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## Banning Revenge Pornography: Florida

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# Banning Revenge Pornography: Florida

Ausegul Harika

## **Abstract**

As the use of technology and social media websites rise every day, so do the number of people who fall victim to revenge pornography

**KEYWORDS:** pornography, banning, websites

**BANNING REVENGE PORNOGRAPHY: FLORIDA**

AYSEGUL HARIKA\*

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## I. INTRODUCTION

As the use of technology and social media websites rise every day, so do the number of people who fall victim to revenge pornography.<sup>1</sup> Social media websites, like Instagram, which as of December 2013 had seventy-five million daily users and as of March 2014 approximately sixty million photos uploaded a day, can easily be used as a platform to post explicit photos of ex-

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1. 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, 237–38 (2014).

lovers.<sup>2</sup> Even more troubling, is the startup of websites such as IsAnyoneUp, which allow people to submit explicit images, sometimes accompanied by the victim's name, phone number, address, and links to their social media profiles.<sup>3</sup> Some of these websites even charge the individuals fees in order to remove their images from the website.<sup>4</sup> Twenty-seven-year-old Kevin Christopher Bollaert started the website UGotPosted, which facilitated more than ten thousand explicit images of individuals without their consent, and charged each individual as much as three hundred and fifty dollars to remove the explicit content.<sup>5</sup> State legislatures are slowly beginning to realize the need to outlaw the posting of explicit images on social media sites, as the resulting harm to victims can include years of harassment and shame.<sup>6</sup>

Revenge pornography—which is also known as non-consensual pornography—is the “distribution of sexually graphic images of individuals without their consent.”<sup>7</sup> Specifically, revenge pornography refers to “images originally obtained with consent . . . within the context of a private or confidential relationship, . . . [such as between] intimate partner[s], [which are] later distribute[d] . . . without consent.”<sup>8</sup> “As of July 18, 2014, thirteen states—New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, Arizona, Maryland, Colorado, and Hawaii—have passed laws that treat nonconsensual pornography as a crime in itself . . . .”<sup>9</sup> This Comment aims to persuade readers that the Florida Legislature needs to

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2. Craig Smith, *By the Numbers: 100+ Interesting Instagram Statistics*, DIGITAL MARKETING RAMBLINGS, <http://expandedramblings.com/index.php/important-instagram-stats/#.VBH8-vldWdR> (last updated Dec. 14, 2014).

3. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–51 (2014); Martinez, *supra* note 1, at 238; Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 423–24 (2014); Lindsey Bever, *Fighting Back Against ‘Revenge Porn,’* WASH. POST, (April 28, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/04/28/fighting-back-against-revenge-porn>. IsAnyoneUp’s creator earned himself the title of “the most hated man on the Internet.” Bever, *supra* note 3; *see also* Levendowski *supra* note 3, at 423.

4. *California Attorney General Announces Arrest of Revenge Porn Operator*, COMPUTER & INTERNET LAW, Mar. 2014, at 22, 22.

5. *Id.* at 22–23.

6. *See* Martinez, *supra* note 1, at 239–244; Mary Anne Franks, *Criminalizing Revenge Porn: Frequently Asked Questions*, SOC. SCI. RES. NETWORK 3 (unpublished working paper, Oct. 9, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337998](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337998).

7. Citron & Franks, *supra* note 3, at 346.

8. *Id.* Revenge pornography also includes images retrieved without consent, such as by hacking an individual’s phone or recording sexual acts by hidden cameras; but this Comment will only focus on images obtained with consent as it is the most prevalent type of revenge pornography. *See id.*; *infra* Parts II–III.

9. Franks, *supra* note 6, at 3.

follow the progression of the laws in these states, and enact its own laws to ban revenge pornography.<sup>10</sup>

Part II of this Comment will discuss the rising trend of revenge pornography and the increase in use of the platforms it is found on today.<sup>11</sup> Part III of this Comment will examine what being a victim means for the lives of those who fall victim to the posting of their intimate photographs.<sup>12</sup> Part IV of this Comment will discuss the issues faced when proposing revenge porn legislation, and will then examine the text of three states which have enacted revenge porn statutes—New Jersey, California, and Maryland.<sup>13</sup> Part V of this Comment will compare the language of the failed Florida bills—House Bill 475 and Senate Bill 532—to determine what could be changed in order to help enact statutes that will ban the posting of revenge porn in the state of Florida.<sup>14</sup>

## II. REVENGE PORNOGRAPHY: A RISING TREND

Revenge pornography has become more popular with the increased use of social media sites, new photo sharing applications for smart phones, and sexting.<sup>15</sup> This Part of the Comment will be split into two parts.<sup>16</sup> The first part will discuss the role that social media websites—such as Facebook and Instagram, and new photo and video applications for smartphones, like Snapchat—play in the popularity of revenge pornography.<sup>17</sup> The second part discusses the popular trend among teens and young adults—sexting—which many times leads to the posting of revenge pornography.<sup>18</sup>

### A. *Social Media Websites*

Adding to the sixty million photos uploaded onto Instagram everyday, Facebook users are uploading approximately three hundred million

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10. See *infra* Part V.

11. See *infra* Part II.

12. See *infra* Part III.

13. CAL. PENAL CODE § 647(j)(4) (West 2014); H.D. 43, 2014 Leg., Reg. Sess. (Md. 2014); N.J. STAT. ANN. § 2C:14-9 (West 2014); see also *infra* Part IV.

14. H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); see also *infra* Part V.

15. Martinez, *supra* note 1, at 237; Nicole A. Poltash, Comment, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH., no. 4, 2013, at 1, 4–5, 11.

16. See *infra* Part II.A–B.

17. See *infra* II.A.

18. See *infra* II.B.

photos to Facebook each day.<sup>19</sup> Facebook alone has over 1.35 billion users.<sup>20</sup> With hundreds of millions of photos being uploaded every day, the potential for misuse heightens, and it becomes more and more unrealistic to expect website administrators to catch the inappropriate images being posted.<sup>21</sup> Lawmakers have recently suggested that social media websites—like Facebook and Instagram—need to begin “establish[ing] the identity of people opening accounts to prevent . . . revenge porn[ography].”<sup>22</sup> Although verifying the identity of each user on a social media website might not be the ultimate answer to ending the posting of non-consensual pornography, it is a step in the right direction.<sup>23</sup> It is less likely that individuals will engage in unacceptable behavior if their identity is revealed, especially if they can be traced to the information posted, unlike if an individual posted anonymously.<sup>24</sup> If allowed to post anonymously, individuals are less likely to feel guilt, and might have a false sense of security that they might not get into any trouble.<sup>25</sup>

In addition to the common use of these social media sites comes Snapchat, “a mobile phone application that sends self-destructing messages.”<sup>26</sup> Snapchat allows users to send photos and videos, which are deleted within seconds of the recipient viewing them.<sup>27</sup> According to the company, “[t]he data is completely deleted and could not be recalled even if law enforcement came looking for [it].”<sup>28</sup> This description misguides users though, as further investigation into the company’s privacy policy reveals: “Although we attempt to delete image data as soon as possible after the message is received and opened by the recipient . . . we cannot guarantee that the message contents will be deleted in every case. . . . Messages, therefore, are sent at the risk of the user.”<sup>29</sup>

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19. Poltash, *supra* note 15, at 2; Smith, *supra* note 2.

