

**FIFTY STATES OF GRAY: A COMPARATIVE  
ANALYSIS OF “REVENGE-PORN” LEGISLATION  
THROUGHOUT THE UNITED STATES AND  
TEXAS’S RELATIONSHIP PRIVACY ACT**

Comment\*

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|      |  |     |
|------|--|-----|
| I.   | INTRODUCTION: THIS IS THE (RISE) OF THE AGE OF SNAPCHAT.....   | 334 |
| II.  | BACKGROUND .....   | 336 |
|      | A. <i>Revenge Porn: What’s in a Name?</i> .....  | 336 |
|      | B. <i>The Plight of Revenge-Porn Victims: Who They Are and<br/>        Their Ongoing Dilemma</i> .....   | 337 |
| III. | REDRESSING REVENGE-PORN VICTIMS: THE ADEQUACY OF CIVIL<br>REMEDIES IN TEXAS .....                        | 340 |
|      | A. <i>Privacy-Based Torts and Their Limitations: Patel v. Hussain</i> .                                  | 340 |
|      | 1. <i>Defamation</i> .....   | 342 |
|      | 2. <i>Intentional Infliction of Emotional Distress</i> .....   | 342 |
|      | 3. <i>Intrusion on Seclusion and Public Disclosure of Private<br/>            Facts</i> .....            | 344 |
|      | B. <i>Website-Provider Immunity: GoDaddy.com, LLC v. Toups</i> ....                                      | 346 |
|      | C. <i>Other Civil Law Limitations</i> .....  | 347 |
| IV.  | CRIMINALIZING REVENGE PORN IN THE UNITED STATES.....   | 348 |
|      | A. <i>Revenge Porn and the First Amendment</i> .....   | 349 |
|      | B. <i>Drafting a Statute that Passes Constitutional Muster: Expert<br/>        Recommendations</i> ..... | 352 |
|      | 1. <i>The Base Element</i> .....   | 352 |
|      | 2. <i>The Malicious-Intent Requirement</i> .....   | 353 |
|      | 3. <i>The Exceptions</i> .....   | 355 |
|      | 4. <i>Definitions</i> .....  | 356 |
| V.   | LEGAL GRAY AREAS: THE RISE OF STATE LEGISLATION AND THE<br>ROAD TOWARD A FEDERAL BILL.....               | 356 |
|      | A. <i>Survey of Selected State Laws: The Good, the Bad, and the<br/>        Ugly</i> .....               | 357 |
|      | 1. <i>The Good</i> .....   | 357 |

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|   |     |
|---|-----|
| 2. <i>The Bad</i> .....   | 359 |
| 3. <i>The Ugly</i> .....  | 360 |
| B. <i>Legal Gray Areas in State Statutes</i> .....  | 360 |
| 1. <i>The Base Elements and Malicious Intent Requirement</i> .....  | 360 |
| 2. <i>Exceptions and Definitions</i> .....  | 361 |
| C. <i>A Federal Bill Attempts to Bridge State Legislation Gaps</i> .....                                    | 362 |
| VI. TEXAS CRIMINALIZES REVENGE PORN WITH TOUGH LAW: THE<br>RELATIONSHIP PRIVACY ACT .....                   | 363 |
| A. <i>The Criminal Provision: The Positives and Its Shortcomings</i> ..                                     | 363 |
| 1. <i>Base Elements</i> .....   | 364 |
| 2. <i>The Harm Requirement</i> .....  | 366 |
| 3. <i>Exceptions</i> .....  | 366 |
| 4. <i>Definitions</i> .....   | 367 |
| B. <i>Additional Aspects of the Criminal Provision</i> .....  | 368 |
| 1. <i>Blackmail</i> .....   | 368 |
| 2. <i>Additional Liability</i> .....  | 368 |
| VII. FITTING A SQUARE PEG INTO A ROUND HOLE: ADDRESSING<br>ISSUES IN TEXAS’S RELATIONSHIP PRIVACY ACT ..... | 369 |
| A. <i>The Base Elements</i> .....   | 369 |
| B. <i>The Intent Requirement</i> .....  | 370 |
| C. <i>The Exceptions</i> .....  | 371 |
| D. <i>Definitions</i> .....   | 372 |
| VIII. CONCLUSION .....  | 372 |

#### I. INTRODUCTION: THIS IS THE (RISE) OF THE AGE OF SNAPCHAT<sup>1</sup>

“If I can’t unsee this then you can’t either.”<sup>2</sup> That caption, along with the picture of a naked 70-year-old woman in the bathroom of an L.A. Fitness, may land Playboy model Dani Mathers in jail after she accidentally “Snapchatted” the message to her entire base of fans, rather than to a private friend.<sup>3</sup> Following the incident, the public backlashed against her, L.A. Fitness permanently banned her from its facilities, and the radio station she worked at fired her.<sup>4</sup> Yet, an unforeseen consequence—one that is the

1. Snapchat is an application that allows users to share videos and photos. *See Snapchat Support*, SNAPCHAT.COM, <https://support.snapchat.com/en-US/a/when-are-snaps-chats-deleted> (last visited Aug. 25, 2017). The recipient of the Snapchat can only see the image for one to ten seconds before it automatically deletes; however, the recipient may screenshot the image to save it on his or her device. *Id.* (“Snapchatters who see your messages can always potentially save them, whether by taking a screenshot or by using some other image-capture technology . . .”).

2. Cole Delbyck, *Playboy Model Dani Mathers Could Face Up to Six Months in Jail for Body-Shaming Photo*, HUFFINGTON POST (Nov. 4, 2016, 4:41 PM), [http://www.huffingtonpost.com/entry/playboy-model-dani-mathers-could-face-up-to-six-months-in-jail-for-body-shaming-photo\\_us\\_581ce1dee4b0d9ce6fbbf710](http://www.huffingtonpost.com/entry/playboy-model-dani-mathers-could-face-up-to-six-months-in-jail-for-body-shaming-photo_us_581ce1dee4b0d9ce6fbbf710).

