aggravation.[125] In addition, civil judgments are public record and therefore can be seen by anyone, including an employer or potential creditor,[126] or could be publicly advertised by a victim as well, thereby

case (describing the woman's satisfaction with this outcome).

[123] *See* Citron & Franks, *supra* note 8, at 371–74, 389. Citron and Franks here compare revenge porn penalties in different states, and in relevant part criticize California's penalty for being weak and less of a deterrent because it only punishes the act as a misdemeanor with a maximum sentence of six months in prison, a $1,000 fine, or both for a first offense. *Id.* at 374, 389. Instead, the authors advocate for a penalty closer to that of New Jersey's, in which case the act is punishable as a felony offense with a maximum sentence of three to five years in prison. *Id.* at 371, 374, 389.

[124] *See* Panariello, *supra* note 7 ("Humiliating women is the obvious plan for photo posters."). To exemplify, one victim of revenge porn, and the creator of EndRevengePorn.org, Holly Jacobs, discovered that a fake email address was created using her name and her explicit photographs were sent by the offender from that email address to her boss and colleagues. *Id.* In addition, Ms. Jacobs had to cancel a presentation of her PhD thesis at an American Psychological Association conference after receiving threats to expose the photos at the conference. *Id.* To avoid any further damage to her reputation and career—which was the clear target of the poster—Ms. Jacobs changed her identity in an attempt to eliminate any association with herself and the revenge porn postings (Holly Jacobs is her new name). *Id.*

[125] *See* Paula Hannaford-Agor & Nicole L. Waters, Nat'l Ctr. for State Courts, *Caseload Highlights: Estimating the Cost of Civil Litigation,* 20 COURT STATISTICS PROJECT 1, 5, 7 (2013), http://www.courtstatistics.org/~/media/microsites/files/csp/data%20pdf/csph_online2.ashx.

[126] *See, e.g.*, *Credit Reports and Obtaining Credit Records*, N.Y. UNIFIED CT. SYS., N.Y.C. CIV. CT., https://www.nycourts.gov/courts/nyc/civil/creditreports.shtml (last updated Apr. 1, 2013) ("The Civil Court of the City of New York is a court of record. This means that it maintains records of civil actions and proceedings. Any member of the public, whether he or she is involved in an action or not, has the right to examine or copy a record, if it has not been sealed. . . . Credit Reporting Firms (such as TRW; Equifax and TransUnion) have a staff which visits the court to review the records of the court and to record Judgments, Satisfactions of Judgments, Orders Vacating Judgments, Stipulations of Settlement, Discontinuances and Dismissals of cases. This is information that they deem useful to their clients and is used for the maintenance of a data bank which exchanges information across the country."); *see also*

allowing the victim to bring damage to an offender in a manner similar to the offender's actions of publicizing the victim's explicit photographs. Even if judgment-proof at the time of the judgment,[127] an offender would have to essentially remain impoverished for a significant amount of time in order to evade paying a judgment.[128] Once filed, judgments do not disappear easily—in New York State, they are good for twenty years[129] and can remain on a person's credit report for up to seven years.[130] Further, judgments of this nature may or may not be dischargeable in bankruptcy,[131] which, either way, can be beneficial for victims in a revenge porn context—if the judgment is not dischargeable, then a victim knows that he or she is owed the judgment regardless of bankruptcy and he or she has at least twenty years to collect; if the judgment is dischargeable, then a victim gains the satisfaction of knowing that he or she caused the offender to file for bankruptcy, which could have significantly higher negative consequences on a person's overall financial portfolio than a judgment.[132]

At the time of this Note, revenge porn legislation is currently pending in the New York State legislature.[133] When New York's legislation was first introduced in 2013, it only criminalized the act

WebCivil Local, N.Y. UNIFIED CT. SYS., https://iapps.courts.state.ny.us/webcivilLocal/LCMain (last visited Sept. 14, 2016) (providing an electronic means by which a person may search any case from any local Civil Court in New York State).

[127] *See* Citron & Franks, *supra* note 8, at 358–59 (arguing that civil judgments are worthless if an offender is judgment-proof). This Note contends that the authors make a shortsighted argument when writing-off civil judgments against judgment-proof offenders as "worthless." *See infra* Part IV(A).

[128] *See Collection Basics,* N.Y. UNIFIED CT. SYS., http://nycourts.gov/courthelp/AfterCourt/collectionBasics.shtml (last updated June 2, 2015) (discussing a multitude of ways in which a creditor can collect a judgment from a debtor).