20. Craig Smith, *By the Numbers: 200+ Amazing Facebook User & Demographic Statistics*, DIGITAL MARKETING RAMBLINGS, <http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats/> (last updated Dec. 20, 2014).

21. See Poltash, *supra* note 15, at 2; Julie Kay, “Revenge Porn” a Criminal Act? Yes, If Groups Get Their Way, DAILY BUS. REV. (Aug. 6, 2014), <https://www.dailybusinessreview.com/id=1202666010714/Revenge-Porn-A-Criminal-Act-Yes-If-Groups-Get-Their-Way?SLreturn=20140811130411>; Andrew Whitaker, *Revenge Porn Sites Must End Anonymity*, THE SCOTSMAN, July 30, 2014, at 15.

22. Whitaker, *supra* note 21.

23. *See id.*

24. *See id.*

25. *See id.*

26. Poltash, *supra* note 15, at 2.

27. *Id.* at 2–3, 7.

28. *Id.* at 3 (alteration in original).

29. *Id.* at 8–9 (alteration in original).

The loopholes do not end there.<sup>30</sup> There is still a chance that the recipient may take a screenshot of the image—a photo of the image seen on the screen of a cellphone, which saves the received photo to their photo album.<sup>31</sup> Even though the application will notify the sender that the screenshot has been taken, once the photo is copied, the sender has little control over what the recipient will do with the image.<sup>32</sup> “In 2012 alone, more than five billion messages were sent through Snapchat,” and its popularity has increased since then, making it “the second-most popular free photo and video app for the iPhone . . . just behind YouTube and ahead of Instagram” in February 2013.<sup>33</sup> This increased popularity of the application and the false sense of security that the images will disappear forever, make Snapchat “the greatest tool for sexting since the front-facing camera.”<sup>34</sup> Snapchat’s use for sexting was apparent at its inception—“the application is rated for users twelve years of age and older due, in part, to ‘suggestive themes’ and ‘mild sexual content or nudity,’” but the start-up of websites such as Snapchat Sluts—“a website featuring photos of naked women that were taken using Snapchat”—has provided even more proof.<sup>35</sup>

#### B. *Sexting*

Minors and young adults are also exploring their sexuality in a more dangerous way by leaving permanent traces of the “fruits of their exploration” through sexting.<sup>36</sup> Sexting is defined as “[t]he practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular phones . . . or over the Internet.”<sup>37</sup> Most commonly, “a person takes a digital photo of himself or herself and sends it via mobile phone as a text message.”<sup>38</sup> “[A]ccording to . . . the Cyber Civil Rights Initiative, up to [eighty percent] of revenge porn victims belong to this category,” meaning they initially sent their explicit images willingly.<sup>39</sup> Recent surveys have shown that “[s]ending and posting

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30. *Id.* at 9.

31. *See* Poltash, *supra* note 15, at 9.

32. *See id.*

33. *Id.* at 9–10 (alteration in original).

34. *Id.* at 8–9, 11.

35. *Id.* at 11–12.

36. Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 363 (2010).

37. Poltash, *supra* note 15, at 4 (quoting Verified Complaint at 5, Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009)) (alteration in original).

38. *Id.*

39. Martinez, *supra* note 1, at 242.

nude or semi-nude photos or videos starts at a young age and becomes even more frequent as teens become young adults.”<sup>40</sup> In a “2012 survey of over six hundred . . . high school students, . . . twenty percent . . . had sent a sext [from their] cell phone,” and almost forty percent had received a sext.<sup>41</sup> “More than a quarter had forwarded a sext that they had received to others.”<sup>42</sup> Of the participants who had sent a sext, one third had sent the sext “despite believing that there could be serious consequences.”<sup>43</sup> The real consequence though, that teens and young adults need to keep in mind and remember before they engage in the new trend of sexting, is the fact that “once an individual transmits an image via cell phone or over the Internet, it is virtually impossible to remove it.”<sup>44</sup>

Pictures received from sexting are the main source of explicit images posted on social media websites or revenge pornography websites.<sup>45</sup> Many revenge porn websites were started to post these sext messages for the entertainment of others.<sup>46</sup> In February 2013, the students at Cypress Bay High School in Weston, Florida, learned firsthand the dangers of teenage sexting.<sup>47</sup> An anonymous web page filled with more than a dozen nude pictures—apparently received through sexting—appeared online.<sup>48</sup> Students at Cypress Bay High identified many of the females as classmates, and some of the pictures even listed the females’ names.<sup>49</sup> The photos went viral after the link was quickly shared through Twitter, with over four thousand students viewing the website while still in school.<sup>50</sup> It is believed that the website was created by current Cypress Bay classmates.<sup>51</sup>

Mentioned earlier in this Comment, the revenge pornography website, IsAnyoneUp, was one of the most successful—if not the most successful—of the hundreds of sketchy sites before it shut down in 2013.<sup>52</sup>

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40. Poltash, *supra* note 15, at 5 (alteration in original).

41. *Id.*

42. *Id.*

43. *Id.*

44. Ryan, *supra* note 36, at 363.

45. See Poltash, *supra* note 15, at 14.

46. See *id.* at 12; California Attorney General Announces Arrest of Revenge Porn Operator, *supra* note 4, at 22.

47. See Michael Vasquez, *Photos of Nude Teen Girls Linked to Cypress Bay High School*, MIAMI HERALD (Feb. 27, 2013, 7:17 AM), <http://www.miamiherald.com/incoming/article1947560.html>.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Kelly Goff, *Mother Vows to Make Revenge Pornography a Federal Crime*, INLAND VALLEY DAILY BULLETIN (Feb. 6, 2014), [www.dailybulletin.com/general-news/20140203/mother-vows-to-make-revenge-pornography-a-federal-crime](http://www.dailybulletin.com/general-news/20140203/mother-vows-to-make-revenge-pornography-a-federal-crime).



IsAnyoneUp would have three hundred fifty thousand page views a day.<sup>53</sup> Hunter Moore, the website’s creator, would “post[] names, addresses, and work information about the victims and urged followers—strangers to the person posing—to taunt them.”<sup>54</sup> “Moore netted more than [thirteen thousand dollars] a month in advertising revenue” through IsAnyoneUp.<sup>55</sup> Hunter Moore decided to opt out of the website in 2013, after he learned that the FBI was investigating him.<sup>56</sup> It took two years to investigate Moore and the website before any action was taken.<sup>57</sup>

With the popularity of IsAnyoneUp, more and more revenge pornography websites began popping up.<sup>58</sup> One of these websites was UGotPosted, which was created in December 2012.<sup>59</sup> This new revenge pornography website not only suggested, but “*required* that the poster include the subject’s full name, location, age, and Facebook profile link” next to their explicit image.<sup>60</sup> Even worse, the website’s creator, Kevin Christopher Bollaert, would charge the victims “a fee ranging from \$299.99 to \$350” to get their explicit images or videos removed from the site.<sup>61</sup> Bollaert created another website—ChangeMyReputation—to collect these fees.<sup>62</sup> When a revenge porn victim would contact UGotPosted with a request for their content to be removed, Bollaert would reply with a ChangeMyReputation email address, offer to remove them for a fee, and then the victim could pay using a PayPal account.<sup>63</sup> Court documents obtained from Bollaert’s ChangeMyReputation PayPal account showed that he earned tens of thousands of dollars from the fees he charged the victims.<sup>64</sup> Like Hunter Moore, Bollaert also made a significant amount of money from advertisers on his revenge porn site—nine hundred dollars a month to be exact.<sup>65</sup>

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53. *Id.*

54. *Id.*

55. Levendowski, *supra* note 3, at 423.

56. Goff, *supra* note 52.

57. *See id.*

58. *See California Attorney General Announces Arrest of Revenge Porn Operator*, *supra* note 4, at 23; Goff, *supra* note 52.

