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Revenge in Modern Times: The Necessity of a Federal Law Criminalizing Revenge Porn

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examine other laws that could be used against the perpetrator including cyber stalking and tort laws. This paper will then examine why copyright law is currently the best recourse for most victims of revenge porn, by giving them the opportunity to remove the image(s) from public light. Finally this paper will examine the need for federal intervention in order to protect the privacy rights of victims and ensure that law enforcement takes the issue seriously.

Revenge porn is most commonly defined as “the sharing of private, sexual materials, either photos or videos, of another person without their consent and with the purpose of causing embarrassment or distress.”¹ Although men can be victims of revenge porn, the overwhelming majority of victims are female.² Typically the photographs used in revenge porn were taken by the victims themselves, shared in the context of a consensual romantic relationship, or were obtained without the consent of the woman, typically through hacking.³ Increasingly, perpetrators are sharing not only intimate pictures of the victim, but also the victim’s personal contact information.⁴ The sharing of this personal information results in an even greater invasion of privacy and causes the victim to fear for their personal safety. In some cases, the perpetrator(s) have set up fake Facebook accounts in their victim’s names or posed as the victims online and invited other men to seek them out in real life.⁵ This privacy violation typically causes the victim a great deal of emotional stress and can result in psychiatric care. As the postings are often explicit and the perpetrator depends on the sexual nature of the image to cause maximum distress, revenge porn is, and thus should be treated as a form of sexual assault.

The issue of revenge porn has entered the public consciousness as the result of a number of high-profile hacking cases where celebrities had personal photographs stolen from online storage accounts.⁶ This includes the recent hack of the iCloud, in which a number of high-profile celebrities had embarrassing and intimate photographs stolen.⁷ One victim, the actress

1. Alexis Morse, *When Dating Abuse Goes Digital: Revenge Porn*, (July 8, 2015), <http://nomore.org/dating-abuse-goes-digital-revenge-porn/>.

2. Danielle Keats Citron, *Revenge Porn: A Pernicious Form of Cyber Gender Harassment*, THE BALTIMORE SUN, http://articles.baltimoresun.com/2013-12-15/news/bs-ed-cyber-gender-harassment-20131214_1_cyber-civil-rights-initiative-nude-images-harassment (Oct. 11, 2016); *see also, infra* note 54 (discussing how cyberharassment, including revenge porn, is a predominately female problem); *but see, infra* note 55 (noting exceptions).

3. Sarah Bloom, *No Vengeance for “Revenge Porn” Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense Is Still Legal, and Why We Should Criminalize It*, 42 FORDHAM URB. L.J. 233, 237–38 (2014).

4. Morse, *supra* note 1.

5. *CPS to Prosecute ‘Trolls’ Who Use Fake Online Profiles*, BBC, (Mar. 3, 2016), <http://www.bbc.com/news/technology-35712772>.

6. Amanda Remling, *iCloud Nude Leaks: 26 Celebrities Affected in the Nude Photo Scandal*, INT’L BUS. TIMES (Sept. 21, 2014, 1:19 PM), <http://www.ibtimes.com/icloud-nude-leaks-26-celebrities-affected-nude-photo-scandal-1692540>.

7. Piya Sinha-Roy, *Penn. man to Plead Guilty to Hacking Celebrities’ Email, iCloud*

Jennifer Lawrence, described the hack as a sex crime and expressed fear that it would negatively impact her career.⁸ Specifically, Lawrence stated “[t]he law needs to be changed, and we need to change. That’s why these Web sites are responsible. Just the fact that somebody can be sexually exploited and violated, and the first thought that crosses somebody’s mind is to make a profit from it.”⁹ Although Lawrence is a high-profile victim, her statement reflects the fear and outrage most victims feel after the photograph has been placed online. Lawrence also noted that many of the revenge porn websites encourage this behavior and are ultimately not held responsible for their actions.

In some situations, the offender is the celebrity and the victim is a less well-known individual. Recently, a Chicago Blackhawk player, Garrett Ross, was arrested for sharing the photo of a woman engaged in a sexual act without getting the victim’s consent.¹⁰ The victim originally tried to prosecute Ross in Illinois, where the crime is a felony, but because the sexual act occurred in Michigan, and the photograph was originally shared in Michigan, is forced to pursue charges there, where the crime is a misdemeanor.¹¹ This is despite the fact that Ross lives in Illinois. Further, the harm is nationwide, as her picture is available in all states. Revenge porn litigation should look to libel jurisdiction case law and grant jurisdiction to the state where the harm occurred, where the victim is located.¹² Although these cases are high-profile, victims are most commonly “ordinary” citizens who have had their privacy violated in extremely personal ways.

Exacerbating the trauma, revenge porn websites often charge the victims to remove the photograph(s) while taking no steps to ensure the photographs were consensually shared.¹³ California recently became the first state to prosecute an individual for charging victims to remove their photographs when it successfully convicted Kevin Bollaert of extortion for charging victims up to 350 dollars to remove their photographs.¹⁴ Bollaert’s case demonstrated that often offenders share the image and then a third-party profits from the crime by charging the victim to remove the

Accounts, REUTERS (Mar. 17, 2016, 5:48 AM), <http://www.reuters.com/article/us-cyber-celebrities-court-idUSKCN0WI36N>.

8. *Cover Exclusive: Jennifer Lawrence Calls Photo Hacking a “Sex Crime”*, VANITY FAIR (Nov. 2014), <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover>.

9. *Id.*

10. *Revenge Porn Charges Dropped Against Garret Ross*, SPORTS ILLUSTRATED (Mar. 29, 2016), <http://www.si.com/nhl/2016/03/29/blackhawks-garrett-ross-revenge-porn-charges-dropped-can-not-prosecute>.

11. *Id.*

12. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

13. Liberty Zabala & R. Stickney, “*Revenge Porn*” *Defendant Sentenced to 18 Years*, NBC SAN DIEGO (Apr. 3, 2015, 10:37 AM), <http://www.nbcsandiego.com/news/local/-Bollaert-Revenge-Porn-Sentencing-San-Diego-298603981.html>.