[129] *See Judgments*, N.Y. UNIFIED CT. SYS., http://nycourts.gov/courthelp/GoingToCourt/judgments.shtml (last updated June 2, 2015).

[130] *Id.*

[131] The federal Bankruptcy Code outlines nineteen categories of non-dischargeable debt; among these categories are debts for willful and malicious injuries to person or property. *See* 11 U.S.C. § 523(a) (2012). While a subsequent section of the Code provides a presumption that some of these willful and malicious injury debts are to be discharged, that same section allows creditors to have the opportunity to request the opposite—that these debts in fact be excepted from discharge—and a court has the discretion to either grant or deny these requests. *See id.* § 523(c)(1).

[132] For example, filing for chapter 7 bankruptcy will remain on a person's credit report for at least ten years, and filing for chapter 13 bankruptcy will remain on a credit report for at least seven years; a person's credit score can drop by a significant number of points; and filing for bankruptcy hinders a person's ability to obtain good credit, low-interest credit, or sometimes any credit in the future. *See* Associated Press, *Personal Bankruptcy: What You Should Know*, NBC NEWS, http://www.nbcnews.com/id/27684203/ns/business-personal_finance/t/personal-bankruptcy-what-you-should-know/#.V0tXxCMrJmA (last updated Nov. 12, 2008).

[133] *See* S. B. 2725, 240th Reg. Sess. (N.Y. 2017).

of revenge porn and unsurprisingly, the bill did not move out of committee.[134] The bill was reintroduced in the following term[135] and then amended to meet the changing nature of this issue, perhaps in light of First Amendment challenges from other states. Most notably, in early 2016 the bill was amended to not only recognize a criminal cause of action, but also to recognize a civil cause of action as well.[136] While the civil cause of action legislation does not yet stand on its own, this amendment may indicate that New York legislators recognize that criminalizing revenge porn may not be the best approach to take in combating this issue.

New York's proposed civil cause of action actually shares many of the same elements that its proposed criminal cause of action contains[137]—such as the nonconsensual dissemination of a sexually explicit image, obtained with consent—yet the penalties significantly differ between the two.[138] When criminalizing an act and crafting the

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[134] *See* S. B. 5949, 236th Reg. Sess. (N.Y. 2013).

[135] *See* S. B. 4450, 238th Reg. Sess. (N.Y. 2015).

[136] *Compare id.* (proposing the addition of a new section to the penal code, section 250.70, the "[n]on-consensual disclosure of sexually explicit images"), *with* S. B. 4450-A, 239th Reg. Sess. (N.Y. 2016) (proposing the addition of two new sections to the penal code, section 250.70, the "[n]on-consensual disclosure of sexually explicit images," and section 250.75, the "[c]ivil cause of action for non-consensual disclosure of sexually explicit images"). The bill was further amended in 2016 to its most current version, in which the term "disclosure" was replaced with "dissemination." S. B. 4450-B, 239th Reg. Sess. (N.Y. 2016).

[137] *See* N.Y. S. B. 2725 ("The *penal law* is amended by adding . . . [that a] person is guilty of non-consensual dissemination of sexually explicit images when he or she knowingly and *without consent* of the depicted person disseminates a photograph . . . of such depicted person whose intimate parts are exposed or who is engaged in an act of sexual contact, when a *reasonable person would have known that the person depicted would not have consented to such dissemination*, and under circumstances in which the depicted person has a reasonable expectation of privacy. . . . A *civil cause of action* lies against a person who disseminates, threatens to disseminate an image of another person identifiable from the image itself or information displayed in connection with the image and whose intimate parts are exposed or is engaged in sexual conduct *without that other person's consent*, if the actor . . . obtained the image or images under circumstances in which *a reasonable person would know or understand that the image was to remain private*, including but not limited to images shared within the context of a confidential relationship that were then disseminated beyond such relationship[.]" (emphasis added)).