59. *California Attorney General Announces Arrest of Revenge Porn Operator*, *supra* note 4, at 23.

60. *Id.* (emphasis added).

61. *Id.*

62. *Id.*

63. *Id.*

64. *California Attorney General Announces Arrest of Revenge Porn Operator*, *supra* note 4, at 23.

65. *Id.*; *see also* Levendowski, *supra* note 3 at 423.

### III. REVENGE PORNOGRAPHY: THE HARM

Once an image is shared without consent, the victim becomes sexual entertainment for complete strangers.<sup>66</sup> According to a survey from 2013, which “included 1182 online interviews amongst American adults ages [eighteen through fifty-four],” “one in ten former partners threaten to post sexually explicit images of their exes online.”<sup>67</sup> About sixty percent of those scorned lovers follow through.<sup>68</sup> If uploaded to the Internet, the explicit photograph can be viewed by thousands of people, continued to be shared on multiple other websites, or even emailed to the victim’s family, employers, or friends to further embarrass the victim.<sup>69</sup> In some instances, the explicit “image[s] can dominate the first several pages of *hits* on the victim’s name in a search engine,” which has the potential to “destroy victims’ intimate relationships, as well as their educational and employment opportunities.”<sup>70</sup> In a “recent study, . . . colleges and universities [revealed that they] use social-networking websites—a medium that commonly features primary- and secondary-sexting images—to help evaluate applicants.”<sup>71</sup> Explicit images can be just as detrimental to “careers and future job prospects.”<sup>72</sup> “According to a recent survey by Microsoft, [seventy-five] percent of U.S. recruiters and human-resource professionals report that their companies require them to do online research about candidates, and many use a range of sites when scrutinizing applicants, including . . . photo- and video-sharing sites.”<sup>73</sup> More importantly, “[s]eventy percent of U.S. recruiters report that they have rejected candidates because of information found online,”<sup>74</sup> a sad reality for the victims who have images posted online without their consent or knowledge; especially because it is unrealistic to expect employers to “contact victims to see if they posted the nude photos of themselves or if someone else did in violation of their trust.”<sup>75</sup> “The ‘simple but regrettable truth is that after consulting search results, employers [do not] call revenge porn victims to schedule’ interviews or to extend offers.”<sup>76</sup>

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66. Franks, *supra* note 6, at 1.  
 67. Levendowski, *supra* note 3, at 424, 424 n.7.  
 68. *Id.* at 424.  
 69. Franks, *supra* note 6, at 1.  
 70. *Id.*  
 71. Ryan, *supra* note 36, at 364.  
 72. Poltash, *supra* note 15, at 16.  
 73. *Id.* at 16–17 (alteration in original).  
 74. *Id.* at 17 (alteration in original).  
 75. Citron & Franks, *supra* note 3, at 352.  
 76. *Id.*

For other revenge porn victims, the consequences are much worse.<sup>77</sup> Some victims endure stalking, harassment, bullying, psychological problems, and in dire cases, suicide.<sup>78</sup> “According to a study conducted by the Cyber Civil Rights Initiative, over [eighty percent] of revenge porn victims experience severe emotional distress and anxiety.”<sup>79</sup> Much of this anxiety comes from the fact that the victims’ explicit images are more often than not accompanied by their personal information when posted on revenge porn websites.<sup>80</sup> “In a study of 1244 individuals, over [fifty percent] of victims reported that their naked photos appeared next to their full name and social network profile . . . .”<sup>81</sup> Furthermore, “over [twenty percent] of [the] victims reported that their e-mail addresses and telephone numbers appeared next to their naked photos,” instilling a fear that strangers may confront the victims offline, especially since some of the online interactions include sexual demands.<sup>82</sup>

For teenagers and young adults who are victims of revenge pornography, the consequences are more severe and tragic.<sup>83</sup> From the onset, the moment an explicit image is shared with those who are not meant to see it, the continued existence of the idea of a *permanent record* of the image will haunt young teens or adults for years to come.<sup>84</sup> “[I]t is the fear of exposure and the tension of keeping the act secret that seems to have the most profound emotional repercussions.”<sup>85</sup> Other times, the harassment and bullying once the image is shared is too much for teens and young adults to handle.<sup>86</sup> Hope Witsell was only thirteen years old when she took a topless photograph of herself and sent it to a boy she liked.<sup>87</sup> The boy then sent the photograph to others, who then also forwarded the picture to further recipients.<sup>88</sup> This included students at her school and a nearby high school, who began bullying her in person and over the Internet.<sup>89</sup> To deal with the harassment, Witsell began cutting herself.<sup>90</sup> In a heart-breaking turn of

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77. See Franks, *supra* note 6, at 1.  
 78. *Id.*; Citron & Franks, *supra* note 3 at 347; Ryan, *supra* note 36, at 359.  
 79. Citron & Franks, *supra* note 3, at 351.  
 80. Levendowski, *supra* note 3, at 424.  
 81. Citron & Franks, *supra* note 3, at 350.  
 82. *Id.* at 350–51.  
 83. See Ryan, *supra* note 36, at 359.  
 84. Poltash, *supra* note 15, at 19.  
 85. *Id.*  
 86. See Ryan, *supra* note 36, at 359.  
 87. *Id.*  
 88. *Id.*  
 89. *Id.*  
 90. *Id.*

events, Hope Witsell took her own life.<sup>91</sup> Eighteen-year-old Jessica Logan's life also ended too soon when she took her own life after falling into depression over her shared nude image.<sup>92</sup> Jessica sent her boyfriend a nude photograph of herself when she was on vacation with her friends.<sup>93</sup> When their relationship ended, Jessica's boyfriend shared her explicit photograph with others, and the photo was distributed among "students at four different high schools."<sup>94</sup> "Students at the four schools incessantly harassed Logan about the photo, calling her a *slut*, *whore*, and other names in person, over the phone, and over the Internet."<sup>95</sup>

#### IV. THE START OF BANNING REVENGE PORNOGRAPHY: RECENT LEGISLATION

The fourth part of this Comment will be split into two separate sections.<sup>96</sup> The first section will explore the challenges faced when trying to enact revenge porn legislation, while the second section will review the fairly new revenge porn legislation passed in thirteen states.<sup>97</sup> While thirteen states—New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, Arizona, Maryland, Colorado, and Hawaii—have passed legislation, the public's lack of empathy for revenge pornography victims might be the reason why enacting legislation in many other states, including Florida, has not been as successful.<sup>98</sup>

##### A. *Issues With Enacting Legislation*

The main issue faced when trying to enact legislation to ban revenge pornography, is the matter of consent.<sup>99</sup> The public's perception of the issue seems to be one of the "victims 'brought it upon themselves.'"<sup>100</sup> This unfortunate lack of empathy towards revenge porn victims has been illustrated in both scholarly commentary and in comment sections of any

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91. Ryan, *supra* note 36, at 359.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See infra* Part IV.A–B.