14. *Id.*

photograph from a website. Although the third-party did not commit the original revenge porn crime, it committed the crime of extortion. Google, recognizing that revenge porn is “intensely personal and emotionally damaging,” agreed to remove links to photographs upon request of the victim.¹⁵

Victims have several options to pursue once they become aware that their photographs have been made public. But all avenues have serious drawbacks. If the photograph was taken in a state that criminalizes revenge porn or the perpetrator uploaded the picture while in a state that criminalizes revenge porn, criminal charges can be pursued. But the laws are inconsistent, with some states prosecuting a violation as a felony, and others pursuing misdemeanors.¹⁶ In an attempt to use federal law, victims have also had perpetrators prosecuted under federal cyber stalking laws, but the offender often has to do more than simply share the photograph.¹⁷ Other victims have pursued tort law actions, bringing suits alleging invasion of privacy, false light portrayal, defamation, and intentional infliction of emotional distress.¹⁸ Drawbacks to this approach include the cost of litigation, affirmative defenses, such as truthfulness, and the difficulty of collecting judgments. Finally, none of these options address the victim's biggest goal, which is the removal of the photographs. Therefore, copyright law tends to be the most effective at ensuring victims get what they want, the removal of photographs from websites.

However, like the other options, this route is not perfect and victims will not have the satisfaction of seeing the perpetrator criminally punished. As discussed below, for a victim to take advantage of copyright laws they must own the image, which typically means the victim must be the person who took the photograph. Although 80%¹⁹ of victims took the explicit photograph of themselves, this requirement in copyright law ensures that a sizeable minority of victims have no recourse to force a photograph to be removed from a hosting website.²⁰ Further, most victims will be unable to pursue monetary damages against the offender, by failing to register the copyright within 90 days. Due to these drawbacks, and based on the sexual

15. *Removing 'revenge porn' is the Right Move for Google*, S.F. CHRONICLE (June 22, 2015), <http://www.sfchronicle.com/opinion/editorials/article/Removing-revenge-porn-is-the-right-move-for-6342798.php>.

16. C.A. Goldberg, *State Revenge Porn Laws*, (May 6, 2016), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>.

17. *U. S. v. Matusiewicz*, 84 F. Supp. 3d 363, 365 (D. Del. 2015).

18. Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57 (2014).

19. Jessica Roy, *California's New Anti-Revenge Porn Bill Won't Protect Most Victims*, TIME (Oct. 3, 2013), <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/>.

20. Kaitlan M. Folderauer, *Not All Is Fair (Use) in Love and War: Copyright Law and Revenge Porn*, 44 U. BALT. L. REV. 321, 326 (2015).

nature of the crime, the federal government must pass legislation protecting these victims from further exploitation.

II. STATE CRIMINAL LAWS

States are beginning to recognize the damage revenge porn causes its victims and have drafted various criminal laws targeting the behavior. Although these state laws are a good start, they vary widely based on the state, and leave many victims unprotected. Some states punish the act of dissemination as a felony, while others punish it only as a misdemeanor. This will lead some victims to justice, but others will feel ignored. These statutes often fail to include an ability to bring a civil remedy, or contain various exceptions and affirmative defenses that prevent them from being effective. Finally, as many of the laws are relatively new, it remains to be seen how seriously state law enforcement will take the situation. This is especially concerning given that victims of other forms of sexual harassment or assault face a difficult time convincing law enforcement to assist them.

Nevada makes the “unlawful dissemination of an intimate image when, with the intent to harass, harm, or terrorize another person” a category D felony.²¹ However, the statute contains the requirement that the person “had a reasonable expectation that the intimate image would be kept private and would not be made visible to the public.”²² The statute then states that this provision does not apply if the image is disseminated for a “legitimate public interest.”²³ Finally, the statute makes it illegal to demand compensation in exchange for removing the image from “public view.”²⁴ Although this law is a good foundation to build upon, these requirements may make prosecuting perpetrators and securing convictions difficult.

Although the legislature made the crime a felony in order to serve as a deterrent, some legislators pushed back fearing that young teenagers who make a single mistake.²⁵ Further, the purpose of requiring the State to prove the perpetrator intended to harass the individual, was to avoid situations where the actions were committed with “no evil intent.”²⁶ The argument that a defendant need not be punished for a single mistake is one often used to protect perpetrators of sexual harassment and results in a legal system that does not protect the victim. This concern for evil intent ignores the fact that the person in the photograph is victimized regardless of the

21. NEV. REV. STAT. § 200.780 (2015).

22. *Id.* at § 200.780(1)(b).

23. *Id.* at § 200.780(3)(a).

24. *Id.* at § 200.785 (2015).

25. *Revises Provisions Regarding Crimes: Hearing on A.B. 49 Before the Assembly Committee on the Judiciary*, 2015 Leg., 78th Sess. 9 (Nev. 2015) (statement of Assemblywoman Diaz, Assembly Committee on the Judiciary).

26. *Id.* at 10 (statement of Assemblyman Ohrenschall, Assembly Committee on the Judiciary).

intent of the perpetrator. Further, it begs the question of other than shaming or embarrassing the person, why would someone publicly post the intimate image of another without the victim's consent? It remains to be seen if a defendant can escape conviction by simply claiming the dissemination was an attempt to compliment the victim, increase the fame of the victim, or simply to make a profit. Unfortunately, this requirement may be necessary to avoid running afoul of the First Amendment.

The debate on Assembly Bill 49, which created the new statute, showed that legislators are often following the same general misconceptions the public has, which leads to a failure to adequately protect the privacy rights of the victims involved. For example, during the discussion on a Nevada Bill an assemblywoman asked “[w]here is the responsibility on the other party who let the person take the pictures to begin with?”²⁷ This blame-shifting ignores the fact that a person's photograph was shared against their will. Instead it focuses on the argument that if you want to protect your privacy you should not take photographs to begin with. This shifts the burden of protecting an individual's privacy from the government, the entity with enforcement power, to an individual. Further, it ignores the fact that many photographs used in revenge porn are taken without the subject's knowledge. To combat the argument that the blame lies with the victim, California State Attorney General Kamala Harris argues that the crime should be referred to as cyber exploitation because “most women pose for such photographs in consensual relationships and, after the relationship ends, the photograph is used to humiliate.”²⁸

Regarding the public interest perception, a Deputy District Attorney stated that the provision “was meant to be directed as in the example of a politician exposing himself and sending photos to his constituents; that would be a matter of public concern.”²⁹ The deputy stated when it came to individuals that are quasi-public figures, the situations would be reviewed on an individual basis to see if the public interest exception applies.³⁰ However, this appears to be poorly defined as anyone could claim the public has a right to know about an individual. Could sharing an explicit image of an elementary school principal count as public interest if the offender claims the public has a right to know? It may also have the effect of encouraging those interested in sharing the intimate photographs of

27. *Revises Provisions Regarding Crimes: Hearing on A.B. 49 Before the Assembly Committee on the Judiciary*, 2015 Leg., 78th Sess. 9 at 11 (statement of Assemblywoman Diaz, Assembly Committee on the Judiciary).

