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The State of the States: The Continuing Struggle to Criminalize Revenge Porn

Justin Pitcher

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The State of the States: The Continuing Struggle to Criminalize Revenge Porn

I. INTRODUCTION

Desire Luzinda is Uganda's Jennifer Lawrence or Kate Upton. She is neither an actor nor a model. Luzinda does not come close to the number of Facebook or Twitter followers of Lawrence or Upton.¹ Furthermore, she most likely does not compare in net worth to her two prominent American counterparts.² Though Luzinda is a popular figure in Uganda, her similarities with Lawrence and Upton do not come from her fame and fortune. Rather, the Ugandan singer is the latest victim in the technological plague "revenge porn" that is becoming a newly popular method of attaining revenge against one's ex-wife, husband, or lover.

Luzinda's recent debacle has caused many problems for her family and career. Her ex-boyfriend circulated nude pictures of Luzinda allegedly to "teach her a lesson."³ In addressing the issue, she stated:

I want to sincerely apologi[z]e to my mother, to my daughter, to my family, to my friends, to my fans and any other people who have

1. For example, Jennifer Lawrence has nearly 11 million Facebook "likes" to Luzinda's 83,031 on her page. Jennifer Lawrence, FACEBOOK, <https://www.facebook.com/JenniferLawrence> (last visited Nov. 13, 2014); Desire Luzinda, FACEBOOK, <https://www.facebook.com/DesireLuzindaMusic> (last visited Nov. 13, 2014); *see also* Kate Upton, FACEBOOK, <https://www.facebook.com/kateuptonweb> (last visited Nov. 13, 2014) (showing that Kate Upton has over 2 million "likes"). Further, Luzinda only has approximately 3,000 Twitter followers while Lawrence has over 18 million followers. *See* Desire Luzinda (@DLuzinda), TWITTER, <https://twitter.com/DLuzinda> (last visited Nov. 13, 2014); Jennifer Lawrence (@itsjlaw), TWITTER, <https://twitter.com/itsjlaw> (last visited Nov. 13, 2014); *see also* Kate Upton (@kateupton), TWITTER, <https://twitter.com/kateupton> (last visited Nov. 13, 2014) (showing that Kate Upton has over 2 million followers).

2. Jennifer Lawrence earned \$34 million as of June 2014, and Kate Upton earned \$7 million as of June 2014. *Celebrity 100: #12*, FORBES, <http://www.forbes.com/profile/jennifer-lawrence/> (last visited Nov. 13, 2014); *Celebrity 100: #94*, FORBES, <http://www.forbes.com/profile/kate-upton/> (last visited Nov. 13, 2014). No definitive information could be found on Luzinda's net worth, which most likely confirms the conclusion set forth.

3. Ella Alexander, *Ugandan Pop Star Desire Luzinda could be Arrested over 'Revenge Porn' Nude Pictures*, INDEPENDENT (U.K.) (Nov. 12, 2014, 6:33 PM), <http://www.independent.co.uk/news/people/ugandan-pop-star-desire-luzinda-could-be-arrested-over-revenge-porn-nude-pictures-9855957.html>.

been offended by these images . . . this was a breach of trust by someone I loved. I take full responsibility for having lost my mind to take such shameful pics [sic]. This person has not only abused that trust but now seeks to drag me down These images in no way should define who I am.⁴

Those who have been victims of revenge porn can sympathize with Luzinda's feelings and emotions. Surely, these situations are devastating, as a breach of privacy has completely upset the balance of a successful family life and career. Questions loom as to where these victims can turn for redress. For Luzinda, rather than turning to legal authorities for assistance, she will actually have to answer to them. The Ugandan Ethics Minister called for her arrest to enforce a "new anti-pornography law that punishes 'indecent' behavior" after the pictures surfaced.⁵

Seeking to avoid outcomes like Luzinda's, legal scholars are debating which areas of law will be best suited to remedy these crimes.⁶ The debates emphasize the strengths of existing areas of law that can potentially provide the legal remedy against revenge porn exploitations. However, holes and uncertainty present the need for new laws and legislative awareness addressing the issue. States have now taken action and have begun to address revenge porn and its expansion with the rise of the Internet.⁷ For the purposes of this Comment, "revenge porn" is the malicious online distribution of sexually explicit pictures or videos of a victim, without consent, that occurs after the relationship terminates, where the pictures were taken by either "selfie" or by an intimate partner with the intent to retain privacy.

This Comment will discuss the legality of revenge porn and argue that, under the current status quo, California's revenge porn statute is an effective model for other states and should stand as a basis for future state legislation. Part II briefly addresses the history

4. *Id.*

5. Gail Sullivan, *Ugandan Official Wants to Arrest Victim of Revenge Porn: 'She Should Be Locked up and Isolated'*, WASH. POST (Nov. 12, 2014, 8:48 PM), <http://www.washingtonpost.com/news/morning-mix/wp/2014/11/12/ugandan-official-wants-to-arrest-victim-of-revenge-porn-she-should-be-locked-up-and-isolated/>.

6. A few of the prominent theories will be discussed hereafter in this Comment.

7. Thirteen states have enacted legislation to combat revenge porn since 2013. *State 'Revenge Porn' Legislation*, NAT'L CONF. ST. LEGIS., <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx> [hereinafter *State 'Revenge Porn' Legislation*].

of revenge porn and the current state of affairs. Part III discusses the forms of legal redress that have been presented as solutions to eradicate the problem, along with some key strengths and weaknesses of each. It also analyzes the states' actions addressing the matter and the superiority of California's statute in comparison with others. Part IV addresses the fact that states will continue to struggle passing complete revenge porn laws without first addressing the initial distribution and consent of the images. It also focuses on possible federal remedies. Part V concludes.

II. THE ONGOING REVENGE PORN PROBLEM

Revenge porn, or at least the concepts of breach of trust and privacy underlying revenge porn, has existed since early history (c. 484-c.425 B.C.).⁸ The great historian Herodotus describes the account of King Candaules, early king over Lydia, and his betrayal of his wife's trust in their relationship.⁹ In the account, the King approaches the guard Gyges with a furtive plan to have Gyges "behold [the King's wife] naked."¹⁰ The reluctant guard pleads with the King not to have to pursue the perfidious plan: "I hold thy wife for the fairest of all womankind. Only, I beseech thee, ask me not to do wickedly."¹¹ Despite this rejection, the King persists and the "trembling" guard participates. The account ends with unfortunate consequences; Gyges secretly attempts to view the Queen disrobed, they are discovered in their plot by the Queen, and it ends with the untimely, but perhaps not unexpected, death of the King at the hands of Gyges the guard.¹²

8. THE HISTORY OF HERODOTUS: THE FIRST BOOK, ENTITLED CLIO, *reprinted in* 6 GREAT BOOKS OF THE WESTERN WORLD: HERODOTUS, THUCYDIDES (Robert Maynard Hutchins ed., George Rawlinson trans., 1952).

9. *Id.* at 2.

10. *Id.*

11. *Id.* at 3.