97. *Id.*

98. Franks, *supra* note 6, at 3; *see also* Martinez, *supra* note 1, at 250–51; *infra* Part V.

99. *See* Citron & Franks, *supra* note 3, at 354; Martinez, *supra* note 1, at 251.

100. Martinez, *supra* note 1, at 250; *see also* Citron & Franks, *supra* note 3, at 354.

article or post on the topic.<sup>101</sup> When online news articles on revenge porn are posted—or when bloggers post about and discuss the topic—the comments section will most likely include derogatory comments towards the victims.<sup>102</sup> It is not uncommon to see comments stating that the victims are *stupid* or *slutty*.<sup>103</sup> The biggest reason for this response from the public is the fact that the victims chose to take these photos and then willingly shared them with other individuals.<sup>104</sup>

This disregard for harms undermining women's autonomy is closely tied to idiosyncratic, dangerous views about consent with regard to sex. Some argue that a woman's consensual sharing of sexually explicit photos with a trusted confidant should be taken as wide-ranging permission to share them with the public. Said another way, a victim's consent in one context is taken as consent for other contexts. . . . While most people today would rightly recoil at the suggestion that a woman's consent to sleep with one man can be taken as consent to sleep with all of his friends, this is the very logic of revenge porn apologists.<sup>105</sup>

Unfortunately, the lack of public sympathy is mostly harming young girls.<sup>106</sup> A recent study conducted by the Cyber Civil Rights Initiative found that “[ninety percent] of [the individuals] victimized by revenge porn[ography] were female.”<sup>107</sup> The rise in popularity of sexting, has led to the peer pressuring of young women—by friends or boyfriends—encouraging them to take and send these explicit images.<sup>108</sup> Other young women believe that they need to participate in the trend to be *cool*.<sup>109</sup> No matter the public's opinion, one minor mistake—especially at an age where teenagers and young adults might not know any better—should not be a justification for the years of harassment that these individuals will be forced to endure.<sup>110</sup>

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101. Martinez, *supra* note 1, at 250.

102. *Id.* at 250–51.

103. *Id.*

104. Citron & Franks, *supra* note 3, at 354; Martinez, *supra* note 1, at 251.

105. Citron & Franks, *supra* note 3, at 348.

106. Martinez, *supra* note 1, at 251.

107. Citron & Franks, *supra* note 3, at 353.

108. *See* Martinez, *supra* note 1, at 251.

109. *See id.*

110. *See id.*

## B. *Current Legislation*

“People [do not] know where to start when they are a victim of revenge porn . . . .”<sup>111</sup> Since the trend of sexting is fairly new, many victims do not know whether they have any rights or any available remedies when the recipient of their image or video shares it with others, or posts it online.<sup>112</sup> “Having legislation that defines *sexually explicit images* and repercussions of posting images without permission and not removing them on request empowers the victim and hopefully leads to quick resolution in many of these cases.”<sup>113</sup> Sexting and the recent advances in technology—which have made the startup of revenge pornography websites to post explicit content received through sexting incredibly simple for anybody who owns a computer—has brought on new challenges which our generation is only now beginning to tackle.<sup>114</sup>

Revenge porn victims have only recently come forward to describe the grave harms they have suffered, including stalking, loss of professional and educational opportunities, and psychological damage. As with domestic violence and sexual assault, victims of revenge porn suffer negative consequences for speaking out, including the risk of increased harm. We are only now beginning to get a sense of how large the problem of revenge porn is now that brave, outspoken victims have opened a space for others to tell their stories. The fact that nonconsensual porn so often involves the Internet and social media, the public, law enforcement, and the judiciary sometimes struggle to understand the mechanics of the conduct and the devastation it can cause.<sup>115</sup>

In an effort to end the lifelong damaging outcomes suffered by the victims of revenge pornography, state legislatures are beginning to take innovative steps toward criminalizing the act.<sup>116</sup> Currently, thirteen states—New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, Arizona, Maryland, Colorado, and Hawaii—have passed laws that

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111. *Revision Legal to Testify May 6 Before Michigan Senate Judiciary Committee on Issues, Recommendations for “Revenge Porn” Legislation*, P.R. NEWSWIRE, (May 5, 2014), <http://www.prnewswire.com/news-releases/revision-legal-to-testify-may-6-before-michigan-senate-judiciary-committee-on-issues-recommendations-for-revenge-porn-legislation-258001681.html>.

112. *See id.*

113. *Id.* (emphasis in original).

114. *See Franks, supra* note 6, at 1.

115. Citron & Franks, *supra* note 3, at 347.

116. *See Franks, supra* note 6, at 3.

criminalize revenge pornography.<sup>117</sup> Although experts in the field of cyber harassment admit that the laws may be flawed and may not provide enough protection—stating that “many of these laws suffer from narrow applicability and/or constitutional infirmities”—they are still groundbreaking and an improvement for victims who may not be able to receive any protection at all.<sup>118</sup>

Revenge pornography is likely to violate state statutes for harassment or invasion of privacy in many states, but police officers will usually not act unless the explicit content posted involves a minor.<sup>119</sup> When the image involves a minor, child pornography laws come into play, which are normally treated with more seriousness and urgency.<sup>120</sup> Police tend to turn away many revenge pornography victims who are young adults or adults, because they cannot provide any evidence of physical harm.<sup>121</sup> Sometimes police officers embarrass or harass the victims themselves.<sup>122</sup> It is imperative that all revenge pornography victims receive protection because the harm of harassment, “lost jobs, lost relationships, lost friendships, and in extreme cases, physical harm,” is very real.<sup>123</sup> The thirteen states that have passed legislation banning the posting of nonconsensual pornography have begun a groundbreaking movement that may take years to complete.<sup>124</sup>

### 1. New Jersey

New Jersey Code 2C:14-9 was passed in New Jersey in 2003.<sup>125</sup> The statute “makes ‘it a felony to disclose a person’s nude or partially nude image without that person’s consent.’”<sup>126</sup> Subsection (c) of the statute specifically refers to the type of revenge pornography this Comment discusses—instances in which an individual willingly shares the content with one person they trust, but the content is then further distributed without their

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117. *Id.*

118. *Id.* at 1, 3; *see also* Martinez, *supra* note 1, at 240–41.

119. Martinez, *supra* note 1, at 239.

120. *See* Poltash, *supra* note 15, at 13.

121. *See* Martinez, *supra* note 1, at 236–37 (illustrating the story of Annmarie Chiarini, whose boyfriend coerced her to take explicit photographs of herself). After the relationship ended, Chiarini’s boyfriend distributed her explicit photographs to strangers, her friends, and her family. *Id.* She contacted the police, who “told her that no crime was committed and there was nothing [that] they could do.” *Id.* at 236. The second time she contacted the police, they “laughed [at her] and essentially blamed her for the incident.” *Id.* at 237.

122. *Id.* at 237, 239.