28. Lane Florsheim, *Why we Need to Stop Calling it “Revenge Porn”*, MARIE CLAIRE (May 6, 2015), <http://www.marieclaire.com/culture/news/a14219/online-harassment-ashley-judd-anita-sarkeesian-kamala-harris-kate-couric-witw-panel/>.

29. *See supra* note 25 at 9 (statement of Laura Tucker, Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General).

30. *Id.* at 13 (statement of Laura Tucker, Deputy Attorney General, Bureau of Consumer Protection, Office of the Attorney General).

celebrities or other quasi-public figures to move to Nevada or commit the act in Nevada. Although this may have been an attempt to track defamation law it leaves high profile victims at a greater risk.

Interestingly, throughout the debate on the bill, the focus was not on the protection of the victim's privacy, but instead on whether this was something that should be punished, and if the crime was being punished too severely. The majority of the testimony was spent on the fear that teenagers would be punished under the law because teenagers do silly things. However, this ignores the fact that assuming the perpetrator was a teenager who made a mistake, the victim's photograph will be on the Internet or publically available, long after she is no longer a teenager. Further, the failure of the legislature to give adequate guidance on what qualifies as public interest, except to say politicians should not send racy photographs, raises a serious questions that the courts has to settle.

Additionally, the requirement that the victim have a reasonable expectation that the photograph will remain private is troublesome. As privacy advocates will note, the term reasonable expectation of privacy has been debated for decades and there is still no easy definition. It raises the question of whether an individual has a reasonable expectation that a photo should remain private after sending it through an app, such as Snapchat, Twitter direct messaging, or Facebook messenger. For example, Snapchat claims that all photographs are deleted, but there are examples of individuals "screen-shooting" the picture and saving it on their phone.³¹ Under the third-party doctrine applicable to the Fourth Amendment, courts have held that a person has no reasonable expectation of privacy in information shared with a third party.³² Facebook messenger saves photographs sent between users, could this be used to show a victim does not have a reasonable expectation of privacy? Nevada could have eliminated this debate by simply requiring that before an intimate photograph is posted or disseminated, the participant must consent. Although Nevada has yet to prosecute an individual under this law, it will be interesting to see if a defendant argues that by sending a photograph through a message device, the victim no longer has a reasonable expectation that the photograph will remain private. The third-party doctrine could render the law useless when the photograph is shared via a third party; any federal legislation should avoid this requirement. This is an issue that the legislature in Illinois has dealt with and came to a better result.

31. Andrea Smith, *Heres why Snapchat Photos Aren't Private*, MASHABLE (Mar. 14, 2013), <http://mashable.com/2013/03/14/heres-why-snapchat-photos-arent-private/#bu5avYDwyGqH>.

32. Ryan Watzel, *Riley's Implications for Fourth Amendment Protection in the Cloud*, 124 YALE L.J. F. 73 (2014), <http://www.yalelawjournal.org/forum/rileys-implications-in-the-cloud>.

The legislation in Illinois has been described as a model that the federal government should follow if it decides to pass federal revenge porn legislation.³³ State Representative Scott Drury noted that one of the biggest difficulties was getting others to recognize that revenge porn is a crime, and he described the harm to the victim as being similar to the harm victims of sexual assault face.³⁴ Illinois' law is praised primarily for three reasons: 1) the law targets not only ex boyfriends who post the picture for revenge purposes, but also punishes hackers who publish photos simply to create "chaos"; 2) offenders are forced to forfeit any profits earned; and 3) it imposes stiff penalties on offenders.³⁵ Other states and the federal government should consider adopting Illinois' law. Initially, Illinois makes it a crime if the person disseminates an image of a person and provides information that identifies the subject of the photograph.³⁶ Further, instead of requiring the State to prove that the victim had a reasonable expectation that the photograph would remain private, Illinois requires that the State show the defendant "knows or should have known that the person in the image has not consented to the dissemination."³⁷ This avoids the third-party doctrine as well as avoiding the "evil intent" issue. Violators are punished for a Class 4 felony, which is punishable by one to three years in prison and a fine of up to \$25,000.³⁸ It was under this law that the Blackhawks prospect discussed in the introduction was charged.³⁹ Unfortunately, given the jurisdiction aspect of the case the player was prosecuted under a less punishing law. As Representative Drury stated, "if we lose the expectation of privacy in taking images meant only for someone we trust, then we lose another valuable form of speech: our private speech."⁴⁰ By viewing the issue as one of sexual exploitation, Illinois provided a strong framework for the federal government or other states to follow.

Although these state criminal laws are a good start, ultimately they provide no way for a victim to force a website to take down images that would otherwise violate these laws. Further, Illinois exempts domain-

33. Kim Bellware, *Illinois Passes New 'Revenge Porn' Law that Includes Harsh Penalties*, HUFFINGTON POST (Dec. 31, 2014), http://www.huffingtonpost.com/2014/12/30/illinois-revenge-porn_n_6396436.html.

34. *Id.*

35. *Id.*

36. 720 ILL. COMP. STAT. 5/11-23.5(b)(1)(B) (2015).

37. *Id.* at § 5/11-23.5(b)(3).

38. Monique Garcia, *Quinn Signs 'Revenge Porn' Ban Into Law*, CHI. TRIBUNE (Date) <http://www.chicagotribune.com/news/local/politics/ct-quinn-signs-illinois-revenge-porn-law-met-1230-20141229-story.html>.

39. Stefano Esposito, *Blackhawks Prospect Charged Under Illinois' 'Revenge Porn' Law*, CHI. NEWS (Mar. 22, 2016, 1:24 PM), <http://chicago.suntimes.com/news/garret-ross-blackhawks-icehogs-revenge-porn-charges-sycamore-dekalb-county/>.