12. *Id.* It is worth noting that the King's intent was not malicious in the sense that he wanted to take revenge for a breakup or perceived personal injustice. Though not identical to the issue of revenge porn, the story still has application. The account begins "Now it happened that this Candaules was in love with his own wife; and not only so, but thought her the fairest woman in the whole world." *Id.* at 2. Candaules approaches Gyges with this plan so that the guard may see her beauty for himself: "I see thou dost not credit what I tell thee of my lady's loveliness; but come now, since men's ears are less credulous than their eyes, contrive some means whereby thou mayst behold her naked." *Id.* The concocted plan entails Gyges hiding behind a door in the royal bedroom, the Queen disrobing and laying her clothes upon a chair, whereby the guard can "peruse her person." *Id.* at 3. After viewing the Queen, he attempts to

Modern society offers greater opportunity to breach the privacy of others than that accessible by King Candaules. Technology enables individuals to engage in various abuses of invasion of privacy not presently seen in history. Legislators and legal scholars struggle to confront challenges dealing with a wide variety of abuses ranging from “hacking” to “extortion” and “creepshots.”¹³ This Paper will focus on revenge porn and, although definitions and similarities vary between authors, it will differentiate revenge porn from the previously mentioned categories.¹⁴ The following definition provides an adequate framework for analysis of state laws passed to address the topic. As mentioned previously, “revenge porn” is the malicious online distribution of sexually explicit pictures or videos of a victim, without consent, that occurs after the relationship terminates, where the pictures were taken by either “selfie” or by an intimate partner with the intent to retain privacy. Though this definition could explicitly require an intent of vengeance, it should not be required in order for more complete legal protection—an idea that will be discussed in the analysis of the states. Malicious intent, beyond vengeance alone, should adequately encompass a majority of forms of revenge porn.

The risks of revenge porn are high and growing. A few statistics confirm the increasing rate. According to a study done by McAfee, approximately fifty percent of people have used their mobile devices

flee but she sees him. The following day she presents the guard with two options: either he can die for what occurred, or he can kill the King and marry her. “It must needs be that either he perish by whose counsel this thing was done, or thou, who sawest me naked, and so didst break our usages.” *Id.* Gyges chooses the former, and the two carry out the plot to “attack” the King “on the spot where [she] was by him shown naked to [Gyges],” and Candaules is ultimately killed in his sleep. *Id.*

13. See, e.g., Amanda Marcotte, *‘The Fappening’ and Revenge Porn Culture: Jennifer Lawrence and the Creepshot Epidemic*, THE DAILY BEAST (Sept. 3, 2014, 3:45 AM), <http://www.thedailybeast.com/articles/2014/09/03/the-fappening-and-revenge-porn-culture-jennifer-lawrence-and-the-creepshot-epidemic.html>.

14. See Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 44 (2012) (explaining that “[r]evenge porn is pornography in which at least one of the subjects was unaware that sexual acts were being fixed in a tangible medium of expression or was unaware of or opposed to the work’s distribution, usually over the Internet”); Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CALIF. L. REV. 1303, 1306 (2014) (explaining that “[r]evenge porn is the term for the distribution of images of nude or semi-nude individuals—usually women—without the consent of the person(s) present in the photo”).

to share or receive intimate text messages, emails, or photos.¹⁵ Fifty percent have saved or archived “sexts” or other intimate messages.¹⁶ The survey also states that thirty-seven percent of people have asked their ex to delete or remove the intimate messages that were distributed.¹⁷ Similarly, thirty percent of people admit to cyber stalking or following their significant other’s ex on social media applications.¹⁸ McAfee’s 2013 survey shows that one in ten exes threaten to send intimate or “risqué” photos of their ex-partner online, and of that percentage, sixty percent carry out the threat.¹⁹ Notably, only thirteen percent of adults have had their personal information leaked without consent,²⁰ showing that there is a greater risk of exposure and exploitation if the photographs are voluntarily distributed initially. Despite these statistics and inherent risks, intriguingly, thirty-six percent of Americans still plan to send sexy or romantic photos to partners through email or text on Valentine’s Day.²¹ McAfee offers this interesting conclusion:

Despite public awareness of data leaks and high profile celebrity photo scandals, Americans continue to take risks by sharing personal information and intimate photos with their partners and friends. The research shows that 94% of Americans believe their data and revealing photos are safe in the hands of their partners.²²

The victim of revenge porn suffers substantial harm because of the perpetrator’s actions. The perpetrator typically distributes online a lewd or embarrassing picture of the victim for multiple viewers to see. He or she will also add the name, address, and contact information to the picture in some circumstances, intending to cause further harassment.²³ The images can be sent to parents, employers, classmates, or other individuals with whom the victim has a personal

15. *Love, Relationships & Technology: Don’t Get Stung by Bad Buzz*, MCAFEE, <http://promos.mcafee.com/offer.aspx?id=605436&culture=en-us&affid=0&cid=140624> (last visited Nov. 17, 2014).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, MCAFEE, <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx> (last visited Nov. 17, 2014).

20. *Id.*

21. *Id.*

22. *Id.*

23. Franklin, *supra* note 14, at 1309.

relationship.²⁴ As a result, victims have “lost jobs, been forced to change schools, change their names, and have been subjected to real-life stalking and harassment Some victims have committed suicide.”²⁵ And, as shown in the Luzinda case, victims might also have to answer to authorities for the perpetrator’s actions.

III. THE RISE AND FALL OF LEGAL REMEDIES

As the problem of revenge porn spreads, legal theorists have researched and opined on the potential legal remedies that may be used to combat it. Each legal remedy has strengths that can reduce the amount of exploitation by abuse, but as will be shown, all also have weaknesses and holes that have essentially forced the hand of state legislators to take action. Not all of the remedial possibilities are discussed in this Comment, but it will briefly discuss the primary contenders. The four primary legal avenues utilized to combat revenge porn are privacy rights, contract law, copyright law, and the tort of intentional infliction of emotional distress. Aspects of child pornography laws, while carrying weight as a potential remedy, will be discussed to exemplify the challenges that legislatures face in crafting a balanced “revenge porn” law.

In determining which avenue to pursue for relief, a number of threshold questions should be answered. Which type of law should legal authorities turn to in order to right the wrongs accompanying revenge porn actions? Is the civil system sufficient to meet the needs of the victim, or does the criminal justice system need to step in to ensure adequate remedy, proper punishment, and sufficient incentive to effectively deter the behavior in hopes of total eradication? The legal remedies first discussed in this section deal primarily with civil litigation, but the states, as will be discussed later, are beginning to criminalize the behavior to further fight revenge porn.²⁶

A. Civil Remedies

This Section discusses the civil remedies that have surfaced as possible solutions to the revenge porn problem. Specifically, it will

24. Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013), <http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html>.

25. *Id.*

26. *See infra* Section III.B.

address privacy torts, contract law, copyright law, and the tort of intentional infliction of emotional distress. While each legal area presents certain strengths in the revenge porn fight, they ultimately have proven inadequate to resolve the whole problem. The criticisms pertaining to civil law solutions in this realm are addressed at the conclusion of this Section.

1. Privacy torts

Privacy torts are prevalent bases for claims under which the victims of revenge porn seek redress. The strengths and weaknesses of this theorized remedy are discussed in this subsection. Ultimately, however, these torts prove to be insufficient.