123. Martinez, *supra* note 1, at 251.

124. Franks, *supra* note 6, at 3; *see also* Martinez, *supra* note 1, at 239–44.

125. N.J. STAT. ANN. § 2C:14-9 (West 2014).

126. Martinez, *supra* note 1, at 239; *see also* N.J. STAT. ANN. § 2C:14-9.

consent—whereas the other sections of the statute describe instances where the individual engaging in the act is photographed or recorded without permission.<sup>127</sup> The section specifically reads:

c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, *disclose* means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b of [New Jersey Statute] 2C:43-3, a fine not to exceed \$30,000 may be imposed for a violation of this subsection.<sup>128</sup>

Subsection (d)(1) of the statute makes it “an affirmative defense to a crime under this section that: [T]he actor posted or otherwise provided prior notice to the person of the actor’s intent to engage in the conduct specified in subsection a., b., or c.”<sup>129</sup> Experts and lawmakers alike praise the “specific definitions and affirmative defenses” outlined in the statute, as they “guard the statute against First Amendment overbreadth.”<sup>130</sup> The law has also been complimented for treating the conduct seriously even though it was enacted “well ahead of its time” and “years before any of the debate that surrounds such laws today” began.<sup>131</sup> Making the posting of revenge pornography a felony also serves as a good deterrent for those who may not think that the act is a serious offense.<sup>132</sup> “New Jersey ‘gave the law enough teeth to serve as a deterrent, threatening those convicted of posting lewd images or video of someone without license or privilege with a third-degree crime, punishable with a prison sentence of [three] to [five] years.’”<sup>133</sup> The lack of this deterrent effect in many of the other states that have proposed legislation may lead to the opinion that the legislation might not be effective, and therefore, the proposed bill may ultimately fail to pass as law.<sup>134</sup>

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127. N.J. STAT. ANN. § 2C:14-9(1)(a)–(c).

128. *Id.* § 2C:14-9(1)(c).

129. *Id.* § 2C:14-9(1)(d)(1).

130. Martinez, *supra* note 1, at 240–41.

131. *Id.* at 241.

132. *Id.*

133. *Id.*

134. *See id.*



## 2. California

California's Senate Bill 255, which is now codified as section 647(j)(4) of the California Penal Code, became effective on October 1, 2013.<sup>135</sup> The law "makes it a misdemeanor to 'publish images of another person without their consent 'with the intent[] to cause . . . emotional distress.'"<sup>136</sup> The California law finds someone guilty of disorderly conduct if:

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.<sup>137</sup>

The initial issue with the California revenge pornography statute was that it did not protect victims who had taken the images themselves and then shared them with someone they trusted, who then shared them with third party recipients without the victims' consent.<sup>138</sup> As stated earlier in this Comment, "up to [eighty percent] of revenge porn[ography] victims belong to this category," which is why it is the main focus of this Comment.<sup>139</sup> The law, therefore, did not punish anybody except the person who made the recording.<sup>140</sup> This meant that operators of revenge pornography websites and third party redistributors of the image—who many times encourage the posting of these images or engage in egging on viewers to harass the victims—could not be charged under the law.<sup>141</sup> On February 21, 2014, the California Assembly Commission enrolled Bill 2643, which will expand the Civil Code by prohibiting a person from posting explicit images of another identifiable person that were intended to remain private.<sup>142</sup> This new addition to the law

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135. CAL. PENAL CODE § 647(j)(4) (West 2014); Martinez, *supra* note 1, at 241.

136. Martinez *supra* note 1, at 241–42; *see also* CAL. PENAL CODE § 647(j)(4)(A).

137. CAL. PENAL CODE § 647(j)(4)(A).

138. Martinez, *supra* note 1, at 242–43; *see also* CAL. PENAL CODE § 647(j)(4)(A).

139. Martinez, *supra* note 1, at 242; *see also supra* Parts I–II.

140. Martinez, *supra* note 1, at 243.

141. *Id.*

142. Assemb. 2643, 2013–14 Leg., Reg. Sess. (Cal. 2014).

would create a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes the intimate body parts, as defined, of that person or him or her engaged in specified sexual acts, without his or her consent, knowing that the other person had a reasonable expectation that the material would remain private, if specified conditions are met.<sup>143</sup>

Another major issue with California law still remains though; the criminal law requires that the defendant intended to cause the victim serious emotional distress.<sup>144</sup> This creates a problem for prosecutors who then need to collect evidence to prove that victims have suffered emotional distress.<sup>145</sup> The sexual nature involved with sexting and becoming a victim of revenge pornography already makes victims reluctant to share their stories.<sup>146</sup> Many victims are too humiliated or afraid to speak out and would rather just have the whole episode disappear, or at the very least remain anonymous.<sup>147</sup> The California criminal statute is also quite tame in its punishment compared to other revenge porn statutes, which has a negative effect on its deterrent factor.<sup>148</sup>

### 3. Maryland

Scholars with an expertise in online cyber bullying and harassment—and have extensive knowledge of revenge pornography—were very excited about the proposed legislation aimed at criminalizing revenge pornography in Maryland.<sup>149</sup> Proposed House Bill 43 originally intended to “bar[] the disclosure of a person’s sexually explicit or nude images ‘knowing that the other person has not consented to the disclosure.’”<sup>150</sup> The original

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143. *Id.*

144. CAL. PENAL CODE § 647(j)(4)(A) (West 2014); Citron & Franks, *supra* note 3, at 374.

145. *See* CAL. PENAL CODE § 647(j)(4)(A); Martinez, *supra* note 1, at 243.

146. Citron & Franks, *supra* note 3, at 358.

147. *See id.*

148. CAL. PENAL CODE § 647(k)–(l); Citron & Franks, *supra* note 3, at 374.

The statute makes nonconsensual pornography a misdemeanor “punishable by up to six months in prison and a [one thousand dollar] fine, up to one year in prison and a [two thousand dollar] fine for a second offense,” whereas New Jersey’s revenge pornography statute—and many other newly proposed statutes—makes the act punishable as a felony imposed with greater jail time and heftier fines. Citron & Franks, *supra* note 3, at 374; Martinez, *supra* note 1, at 239–41.

149. *See Groundbreaking Revenge Porn Bill*, THE ELM (Nov. 4, 2013), <https://elm.umaryland.edu/groundbreaking-internet-safety-bill/>.

150. Citron and Franks, *supra* note 3, at 372 (quoting H.D. 43, 2014 Leg., Reg. Sess. (Md. 2014)).

legislative text of the bill was similar to New Jersey's praised revenge pornography statute due to its specific definitions, broad scope, and its effective deterrent status in making the act of revenge pornography a felony.<sup>151</sup> It was a positive move towards more states enacting *effective* legislation to criminalize revenge pornography.<sup>152</sup> Unfortunately, before it was enacted on May 12, 2014, the legislative text of the bill was dramatically changed.<sup>153</sup> The enacted law—effective October 1, 2014—now reads:

(B)(1) This section does not apply to: (I) lawful and common practices of law enforcement, the reporting of unlawful conduct, or legal proceedings; or (II) situations involving voluntary exposure in public or commercial settings. An interactive computer service, as defined in 47 U.S.C. § 230(f)(2), is not liable under this section for content provided by another person.

(C) A person may not *intentionally cause serious emotional distress to another* by intentionally placing on the Internet a photograph, film, videotape, recording, or any other reproduction of the image of the other person that reveals the identity of the other person with his or her intimate parts exposed or while engaged in an act of sexual contact: (1) knowing that the other person did not consent to the placement of the image on the Internet, and (2) under circumstances in which the other person had a reasonable expectation that the image would be kept private.