40. Jim Vassallo, *Illinois Passes Strong Anti-Revenge-Porn Law*, JD J. (Jan. 7, 2005), <http://www.jdjournal.com/2015/01/07/illinois-passes-strong-anti-revenge-porn-law/>.

hosting sites from being prosecuted under these laws.⁴¹ This will result in situations in which the person who provided the photograph will be prosecuted. But the website hosting the photograph will not be required to remove the image nor punished for refusing to do so. Although Nevada does criminalize charging to remove an intimate image, it does not require that a website remove the image upon request. It appears that under Nevada law a website could simply refuse to take down a photograph for any reason, and as long as the site does not charge the victim it has not run afoul of Nevada law.

Additionally, as demonstrated by the case involving the hockey player, before a state prosecutes a defendant, it will be forced to determine where the photograph was uploaded. If a resident of Nevada shares a photograph with a resident of California, and the Californian shares the photograph from his home, Nevada law would be inapplicable because it lacks jurisdiction. This is another reason that the federal government should pass a national revenge porn law. Further, although Illinois requires an offender forfeit all monies earned, it does not appear that this money will go toward the victim. Furthermore, neither of these state laws creates a private source of action that a victim can pursue independent of the police. Often the victim suffers the public embarrassment and shame, yet has no way to receive monetary reimbursement.

Additionally, although Illinois at least appears willing and able to enforce the new law, it remains to be seen how committed Nevada or other states are to the enforcement of these revenge porn laws. California only recently became the first state to successfully prosecute someone for revenge porn. Given the attitude of some individuals, that the victim shares in the blame because they willingly took or shared a photograph, it is entirely likely that states will not robustly enforce these laws. Given the difficulty in determining where the photograph was uploaded and in establishing that a victim had a reasonable expectation of privacy these laws may not be as effective as they could be. Finally, until the laws provide a mechanism for a victim to force websites to remove the photographs, the victim will continue to be victimized and will permanently have their privacy violated. This forces the victim to play a never ending game of whack-a-mole. The victim must constantly search for the photograph, locate the individual who shared it to the new site, and convince state law enforcement to prosecute the perpetrator. As Erin Andrews said, “[i]t’s on the internet now . . . It’s going to be on the Internet until I die.”⁴²

41. 720 ILL. COMP. STAT. 5/11-23.5(d) (2015).

42. Ahiza Garcia, *Why is the Erin Andrews Nude Video Still Online?*, CNN MONEY (Mar. 6, 2016, 8:30 PM), <http://money.cnn.com/2016/03/06/media/erin-andrews-video-online-trial/>.

III. CURRENT FEDERAL CRIMINAL LAWS AND SURVIVING A FIRST AMENDMENT CHALLENGE

Opponents of a federal revenge porn law argue that any legislation would necessarily run afoul of the First Amendment.⁴³ In *United States v. Stevens*, the Supreme Court invalidated federal legislation that sought to ban “crush videos” depicting animal abuse.⁴⁴ As the Supreme Court found that depictions of animal abuse do not fall into any category outside the protection of the First Amendment, opponents of federal legislation argue that a revenge porn law would be treated similarly. The ACLU challenged an Arizona law criminalizing revenge porn as unconstitutionally overbroad in violation of the First Amendment.⁴⁵ The ACLU argued, among other things, that to ensure constitutionality a state must require that the photograph must be shared without consent, with the intent to harass, and that the victim had a reasonable expectation of privacy in the photograph.⁴⁶ However, the following cases demonstrate that a federal law can avoid constitutional issues. Although requiring the defendant disseminate the image with the intent to harass may prevent some victims from receiving justice, it may be necessary to avoid a constitutional challenge. In *Stevens*, the Court found that the law did not fall into the “speech integral to the commission of a crime” exception.⁴⁷ The following cases demonstrate by requiring the government to prove the defendant intended to harass the victim, a federal law may fall into this exception.

Although there is no federal law criminalizing revenge porn, some victims have been able to convince federal prosecutors to pursue other federal criminal violations connected to revenge porn. In at least one instance the federal government prosecuted a defendant under the federal cyberstalking statute, 18 U.S.C. 2261A(2), for behavior that is similar to revenge porn.⁴⁸ Although the defendant claimed that it was unconstitutionally overbroad to apply cyberstalking to her conduct, the court rejected that argument holding “it would be difficult to conceive of a legitimate purpose behind the speech in question.”⁴⁹ However, in this case the defendant was not charged with posting the explicit images usually associated with revenge porn. The holding is important because it can be

43. Danielle Citron, *Debunking the First Amendment Myths Surrounding Revenge Porn Laws*, (Apr. 18, 2014, 11:19 PM), <http://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/#5d382e284b89>.

44. See 599 U.S. 460 (2010).

45. Clark Mindock, *Arizona Revenge Porn law Halted Permanently*, INT'L BUS. TIMES (July 10, 2015, 5:17 PM), <http://www.ibtimes.com/arizona-revenge-porn-law-halted-permanently-after-aclu-lawsuit-challenged-2004009>.

46. Mary Anne Franks, *The ACLU's Frat House Take on 'Revenge Porn'*, HUFFINGTON POST (June 1, 2015), http://www.huffingtonpost.com/mary-anne-franks/the-aclus-frat-house-take_b_6980146.html.

47. *Stevens*, 599 U.S. at 468.

48. See *U. S. v. Matusiewicz*, 84 F. Supp. 3d 363 (D. Del. 2015).

49. *Id.* at 371.

used to turn away First Amendment and overbreadth challenges that a federal revenge porn law would face.

Further, the United States Court of Appeals, Eighth Circuit, upheld a conviction for interstate stalking and interstate extortionate threat in a case involving revenge porn.⁵⁰ In *Petrovic*, the victim allowed the defendant to take photographs of her nude or performing sex acts and also sent him various messages about sexual abuse she suffered as a child.⁵¹ After the victim attempted to end the relationship the defendant informed her he had saved all the messages and photographs and would post the information online if she ended the relationship.⁵² In addition to posting the photographs online the defendant printed the photographs and mailed them to the victim's friends and family.⁵³ In addition, the defendant posted the victim's contact information.⁵⁴ Ultimately, the defendant was arrested by the United States Postal Inspectors and charged with stalking in violation of 18 U.S.C. 2261(A)(2)(A).⁵⁵ Similar to the defendant in *Matusiewicz*, the defendant attempted to have the charges dismissed claiming they violated the First Amendment.⁵⁶ The court rejected this argument noting that the information he posted was private and had never been in the public domain, and the victim was a private individual.⁵⁷ Further, the court expressly found that his behavior was not protected speech because his harassing communication was "integral to the criminal conduct of extortion."⁵⁸ Based on this ruling, it appears in cases where the perpetrator requires the victim to pay to remove the photographs federal extortion law can apply. But, this would not apply in situations where the offender posted the photographs only to obtain "revenge" and does not seek any sort of financial incentive or seek to keep the victim in the relationship. Further, the stalking charge here seemed to refer more to the physical acts of mailing the photographs and physically following the victim, not to the fact that a photograph was posted online.