3. *See id.*

4. *Id.*

product of society’s increasing protection of sexual-privacy rights—was that the victim pressed charges against her for invasion of privacy.<sup>5</sup>

At the time of this writing, Mathers faced a possible conviction of “up to six months in jail and a \$1,000 fine” for her violation of a California statute prohibiting unlawful distribution of sexually explicit images without the depicted person’s consent, otherwise known as “revenge porn.”<sup>6</sup> Also labeled “nonconsensual pornography,”<sup>7</sup> the growth of social media has contributed to this increasingly common trend.<sup>8</sup> As a result, many states, in addition to California, have enacted laws to specifically combat revenge porn.<sup>9</sup>

This Comment discusses the rise of revenge-porn legislation and the constitutional concerns it has created, focusing primarily on Texas cases that have addressed revenge porn and the Texas Relationship Privacy Act, Texas’s revenge-porn statute. Specifically, Part II presents an overview of revenge porn and the plight of some of its victims.<sup>10</sup> Part III discusses some of the limitations that victims have faced to recover under current civil laws, highlighting two major revenge-porn cases in Texas.<sup>11</sup> Part IV touches on the criminalization of revenge porn, mostly focusing on the arguments against it and on First Amendment issues.<sup>12</sup> It also explores expert recommendations for drafting statutes that pass constitutional muster.<sup>13</sup>

Part V provides an overview of the statutes currently in place in the United States, discusses gray areas within them, and briefly touches on a recently-proposed federal bill intended to combat revenge porn nationwide.<sup>14</sup> Part VI expands on the previous section by introducing and analyzing the Texas Relationship Act, a statute that the Texas Legislature passed in 2015 to combat revenge porn.<sup>15</sup> Finally, Part VII recommends changes to the Texas Relationship Act in accordance with constitutional standards and other social considerations.<sup>16</sup>

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5. *See id.*

6. *See id.*; *see also* CAL. PENAL CODE § 647(j)(4)(A) (West 2017).

7. *See infra* Section II.A (expanding on the definition of revenge porn).

8. *See* Miles Klee, *The New Era of Revenge Porn Has Begun on Snapchat*, DAILY DOT (Apr. 3, 2015, 6:00 AM), <http://www.dailydot.com/irl/snapchat-revenge-porn-consent-postsmash-college-photos/>.

9. *See infra* Part V.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Section IV.B.

14. *See infra* Part V.

15. *See infra* Part VI.

16. *See infra* Part VII.

## II. BACKGROUND

Though the term revenge porn elicits images of bitter exes taking revenge on ex-lovers by posting homemade videos as a means of humiliation, it encompasses all “distribution of private, sexually explicit material without consent.”<sup>17</sup> Regardless of its name, this twenty-first century phenomenon has evidently impacted not only its victims but also society in a variety of ways.<sup>18</sup>

*A. Revenge Porn: What’s in a Name?*

Webster’s Dictionary defines revenge porn as “sexually explicit images of a person posted online without that person’s consent especially as a form of revenge or harassment.”<sup>19</sup> The Cyber Civil Rights Initiative (CCRI), a group that advocates for the rights of revenge-porn victims and assists states in the drafting of legislation, states that the term is misleading because revenge or ill-will does not necessarily motivate many perpetrators.<sup>20</sup>

For this reason, Professor Mary Anne Franks, a top legal advocate for revenge-porn victims, calls revenge porn a misnomer and suggests that nonconsensual pornography is a more accurate term.<sup>21</sup> Under this definition, the array of revenge-porn victims expands to include celebrities whose photos were obtained through hacking and were then posted online—like the cases of Jennifer Lawrence and Kate Upton in 2014.<sup>22</sup>

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17. Mary Anne Franks, *How to Defeat ‘Revenge Porn’: First, Recognize It’s About Privacy, Not Revenge*, HUFFINGTON POST (June 22, 2015, 8:22 AM), [http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn\\_b\\_7624900.html](http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn_b_7624900.html). For example, Urban Dictionary defines revenge porn as “[h]omemade porn uploaded by [an] ex-girlfriend or (usually) [an] ex-boyfriend after particularly vicious breakup as a means of humiliating the ex or just for [his or her] own amusement.” See *Revenge Porn*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=revenge%20porn> (last visited Aug. 25, 2017).

18. See Nina Bahadur, *Victims of ‘Revenge Porn’ Open Up on Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 15, 2015), [http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact\\_n\\_4568623.html](http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html); Franks, *supra* note 17; *Victims’ Stories*, CYBER C.R. INITIATIVE, <http://www.cybercivilrights.org/share-your-story/> (last visited Aug. 25, 2017).

19. *Revenge Porn*, MERRIAM-WEBSTER (2016), <https://www.merriam-webster.com/dictionary/revenge%20porn>. The term is so particular to the technological era that Merriam-Webster only added the term in April 2016. See Megan Willett, *‘Revenge Porn’ and ‘Dox’ Are Among the 2,000 Words Just Added to the Dictionary*, BUS. INSIDER (Apr. 20, 2016, 4:30 PM), <http://www.businessinsider.com/slang-added-to-merriam-webster-dictionary-2016-4>.

20. See *About*, CYBER C.R. INITIATIVE, <http://www.cybercivilrights.org/welcome/> (last visited Aug. 25, 2017). For example, some argue that men victimize women as a “sport,” not for revenge. See Amanda Marcotte, *‘The Fappening’ and Revenge Porn Culture: Jennifer Lawrence and the Creepshot Epidemic*, DAILY BEAST (Sep. 3, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/09/03/the-fappening-and-revenge-porn-culture-jennifer-lawrence-and-the-creepshot-epidemic.html>.