The legal protections accompanying privacy torts are intended to protect the precious rights of privacy held by the victims. *The Restatement (Second) of Torts* defines “four distinct” kinds of invasion that can occur:

- (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or
- (b) appropriation of the other’s name or likeness, as stated in § 652C; or
- (c) unreasonable publicity given to the other’s life, as stated in § 652D; or
- (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.²⁷

These doctrines stem from the famous legal article titled *The Right to Privacy* by Samuel D. Warren and Louis D. Brandeis.²⁸ The evolution of the law, they argue, had led to the “intangible” right of privacy:

Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the “right to life” served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man’s spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the

27. RESTATEMENT (SECOND) OF TORTS § 652A (1977); *see also* RESTATEMENT (SECOND) OF TORTS § 652B-E (1977).

28. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *see* Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1296 (2010) (“Their short article is considered by scholars to have established not just the privacy torts but the field of privacy law itself.”).

right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term “property” has grown to comprise every form of possession—intangible, as well as tangible.²⁹

The article had a tremendous impact on the legal field,³⁰ and in 1941, William Prosser divided the right of privacy into four torts that became the base for those listed in the aforementioned *Restatement*.³¹ These invasions initially appear to be promising remedies for victims of revenge porn—these acts seem to unreasonably intrude on the seclusion of victims, the perpetrators seemingly appropriate the likeness of victims, the acts draw significant unreasonable and unwanted publicity, and they most often place the victims in a false light.

Despite the positive possibilities, the privacy torts have faced considerable criticism. Recent scholarship criticizes the modern law of invasion of privacy in at least two ways: impotence and constitutional conflict with other rights.³² Impotence, according to Diane Zimmerman, “contends . . . that despite the ever-increasing number of claims under the Warren-Brandeis theory, plaintiffs rarely win.”³³ With a lack of plaintiff-favored judgments, it becomes questionable as to whether litigation under invasion of privacy laws is worth further embarrassment and public disclosure of private facts. The second criticism of constitutional conflict relates to the protections under the laws of privacy being in conflict with the constitutional rights of free speech and press, and the cause of action under privacy “cannot coexist” with these other constitutional rights.³⁴

29. Warren & Brandeis, *supra* note 28, at 193.

30. See Richards, *supra* note 28, at 1296.

31. Scott Jon Shagin, *The Prosser Privacy Torts in a Digital Age*, N.J. L. REV. 9, 9 (2008); see also William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (“Without any attempt to exact definition, these four torts may be described as follows: 1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs, 2. Public disclosure of embarrassing private facts about the plaintiff, 3. Publicity which places the plaintiff in a false light in the public eye, 4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”).

32. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 293 (1983).

33. *Id.*

34. *Id.*; see also Fla. Star v. B.J.F., 491 U.S. 524, 524, 526 (1989) (holding that imposing damages on a newspaper for publishing the name of a victim of a sexual offense violates the First Amendment).

Another criticism of protections under privacy is almost an assumption-of-risk problem. Privacy rights must be weighed in the balance against “expectation of privacy rights.”³⁵ In other words, for there to be a cause of action claiming a violation of privacy rights, the claimant must reasonably expect to have privacy. This creates doubt as to whether individuals who voluntarily distribute photographs of themselves can be said to “reasonably expect” privacy protection.

Though there are courts that will assert no such assumption, others may rule that such an assumption exists. For example, in Florida, a state appellate court ruled that a teenage girl who engaged in “sexting” with her minor boyfriend did not qualify for protection by implicating her right of privacy.³⁶ The court stated that “before the right to privacy attaches and the standard is applied, a reasonable expectation of privacy must exist” and this is determined by “objective manifestations of that expectation.”³⁷ The court held no reasonable expectation in the case for the following reasons: first, “the decision to take photographs and to keep a record that may be shown to people in the future weighs against a reasonable expectation of privacy”;³⁸ second, “the photographs which were taken were shared by the two minors who were involved in the sexual activities . . . [they] ha[d] no reasonable expectation that their relationship w[ould] continue and that the photographs w[ould] not be shared with others intentionally or unintentionally”;³⁹ and lastly, because “[a] reasonably prudent person would believe that if you put this type of material in a teenager’s hands that, at some point either for profit or bragging rights, the material w[ould] be disseminated to other members of the public.”⁴⁰ Such an opinion exemplifies the risk and weakness in asserting a possible claim under the right of privacy when initial distribution is voluntary; a court may perceive such activity as waiving the right to privacy.

35. See *A.H. v. State*, 949 So. 2d 234, 237 (Fla. Dist. Ct. App. 2007).

36. *Id.* at 235.

37. *Id.* at 237.

38. *Id.* (referencing *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005) (“[H]olding active duty military members who allowed photographs to be taken of prisoner abuse did not have reasonable expectation of privacy.”)).

39. *Id.*

40. *Id.*

There may, however, be some reasons to use privacy laws to protect against revenge porn. The fact that privacy is protected shows an interest in its favor, thus manifesting steps in the right direction to combat various invasions. Also, the laws themselves may serve as deterrents to exploitive behavior in some circumstances, thus potentially reducing the number of cases involving invasion. However, the laws and their application to revenge porn are not bulletproof. Scholars and legislators alike have recognized this by continually searching for something more robust. Furthermore, the privacy laws were enacted at a time when communication was not facilitated with the Internet and cell phones.⁴¹ This stark change has vastly facilitated invasions of privacy and thus may diminish the ability of a privacy-tort remedy. Thus, it seems evident that lawmakers need to look elsewhere to properly combat revenge porn.

2. *Contract law*

Contract law, interestingly, may be the safest legal route to combat revenge porn out of the majority of existing laws. Granted, express contracts with the typical offer, acceptance, and consideration may not be the most advantageous (it would seem unlikely that anyone would expect two amorous lovers to enter into verbal or written agreements pertaining to their intimacy). The theory of an implied contract between the couples, however, may have striking implications. The strengths and weaknesses of contract law as applied to revenge porn are discussed in this subsection.

Andrew J. McClurg offers a proposal regarding the implied contract that can exist in intimate relationships: “an implied contract of confidentiality arises in intimate relationships that the parties will not disseminate through an instrument of mass communication private, embarrassing information (including photos or videotapes) about the other acquired during the relationship.”⁴² There are no differences in legal enforcement between express contracts and implied contracts; the only difference in litigation is that assent to an implied contract is manifest by conduct rather than explicit language.⁴³ Because intimate relationships could be classified as

41. See Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 889 (2006).

42. *Id.* at 888.

43. *Id.* at 912 (referencing RESTATEMENT (SECOND) OF CONTRACTS §§ 4, 19(1)(1981)).

encompassing an implied contract of confidentiality, assent to that contract would be determined by conduct, which seems more appropriate to the revenge porn situation and circumstances.

This proposal is based on the theory surrounding confidential relationships and their protections in many societal aspects. Eugene Volokh addressed this theory, asserting that implied contracts arise in many confidential relationships and are afforded protection:

In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality. This explains much of why it’s proper for the government to impose confidentiality requirements on lawyers, doctors, psychotherapists, and others: When these professionals say “I’ll be your advisor,” they are implicitly promising that they’ll be confidential advisors, at least so long as they do not explicitly disclaim any such implicit promise.⁴⁴

Under this theory, intimate romantic relationships between private individuals should also merit protection. Confidentiality is intended to protect private information, and in almost no other relationship is more private information shared than in intimate romantic relationships.

Thus, the proposition of implied contracts “extends with force to intimate romantic relationships, where the parties exchange unparalleled amounts of private information with the cultural and customary understanding that it will be held in confidence.”⁴⁵ For the relationship to qualify as a contract, the general contractual elements must be met. In cases of romantic relationships, the typical “meeting of [the] minds” is inferred through a tacit understanding and the conduct between the two individuals.⁴⁶ Consideration is in the “mutuality of the confidentiality agreement as well as in the broader emotional, physical, and other benefits each partner to an intimate relationship confers upon the other.”⁴⁷

44. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1058 (2000).