The United States Court of Appeals, First Circuit, rejected a first amendment challenge brought by a defendant who pled guilty to cyberstalking.⁵⁹ In *Sayer*, the defendant posted videos of the victim and himself engaged in consensual sexual acts to pornographic websites, setup classified advertisements claiming the victim would provide "sexual entertainment," and impersonated the victim to encourage men to visit her

50. See *U. S. v. Petrovic*, 701 F.3d 849 (8th Cir. 2012).

51. *Id.* at 852.

52. *Id.* at 852–53.

53. *Id.* at 853.

54. *Id.*

55. *Id.* at 853–54.

56. *Id.* at 854.

57. *Id.* at 855–56.

58. *Id.* at 855.

59. See *U. S. v. Sayer*, 748 F.3d 425 (1st Cir. 2014).

home.⁶⁰ The defendant was indicted for cyberstalking and claimed that the statute violated his First Amendment right to free speech.⁶¹ The court noted that the defendant could point to no legitimate or lawful purpose and the First Amendment did not protect the speech involved.⁶² Further, the government was required to prove that the defendant intended to harass the victim and that the defendant engage in conduct that actually caused substantial emotional distress.⁶³ Therefore, to the extent that the defendant's conduct could be considered speech, it was not protected because it fell into the "speech integral to criminal conduct" exception.⁶⁴ Thus the First Amendment did not shield the defendant's conduct.

Finally, the United States Court of Appeals, Ninth Circuit upheld a defendant's conviction for cyberstalking, for behavior involving revenge porn.⁶⁵ In *Osinger*, the defendant sent threatening emails to the victim, created a fake Facebook profile in the victim's name, and posted sexually explicit photographs of the victim.⁶⁶ The defendant also sent emails with sexually explicit photographs to the victim's coworkers.⁶⁷ The court stated in the limited context of cyberstalking, "Osinger's speech is not afforded First Amendment protection for the additional reason that it involved sexually explicit publications concerning a private individual."⁶⁸

All of these cases demonstrate that at least some victims can rely on current federal law to criminally prosecute the individuals involved in revenge porn crimes. However, these cases all involved instances of the defendant physically following or confronting the victim, involve the defendant actively mailing out or sending the images to friends and family, or involve the defendant offering to remove the images if the victim returned to the relationship. These instances of physical threats and actively sending out the images do not occur in all revenge porn cases. It seems based on these cases that cyberstalking does not apply in situations where the perpetrator posts the photograph to a website or online but otherwise does not stalk or harass the victim, instead simply allows the denizens of the Internet to harass the victim on their own. Therefore, the law does not apply to those cases and the victim would be forced to rely on state law, assuming the photograph was uploaded in a state that criminalizes revenge porn. Further, unlike in state criminal cases, the federal government does not have to prove where the perpetrator uploaded the photograph, because it is not constrained by state jurisdiction. Finally,

60. *Sayer*, 748 F.3d at 428.

61. *Id.* at 430.

62. *Id.* at 434.

63. *Id.* at 433.

64. *Id.* at 433–34.

65. *See U. S. v. Osinger*, 753 F.3d 939 (9th Cir. 2014).

66. *Id.* at 941.

67. *Id.* at 942.

68. *Id.* at 948.

these cases demonstrate that a federal law can withstand First Amendment scrutiny as long as it is narrowly tailored, because the speech involved in revenge porn has no lawful purposes and instead is intended only to harass individuals.

IV. TORT LAW

In the absence of criminal law, victims have increasingly turned to tort law in an attempt to force the perpetrator to delete the image or to punish the perpetrator for the violation of privacy. However, there are several issues that arise when a victim pursues civil action, including the high cost of litigation and various affirmative defenses that a defendant can raise. Additionally, victims will be forced to go through civil discovery, which can result in other embarrassing details being released. Further, it is often difficult for a plaintiff to establish damages for a violation of privacy. Typically victims bring claims for “invasion of privacy, ‘false light’ portrayal, defamation and intentional infliction of emotional distress.”⁶⁹ Although at least one commentator believes that claims can be brought for breaching the contractual principle of implied assurance of confidentiality.⁷⁰ Perhaps, not surprisingly, many of the offenders in revenge porn cases will be judgment proof and unable to pay for the harm caused. Therefore, even if a victim goes through the hassle of hiring an attorney and successfully wins a suit they will be unable to collect.

Furthermore, there are several obstacles to overcome in bringing a successful tort action. First, a defendant can claim a consent defense, i.e. that the person consented to the publication of the photograph being published.⁷¹ As most photographs used for revenge porn purposes were “selfies” the defendant will argue they obviously consented to the photograph being taken and there is an implied consent to publication or the victim should have known a photograph could be shared. Further, regarding defamation, truth is a defense and assuming the photograph or video was unaltered it is a truthful description.⁷²

Some of these shortcomings were apparent in a recent case in which the Court of Appeals of Texas overturned a jury verdict finding the defendant guilty of defamation because the publication, a sexually explicit photograph of the victim, was substantially true.⁷³ However, the court upheld the jury verdict for intrusion on seclusion and public disclosure of private facts, although it did reduce the jury award.⁷⁴ During their consensual relationship Nadia emailed Patel several photographs of herself

69. Larkin, *supra* note 18, at 72.

70. *Id.*

71. *Id.* at 80–81.

72. *Id.* at 81.

73. *Patel v. Hussain*, 485 S.W.3d 153 (Tex. App. 2016).