21. See Franks, *supra* note 17.

22. See Jojo Marshall, *Why We All Need to Worry About Revenge Porn*, ELLE (Sept. 24, 2014, 12:17 AM), <http://www.elle.com/life-love/sex-relationships/news/a15497/what-is-revenge-porn/>. Other celebrity victims include Rihanna, Kate Middleton, Kim Kardashian, Pamela Anderson, and Prince Harry. See Keith Perry, *Revenge Porn: Some of the Biggest Celebrity Victims*, TELEGRAPH (Sept. 30, 2014),

Moreover, posting an image on a social media page, like Facebook, or forwarding it to a friend without the consent of the depicted person actually constitutes nonconsensual pornography in some states, including Texas.<sup>23</sup> The definition may also cover images shared on Snapchat that the recipient shares with third parties without the sender's consent in some jurisdictions.<sup>24</sup> In essence, the crux of the definition of revenge porn lies in the fact that the victim did not consent to its *distribution*—though the victim may have consented to its recording or may have taken the photo or video themselves.<sup>25</sup> As a result, the rise of revenge porn has (unsurprisingly) gone hand-in-hand with the increasing use of social media and the Internet, on which people constantly exchange ideas and images without asking permission from the originator.<sup>26</sup> Additionally, anonymity remains a staple of many internet websites, providing revenge-porn perpetrators a shield against easy identification.<sup>27</sup> For that reason, today more than 2,000 revenge-porn websites operate worldwide.<sup>28</sup>

*B. The Plight of Revenge-Porn Victims: Who They Are and Their Ongoing Dilemma*

Statistics generally support the notion that revenge porn disproportionately impacts young women.<sup>29</sup> According to a CCRI survey consisting of 1,606 total respondents and 361 victims, women constituted

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<http://www.telegraph.co.uk/news/celebritynews/11129357/Revenge-porn-some-of-the-biggest-celebrity-victims.html>.

23. See TEX. PENAL CODE ANN. § 21.16(b) (West 2017); see also Jocelyn Tovar, *Incarnate Word Student Suspended after Nude Photos Posted to Social Media*, NEWS4SA.COM (Feb. 19, 2016), <http://news4sanantonio.com/news/local/incarnate-word-student-suspended-after-nude-photos-posted-to-social-media> (reporting on the suspension of a high-school student in Texas after nude photos of a girl were posted on the student's social media account).

24. See Klee, *supra* note 8. Perpetrators have even created niche websites for Snapchat images, like SnapSext.com and SnapGFs.com. See *id.*

25. See, e.g., TEX. PENAL § 21.16(e).

26. See Klee, *supra* note 8. An overall increase in “sexting” over the years may also contribute to its rise. See Amanda Lenhart & Maeve Duggan, *Couples, the Internet, and Social Media*, PEW RES. CTR. (Feb. 11, 2014), <http://www.pewinternet.org/2014/02/11/couples-the-internet-and-social-media/>. For example, in a 2014 survey of 2,252 adults, 9% reported sending a sext to another person, 20% received a sext, and 3% forwarded a sext. See *id.*

27. See Adrienne N. Kitchen, Comment, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI. KENT L. REV. 247, 253 (2015); Salina Tariq, Comment, *Revenge: Free of Charge?*, 17 SMU SCI. & TECH. L. REV. 227, 228 (2014).

28. See Sameer Hinduja, *Revenge Porn Research, Laws, and Help for Victims*, CYBERBULLYING RES. CTR. (July 14, 2016), <http://cyberbullying.org/revenge-porn-research-laws-help-victims>.

29. See Mary Anne Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators*, CYBER C.R. INITIATIVE 11 (Sept. 22, 2016), <https://www.cybercivilrights.org/wp-content/guide-to-legislation/> [hereinafter *Guide for Legislators*].

90% of revenge-porn victims in 2015.<sup>30</sup> Moreover, 68% of the victims who responded fell within the ages of eighteen to thirty-years old.<sup>31</sup> Nonetheless, the Cyberbullying Research Center warns that the CCRI bases its surveys on a convenience sample; “they simply solicit respondents through a link on their own web page.”<sup>32</sup> This method leads to inflated numbers because it only takes into account those who visit the website, possibly excluding a wide array of victims.<sup>33</sup> Consequently, the number of male victims might be higher, as well as the number of people over the age of thirty.<sup>34</sup>

Despite this possibility, and regardless of age and gender, revenge porn has deeply impacted the lives of its victims with its demoralizing effects.<sup>35</sup> One major concern involves the invasion of privacy.<sup>36</sup> For example, 59% of CCRI survey responders reported that their names had been posted with sexually-explicit material.<sup>37</sup> Some offenders also included the victim’s email address, social network information, home address, phone number, work address, and even social security number along with the sexually-explicit material.<sup>38</sup>

Victims also reported that the unwanted dissemination harmed them in other ways—93% of responders stated that they suffered great emotional distress, and 42% sought psychological services.<sup>39</sup> Others lost friends, family, partners, jobs, and reputations.<sup>40</sup> One male confessed that he lost twenty pounds after his ex-girlfriend blackmailed him.<sup>41</sup>

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30. *See id.* At first glance, this percentage seems to correlate with a high number of women taking sexually explicit pictures—in 2014, a Cosmopolitan survey of 850 millennial women revealed that 89% of them have taken naked photographs. *See* Emma Barker, *Cosmo Survey: 9 Out of 10 Millennial Women Take Naked Photos*, COSMOPOLITAN (Sept. 3, 2014), <http://www.cosmopolitan.com/sex-love/a30675/ninety-percent-millennial-women-take-nude-photos-cosmo-survey/>. On the other hand, an earlier Playboy Poll suggests that men take more nude photographs of themselves than women. *See* Lukas I. Alpert, *Americans Use Internet, Sexting with Cell Phones to Bring Sex Lives into 21st Century: Playboy Poll*, DAILY NEWS (May 16, 2011, 9:46 AM), [www.nydailynews.com/news/national/americans-internet-sexting-cell-phones-bring-sex-lives-21st-century-playboy-poll-article-1.146007](http://www.nydailynews.com/news/national/americans-internet-sexting-cell-phones-bring-sex-lives-21st-century-playboy-poll-article-1.146007) (reporting that 27% of men reported taking nude photographs, compared to 23% of female responders).