45. McClurg, *supra* note 41, at 912–13.

46. *Id.* at 917.

47. *Id.*

Relationships of confidence generally include certain similar elements aside from the aforementioned contractual elements: (1) confidentiality is expected as a “matter of custom and general understanding”; (2) individuals in the relationships divulge private information often to their detriment; and (3) trust in the confidentiality of the relationship in order for the relationship to function.⁴⁸ The latter two seem implicit when discussing intimate romantic relationships; obviously deep, private information is shared in such relationships—in the context of revenge porn, private nude pictures—and trust in that relationship is vital for the romantic relationships to continue. There can be possible questions, however, regarding the expectation of confidentiality regarding all matters in the relationship. This appears to go back to the expectation of privacy problems discussed earlier, but scholars will point to Supreme Court rulings regarding privacy in relationships to show an expectation of privacy in these relationships.⁴⁹

Though the implied contract theory deserves consideration in combating revenge porn, the theory has significant weaknesses, which perhaps signify the need for state legislatures to pursue other legal courses. First, although there is evidently an expectation of privacy in the relationship, one might argue that such an expectation disappears when private information is shared through publicly accessible instruments (cell phones, email, or other social media). No matter how secure or private a device may seem, there is always a risk of potential disclosure to the public by using them. Second, defining the expectation of confidentiality in an implied contract is difficult; some might expect confidentiality pertaining to specific issues while others would pay the same issues no attention. In other words, “[w]ithout express agreement, how does one know what the other person subjectively expects will be kept in confidence?”⁵⁰ Third, according to McClurg, the implied contract theory only extends to communications that take place on a larger scale; it does not incorporate person-to-person disclosures by a partner, thus there is a level of assumption-of-risk by the victims involved.⁵¹ Lastly, damages

48. *Id.* at 913.

49. *Id.* at 914–15 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1971); *Lawrence v. Texas*, 539 U.S. 558 (2003)).

50. *Id.* at 915.

51. *Id.* at 924–25.

in breaches of contract cases are limited because they do not include emotional distress damages like tort law.⁵²

Outside of future state legislation, the contract theory may be the safest legal route among the discussed avenues of legal redress in this Comment. There are weaknesses under an implied contract. However, under an express contract of some sort, there can be no question or doubt pertaining to the agreement of use of the pictures. Essentially, the two individuals in the relationship would be aware of what was expected; they would be under legal obligation to uphold the terms, and in the case of a breach, the perpetrator would be held liable for damages. Though this appears to be a promising legal solution, as mentioned however, it is not reasonably expected that an amorous couple would enter into such an agreement. Thus, the law must look elsewhere for an adequate solution.

3. Copyright law

The next proffered legal solution points to copyright law. Although this theory has its strengths, it too seems to fail to completely eradicate effects of revenge porn. This subsection discusses the strengths of copyright law as well as its inability to solve the revenge porn problem. Under copyright law, the pictures taken and ultimately distributed in revenge porn cases are copyrighted and therefore the copyright owner has the sole rights of distribution. Scholars advocate copyright law because it does not “threaten” rights under the First Amendment⁵³ and it does not require modification of section 230 of the Communications Decency Act, which essentially shields Internet service providers from being liable for user-postings of copyrighted materials.⁵⁴

Amanda Levendowski argues copyright is effective because the vast majority of pictures involved in revenge porn cases are “selfies.”⁵⁵ “Selfies” make up approximately eighty percent of the pictures in revenge porn cases.⁵⁶ If the pictures involved are self-

52. *Id.* at 934–35.

53. Amanda M. Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTEL. PROP. & ENT. L. 422, 437 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2374119.

54. *Id.* at 425, 439.

55. *Id.* at 440.

56. *Press Releases*, CYBER CIV. RTS. INITIATIVE, http://www.cybercivilrights.org/press_releases (last visited Dec. 18, 2014) [hereinafter *Press Releases*].

taken, then the vast majority of revenge porn cases involve pictures with copyright distribution rights owned by the victims under the Copyright Act.⁵⁷ Thus, the perpetrators of revenge porn could be found liable for infringement, leading to possible injunctions, damages, or statutory damages; some courts will also award attorney costs or find criminal offenses where the infringement is willful and particularly egregious.⁵⁸

Copyright law has significant weaknesses and disadvantages. Some scholars argue that copyright protections empower and incentivize revenge porn, as it does the pornography industry in general.⁵⁹ Copyright law is intended to protect the copyright rights of the owners. As mentioned earlier, eighty percent of revenge porn pictures are taken as self-shots. Seemingly, those would be protected under current law. However, that leaves twenty percent of the pictures that were taken by the significant other, the perpetrator, or some other individual who owns the rights to distribution. If copyright is to be enforced in these cases, and is to remain legitimate, it inevitably must also protect the rights of the perpetrator-distributors who potentially own the rights to the pictures. Such would give perpetrators protection coming from the same law intended to deter the very act they are committing. Thus, a modification of the law would be needed to exclude such harmful conduct.

Furthermore, it leaves twenty percent of victims still exposed and without remedy. As Mary Anne Franks mentions in discussing use of copyright law:

This strategy has proven successful in a few cases. However, this option will not be of use to the many victims who do not take the images or videos themselves. Some lawyers and scholars have suggested that an expansive conception of “joint authorship” might cover these victims, but it is not clear how much traction this theory will have in actual cases.⁶⁰

Another concern, though not potentially substantial, deals with the copyrightability of obscenity. Neither Congress nor the Supreme

57. See 17 U.S.C. §§ 101–02, 201 (2012).

58. *Id.* at §§ 501–06.

59. Bartow, *supra* note 14, at 2–3.

60. Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537 (last visited Nov. 18, 2014).

Court has addressed the relationship between copyright law and obscenity,⁶¹ but there has been substantial scholarly debate surrounding the issue. Furthermore, there have been some courts that have addressed whether obscene materials can gain protection under copyright law.

The modern-day flagship case involving the copyrightability of obscenity is *Mitchell Brothers Film Group v. Cinema Adult Theatre* out of the Fifth Circuit.⁶² The case involved a suit of copyright infringement dealing with a motion picture.⁶³ The defendants asserted an affirmative defense claiming that the motion picture was “obscene” and “therefore, under the equitable rubric of ‘unclean hands’ plaintiffs were barred from relief.”⁶⁴ The district court held for the defendants finding the film to be obscene and holding the affirmative defense to be valid.⁶⁵

The Fifth Circuit reversed the district court finding no reason “to read an implied exception for obscenity into the copyright statutes.”⁶⁶ In essence, because Congress was silent on the issue, the court felt it inappropriate that it become the “final judge[] of the worth of pictorial illustrations”⁶⁷ and that it should not get involved in copyright judgment based on content. Moreover, the court discussed the complications that would follow if the *Miller* Obscenity Test was applied to copyright situations:

Since what is obscene in one local community may be non-obscene protected speech in another . . . and the copyright statute does not in other respects vary in its applicability from locality to locality, Congress in enacting an obscenity exception would create the dilemma of choosing between using community standards that would (arguably unconstitutionally) fragment the uniform national standards of the copyright system and venturing into the uncharted waters of a national obscenity standard.⁶⁸

61. Levendowski, *supra* note 53, at 440.

62. 604 F.2d 852 (5th Cir. 1979).

63. *Id.* at 854.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 855 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

68. *Id.* at 858 (footnotes omitted) (referencing *Miller v. California*, 413 U.S. 15, 93 (1973)).