74. *Id.*

topless or wearing only underwear and Patel secretly recorded other sexually explicit videos.⁷⁵ Nadia testified that the videos made her feel humiliated and traumatized.⁷⁶ Further, she testified that she worried she would have difficulties finding a job because the videos were easily findable by Google searching her name.⁷⁷ Although the court found that Patel had harassed Nadia, uploaded the video, and texted her up to 20 times per day, it reversed the defamation case because the jury found the videos and pictures were substantially truthful.⁷⁸ The court also noted that Nadia had to present some evidence that she suffered mental anguish, which required her to testify about the harm to her life and call friends to testify about the disruption the video and pictures caused her life.⁷⁹ Ultimately, the court stated “the nature of the invasions of privacy here are particularly disturbing and shocking and should give rise to an inference of mental anguish resulting from the threats to Nadia’s reputation.”⁸⁰ Although Nadia was awarded damages, her ability to collect will be based on Patel’s finances. If Patel does not have the money to pay the award, Nadia will not be able to collect. However, if the state law allows the government to seize any income the offender earned, it should be turned over to the victim to ensure that the victim receives compensation.

In *Pohle v. Cheatham*, the Court of Appeals of Indiana rejected the defendant’s request to throw out his ex-wife’s claims for intentional invasion of privacy and intentional infliction of severe emotional distress.⁸¹ Specifically, the defendant claimed that the plaintiff had consented to the publication of the photographs when she voluntarily allowed him to take the photographs, failed to inquire about what he intended to do with the pictures, and failed to request that he return the photographs.⁸² However, the court rejected that finding that she had simply consented to being privately photographed and it could not be inferred that she consented to the publication of the photographs.⁸³

These two cases only highlight the potential difficulties a victim has in bringing a tort action. There are many more challenges that also generally affect other types of litigation. Including, the high costs of attorney’s fees, the difficulty in locating an anonymous Internet poster, difficulties collecting judgments against individuals, and being forced to place embarrassing facts or photographs into a public court document. Some of these issues are also present in criminal investigations, including making

75. *Hussain*, 485 S.W.3d. at 158.

76. *Id.* at 169.

77. *Id.* at 170.

78. *Id.* at 172.

79. *Id.* at 178–79.

80. *Id.* at 180.

81. 724 N.E.2d 655, 661 (Ind. Ct. App. 2000).

82. *Id.* at 660.

83. *Id.* at 661.

the information public, but because the government is the enforcement agency victims are not forced to pay for legal representation. However, both criminal law and tort law fail to accomplish what most individuals want, removal of the photographs from online websites. An unfortunate byproduct of the Internet is that nothing is truly gone forever, images can be downloaded and saved and then uploaded on a different site. But victims can take steps to remove the photographs from the most common or popular websites.

V. COPYRIGHT IS CURRENTLY THE BEST SOLUTION AND THAT'S A PROBLEM⁸⁴

It has long been established that photographs are entitled to protection under copyright laws.⁸⁵ Further, the owner of the copyright is not the subject in the photograph, but is instead the photographer, assuming there is no contract between the two stating otherwise.⁸⁶ As stated above, the majority of photographs used for revenge porn purposes are “selfies” that is, the subject of the photograph took the photograph. However, many of the cases described above involved instances where the victim allowed another person to take the photograph or were unaware that they were being recorded. In instances where the victim was not the photographer, copyright law does not bestow upon them any additional protections and instead the photographer, who is often the perpetrator, owns the copyright.⁸⁷ This authorship requirement raises an initial difficulty in some revenge porn cases because it may be difficult depending on the picture to establish who took the photograph. Although in some cases it will be straight forward, surely there will be cases in which the offender claims to have taken the photograph or claims that the photograph is not one of the named victim, but instead a different person. However, despite this drawback copyright is currently the most effective tool for most victims of revenge porn because it can be used to force websites to remove the image(s).

Among other protections, copyright owners control the right to reproduce and display their copyrighted material.⁸⁸ Revenge porn violates the copyright owner’s exclusive right to reproduce or display the material because by definition the image has been posted without the consent of the

84. This paper is not intended to detail how a copyright is obtained. Instead of detailing the requirements for a copyright, including fixation and originality, this paper is focused on how copyright law can aid the victims of revenge porn.

85. *Burrow-Gils Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

86. Samantha H. Scheller, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 585 (2015).

87. Interestingly, California state law criminalizes revenge porn where the victim was not the photographer. See CAL. PENAL CODE § 647(j)(4). This has led to criticism of the California law because the majority of victims took the photograph themselves.

88. 17 U.S.C. § 104(a) (2012).

victim.⁸⁹ When an individual stores a copy of the image on a computer they have created a copy of the work in violation of copyright law.⁹⁰ Further, in the modern computer age copies may be distributed electronically in violation of copyright law.⁹¹ However, before a victim can file a suit against the infringer, for copying or distributing the picture, they must register the work.⁹² This is another potential issue as many victims will not understand how to register a copyright or will not want to publicly register their photograph to obtain a copyright. Further, in order to receive monetary damages from the infringer, the victim has to register the copyright within 90 days of the infringement.⁹³ However, registration is not required if the victim is simply attempting to remove the photograph from a website, because registration is only a precondition to filing a civil suit claiming infringement. As noted below, a takedown request under the Digital Millennium Copyright Act (DMCA) can help a victim remove a photograph, but it is an imperfect solution.

Although a victim can utilize a takedown request to remove the photograph from one website, it does not prevent the perpetrator from uploading the photograph to another site.⁹⁴ This paper will briefly describe how a takedown request works and why websites typically honor the request and remove the image(s). However, it will be noted that some sites choose to simply ignore the takedown requests and force the victim to pursue them through a civil proceeding. Under the DMCA, websites that host images uploaded by third parties, such as Youtube or Facebook are granted immunity from copyright liability if the website falls into a “safe harbor.”⁹⁵ To qualify for safe harbor a website, must have no actual knowledge of the infringement, or once the website becomes aware of the infringement “it must act expeditiously to remove the material.”⁹⁶ Further, the website must designate an agent whose responsibility is to receive copyright takedown notifications.⁹⁷ Congress created a heavy incentive for websites to designate an agent and to create a takedown policy because failing to do so can cost the website its immunity and open it up to civil liability and monetary damages.⁹⁸

89. 17 U.S.C. § 104(a).

90. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

91. *Id.* at 1162.

92. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010).

93. Folderauer, *supra* note 20, at 330.

94. *Id.* at 330–31.

95. Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use*, 12 J. MARSHALL REV. INTELL. PROP. L. 70, 84 (2012).

96. 17 U.S.C. § 512(c)(1)(A)(iii) (2012).

97. *Id.* at § 512(c)(2).

98. Lauren D. Shinn, *Youtube's Content Id As a Case Study of Private Copyright Enforcement Systems*, 43 AIPLA Q.J. 359, 365 (2015).

The process begins when a copyright owner sends a notification to the website⁹⁹ which complies with the notification requirements in 17 USC 512(c)(3). This requires the victim to send a written communication to the website's agent, identify the work that is infringed (in revenge porn this will be the picture(s) that the victim took), provide the victim's contact information to the website, and state that the owner has not authorized the image to be used on the website.¹⁰⁰ The website must expeditiously remove the image, typically in a few days or up to a few weeks depending on the number of infringing works.¹⁰¹ Courts have held that once a website receives a takedown notification they have actual knowledge of the infringement and lose immunity if the site fails to quickly remove the material.¹⁰² This process has several advantages for a victim of revenge porn. The victim does not need a lawyer to file a takedown request, and the most popular sites typically honor the requests in order to maintain its immunity. Further, failure to honor the request can open the website up to civil suits. However, this process has been described as playing a game of "whack-a-mole" because the material can easily be uploaded to new sites and the victim is forced to constantly search for the images in order to have them removed.

VI. HIGH PROFILE EXAMPLES OF PROSECUTION

Further, some websites have refused to abide by takedown requests and instead forced the victims to pursue costly legal suits. For example, Hunter Moore who ran the revenge porn website IsAnyoneUp claimed that the site did not violate copyright because "when you take a picture of yourself in the mirror, it was intended for somebody else so, actually, the person you sent the picture to actually owns that picture, because it was intended as a gift."¹⁰³ In addition to posting the photographs, Moore posted identifying information, including names and contact information that identified the victim.¹⁰⁴ Moore's case identifies several of the issues that revenge porn victims face in getting the pictures removed or in getting justice for the invasion of their privacy. Moore was ultimately arrested and sentenced to jail time, but on charges unrelated to the actual posting of the photographs.¹⁰⁵ Moore was prosecuted for hiring a man to hack into email

99. Often referred to as an ISP.

100. *See* 17 U.S.C. § 512(c)(3) (2012).

101. Shinn, *supra* note 98 at 366.

102. *Id.*

103. Revenge Porn's Latest Frontier, ON THE MEDIA (Jan. 19, 2009), <http://www.onthedia.org/story/revenge-porns-latest-frontier/transcript>.

104. Abby Ohlheiser, *Revenge Porn Purveyor Hunter Moore is Sentenced to Prison*, WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison>.

105. *Id.*

addresses in order to steal more photographs for his website.¹⁰⁶ At one point Facebook sent Moore a cease and desist letter for linking to its website and Moore ignored the request.¹⁰⁷ Further, Moore routinely relied on the same legal protections that Facebook used, to claim he was immune to civil actions.¹⁰⁸ Moore was ultimately brought down because of the dogged efforts of the mother of one of his victims, Charlotte Laws.¹⁰⁹ Her quest to remove her daughter's photograph is the perfect example of why tort law and copyright laws are ultimately inadequate. Further, Charlotte Laws has become an advocate for the creation of criminal laws to combat the issue of revenge porn. Her experience demonstrates that a federal law is necessary to protect the privacy rights of individuals.

Laws states that she attempted to convince the LAPD to investigate but that they were unwilling and instead blamed her daughter for taking the photographs.¹¹⁰ She also contacted Moore's publicist, attorney, and even his mother about removing the photographs to no avail.¹¹¹ Laws took the added step of registering her daughter's photographs in an attempt to remove them.¹¹² However, it was not until the FBI became involved and arrested Moore for hacking that the website was shutdown.¹¹³ Ultimately though, Moore was given a slap on the wrist and most of his victims received no compensation. Moore was sentenced to two and a half years in federal prison and ordered to pay a \$2000 fine.¹¹⁴ Ultimately, Moore was only ordered to pay the victim \$145.70 in restitution.¹¹⁵ This was largely due to the fact that he was not convicted of any crimes related to revenge porn, but instead related to hacking.

The prosecution and ultimate sentence of Kevin Bollaert in California should serve as a model for any federal legislation. Bollaert ran a revenge porn website and charged victims up to \$350 to remove the photographs.¹¹⁶ He was convicted of felony identity theft and extortion, and was sentenced to 18 years in custody and ordered to pay \$15,000 in

106. Ohlheiser, *supra* note 104.

107. Kashmir Hill, *How Revenge Porn King Hunter Moore was Taken Down*, FORBES (Jan. 24, 2014, 11:17 AM), <http://www.forbes.com/sites/kashmirhill/2014/01/24/how-revenge-porn-king-hunter-moore-was-taken-down/#780f93b73804>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Sarah Jeong, *Hunter Moore Revenge Porn Victim got a Whopping \$145.70 in Restitution*, MOTHERBOARD (Dec. 3, 2015, 5:05 PM), <http://motherboard.vice.com/read/hunter-moore-revenge-porn-victim-got-a-whopping-14570-in-restitution>.

115. *Id.*

116. Tony Perry, *'Revenge Porn' Website Operator Sentenced to 18 years*, L.A. TIMES (Apr. 3, 2015, 4:47 PM), <http://www.latimes.com/local/lanow/la-me-ln-revenge-porn-sentenced-20150403-story.html>.

restitution.¹¹⁷ But again, Bollaert was not prosecuted for a crime directly related to revenge porn, instead he was charged for his conduct in requiring payment to remove the photograph. Despite his charges not being related to revenge porn, his sentence should serve as a guideline for any federal legislation because it took into account the damage caused to the victims lives.

Noe Iniguez, became the first person prosecuted and convicted under a revenge porn law in 2014.¹¹⁸ Iniguez posted a topless photograph of his ex-girlfriend to her employer's Facebook page.¹¹⁹ As California has an eCrime Unit, he was prosecuted for revenge porn.¹²⁰ Ultimately he was convicted and sentenced to one year in jail.¹²¹ Despite the conviction, the Cyber Civil Rights Initiative is pushing for a federal law protecting privacy.¹²² Those involved in the prosecution of this case have suggested that the term revenge porn needs to be changed to cyber exploitation because that term covers individuals who have uploaded photographs for reasons other than revenge.¹²³ Regardless of the terminology used, this conviction serves as a solid first step, but ultimately the federal government needs to pass a law recognizing the important privacy implications involved and providing real protection for the victims.