31. *See Guide for Legislators*, *supra* note 29, at 10.

32. Hinduja, *supra* note 28.

33. *Id.*

34. *See id.*

35. *See, e.g.,* Samantha Allen, *Dear Revenge Porn Victims, It Gets Better*, DAILY BEAST (June 18, 2016, 12:00 AM), <http://www.thedailybeast.com/articles/2016/06/18/dear-revenge-porn-victims-it-gets-better.html>; Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013, 7:30 AM), <https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

36. *See* Franks, *supra* note 17.

37. *See Guide for Legislators*, *supra* note 29, at 10.

38. *See id.*

39. *Id.*

40. *See id.*

41. *See Victims' Stories*, *supra* note 18.

Unfortunately, some have opted to end their lives.<sup>42</sup> In June 2016, 15-year-old Tovonna Holton chose exactly that after both her friends and her ex-boyfriend posted a Snapchat video of her showering without her consent.<sup>43</sup> Her classmates shared the image among each other, and some began “calling her names” afterwards.<sup>44</sup> Unfortunately, Tovonna is not alone—over half of revenge-porn victims reported that they had suicidal thoughts.<sup>45</sup>

Some victims have used their plight to advocate for legislative change.<sup>46</sup> Annmarie Chiarini is one of those victims.<sup>47</sup> Chiarini, a college professor, became a victim after her ex-boyfriend tried to sell naked pictures of her on eBay, posted the pictures on her college’s Facebook page, and then posted them on websites pretending to be her soliciting sex.<sup>48</sup> Though her perpetrator put Chiarini through much despair, the lack of a revenge-porn legislation in her state at that time meant that he was not criminally culpable.<sup>49</sup> Today, thanks in part to Chiarini’s efforts, those actions are illegal in more than thirty-four states.<sup>50</sup> While most victims share their stories via traditional media or online, some have taken their stories to the tribunals in the pursuit of justice.<sup>51</sup> Not all have been successful.<sup>52</sup>

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42. See Kate Briquet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, DAILY BEAST (June 10, 2016, 3:35 PM), <http://www.thedailybeast.com/articles/2016/06/09/leak-of-nude-snapchat-drove-teen-girl-to-suicide.html>; see also *Italian Revenge Porn Victim Tiziana Cantone Commits Suicide*, INT’L BUS. TIMES (Sept. 15, 2016, 6:15 PM), <http://www.ibtimes.co.uk/italian-revenge-porn-victim-tiziana-cantone-commits-suicide-1581555> (reporting on an Italian 31-year-old woman who committed suicide after her ex-boyfriend leaked her sex video online).

43. See Briquet & Zavadski, *supra* note 42.

44. *Id.*

45. See *Guide for Legislators*, *supra* note 29.

46. See Chiarini, *supra* note 35.

47. See *id.*

48. *Id.*

49. *Id.*

50. See *id.*; *State Revenge Porn Laws*, C.A. GOLDBERG, <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/> (last updated June 8, 2017); *38 States + DC Have Revenge Porn Laws*, CYBER CR INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Sept. 1, 2017).

51. See *infra* Part III. Courts have awarded victims million-dollar judgments in high-profile cases. See Ahiza Garcia & Jackie Wattles, *Erin Andrews Awarded \$55 Million in Suit over Nude Video*, CNN MONEY (Mar. 8, 2016, 7:03 AM), <http://money.cnn.com/2016/03/07/media/erin-andrews-video-trial-verdict/index.html?iid=EL>. More recently, a court awarded Hulk Hogan \$140 million (\$115 million compensatory and \$25 million punitive) in damages against Gawker for posting a sex video on its website without Hogan’s consent. See Lukas I. Alpert, *Gawker, Hulk Hogan in Settlement Talks over Invasion-of-Privacy Case*, WALL STREET J. (Aug. 7, 2016, 10:39 PM), <http://www.wsj.com/articles/gawker-and-hulk-hogan-in-settlement-talks-over-invasion-of-privacy-case-1470617756>.

52. See *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied).

### III. REDRESSING REVENGE-PORN VICTIMS: THE ADEQUACY OF CIVIL REMEDIES IN TEXAS

Several Texas cases illustrate the limitations of civil recovery that existed before Texas passed a law providing criminal and civil redress for revenge-porn victims.<sup>53</sup> Though one victim recovered nearly \$350,000 in a civil lawsuit, her case was the exception, rather than the rule.<sup>54</sup>

#### A. *Privacy-Based Torts and Their Limitations: Patel v. Hussain*<sup>55</sup>

On August 2012, Nadia Hussain's life changed forever.<sup>56</sup> Her ex-boyfriend, Akhil Patel, uploaded a sexually explicit video of her online for thousands of people to see—a video he recorded while they were dating, without her permission.<sup>57</sup> Nadia lost friends, her reputation, and her tranquility.<sup>58</sup> But in his quest for revenge, Patel lost something too: the Fourteenth Court of Appeals of Texas partially upheld a jury verdict awarding Nadia \$345,000.<sup>59</sup>