The Fifth Circuit largely put to rest the debate about obscenity and copyright protection. Since the decision, a few courts have adopted similar standards based on Fifth Circuit reasoning.⁶⁹ What is more indicative that the debate is approaching its end, according to James R. Alexander, is

that rulings regarding infringement of allegedly, or even admittedly, obscene works have been infrequent, mostly because defendants have not raised the obscenity defense at all. Whether defendants have failed to argue obscenity defenses because they considered these fruitless after the Fifth Circuit's *Mitchell Brothers* opinion and its subsequent acceptance by copyright treatises is an open question. . . . The obscenity defense, largely dormant and perhaps considered arcane throughout much of the twentieth century, was raised in *Mitchell Brothers* in the district court, dismissed by the Fifth Circuit, and has since returned to dormancy.⁷⁰

Contrary to Alexander's conclusion, however, the debate continues to exist,⁷¹ at least in some respects, and the obscenity defense is still sometimes reaching the court levels.⁷²

The weaknesses revolving around protections of perpetrators and conflict regarding the copyrightability of obscenity, which in some locations would include revenge porn, give cause for concern in utilizing copyright law as the remedy in the fight against revenge porn. Though copyright law may protect the victims' rights in a majority of cases, it may also protect the rights of perpetrators who take the pictures or videos and intend to distribute them.

69. See *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002).

70. James R. Alexander, *Evil Angel Eulogy: Reflections on the Passing of the Obscenity Defense in Copyright*, 20 J. INTELL. PROP. L. 209, 311 (2013) (footnote omitted).

71. See generally Kurt L. Schmalz, *Problems in Giving Obscenity Copyright Protection: Did Jartech and Mitchell Brothers Go Too Far?*, 36 VAND. L. REV. 403 (1983); see generally Ann Bartow, *Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography*, 39 U. BALT. L.F. 75 (2008).

72. See *Wong v. Hard Drive Prods., Inc.*, No. 12-CV-469-YGR, 2012 WL 1252710, at *2 (N.D. Cal. Apr. 13, 2012) (“[Plaintiff] further alleges that [defendant’s] work is not copyrightable under Article I, Section 8, Clause 8 of the United States Constitution because it is pornography, which is not a work that promotes the progress of science and the useful arts.”).

4. *Intentional infliction of emotional distress*

The tort of intentional infliction of emotional distress is another legal option against revenge porn. This subsection briefly discusses why this tort is ineffective against revenge porn. The tort is defined as follows: “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”⁷³ It seems this tort would be useful in revenge porn cases—the betrayal and disclosure are arguably extreme and outrageous, and the conduct is intended to cause emotional distress.

However, difficulty arises in proving the extremity of the act, the severity of the distress, and the causal connection between the distress and the harmful behavior—in this case the distribution of harmful pictures.⁷⁴ With these difficulties, uncertainty begins to surface about the usefulness of the tort in revenge porn cases. Samantha Kopf says: “Intentional infliction of emotional distress only allows recovery for severe emotional injury and resulting bodily harm [if applicable], a difficult hurdle for most people, including revenge porn victims, to overcome.”⁷⁵

An additional problem deals with consent of the victim.⁷⁶ Some courts have ruled that consent to the involved actions that caused the distress essentially nullifies any claim under intentional infliction of emotional distress.⁷⁷ With this reasoning, victims of revenge porn who have consented to the private acts in the relationship would have no effective ground to stand on under an intentional infliction of emotional distress claim. Such challenges make the tort of intentional infliction of emotional distress largely ineffective in the fight against revenge porn, and improved solutions are needed by lawmakers.

73. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

74. Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 257–58 (2015).

75. Samantha Kopf, *Avenging Revenge Porn*, 9 MOD. AM. 22, 23 (2014).

76. See Kitchen, *supra* note 74, at 257–58.

77. See generally *Lewis v. LeGrow*, 670 N.W.2d 675, 686 (2003).

5. Problems and criticisms of civil law remedies

The ability of a civil law remedy to adequately address the problems of revenge porn remains debatable. As such, states are now passing criminal statutes as a solution. In addressing potential problems with the civil solution, Mary Anne Franks suggests: “Civil litigation requires money, time, and access to legal resources. It also often requires further dissemination of the harmful material. The irony of privacy actions is that they generally require further breaches of privacy to be effective.”⁷⁸

Franks continues by discussing the problems with proof in bringing tort claims. She states:

Victims can, in theory, initiate tort actions against the individuals who disclosed their private, explicit images. To do so, however, she would not only have to know who the individual is, but also be able to prove it—no small feat given the ability of Internet users to act anonymously or pseudonymously, and the reluctance of websites and service providers to supply identifying information about their users.⁷⁹

Despite these persuasive arguments, Franks fails to address the higher “beyond a reasonable doubt” burden of proof standard in criminal trials. However, the criticism still holds merit as to potential roadblocks for victims pursuing a civil remedy. Franks believes that “[c]riminal law is both the most principled and the most effective avenue to prevent and address online non-consensual pornography.”⁸⁰

B. Criminal Law Remedies and the Thirteen Original Revenge Porn States

Despite the proposed civil remedies and their strengths, none have arisen to become the panacea of the revenge porn plague. With the persistent problems addressing the issue, the states have now begun to structure new laws to provide more proper remedies for victims of the growing revenge porn crime. As of September 2, 2014, thirteen states had officially enacted legislation in an effort to

78. Franks, *supra* note 60 (manuscript at 6) (footnote omitted).

79. *Id.*

80. *Id.* at 7–8.

fight revenge porn more effectively.⁸¹ This Section addresses the methods of structuring revenge porn laws, analyzes some of the prominent state laws that have begun to receive public attention, and makes recommendations as to the direction that should be taken for states drafting revenge porn statutes in the future.

1. The difficulty of structuring a revenge porn law

Like the majority of laws passed by legislatures, effective and acceptable revenge porn laws are difficult to make. Even after enactment, criticisms arise and new challenges surface pertaining to the new law and ongoing legal circumstance. Legislators must walk a fine line between making an effective law and making a law that does not infringe on other constitutional rights. Two primary challenges face enacted legislation: (1) over- and under-inclusiveness, and (2) infringement on constitutional rights. In the case of revenge porn, state laws have encountered both.

Child pornography laws exemplify the problems of over- and under-inclusiveness. Recent debates have centered on the rising problems with “sexting” (similar to revenge porn) and its interaction with state child porn laws. States struggle in this realm of law because, as a result of current state and federal laws,

teens engaged in sexting may be charged under child pornography laws and become subject to federally mandated sex offender registration rules As demonstrated by the wave of teen prosecutions across the country, teen sexting conduct often falls within the definition of state child pornography law and exposes teens to criminal prosecution, imprisonment, fines and mandatory sexual offender registration. Given these harsh and unanticipated results when teens are prosecuted under child pornography laws, courts and legislatures are struggling to find an appropriate and measured legal response.⁸²

The states have drafted broad legislation that courts have found includes acts and persons not intended to fall under the law because of the statute wording.⁸³ Such has also been the case with revenge

81. *State ‘Revenge Porn’ Legislation*, *supra* note 7.

82. Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN. ST. L. REV. 135, 149–50 (2010).

83. *See Id.* at 150–51.

porn legislation in some states, as will be examined in Section III.B.2.