VII. INTERNATIONAL EXAMPLES OF NATIONWIDE LAWS

Other governments, such as Germany and Israel, have successfully passed nationwide laws recognizing the important privacy implications involved in revenge porn. Israel has taken the approach that the victims of revenge porn are victims of sexual assault and the perpetrators are sexual offenders.¹²⁴ The law punishes those that post sexually explicit material without the victim's consent with up to five years in jail.¹²⁵ This approach directly opposes the approach Nevada lawmakers took because the Nevada law explicitly says that those convicted of revenge porn will not be put on the sexual offender registry.¹²⁶ Israel recognized that revenge porn violates a person's sexual privacy and treat the offenders harshly. Germany,

117. Perry, *supra* note 116.

118. 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>.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Rocha, L.A. TIMES (Dec. 4, 2014, 5:00 PM), <http://www.latimes.com/local/crime/la-me-1204-revenge-porn-20141205-story.html>.

124. Yifa Yaakov, *Israeli law Makes Revenge Porn a Sex Crime*, TIMES OF ISR. (Jan. 6, 2014, 9:11 PM), <http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/>.

125. *Id.*

126. NEV. REV. STAT. § 200.780(4) (2015).

however, appears to have the most robust protection for victims of revenge porn, which fits its description of having the strictest privacy laws in Europe.

In Germany, a court ordered an ex-partner to delete any intimate photographs or videos of his former partner, holding that her consent to his possession of the images ended when the relationship ended.¹²⁷ However, it is unclear how the ruling will be enforced unless the government is willing to review all of the man's electronic devices to ensure that the images are deleted. Further, the German Court ruled that it did not matter that the ex-partner had no intention of making the images public.¹²⁸ Specifically, the court found that the woman's personal rights deserved stronger protection than the rights of the photographer, in this case her ex-boyfriend. Again, this runs directly counter to U.S. copyright law, which holds that it is the photographer, not the subject that controls and owns the image. Therefore, Congress would most likely be unwilling to adopt this approach, as it would require the rewriting of centuries of copyright law. Further, the Germany law raises a serious question of enforcement. Is it the responsibility of the government to ensure that all the photographs are deleted? Or will the victim need to go to court and request injunctive relief? Further, this does nothing to help a victim once a photograph has been placed online. Instead it requires that a person proactively request that the ex-partner delete the photograph once the relationship has ended and that the person be willing to seek court enforcement should the person refuse to delete the photograph.

VIII. POTENTIAL FEDERAL LAW

As shown above, the current avenues for relief from revenge porn are inadequate. Although states have attempted to target and stop the phenomenon of revenge porn, this has resulted in a patchwork of laws that make it difficult for victims to navigate. Further, although copyright law allows the victim to get the photograph removed it does nothing to punish the individual responsible unless the victim thought to register a copyright in the work. Congress should pass a law making revenge porn or cyber exploitation a federal crime and placing it within the jurisdiction of assistant U.S. Attorneys. This law should be based primarily off the law in Illinois, which should serve as a model to other states and the federal government. However, the government should incorporate the Israeli approach by concluding that victims of revenge porn are victims of sexual abuse. This makes sense for several reasons. First, the photographs used

127. *Sex Tape Row: German Court Orders Man to Destroy Naked Images*, BBC (Dec. 22, 2015), <http://www.bbc.com/news/world-europe-35159187>.

128. Philip Oltermann, *'Revenge Porn' Victims Receive Boost From Germany Court Ruling*, GUARDIAN (May 22, 2014), <https://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling>.

in revenge porn are by nature sexual and portray the victim either nude or engaging in sexual activities. It is impossible to separate the sexual nature of the images from the underlying action. Perpetrators are not uploading photographs of their victims watching television or reading but are uploading sexual explicit photographs because they will humiliate the victim. Therefore the sexual nature of the photographs is inherently related to the crime of revenge porn. Further, uploading the photographs directly invades a person's privacy as the acts portrayed are typically done in the privacy of a home and are intended only for one person. Additionally, considering revenge porn as sexual abuse will make law enforcement take the crime more seriously.

Illinois law is preferable because unlike California, it does not treat the crime as a misdemeanor and it punishes those that share selfie style photographs, which affects the majority of victims. As any federal law runs the risk of preemption, the federal government should base its law on the state that provides one of the strongest protections, not on a state that has weaker protections. Federal preemption is based in the Supremacy Clause and requires that certain federal laws will trump state laws.¹²⁹ Preemption can occur where Congress explicitly states that its legislation is preempting state law, or if a State attempts to regulate conduct in a field that Congress intended the federal law to completely occupy, or where it will be impossible for someone to comply with both state and federal law.¹³⁰ Therefore, Congress could pass a revenge porn law that expressly preempts state laws, which would require victims to solely rely on the federal law. It is imperative that the federal law be stronger or as strong as Illinois and that it is not modeled after a weaker state protection.

Further, as the federal government regulates the Internet and websites, a federal law should grant the victim of revenge porn the ability to force websites to remove the photograph, regardless of who owns the copyright. This power would need to be strictly construed to prevent upending copyright law, but the government could grant the ability. Having a criminal law that provides for serious prison time for offenders and grants the victim the ability to have the photograph removed would give most victims the outcome they wish to see. Ultimately, it is the federal government that is in the best position to protect victims of revenge porn and to ensure that images are removed from websites. Until the government passes a criminal law, victims will be at the mercy of their jurisdiction and often unable to recover their lives. Revenge porn is a violation of a person's most basic privacy expectations and it is the federal government's responsibility to ensure that privacy is protected. Although

129. Marilyn P. Westerfield, *Federal Preemption and the FDA: What Does Congress Want?*, 58 U. CIN. L. REV. 263 (1989).

130. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1060 (9th Cir. 2009) (citing *Indus. Truck Ass'n v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997)).

states have attempted to protect victims the laws are often inadequate, do not protect the majority of victims, or have yet to be enforced. Federal legislation will send a message that the government is willing and able to protect a person's sexual privacy.