Though Nadia's story is familiar to that of other victims, it presents particularly egregious conduct on behalf of the perpetrator, Patel.<sup>60</sup> Nadia and Patel dated "on-and-off" for about seven years before breaking up in 2010.<sup>61</sup> Disgruntled, Patel engaged in a series of harassing behaviors.<sup>62</sup> Throughout the course of several months in 2011 and 2012, Patel sent Nadia a litany of text messages threatening to expose her video and pictures if she did not acknowledge his texts.<sup>63</sup> His messages indicated a desire to publicly humiliate her.<sup>64</sup> One of these messages read: "When someone texts you, esp[ecially] if the[y] supposedly have your life in their possession, why would you ignore them?"<sup>65</sup> Another stated, "YOU HAVE HURT ME SOO

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53. TEX. PENAL CODE § 21.16 (West 2017); TEX. CIV. PRAC. & REM. CODE ANN. § 98B.002 (West 2015); see *Patel v. Hussain*, 485 S.W.3d 153 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Toups*, 429 S.W.3d at 759.

54. See *Patel*, 485 S.W.3d at 158; see also Lana Shadwick, *Texas Appeals Court Affirms \$345K in Revenge Porn Damages*, BREITBART (Jan. 26, 2016), <http://www.breitbart.com/texas/2016/01/26/hold-texas-appeals-court-upholds-revenge-porn-judgment/> (reporting that Nadia's lawyer stated that the jury's decision in *Patel* "is the first of its kind in Texas").

55. *Patel*, 485 S.W.3d at 153.

56. *Id.* at 165.

57. *Id.* at 157, 165. Patel also possessed several topless pictures of Nadia that she sent to him during their relationship and asked him to delete, yet he kept them anyway. *Id.* at 158.

58. See *id.* at 169–71.

59. *Id.* at 184.

60. See generally *id.*; see also *supra* Section II.A (discussing victims' stories).

61. *Patel*, 485 S.W.3d at 158.

62. See *id.* at 158–69.

63. See *id.*

64. See *id.*

65. *Id.* at 162.



MUCH NADIA. DO I want to RUIN YOUR REP!!!! yes i do very much so . . . .”<sup>66</sup> Patel repeatedly threatened to send the video or photos to Nadia’s friends, coworkers, parents, uncles, and grandparents.<sup>67</sup>

Despite his threats, Nadia hardly responded to him.<sup>68</sup> Her lack of communication angered Patel to the point that he later sent Nadia “upwards of 20 to 30 text messages and phone calls per day.”<sup>69</sup> Nadia’s mother also testified that for years, Patel prank called Nadia’s house at late hours of the night—even at 1 a.m. and 2 a.m.<sup>70</sup> Nadia eventually reported Patel’s conduct to the police in March 2012.<sup>71</sup> A few months later, he uploaded the video online, and within months, it received thousands of views.<sup>72</sup> Afterward, Nadia testified that she felt humiliated and traumatized.<sup>73</sup> She worried that men might only be interested in her because they came across her video.<sup>74</sup> She also felt concerned that an employer did not hire her because a simple Google search could have led them to the video.<sup>75</sup> Her friends testified that she lived in fear and that the situation had “been hell for [Nadia].”<sup>76</sup> Additionally, this exposure tainted Nadia’s reputation in the Muslim community.<sup>77</sup>

Because the discussion of the legality of revenge porn is novel, *Patel* is one of the recent cases highlighting the potential roadblocks revenge-porn victims seeking civil redress face in courts.<sup>78</sup> In March 2013, Nadia sued Patel claiming defamation, public disclosure of private facts, intrusion on seclusion, and intentional infliction of emotional distress (IIED).<sup>79</sup> The jury awarded her \$500,000 in damages; however, the Fourteenth Court of Appeals reversed on her defamation and IIED claims, reducing her award to \$345,000.<sup>80</sup> The loss of \$155,000 is substantial and demonstrates the limitations to recovery for victims, notwithstanding the perpetrator’s egregious invasion of privacy. Although Nadia could have recovered under

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66. *Id.* at 163.

67. *See id.* at 158–69. For example, one of these messages read: “I’m going to make sure each one of your family members knows about those pics n vids and when I say family I mean nana nani mom uncle bhabhi dad.” *Id.* at 164. “[N]ana” and “nani” are Nadia’s grandparents, and “bhabhi” is her aunt. *Id.* at 163 n.10, 164 n.13.

68. *See id.* at 158–69.

69. *Id.* at 165.

70. *See id.*

71. *Id.* at 164.

72. *Id.* at 165.

73. *See id.* at 169.

74. *See id.*

75. *See id.* at 170.

76. *Id.* at 170–71.

77. *Id.*

78. *See infra* Section III.C (discussing limitations on victims’ recovery).

79. *See Patel*, 485 S.W. 3d at 157, 169.

80. *See id.* at 157, 184.

various remedies, the *Patel* court foreclosed many of them due to the nature of revenge porn.<sup>81</sup>

### 1. Defamation

First, on the defamation issue, the court held that “[t]he affirmative defense of substantial truth is a complete defense to defamation.”<sup>82</sup> Because the jury found that the content in the video was “substantially true,” Nadia’s defamation claim failed.<sup>83</sup> This result demonstrates how difficult it is for a victim to succeed on any defamation claim; the “content [of the videos or photographs] is truthful information, a record of what did in fact occur.”<sup>84</sup>

Because revenge porn is considered truth under the law, at least one commentator suggests that the benefit of the free flow of truthful information—in this case, revenge-porn content—outweighs the individualized harm revenge porn may cause.<sup>85</sup> This commentator conclusion rests on the idea that some people, such as employers, might actually have an interest in finding out “facts they believe relevant to the moral caliper (sic) of their employees,” such as whether that person takes nude pictures of themselves or not.<sup>86</sup>

But while this statement may be true, it discounts the fact that many victims never intended that image to circulate online for the whole world to see.<sup>87</sup> The photography or recording of sexually explicit content normally takes place inside the privacy of the home, whereas other activities that employers also look at—for example, drinking habits, political tendencies, and social connections—generally occur in public and are sometimes shared openly on social media by the candidate himself.<sup>88</sup>

### 2. Intentional Infliction of Emotional Distress

In addition to the defamation discussion, the *Patel* court also held that the IIED claim failed because, in Texas, an IIED claim acts only as a

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81. *See id.* at 183–84.