The problem of newly passed laws infringing on other constitutional rights has also arisen in the current revenge porn debates. Lauren Walker of *Newsweek* addressed the possibility of some current state laws already drawing very close to encroaching on First Amendment rights:

[O]pinion is split . . . as to whether such legislation will impinge on First Amendment rights. Privacy advocates suggest these laws represent a step toward properly protecting the public and that some free speech sacrifices are necessary collateral damage. But free speech advocates argue existing laws are sufficient and the potential First Amendment infringements outweigh the privacy gains.⁸⁴

As discussed hereafter, Arizona's revenge porn law is already facing possible litigious challenges due to the law's potential infringement on the First Amendment.⁸⁵

Scholars have proffered opinions as to how to properly structure revenge porn law. Mary Anne Franks, a prominent voice in the fight against revenge porn,⁸⁶ discussed the state legislation that has been passed and stated that a strong revenge porn law must be "clear, specific, and narrowly drawn to protect both the right to privacy and the right to freedom of expression."⁸⁷ Franks listed multiple elements that make "an effective law" in the article.⁸⁸ These are only her hopefully persuasive suggestions, but they are worth analysis.

First, an effective law should first "clearly set out the elements of the offense: the knowing disclosure of sexually explicit photographs and videos of an identifiable person when the discloser knows or should have known that the depicted person has not consented to

84. Lauren Walker, *Are Revenge Porn Laws Going too Far?*, NEWSWEEK (Sept. 3, 2014 3:47 PM), <http://www.newsweek.com/are-revenge-porn-laws-going-too-far-268292>.

85. See Amanda Le Claire, *ACLU, Bookman's Sue Arizona Over 'Revenge Porn' Law*, ARIZ. PUB. MEDIA (Sept. 23, 2014), <https://www.azpm.org/p/top-news/2014/9/23/44843-aclu-of-arizona-sues-state-over-revenge-porn-law/>.

86. Kevin Collier, *Meet Mary Anne Franks, the Lawyer behind U.S. Revenge Porn Laws*, THE DAILY DOT (Apr. 15, 2014, 10:07 PM), <http://www.dailydot.com/politics/mary-anne-franks-revenge-porn/>.

87. Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, 5 (Aug. 17, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823.

88. *Id.*

such disclosure.”⁸⁹ Franks declares the bounds of the law in this manner to avoid punishing those who inadvertently disclose or those that disclose without knowing there was a lack of consent.⁹⁰

Second, the law should contain “exceptions for sexually explicit images voluntarily exposed in public or commercial settings and narrow exceptions for disclosures made in the public interest.”⁹¹ Such is intended to protect those who perhaps record voluntary “flashing” in public and then post the pictures later.⁹² Third, the law should include a severability provision; the law remains valid even if one or multiple provisions are invalidated by courts.⁹³

Fourth, revenge porn laws should not confuse intent with motive.⁹⁴ Franks gives examples like “intent to cause emotional distress” and “intent to harass” to show that such laws “arbitrarily distinguish between perpetrators motivated by personal desire to harm and those motivated by other reasons.”⁹⁵ Motive requirements tend to ignore “the reality that many perpetrators are motivated not by an intent to distress but by a desire to entertain, to make money, or achieve notoriety.”⁹⁶

Fifth, the revenge porn laws should not be so broad as to include “drawings” or “unusually expansive definitions of nudity” like “buttocks or female nipples visible through gauzy or wet fabric.”⁹⁷ Franks says that overly broad laws could lead to charges for “baby in the bath” problems where pictures were taken innocently (i.e. parents taking pictures of their infants).⁹⁸ On the other hand, she states that laws should not be too narrow either, such as only restricting punishment for pictures depicting explicit nudity.⁹⁹ This goes to the difficulty in balancing as discussed above. Though proper balancing is highly advocated, it appears that such is more easily said than done.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 6.

96. *Id.*

97. *Id.* at 7.

98. *Id.* at 7–8.

99. *Id.* at 8.

Lastly, Franks argues that effective revenge porn law should not be limited to online disclosures only (should include printed pictures and DVDs), should not be limited to current or former partners only, and should not broaden immunity for internet service providers beyond those already granted by the Communications Decency Act.¹⁰⁰

Franks' assertions on how to structure an effective revenge porn law are well intentioned, but may overlook the difficulty that legislatures still face to enact effective laws. A balanced state revenge porn law that does not impinge on other constitutional rights and that targets the intended group of perpetrators is a challenge that is rarely overcome, as discussed in the next subsection.

2. *The pioneers of state revenge porn law*

As of September 2, 2014, thirteen states have officially enacted revenge porn legislation: Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Maryland, New York, Pennsylvania, Utah, Virginia, and Wisconsin.¹⁰¹ This Comment will focus on legislation from California, Georgia, and Arizona. The acts from these three states will be analyzed to present a sampling of how state legislators are beginning to criminalize revenge porn. Though the laws from other states differ in some aspects, analysis of the laws in these three states should give a general understanding as to how revenge porn laws are being legislated.

a. California. California's law and legislative history exemplify the challenges that states face in passing revenge porn legislation. The state first passed a statute criminalizing revenge porn activity on October 1, 2013. S.B. 255 read as follows:

647. Except as provided in subdivision (1), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (4)(A) Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress. (B) As used in this paragraph, intimate

100. *Id.*

101. *State 'Revenge Porn' Legislation, supra* note 7.

body part means any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or visible through less than fully opaque clothing.¹⁰²

The passed law was a step in the right direction, but immediate criticism arose, eventually leading to an amendment. Critiques included the fact that “the law did not cover hackers, it did not adequately clarify confidentiality disputes, and it upheld a strict standard of ‘intent to cause emotional distress.’”¹⁰³ The most important criticism of the law was that it did not include “selfies”¹⁰⁴ for criminal prosecution. As mentioned, eighty percent of cases involve pictures taken as “selfies.”¹⁰⁵ If California’s law limited punishment only to pictures taken and distributed by the perpetrators themselves, as the language states “any person who photographs or records by any means the image of another identifiable person . . . and the person subsequently distributes the image taken,”¹⁰⁶ then the law would result in significant under-inclusiveness and would be essentially useless for a majority of cases where the victim sends the initial picture after taking the “selfie.”

The law has recently been amended. Senator Anthony Cannella authored S.B. 1255, which amended the statute as follows:

(4) (A) Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.¹⁰⁷

102. CAL. PENAL CODE § 647 (Deering 2013).

103. Eric Goldman, *California’s New Law Shows It’s Not Easy to Regulate Revenge Porn*, FORBES, <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/> (last visited Dec. 22, 2014).

104. *Id.*

105. *Press Releases*, *supra* note 56.

106. CAL. PENAL CODE § 647 (Deering 2013).

107. S.B. 1255, 2013–2014 Reg. Sess. (Cal. 2014).

The amendment was unanimously passed,¹⁰⁸ and was signed by the Governor on September 30, 2014.¹⁰⁹

The law that was initially passed and its subsequent amendment portray the difficulties encountered in enacting revenge porn statutes. Almost immediately, the first California law faced substantial backlash from the media and public. The public criticism forced the legislature to broaden the statutory language to include a greater number of perpetrators. The amendment was required to reduce the under-inclusiveness of the statute.