(D) A person who violates this section is guilty of a *misdemeanor* and on conviction is subject to imprisonment not exceeding [two] years or a fine not exceeding [five thousand dollars] or both.<sup>154</sup>

The enacted bill now requires the intent of causing emotional distress to the victim—similar to the California revenge pornography

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151. See Md. H.D. 43; Citron & Franks, *supra* note 3, at 372–74.

152. See Citron & Franks, *supra* note 3 at 372–74.

153. Md. H.D. 43; MD. DEP'T OF LEGIS. SERVS., FISCAL & POLICY NOTE, H.D. 43, Reg. Sess., at 5 (2014).

154. Md. H.D. 43. The original legislative attempt to pass Maryland revenge pornography legislation read:

For the purpose of prohibiting a person from intentionally disclosing a certain sexually explicit image of a certain other person, knowing that the other person has not consented to the disclosure; providing penalties for a violation of this Act; providing for the scope of this Act; providing that this Act does not affect any legal or equitable right or remedy otherwise provided by law; defining certain terms; and generally relating to the intentional disclosure of sexually explicit images.

H.D. 64, 434th Gen. Assemb., Reg. Sess. (Md. 2014).

statute.<sup>155</sup> The original attempt to pass revenge porn legislation only required that a person *intentionally* disclose an image, “knowing that the other person has not consented.”<sup>156</sup> The enacted law has also lowered the severity of the crime.<sup>157</sup> The original attempt to pass revenge porn legislation would have made the disclosure of sexually explicit images, without consent, a felony with a punishment of up to five years of jail time and a significant fine.<sup>158</sup> The enacted law lowered the degree of the crime to a misdemeanor.<sup>159</sup> With the law being classified as a lower degree crime, it means that the punishable time of an offender must also be lowered.<sup>160</sup> The Maryland law currently allows up to two years of jail time and, in the most serious offenses, up to a five thousand dollar maximum fine.<sup>161</sup>

There is still reason for lawmakers, and the public alike, to be pleased with Maryland’s enacted revenge pornography statute.<sup>162</sup> Lawmakers have commended the second section of the bill, which lists various exemptions of scenarios where the bill does not apply.<sup>163</sup> Luckily for them, the second section of the statute stayed intact with only relatively minor changes.<sup>164</sup> The statute provides that in certain scenarios—such as in any situation that involves “lawful and common practices of law enforcement, the reporting of unlawful conduct, or legal proceedings”—the statute does not apply and the act engaged in cannot be considered a criminal act.<sup>165</sup> Scholars have argued that it is important for lawmakers to include clear exemptions like these so that the proposed statutes can avoid First Amendment overbreadth issues.<sup>166</sup>

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155. Md. H.D. 43; *see also* CAL. PENAL CODE § 647(j)(4)(A) (West 2014).

156. Md. H.D. 64.

157. *Compare* Md. H.D. 64, *with* Md. H.D. 43.

158. Md. H.D. 64.

159. Md. H.D. 43.

160. *See* Md. H.D. 43; Citron & Franks, *supra* note 3, at 373–74 (discussing the different laws in states who have passed laws criminalizing revenge porn and the amount punishable under each statute).

161. Md. H.D. 43.

162. *See id.*; Pat Warren, *Bill Signed Into Law Making Revenge Porn a Misdemeanor*, CBS BALTIMORE LOCAL (May 15, 2014, 6:52 PM), <http://Baltimore.cbslocal.com/2014/05/15/bill-signed-into-law-making-revenge-porn-a-misdemeanor/>.

163. Md. H.D. 43; *see also* Warren, *supra* note 162.

164. Md. H.D. 43.

165. *Id.*

166. Citron & Franks, *supra* note 3, at 388.

Revenge porn bills should include exemptions that guard against the criminalization of disclosures concerning matters of public interest, such as the Maryland, New York, and Wisconsin bills do. They should make clear that it is a crime to distribute someone’s sexually explicit images *if and only if* those images do not concern matters of public importance. . . . Such an exception would help reflect the state of First Amendment doctrine; it would not alleviate overbreadth problems.

## V. BANNING REVENGE PORNOGRAPHY: FLORIDA

The fifth section of this Comment will specifically focus on the current state of revenge pornography legislation in Florida, and aim at convincing readers that revenge pornography should be criminalized in the state of Florida.<sup>167</sup> Recently, both Florida House Bill 475 and Florida Senate Bill 532 failed to pass as law.<sup>168</sup> The proposed legislation aimed at “prohibiting an individual from disclosing a sexually explicit image of an identifiable person.”<sup>169</sup> The first part of this section will outline both the Florida House Bill 475 and Florida Senate Bill 532.<sup>170</sup> The second part of this section will discuss the suggestions of scholars who specialize in revenge pornography, as applied to Florida’s proposed legislation, to help legislative bodies draft new bills so the state can continue to move forward in its efforts to criminalize revenge pornography.<sup>171</sup>

A. *Proposed Legislation*

Legislation was proposed both in the Florida House of Representatives and the Florida Senate to criminalize revenge pornography in Florida.<sup>172</sup> Unfortunately, both efforts failed.<sup>173</sup> One issue—which will be discussed in the second section of this part of the Comment—is that both proposed bills required a showing of *intent to harass* the victim by posting the explicit images.<sup>174</sup> The statutes do have significant differences though, which can be seen in the legislative text of the bills.<sup>175</sup> Florida House Bill 475—which died in the Criminal Justice Subcommittee on May 2, 2014—reads:

An act relating to the disclosure of sexually explicit images . . . prohibiting an individual from disclosing a sexually

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*Id.* (footnote omitted).

167. See *infra* Part V.A–B.

168. See H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); *CS/CS/SB 532: Disclosure of Sexually Explicit Images*, FLORIDA SENATE, <http://www.flsenate.gov/Session/Bill/2014/0532> (last visited Jan. 2, 2015); *HB 475: Disclosure of Sexually Explicit Images*, FLORIDA SENATE, <http://www.flsenate.gov/Session/Bill/2014/0475> (last visited Jan. 2, 2015).

169. Fla. H.R. 475; Fla. S. 532.

170. See *infra* Part V.A.

171. See *infra* Part V.B.

172. See Fla. H.R. 475; Fla. S. 532.

173. Fla. H.R. 475; Fla. S. 532; *CS/CS/SB 532: Disclosure of Sexually Explicit Images*, *supra* note 168; *HB 475: Disclosure of Sexually Explicit Images*, *supra* note 168.

174. Fla. H.R. 475; Fla. S. 532; see *infra* Part V.B.

175. See Fla. H.R. 475; Fla. S. 532.

explicit image of an identifiable person with the intent to harass such person if the individual knows or should have known such person did not consent to the disclosure.

....

(2) An individual may not intentionally and knowingly disclose . . . sexually explicit image of an identifiable person or that contains descriptive information in a form that conveys the personal identification information . . . of the person to a social networking service or a website, or by means of any other electronic medium, *with the intent to harass such person*, if the individual knows or should have known that the person depicted in . . . sexually explicit image did not consent to such disclosure.

(3)(a) Except as provided in paragraph (b), an individual who violates this section commits a *felony of the third degree* . . . .