82. *Id.* at 173.

83. *See id.* at 172, 174.

84. Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 666 (2016).

85. John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 230 (2014). “Dissemination of truth seems, after all, to be exactly the kind of thing that the First Amendment exists to protect.” *Id.* at 226.

86. *Id.* at 229.

87. *See* Jacob Davidson, *The 7 Social Media Mistakes Most Likely to Cost You a Job*, TIME (Oct. 16, 2014), <http://time.com/money/3510967/jobvite-social-media-profiles-job-applicants>. Data in 2014 showed 93% of hiring managers check a candidate’s social media accounts, and 70% of recruiters stated that sexual posts are on the “don’t do this” list. *Id.*

88. *See generally id.*

“gap-filler tort.”<sup>89</sup> In order to recover for IIED in Texas, a plaintiff must show that: “(1) the defendant acted intentionally or recklessly; (2) the defendant’s conduct was extreme and outrageous; (3) the defendant’s actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe.”<sup>90</sup> In other words, it is a limited-purpose tort intended for use only in circumstances in which the defendant has intentionally inflicted severe emotional distress in such a rare manner that the plaintiff has no other legal recourse.<sup>91</sup> Thus, if another tort claim or a statute encompasses the gravamen of the plaintiff’s complaint, the plaintiff cannot recover under an IIED tort claim in Texas.<sup>92</sup>

Though Nadia attempted to argue that Patel’s conduct was extreme and outrageous and that some of his threats could independently support an IIED claim, the court reasoned that because the gravamen of her complaint fell under her invasion of privacy claims, an IIED tort claim was unavailable.<sup>93</sup> The *Patel* case exemplifies how difficult it is for a plaintiff to recover under an IIED claim under Texas law.<sup>94</sup> Though Texas recognizes IIED as an independent tort, one Texas court noted that succeeding on an IIED claim is “virtually impossible.”<sup>95</sup> One Texas Supreme Court Justice has also advocated for the elimination of the tort claim entirely.<sup>96</sup> Considering that 93% of victims suffer emotional distress due to disclosure of their photos or videos and that 42% seek psychological services, the trend of unsuccessful IIED claims can be disheartening for victims.<sup>97</sup>

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89. See *Patel v. Hussain*, 485 S.W.3d 153, 176 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

90. *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004).

91. *Patel*, 485 S.W.3d at 176.

92. *Id.*; *Draker v. Schreiber*, 271 S.W.3d 318, 326 (Tex. App.—San Antonio 2008, no pet. h.) (Stone, J., concurring).

93. See *Patel*, 485 S.W.3d at 176–78.

94. See generally *id.*; see also *Zeltwanger*, 144 S.W.3d at 449–50 (reversing the lower court’s ruling for the plaintiff on her IIED tort claim because the claim was not independent of her claim for sexual harassment); *Vaughan v. Drennon*, 372 S.W.3d 726, 732–33, 740–41 (Tex. App.—Tyler 2012, no pet.) (reversing the trial court’s judgment on plaintiff’s IIED claims because the defendant’s alleged acts would have stated claims for non-IIED torts, such as assault and nuisance); *Draker*, 271 S.W.3d at 326 (affirming the lower court’s summary judgment ruling against the plaintiff on her IIED claim because the essence of her claim was defamation); *Moser v. Roberts*, 185 S.W.3d 912, 915–16 (Tex. App.—Corpus Christi 2006, no pet. h.) (concluding the IIED tort claim was not available to the plaintiff because she recovered under her libel, slander, and malicious prosecution claims).

95. *Draker*, 271 S.W.3d at 326; see also *Haynes & Boone, L.L.P. v. Chason*, 81 S.W.3d 307, 311–14 (Tex. App.—Tyler 2001, pet. denied) (reversing the plaintiff’s IIED claim because the defendant’s conduct of carrying a poster-sized photograph of plaintiff’s naked torso in public did not amount to outrageous and extreme behavior). *But see Conley v. Driver*, 175 S.W.3d 882, 886–88 (Tex. App.—Texarkana 2005, rev. denied) (upholding the plaintiff’s IIED award based on the defendant’s threats to ruin her reputation by exposing a videotape depicting her sexual encounters to her school, family, mother, current boyfriend, and future boyfriends or husbands).

96. *Zeltwanger*, 144 S.W.3d at 450–51 (Hecht, J., concurring) (“This is consistent with, and not a departure from, my more fundamental position that the tort of intentional infliction of emotional distress should not exist at all . . .”).

97. See *Guide for Legislators*, *supra* note 29, at 11–12.

Even if Texas recognized the tort of IIED more generally, the issue of consent arises.<sup>98</sup> One question is whether a victim waives his or her rights by allowing the other party to photograph or record them.<sup>99</sup> Another similar issue is whether a victim should be able to bring an IIED claim when he or she deliberately sent a sexual image to another person who later distributed it to third parties.<sup>100</sup> While some commentators argue that the victim consented to the image's distribution by consenting to send it in the first place, Professors Danielle Citron and Mary Anne Franks argue that consent is contextual.<sup>101</sup> In other words, disclosing something to one party for a certain purpose does not give the receiver permission to share that information with others or to use it for other purposes.<sup>102</sup>

Citron and Franks also point out that societal norms may play a role in determining whether revenge porn should be protected as a privacy matter and argue that it should because victims share content under the expectation that it will remain confidential—that is, between the two parties.<sup>103</sup> This situation mirrors the sharing of a Social Security number with certain parties or an HIV diagnosis with family and friends.<sup>104</sup> Professor Franks makes a strong point: A person is less likely to share potentially compromising images if he or she distrusts the receiver; that is why these images are usually shared in an *intimate* relationship—one in which the parties have cultivated a certain level of trust.<sup>105</sup>

### 3. *Intrusion on Seclusion and Public Disclosure of Private Facts*

Despite finding in favor of Patel's defenses for defamation and IIED, the court particularly emphasized that, considering Nadia's behavior following the posting of the video, the evidence was sufficient to establish that she had suffered and would continue to suffer mental anguish under her

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98. See Kitchen, *supra* note 27, at 257.