The amendment appears to be balanced sufficiently to function effectively. First, the law focuses on the distribution of the pictures rather than on a picture that has been obtained in a particular way. Additionally, it focuses on intentional distribution rather than the intention of harm. Both of these elements should result in a majority of punishments being given to those that are intended to fall in this category. Second, the law looks not only to the agreements between the parties pertaining to the pictures and distribution, but focuses on what the perpetrator knew or should have known regarding the emotional harm that would accompany the distribution. In this regard, the likelihood seems high that courts will find that perpetrators should have known there was an expectation of privacy and a breach would inflict significant harm to the victim when intimate pictures and videos are shared between the couple.

The law still has some weaknesses. First, the law requires that the victim prove that distress was actually suffered. The difficulties surrounding proof requirements were discussed previously.¹¹⁰ The meaning of the language will likely gain more definition as it evolves through the California courts, but currently, victims may face an uphill battle in proving that distress actually took place. Consequently, the statutory language will essentially exculpate probable perpetrators, who satisfy the intentional distribution and knowledge of harm requirements, if the harm is not effectively proven to the jury. Second and similarly, burden of proof problems will likely arise in regards to the perpetrators knowledge of harm by

108. Hunter Schwarz, *California's Revenge Porn Law, Which Notoriously Didn't Include Selfies, Now Will*, WASH. POST (Aug. 27, 2014, 1:59 PM), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/27/californias-revenge-porn-law-which-notoriously-didnt-include-selfies-now-will/>.

109. S.B. 1255, 2013–2014 Reg. Sess. (Cal. 2014).

110. See generally Franks, *supra* notes 78–79.

the distribution. Third, the law seems to restrict punishment to those crimes that involve an identifiable victim. This segment of the law attempts to walk the line between criminalizing revenge porn and not encroaching on other constitutional rights like freedom of speech. However, the element of involving an identifiable victim could potentially exonerate some perpetrators when all the other elements of the crime are met. The meaning of identifiable will also have to be clarified by the courts.

In terms of crime severity, the statute classifies these crimes as misdemeanors.¹¹¹ This classification may be a weakness of the law. If laws are going to be effective deterrents against criminal behavior, the threat of punishment must actually deter the potential perpetrators. The newness of the law precludes full analysis at this time as to how a misdemeanor classification in this regard will affect behaviors of perpetrators.

Despite the acknowledged weaknesses, the California law appears to be an effective and substantial step forward in the fight against revenge porn. It can serve as a model for other states, or can serve as the law for other states to adopt if it sufficiently fits their needs, because it is narrowly tailored to avoid overbroad application. Furthermore, it takes into account the other constitutional rights in an effort to avoid future litigation. This law is a step that should adequately convict perpetrators while simultaneously enabling victims to seek remedy for crimes of distribution of pictures in violation of privacy and interest. In this case, the strengths seem to outweigh the potential weaknesses of the statutory language.

The effectiveness of the law is manifest in the recent conviction of Noe Iniguez, who posted topless pictures of his ex-girlfriend on her employer's Facebook page.¹¹² As the first person convicted under the law for revenge porn crimes, he was sentenced to one year in prison.¹¹³ Such a conviction does not necessarily show a law to be a good law, but a conviction under the law shows that victims can overcome the previously discussed weaknesses—such as the difficulty in proving that the distress actually occurred. Time will tell how the law evolves and how courts apply the statute to various fact-patterns.

111. S.B. 1255, 2013–2014 Reg. Sess. (Cal. 2014).

112. Veronica Rocha, *'Revenge Porn' Conviction is a First Under California Law*, L.A. TIMES (Dec. 4, 2014, 5:00 PM), <http://www.latimes.com/local/crime/la-me-1204-revenge-porn-20141205-story.html>.

113. *Id.*

b. Arizona. Arizona has had a revenge porn law in place since April 30, 2014.¹¹⁴ HB 2515 reads as follows:

A. 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.¹¹⁵

Section B of the statute follows with a number of exceptions in which the law does not apply: common practices of law enforcement, images involving voluntary exposure in public, common practice of medical treatment, as well as internet service providers in compliance with the Communications Decency Act.¹¹⁶

A key difference between the California law and the Arizona law is that Arizona defines a violation of the statute as a “class 5 felony.”¹¹⁷ Unlike Arizona, California law currently classifies “revenge porn” crimes as misdemeanors.¹¹⁸ Additionally, the Arizona law mandates the violation bumps up to a “class 4 felony”¹¹⁹ in situations where the victim is recognizable. These differences are substantial in that Arizona will have some form of just punishment even in cases where the victims are not recognizable, and also that the severity of the crime is acknowledged with a harsher punishment. Such might lead to a stronger deterrence, but that is debatable as discussed previously. In this sense, the Arizona law appears to be better.

An analysis of the legislative history gives insight into the primary challenges that the state faced and currently faces in structuring this revenge porn law. House Representative J.D. Mesnard presented H.B. 2515 for hearing to the House Judiciary Committee on February 6, 2014.¹²⁰ Various concerns were raised regarding the legislation. Foremost were concerns pertaining to infringement on the First Amendment, which subsequently became a key point of focus after the law’s passage.¹²¹ Next, another concern dealt with the

114. See *supra* note 7 and accompanying text.

115. ARIZ. REV. STAT. ANN. § 13-1425 (2014).

116. *Id.*

117. *Id.*

118. S.B. 1255, 2013–2014 Reg. Sess. (Cal. 2014).

119. ARIZ. REV. STAT. ANN. § 13-1425 (2014).

120. *Arizona House Judiciary Committee Hearing* (Feb. 6, 2014), at 1:47:10, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=13328.

121. *Id.* at 1:49:05–13.

law not including punishment for “a second relay” by individuals who received the pictures from the original perpetrator.¹²² Questions regarding the use of age and mental capacity factors in assessing proper punishment also arose regarding children and their involvement in “sexting.”¹²³ The concluding remarks in the hearing included age and the issue of granting consent and the consideration of education programs aside from this legislation.¹²⁴

Despite the legislature’s extensive analysis on the law’s potential problems, legal issues surfaced almost immediately upon the bill’s adoption. The language of the law is overly broad and creates concern in its relationship to First Amendment rights. The law’s apparent overbreadth becomes problematic in that the law becomes over-inclusive, making it ineffective. Currently, litigation is pending after a lawsuit was filed by the American Civil Liberties Union (ACLU) against the law.¹²⁵ The ACLU claims the law is unconstitutional because it violates free speech and does not provide exemptions for nude pictures that have historical value or are newsworthy.¹²⁶ As currently written, the law is left to the courts to begin interpretation as to its scope and meaning. In its current state, the law seems to be overly broad, requiring future amendment for future effectiveness. It may have more severe punishments in comparison with California’s revenge porn law, but the broad scope of the Arizona law may force the courts to find the law null and void if it is found to be in violation of constitutional rights.

c. Georgia. The Georgia statute reads as follows:

(b) A person violates this Code section if he or she, knowing the content of a transmission or post, knowingly and without the consent of the depicted person: (1) Electronically 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 (2) Causes 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

122. *Id.* at 1:50:10–27.

123. *Id.* at 1:52:00–1:54:20.

124. *Id.* at 2:02:00–2:03:03, 2:04:00–45.

125. Le Claire, *supra* note 85.

126. *Id.*

transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person.¹²⁷

The statutory language defines “harassment” as “engaging in conduct directed at a depicted person that is intended to cause substantial emotional harm to the depicted person.”¹²⁸

The statute is sufficiently narrow in that it defines a violation of distribution without consent when the distribution involves harassment or financial loss. Thus, it should not encounter problems similar to those of Arizona’s revenge porn law. The law is ambiguous, however, as to the definition of a “legitimate purpose to the depicted person.”