(b) An individual who is [eighteen] years of age or older at the time he or she violates this section commits a *felony of the second degree* . . . if the violation involves a sexually explicit image of an individual who was younger than [sixteen] years of age at the time the sexually explicit image was created.

....

(5) This section does not apply to the disclosure of a sexually explicit image for:

(a) The reporting, investigation, and prosecution of an alleged crime for law enforcement purposes.

(b) Voluntary and consensual purposes in public or commercial settings.<sup>176</sup>

Section (1) of the bill, which was omitted from the recopying of the statute into this Comment provided above, provides specific and detailed definitions for the terms used within the proposed statute, such as *disclose*, *harass*, *identifiable person*, and *sexually explicit image*.<sup>177</sup> As stated in the text, the Florida House Bill makes the violation of the revenge pornography statute a felony.<sup>178</sup>

Unlike the Florida House Bill, the Florida Senate Bill makes the offense of disclosing sexually explicit images a misdemeanor.<sup>179</sup> Florida Senate Bill 532 reads:

An act relating to the disclosure of sexually explicit images . . . prohibiting an individual from *disclosing a sexually explicit image of an identifiable person with the intent to harass*

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176. Fla. H.R. 475 (emphasis added).

177. *Id.* § 1(1)(a)–(d).

178. *Id.* § 1(3)(a).

179. *Compare id.*, with Fla. S. 532 § 1(3)(a).

*such person* if the individual knows or should have known such person did not consent to the disclosure; providing criminal penalties . . . requiring a court to order that a person convicted of such offense be prohibited from having contact with the victim; providing criminal penalties for a violation of such order; providing that criminal penalties for certain offenses run consecutively with a sentence imposed for a violation of [specific provisions].

- . . . .
- (3)(a) Except as provided in paragraph (b), an individual who violates this section commits a *second degree misdemeanor* . . . .
- (b) An individual who is older than [eighteen] years of age at the time he or she violates this section commits a *first degree misdemeanor* . . . if the violation involves a sexually explicit image of an individual who was younger than [sixteen] years of age at the time the sexually explicit image was created.<sup>180</sup>

The Senate-proposed bill provides specific definitions for the terms *disclose*, *harass*, *identifiable person*, and *sexually explicit image* as well.<sup>181</sup> Section 1 of the proposed legislation—intentionally left out of the recopying of the statute above—also specifically mentions, as the House Bill does, that “[a]n individual may not intentionally and knowingly disclose a sexually explicit image of an identifiable person to a social networking service or a website, or by means of any electronic medium.”<sup>182</sup> This illustrates that both of the proposed statutes are trying to specifically target the rising trend of revenge pornography as it relates to posting these images on the Internet.<sup>183</sup> Unlike House of Representatives Bill 475, which placed a heftier punishment for violators of the statute, Senate Bill 532 provided that a violation of the statute would amount to a misdemeanor.<sup>184</sup> In Florida, a misdemeanor of the first degree is punishable “by a definite term of imprisonment not exceeding [one] year.”<sup>185</sup> “A misdemeanor of the second degree [is punishable] by a definite term of imprisonment not exceeding [sixty] days.”<sup>186</sup> For a felony in the second degree under House of Representatives Bill 475, one who committed the act of sharing an explicit image involving a minor without consent could have been punished “by a term of imprisonment not exceeding [fifteen] years.”<sup>187</sup> Young adults and adults who fall in the category of

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180. Fla. S. 532 (emphasis added).

181. *Id.* § 1(1).

182. *Id.* § 1(2); *see also* Fla. H.R. 475 § 1(2).

183. *See* Fla. H.R. 475; Fla. S. 532.

184. *See* Fla. H.R. 475 § 1(3); Fla. S. 532 § 1(3).

185. FLA. STAT. § 775.082(4)(a) (2014).

186. *Id.* § 775.082(4)(b).

187. *Id.* § 775.082(3)(d); Fla. H.R. 475 § 1(3)(b).

violating a felony in the third degree, could have been punished “by a term of imprisonment not exceeding [five] years.”<sup>188</sup> The fines that could have been imposed range from five thousand dollars to ten thousand dollars for the felonies, and five hundred dollars to one thousand dollars for the misdemeanors.<sup>189</sup>

#### B. *Scholar Suggestions*

Reviewing proposed legislation and analyzing the legislative text against expert advice might help legislative bodies determine why the law might have failed to pass.<sup>190</sup> At the very least, reading and analyzing scholars’ advice may help lawmakers draft more applicable legislation that has greater chances of being enacted into law, which is the ultimate goal.<sup>191</sup> The main problem with House of Representatives Bill 475 and Senate Bill 532 was the malicious motive requirement.<sup>192</sup> Both proposed bills required a showing of *intent to harass* the victim by posting the explicit images.<sup>193</sup> When evaluating the California revenge pornography statute—which also requires proof of a malicious motive that the defendants intended to inflict serious emotional distress upon the victim—scholars and lawmakers alike believed that it went too far:<sup>194</sup>

Such requirements misunderstand the gravamen of the wrong—the disclosure of someone’s naked photographs without the person’s consent and in violation of their expectation that the image be kept private. Whether the person making the disclosure is motivated by a desire to harm a particular person, as opposed to a desire to entertain or generate profit, should be irrelevant. Malicious motive requirements are not demanded by the First Amendment and, in fact, create an unprincipled and indefensible hierarchy of perpetrators. What is essential is a statute’s goal of protecting privacy, autonomy, and the fostering of private expression, which the Court has recognized as legitimate grounds for regulation.<sup>195</sup>

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188. FLA. STAT. § 775.082(3)(e), (9)(3)(d).

189. *Id.* § 775.083(1)(b)–(e).

190. *See* Citron & Franks, *supra* note 3, at 386–90.

191. *See id.* at 386.

192. *See* Fla. H.R. 475; S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); Citron & Franks, *supra* note 3, at 387.

193. Fla. H.R. 475; Fla. S. 532.

194. CAL. PENAL CODE § 647(4)(A) (West 2014); *see also* Citron & Franks, *supra* note 3, at 387.

195. Citron & Franks, *supra* note 3, at 387.



Malicious motive requirements also make the case harder for prosecutors who must charge the offenders.<sup>196</sup> As shown throughout this Comment—and through many other scholarly articles that reiterate the stories of victims—many are too ashamed to talk and are afraid to come forward with their story.<sup>197</sup> Victims want to hide from the shame posts found online, not attribute their name further to the content.<sup>198</sup>

The requirement of *intent to harass* the victim may also discourage law enforcement officers from acting when a revenge pornography victim comes forward.<sup>199</sup> The issue of what constitutes *harassment* and when the violator passes the threshold to qualify the act as *intending to harass*, begins again.<sup>200</sup> The definition of *harass*—provided in both House Bill 475 and Senate Bill 532—provides little help.<sup>201</sup> According to the proposed legislation, “‘harass’ means to engage in conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose.”<sup>202</sup> “Revenge porn statutes might have a better chance of withstanding overbreadth challenges if they require the state to prove that the victims suffered harm.”<sup>203</sup> Although it might help the statute escape overbreadth challenges, the requirement of showing harm further frustrates the issue of having revenge porn victims come forward and speak out.<sup>204</sup> Many victims are also afraid of what the person they are reporting might forward to others, and openly speak about what they have been through, as well as the harm that the offender has inflicted on them.<sup>205</sup> It is scary for victims to come forward and openly speak about what they have been through as well as the harm that the offender has inflicted on them.<sup>206</sup> The proposed legislation did a good job of providing clear and specific definitions of key terms, though.<sup>207</sup> Along with the important definitions of *harass* and *sexually explicit image*, Florida legislators also included a definition for the term *disclose*, which is very important in regards to revenge

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196. *Id.* at 369–70; *see also* Martinez, *supra* note 1, at 243.