99. See *id.* For example, under the Restatement (Second) of Torts, “[o]ne who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.” RESTATEMENT (SECOND) OF TORTS § 892A (AM. LAW INST. 1979). Thus, a victim's consent to be photographed or recorded may preclude them from bringing a claim for IIED in some jurisdictions. See *id.* This rule did not apply in *Patel* because Nadia did not consent to Patel's recording via Skype. See *Patel v. Hussain*, 485 S.W.3d 153, 158 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

100. See Kitchen, *supra* note 27, at 267–68.

101. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 355 (2014).

102. *Id.*; cf. Kevin B. Bennett, Comment, *Revenge Pornography: Exploring Tortious Remedies in Texas*, 46 ST. MARY'S L.J. 521, 530–35 (2015) (discussing consent-in-fact and apparent consent under the Restatement (Second) of Torts).

103. Citron & Franks, *supra* note 101, at 357.

104. See *id.*

105. See Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Dec. 5, 2016), <http://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn>.

intrusion on seclusion and public disclosure of facts claims.<sup>106</sup> In Texas, one can recover for intrusion upon seclusion if one can prove the following: “(1) an intentional intrusion, physically or otherwise, upon another’s solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person.”<sup>107</sup>

Moreover, the tort of public disclosure of facts includes three elements: “(1) publicity was given to matters concerning one’s personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern.”<sup>108</sup> The court noted that online pornography exists indefinitely, creating a “permanent record” on the Internet.<sup>109</sup> While the torts of invasion of intrusion upon seclusion and public disclosure of embarrassing facts can and have provided recourse for victims in some cases, the issue of consent may arise once again.<sup>110</sup>

First, under the tort of public disclosure of private facts, a victim in certain jurisdictions must show that she did not give her in-fact or apparent consent to the distribution of the content she consensually shared.<sup>111</sup> While, in most cases, proving this element would cause little difficulty, in certain situations, a distributor may be able to successfully claim that the victim gave apparent consent—an action or inaction manifesting consent that the other person relied upon or understood as consent under a reasonable person standard.<sup>112</sup> One of these situations may include sending Snapchats. Although most people know that Snapchats are meant to be private between sender and receiver, most users widely understand that a receiver may screenshot the image, keep it on his or her device, and possibly share it with friends.<sup>113</sup>

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106. *Patel v. Hussain*, 485 S.W.3d 153, 177–83 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Mental anguish damages are general damages that are noneconomic in nature. *Hancock v. Variyam*, 400 S.W.3d 59, 64 n.4 (Tex. 2013).

107. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).

108. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995); Brief for Appellant, *Patel v. Hussain*, 485 S.W.3d 153 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (No. 201318445), 2013 WL 1366065, at \*64.

109. *Patel*, 485 S.W.3d at 182–83.

110. *See Bennett*, *supra* note 102, at 550–51. In Nadia’s case, consent was likely not so much of an issue because Nadia did not consent to Patel’s recording via Skype in the first place. *See Patel*, 485 S.W.3d at 158.

111. *See* RESTATEMENT (SECOND) OF TORTS § 892 (AM. LAW INST. 1979); RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977); *Bennett*, *supra* note 102, at 550–51.

112. *See* RESTATEMENT (SECOND) OF TORTS § 892, cmt. c (AM. LAW INST. 1979); *Bennett*, *supra* note 102, at 533–35. In considering consent, courts take custom and community standards into account. RESTATEMENT (SECOND) OF TORTS § 892, cmt. d (AM. LAW INST. 1979).

113. *See supra* note 1 and accompanying text (explaining the mechanics of Snapchat). Today, more than 150 million people use Snapchat daily, recently surpassing Twitter usage. *See Sarah Frier, Snapchat Passes Twitter in Daily Usage*, BLOOMBERG (June 2, 2016, 6:30 AM), <https://www.bloomberg.com/news/articles/2016-06-02/snapchat-passes-twitter-in-daily-usage>.

Commentators argue that a person's clear and unequivocal words or acts that manifest nonconsent to distribution provide the highest protection for a victim.<sup>114</sup> Nonetheless, in the era of Snapchat and social media on which images are shared casually and instantaneously, most users lack the foresight to actively object to distribution. Oral agreements may also present extensive proof issues because of their unreliable nature.<sup>115</sup> While written agreements could solve some of those problems, in the context of a trusting relationship, one partner is unlikely to ask the other to sign a nondisclosure agreement before sharing content not only because it conveys a lack of trust and suspicion, but also because the sender trusts that the other will not harm them at the outset.<sup>116</sup>

*B. Website-Provider Immunity: GoDaddy.com, LLC v. Toups*<sup>117</sup>

Though a victim may pursue recovery against the perpetrator, in *GoDaddy.com, LLC v. Toups*, a Texas court of appeals concluded that a victim could not seek recovery from a website provider with deeper pockets.<sup>118</sup> In *Toups*, several women sought to recover, not from the perpetrators, but from GoDaddy.com, an interactive service provider, for knowingly hosting illegal revenge-porn websites depicting them.<sup>119</sup> The plaintiffs asserted several tort claims, including IIED and intrusion on the plaintiffs' right to seclusion, among others.<sup>120</sup>

GoDaddy, however, claimed immunity under § 230 of the Communications Decency Act (CDA), which would bar the plaintiffs' claim.<sup>121</sup> The CDA protects interactive service providers from liability in

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114. See Bennett, *supra* note 102, at 533; see also Taylor E. Gissell, Comment, *Felony Count 1: Indecent Disclosure*, 53 HOUS. L. REV. 273, 298–99 (2015) (suggesting the use of non-disclosure agreements as a temporary solution to the lack of revenge-porn legislation to provide a victim recourse under contract law).