There is also concern as to whether the law is under-inclusive. Problems might surface in that it restricts punishment to cases involving pictured adults only—will that mean that no seventeen-year-olds can be punished under the law in similar cases? Furthermore, if there is no malicious intent on the part of the perpetrator, the law will not provide remedy for potentially harmed victims. This was addressed in the hearing.¹²⁹ These ambiguities and questions give uncertainty as to how the law will apply.

The more specific language of the California statute seems to give more structure for proper application.¹³⁰ The analysis of these three states shows the complexity that accompanies passage of effective state laws. It also shows that states will come up with a variety of provisions designed to most adequately combat revenge porn. However, uncertainty looms as the statutes now pass to the courts for interpretation. Currently, California’s law seems to be a good foundation for more effective revenge porn prosecution.

IV. OTHER POSSIBLE SOLUTIONS

The states are beginning to pass laws, perhaps out of necessity, to fight the revenge porn problem because of the currently inadequate legal remedies. However, the newly framed laws are in their infancy

127. GA. CODE ANN. § 16-11-90(b)(1)–(2) (West 2014).

128. *Id.* § 16-11-90(a)(1).

129. *Georgia House Judiciary Committee Hearing: Non-Civil*, Feb. 17, 2014, http://media.legis.ga.gov/hav/13_14/2014/committees/judinon/judinon021714EDITED.wmv (no time recording citations available).

130. *See* S.B. 1255, 2013–2014 Reg. Sess. (Cal. 2014).

and questions remain as to their validity. Furthermore, only thirteen states to this point have passed legislation; several others have attempted passage of such laws but have been unsuccessful.¹³¹ Thus, there are other possible solutions that may be addressed to more fully combat revenge porn.

A. Can Congress Step Forward?

A key problem with state revenge porn laws is that they will vary from state to state. As the issue becomes more prevalent, incentive grows for the federal government to enact new legislation specifically targeting revenge porn activity. And yet, the federal government has not done so currently. However, the seeds for such legislation are being sown and time will tell if and when the fruits of such planting will be witnessed.

Representative Jackie Speier is leading the charge in introducing such legislation to Congress.¹³² According to author Steven Nelson, Speier was in the drafting stages for a “revenge porn” bill of some sort in March 2014.¹³³ The unresolved details included maximum punishment for offenders and rules for possible removal of non-consensual content.¹³⁴ Interestingly, Mary Anne Franks has been involved in the drafting process,¹³⁵ and she has suggested that upon passage of the federal law, “websites ‘wouldn’t be able to raise the special Section 230 defense that intermediaries are sometimes able to raise with regard to other unlawful activity.’”¹³⁶ This focus seems to target the weaknesses of the Communications Decency Act in relation to the revenge porn problem without specifically changing the act itself.

As with the state laws being passed and debated in state legislatures, there are already similar concerns regarding application of a federal law if one is ever passed. Matt Zimmerman, a staff attorney for Electronic Frontier Foundation, stated: “Frequently, almost inevitably, statutes that try to do this type of thing

131. *State ‘Revenge Porn’ Legislation, supra* note 7.

132. Steven Nelson, *Federal ‘Revenge Porn’ Bill Will Seek to Shriveled Booming Internet Fad*, U.S. NEWS (Mar. 26, 2014), <http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shriveled-booming-internet-fad>.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

overreach The concern is that ‘they’re going to shrink the universe of speech’ that’s available online.”¹³⁷ This concern is one that all legislators must deal with, and Congress will have to go through the same process in passing a well-balanced law in this circumstance.

So far, Mr. Zimmerman does not need to worry. To date, there is no federal law in place, and apparently, there is not even a bill currently being debated. The latest news regarding the “revenge porn” bill does not show a bill that has even been presented for official vote. However, an article from August 2014 seemingly manifests the continual interest in passing such legislation on the federal level.¹³⁸ Thus, time will tell how and when Congress will pass a perhaps more effective and unifying statute in this fight. Until it does, the problem is left to the states for proper legal remedy in these cases.

B. Control and Education

One author wrote: “The only way that this epidemic will end is if we pressure our state legislatures and Congress to make the posting of revenge porn a crime.”¹³⁹ To the extent of seeking a legal remedy and solution for the pervasive revenge porn problem, this Comment agrees that state action is necessitated in the revenge porn fight. There are other possibilities, however, that need to be analyzed in order to find a complete remedy.

First, more acknowledgement and emphasis need to be paid to the responsibilities of individuals and the actions that they chose to take. In addressing this factor, there is no intention to place blame or guilt upon the victims of these heinous crimes. These recommendations go only to the fact that reducing the initial distribution, either by being sent from the victim to the perpetrator or by being taken by the perpetrator with consent of the victim, would dramatically reduce the revenge porn problem without having to deal with the constant legal struggles that have been discussed.

137. *Id.*

138. *Activists Working to Draft Nationwide ‘Revenge Porn’ Legislation*, CIRCA (Jan. 9, 2015, 2:27 PM), <http://cir.ca/news/revenge-porn-laws-in-the-us> (article is no longer accessible).

139. Casey Martinez, *An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims*, 14 PITT. J. TECH. L. & POL’Y 236, 251 (2014).

Greater care and vigilance by society in this regard would go a long way in the revenge porn fight; the law should perhaps be the last line of defense.

Second, education programs should be provided with all convictions of perpetrators. Such programs may enable perpetrators, and maybe victims, to make more informed choices in the future. Lastly, possible amendments to the Communications Decency Act may be looked at to ensure proper conduct on the side of Internet service providers.¹⁴⁰

V. CONCLUSION

The revenge porn problem is nothing new. The remedies available for victim utilization, however, are new and are presently evolving. While scholars have debated vigorously various legal remedies, none have adequately become grounded as the panacea to the issue. If victims like Desire Luzinda are to find sufficient remedy for these violations of trust, then they will have to look outside of legal areas like invasion of privacy rights, contract law, copyright law, and intentional infliction of emotional distress. Though the theories have positive elements and benefits for protection, none are adequately shaped precisely for consequences resulting in revenge porn cases.

The states, currently, are the proper venue for effective revenge porn legislation. Until Congress acts on the issue, the states have acted correctly by taking or attempting to take action in passing necessary laws. Thus far, thirteen states have passed legislation criminalizing acts of revenge porn. Out of the current state laws, California's law seems to be the most effective passed thus far; it is sufficiently narrow so as not to encroach on other legal rights of citizens, and it is sufficiently broad so as to include a majority of perpetrators that require adequate punishment. Both the Arizona

140. It has been said that the Internet represents a brave new world of free speech. Congress enacted the Communications Decency Act (CDA) in part to carve out a sphere of immunity from liability for providers of interactive computer services to preserve that 'vibrant and competitive free market' of ideas on the Internet. Many courts have decided that the grant of immunity is broad when a plaintiff seeks to hold an online entity liable for Web site content posted by a third party.

Claudia G. Catalano, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d 37 (2011).

and Georgia laws are either too ambiguous or too broad, both of which require further legislation and judicial interpretation for proper determination of scope. Thus, with this relatively new area of law, states would be wise to analyze the California law as their legislatures begin to take action in the fight against revenge porn.

*Justin Pitcher**

* J.D. candidate, April 2016, J. Reuben Clark Law School, Brigham Young University. I would like to thank Professor Clark Asay for his feedback and assistance with this Comment.