197. *See* Citron & Franks, *supra* note 3, at 347, 358.

198. *See id.* at 358.

199. Martinez, *supra* note 1, at 237; *see also* H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014).

200. *See* Fla. H.R. 475; Fla. S. 532.

201. *See* Fla. H.R. 475; Fla. S. 532.

202. Fla. H.R. 475; Fla. S. 532.

203. Citron & Franks, *supra* note 3, at 388.

204. *See id.* at 347.

205. *See id.*; Martinez, *supra* note 1, at 236–37.

206. Martinez, *supra* note 1, 236–37; *see also* Citron & Franks, *supra* note 3, at 367.

207. *See* Fla. H.R. 475; Fla. S. 532.

pornography statutes.<sup>208</sup> The legislative text defines *disclose* as “to publish, post, distribute, exhibit, advertise, offer, or transfer, or cause to be published, posted, distributed, exhibited, advertised, offered, or transferred.”<sup>209</sup> This definition is excellent as it covers a wide range of scenarios that can constitute revenge pornography and does not limit the act to a specific transfer from one person to the other; it protects victims on a much larger scale.<sup>210</sup> The proposed legislation also contained an exemption section, similar to the praised section in Maryland’s revenge porn statute.<sup>211</sup> Again, lawmakers favor this type of clear exemption section because it helps avoid First Amendment overbreadth issues.<sup>212</sup>

Another issue the proposed legislation in Florida most likely faced is the extent of the penalty imposed upon violators.<sup>213</sup>

The ideal penalty for nonconsensual pornography is another contested issue. If the conduct is categorized as a mere misdemeanor, it risks sending the message that the harm caused to victims is not that severe. Such categorization also decreases incentives for law enforcement to dedicate the resources necessary to adequately investigate such conduct. At the same time, criminal laws that are more punitive will face stricter examination and possible public resistance. Although California’s categorization of revenge porn as a misdemeanor sends a weak message to would-be perpetrators and will be a less effective deterrent than a law like New Jersey’s, [which categorizes revenge porn as a felony], it may have aided the law’s passage.<sup>214</sup>

Lawmakers need to find a median point in categorizing legislation.<sup>215</sup> The felony categorization of revenge pornography, with a penalty of anywhere between five to fifteen years of jail time—although a good deterrent—seems too extreme, and it casts a shadow of doubt that anybody would actually be charged under the statute.<sup>216</sup> On the other hand, under the

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208. Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 388.

209. Fla. H.R. 475; Fla. S. 532.

210. See Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 388–89.

211. Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 372–73; see also MD. CODE ANN. Criminal Law § 3-809 (West 2014).

212. See Citron & Franks, *supra* note 3, at 388.

213. See Fla. H.R. 475; Fla. S. 532.

214. Citron & Franks, *supra* note 3, at 389.

215. See *id.*

216. See *id.* at 389–90 (discussing the importance of penalty categorization of statutes, which can either make a proposed legislation successful, or be responsible for its death); Martinez, *supra* note 1, at 241.

proposed Senate Bill, it is possible for violators to get a sentence of up to one year in jail, which seems like a slap on the wrist compared to revenge porn statutes in other states.<sup>217</sup> It is possible that legislators wondered if this law would even be worth passing, as it is not likely to deter actors, especially since police officers will probably not be willing to spend the needed time to investigate the act for such a small offense.<sup>218</sup> Although Florida's proposed legislation was a good starting point, it is clear that both bills were flawed.<sup>219</sup>

## VI. CONCLUSION

Revenge pornography is a rising trend that today's generation needs to face.<sup>220</sup> Technological innovations have made it easier for individuals to share private information with others with a simple click of a button.<sup>221</sup> For revenge porn victims, this private information is of the most sensitive kind—sexually explicit images or videos of the individual.<sup>222</sup> With the dramatic increase of the popularity of sexting, teenagers, and young adults are the main victims of revenge pornography.<sup>223</sup> These young adults are haunted at a young age because of one mistake that will likely “result[] in lost jobs, lost relationships, lost friendships, and [possibly] physical harm.”<sup>224</sup> Thirteen states have enacted revenge porn legislation and many have proposed bills in review.<sup>225</sup> The efforts of Florida Legislators to enact revenge pornography have sadly failed, but lawmakers cannot stop trying.<sup>226</sup> This Comment has proven the rise in the number of acts leading to revenge pornography, has shown the harms of revenge pornography faced by victims, and has analyzed legislation in other states which may be of help preparing the next set of proposed legislation.<sup>227</sup> The Florida Legislature's attempts at enacting revenge pornography were commendable, and the state continues to move forward during this groundbreaking era in an effort to join other states in

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217. Fla. S. 532; *see also* FLA. STAT. § 775.082(4)(a) (2014); Citron & Franks, *supra* note 3, at 389.

218. *See* Fla. S. 532; Citron & Franks, *supra* note 3, at 361, 389.

219. *See* H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); Fla. S. 532; Citron & Franks, *supra* note 3, at 387–91.

220. *See* Martinez, *supra* note 1, at 237; Poltash, *supra* note 15, at 5–6, 19.

221. *See* Martinez, *supra* note 1, at 237–38, 245.

222. *Id.* at 245.

223. *Id.* at 251.

224. *Id.*

225. Franks, *supra* note 6, at 3; *see also* Citron & Franks, *supra* note 3, at 371.

226. *See* H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); Kay, *supra* note 21.

227. *See supra* Parts II–V.

criminalizing this disgraceful act.<sup>228</sup> “On July 30, 2014, the Miami Beach Commission unanimously voted to pass a resolution urging the Florida [L]egislature to enact legislation criminalizing . . . revenge porn[ography].”<sup>229</sup> The resolution was passed with the aid of Miami-Dade Florida Association for Women Lawyers, whose main “mission [includes] mak[ing] Florida the next state on [the] list” of the thirteen states that have already passed revenge porn legislation.<sup>230</sup> It is impossible to draft the *perfect* statute, but legislators could take the advice of experts and scholars in the field of cyber harassment to help enact better revenge pornography statutes that will provide victims with more protection, and will succeed at becoming law.<sup>231</sup>

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228. Kay, *supra* note 21; *see also* Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 371.

229. Press Release, Fla. Ass’n for Women Lawyers Miami-Dade Chapter, With the Help of Miami-Dade FAWL, Miami Beach Comm’n Unanimously Votes to Pass Resolution Urging Fla. Legislature to Criminalize “Revenge Porn” (July 30, 2014), *available at* <http://mdfawl.org/miami-beach-revenge-porn-resolution/>; *see also* Kay, *supra* note 21.

230. Press Release, Fla. Ass’n for Women Lawyers Miami-Dade Chapter, *supra* note 229.

231. *See* Citron & Franks, *supra* note 3, at 386, 390–91.