[138] *See id.* The proposed penalty for the civil cause of action states: "In addition to other relief available at law, including an order by the court to destroy any image obtained or disseminated in violation of this section, and to preserve discoverable information, and preliminary and permanent injunctive relief, the actor shall be liable to the plaintiff for . . . [a]ctual damages, but not less than liquidated damages, to be computed at the rate of one thousand dollars per day for each day the image or images were viewable or each instance a threat to distribute was made or an image fraudulently obtained up to thirty days, or ten thousand dollars, whichever is higher; and . . . [p]unitive damages; and . . . [r]easonable court costs and attorneys' fees." *Id.* The proposed penalty for the criminal cause of action is a class A misdemeanor, which carries a maximum sentence of one year in prison or three years of probation. *See* N.Y. PENAL LAW §§ 65.00(3)(b)(i), 70.15(1) (McKinney 2016); N.Y. S. B. 2725. In addition to the different nature of the damages, it is important to note that only one of the

appropriate punishment, the goal is generally to deter a potential offender from acting in a certain manner;[139] conversely, however, when crafting a civil cause of action with the appropriate penalties, the goal is generally to encourage people or entities to affirmatively act in a certain way.[140] Put another way, whereas criminal causes of action seek to prevent behavior altogether, civil causes of action set a standard for individuals to meet prior to acting because harm may result if that standard is not met; failure to meet that standard can result in liability.

It is under this premise that this Note advocates for an affirmative consent standard to be added to New York's, and any other jurisdiction's, civil cause of action against revenge porn.[141] Rather than deterring behavior altogether by making the act illegal (which circles back to this Note's discussion regarding unconstitutional content-based restrictions), civil revenge porn statutes have the ability to set a standard that potential offenders must first meet if they wish to disseminate the explicit image of another. Namely, the potential offender must first obtain the affirmative consent of the person depicted in the image prior to dissemination, and failure to obtain that person's affirmative consent would trigger a cause of action.[142] Instilling such a policy clearly delineates steps that a

causes of action—namely, the civil cause of action—includes the remedy of "an order by the court to destroy any image obtained or disseminated in violation of this section . . . [,]" which is the remedy that many victims seek from the start. N.Y. S. B. 2725; *see also* Citron & Franks, *supra* note 8, at 358–59 ("The removal of images is the outcome that most victims desire above all else . . . .").

139 *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 38–39 (7th ed. 2016) ("Knowledge that punishment will follow crime deters people from committing crimes, thus reducing future violations . . . general deterrence [is] very much a matter of affording rational self-interested persons good reasons not to commit crimes. With a properly developed penal code, the benefits to be gained from criminal activity would be outweighed by the harms of punishment, even when those harms [can be] discounted by the probability of avoiding detection.").

140 *See* VINCENT R. JOHNSON, MASTERING TORTS 3 (5th ed. 2013) ("[T]ort law seeks to minimize the costs of *future* accidents by deterring persons from engaging in activities that are likely to give rise to harm. Sometimes this is done by placing the risk of loss (and thus the incentive for safety) on the party best situated to avoid the accident. In addressing the past and future costs of accidents, courts need to be mindful of . . . the importance of promoting individual responsibility . . . .").

141 Although New York's proposed legislation contains the element "without [the] other person's consent," this Note argues for moving from a non-consent standard to an affirmative consent standard in order to ensure that a certain, clearly delineated norm is attained prior to a potential disseminator taking action that may result in harm to a potential victim. *See* N.Y. S. B. 2725.

142 *See* Jessica Roy, *Could Affirmative Consent Help Stop Revenge Porn?*, N.Y. MAG.: THE CUT (July 6, 2015), http://nymag.com/thecut/2015/06/could-affirmative-consent-stop-revenge-porn.html# ("With an affirmative-consent standard in place, anyone who created pornographic imagery would be required to obtain the written consent of the performer, and could be . . .

potential offender must take to avoid liability, and more importantly, to avoid harm to the potential victim, and also renders an offender's intent irrelevant, which, as discussed in the following section, is sometimes a high hurdle for victims to overcome.

B. Enacting an Affirmative Consent Standard

New York State is one of the first in the nation to recognize an affirmative consent standard in the context of sexual conduct,[143] which makes affirmative consent in a revenge porn context not exceedingly novel for the state. In July 2015, New York State Governor Andrew Cuomo signed into law his "Enough is Enough" legislation.[144] This new law requires that all higher education institutions in New York, both public and private, adopt policies to combat campus sexual assault.[145] Further, the law creates a statewide definition of "affirmative consent," stating that it is:

> [The] knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.[146]

It appears that New York State did not want to leave to the discretion of individual campuses the definition of "affirmative consent," and in doing so has set precedent for providing a statutory definition of affirmative consent for all of New York to follow. While the definition above is confined to "sexual activity,"[147] a similar definition could be used to delineate affirmative consent in other situations involving sexual conduct, including the dissemination of revenge porn.

Making the standard for disseminating revenge porn "affirmative consent" renders irrelevant an offender's mental state, which many times is difficult to prove as adverse to the victim and can be a barrier

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[liable] if they don't.").

[143] *See* Governor Cuomo Press Release, *supra* note 78.

[144] *See* S. B. 5965, 238th Reg. Sess. (N.Y. 2015) (enacted); Governor Cuomo Press Release, *supra* note 78.

[145] *See* N.Y. EDUC. LAW § 6440 (McKinney 2016).

[146] *Id.* § 6441(1) (McKinney 2016).

[147] *Id.*

to a victim's recourse altogether.[148] This is especially true in a situation in which a statute requires a plaintiff to prove that in posting the image, an offender had an "intent to harm," yet the offender argues that his or her intent was in fact not to harass or harm, but was purely for entertainment purposes.[149] Statutes with "intent" elements are criticized for being weak and taking the teeth out of the cause of action for the very reason previously stated.[150] Yet with statutes that omit intent altogether, offenders may still raise similar defenses or others, such as ignorance.[151] However, utilizing an affirmative consent approach would eliminate this gray area by providing that the victim's consent—and *only* the victim's consent—would suffice as permission to disseminate an explicit image, regardless of what the offender "thought."

From a legal standpoint, laws that require an intent element to be proven place the burden squarely on the plaintiff, which in a revenge porn context will always be the victim.[152] "Affirmative consent definitions seek to switch the burden away from the [victim] and place it on the [offender] to receive actual consent before"[153] disseminating the explicit image of another. Utilizing this standard in a civil cause of action against revenge porn would create one less hoop for a victim to jump through before attaining relief and can also cut down on the length of the trial.[154] The more efficient the trial, the quicker the victim can receive a judgment to remove the images from the Internet—which should be the paramount relief requested—and potentially receive monetary damages as well.

Because New York State has set the precedent of creating a universal definition of "affirmative consent" in at least one sexual conduct capacity,[155] the state could do the same in another capacity,

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[148] *See* Franks, *supra* note 90, at 5–6 (describing several situations in which victims did not prevail on their claims because perpetrators were able to viably explain that their motivation for sharing sexually explicit photographs was not to harm a victim, but rather, was for entertainment purposes).

[149] *See, e.g.*, *id.*

[150] *See id.* at 5–7 ("[I]ntent to cause harm or distress language potentially *weakens* . . . nonconsensual pornography laws.").

[151] *See id.* at 6.

[152] *See* Roy, *supra* note 142.

[153] Chandler Delamater, Note, *What 'Yes Means Yes' Means for New York Schools: The Positive Effects of New York's Efforts to Combat Campus Sexual Assault through Affirmative Consent*, 79 ALB. L. REV. 591, 604 (2016).

[154] *See* Roy, *supra* note 142 ("Shifting the burden of consent from the subjects of naked photos to the uploaders of them would make legal battles waged by victims much easier to win.").

[155] *See* N.Y. EDUC. LAW § 6441(1) (McKinney 2016); Governor Cuomo Press Release, *supra* note 78.

namely, for revenge porn. Applying New York's affirmative consent definition to a stand-alone civil cause of action against revenge porn would make the state the first in the nation to do so, and is a means by which victims could swiftly attain justice without facing First Amendment or *mens rea* challenges which as previously discussed, are difficult to overcome, if at all.

V. CONCLUSION

Before concluding, it is worth mentioning that the easiest way for a person to avoid becoming a victim of revenge porn is to simply not create the explicit images. However, social interactions have significantly changed with technological advances and the world is adjusting to the new ways in which we communicate; making a poor judgment call should not leave a person perpetually humiliated with no means of recourse. At the same time, however, that recourse should not come at the expense of another's First Amendment right to free speech.

Criminalizing the dissemination of revenge porn is an unconstitutional content-based restriction on free speech that when successfully challenged by an offender, leaves victims without recourse. Rather, states should focus on creating a new civil cause of action specifically against revenge porn because as discussed, current civil causes of action are inapplicable to the unique circumstances of revenge porn. Further, in crafting these new civil causes of action, states should utilize an affirmative consent standard whereby *only* a victim's consent to disseminate the image would suffice in permitting an offender to disseminate the image; failure to obtain consent would trigger a claim.

New York State is on the right track to achieving a well-crafted and effective civil cause of action against revenge porn, and in addition, has already set precedent for creating a statewide definition of "affirmative consent" in a sexual conduct context. In the future, New York should strive to craft a stand-alone civil cause of action against revenge porn utilizing an affirmative consent standard—doing so would make it the first state to take this practical approach and would empower victims to gain the justice they deserve.