115. Peter Clarke, *Oral Contracts*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/oral-contracts.html> (last visited Sept. 1, 2017).

116. *But see* Lauren Effron, *I Love You, You're Perfect, but Watch What You Facebook: Social Media Prenups*, ABC NEWS (June 3, 2014), <http://abcnews.go.com/Lifestyle/love-perfect-watch-facebook-social-media-prenups/story?id=23977608>.

117. *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied).

118. *See id.* at 760.

119. *See id.* at 753. The plaintiffs admitted GoDaddy had not created, developed, or published the material. *Id.* at 754.

120. *See id.* at 753.

121. *See id.* The CDA extends protection to popular websites like Twitter, Facebook, eBay, and Craigslist. See Greg Land, *Snapchat Wins Tests CDA Immunity in Age When Apps Are Everywhere*, DAILY REPORT (Jan. 26, 2017), <http://www.dailyreportonline.com/home/id=120277765935/Snapchat-Win-Tests-CDA-Immunity-in-Age-When-Apps-Are-Everywhere?mcode=1202617074542&curindex=2>. A county state court judge in Georgia recently held that the CDA immunizes Snapchat. *See id.*

certain civil cases.<sup>122</sup> Although the plaintiffs argued that the CDA does not preempt state law intentional torts, the court disagreed, reasoning that Congress intended to prevent state libel law from imposing liability on website providers for material published by third parties, even when the material is harmful.<sup>123</sup> Because GoDaddy only hosted the content and did not create it, the plaintiffs' claims that treated GoDaddy as a publisher, failed.<sup>124</sup>

Moreover, the court rejected the plaintiffs' argument that GoDaddy could not receive CDA immunity on First Amendment grounds.<sup>125</sup> Specifically, the court reasoned that "no provision in the CDA . . . limits its application to suits involving constitutionally protected material."<sup>126</sup> According to the court, the statute's policy and plain language further support the conclusion that, under the CDA, Internet service providers, like GoDaddy, are immune from liability "even when the posted content is illegal, obscene, or otherwise may form the basis of a criminal prosecution."<sup>127</sup> Thus, this case stands for the proposition that some of the most popular websites, including social media platforms, are completely immune from certain civil lawsuits brought by revenge-porn victims.<sup>128</sup>

### C. Other Civil Law Limitations

Another major limitation to victim recovery is the lack of resources belonging to both the victim and the perpetrator.<sup>129</sup> First, a victim may not have the financial resources or the time to bring a lengthy lawsuit, especially if the matter caused the victim to lose his or her job.<sup>130</sup> Additionally, "the initial culprits are usually ex-lovers who do not have any meaningful assets

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122. See 47 U.S.C. § 230(c)(1) (2015). The relevant provision of the CDA, also known as the "safe harbor" provision, states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* This provision has caused much controversy because of the broad immunity it provides to interactive service providers. See, e.g., Christopher Zara, *The Most Important Law in Tech Has a Problem*, BACKCHANNEL (Jan. 3, 2017), <https://backchannel.com/the-most-important-law-in-tech-has-a-problem-64f5464128b6#.ox99owyr> ("In a nutshell, Section 230 is the statutory glue behind everything you love and hate about the internet.").

123. *Toups*, 429 S.W.3d at 756–58; see also U.S.C. § 230(e)(3) ("[N]o liability may be imposed under any State or local law that is inconsistent with this section.").

124. *Toups*, 429 S.W.3d at 759.

125. *Id.* The plaintiffs argued the First Amendment does not protect revenge porn as legal pornography. See *id.*

126. *Id.*

127. *Id.* at 760.

128. See *id.*; Land, *supra* note 121.

129. Citron & Franks, *supra* note 101, at 358–59; see also Gissell, *supra* note 114, at 286–87 (advocating for revenge-porn legislation because of the lack of civil recourse for victims).

130. Citron & Franks, *supra* note 101, at 358–59.

that could compensate the victim monetarily.”<sup>131</sup> Judgment-proof defendants discourage victims from filing suits, and even a large monetary judgment does not guarantee that a website will take the content down, which is the goal of many revenge-porn victims.<sup>132</sup> Indeed, *Patel* is one of few revenge-porn cases in which the victim recovered monetarily and is one-of-a-kind in Texas because of it.<sup>133</sup>

Finally, copyright laws might offer a remedy to revenge-porn victims by enabling them to make a request to the website to remove the material from its page under a copyright-infringement complaint.<sup>134</sup> However, a limitation exists: the laws only protect the owners of the images or videos.<sup>135</sup> And the person must have taken the photo himself or herself to be considered the owner.<sup>136</sup> Thus, if the lover or another third party takes the photograph or records the video, the victim is left without redress.<sup>137</sup> Moreover, even if the website agrees to take the photo or video down, the damage may be nearly impossible to erase or eradicate if enough time has lapsed between the post and its removal: “Once the image is made available on the Internet, it is forever accessible across the globe” for people to see and share inexhaustibly.<sup>138</sup>

#### IV. CRIMINALIZING REVENGE PORN IN THE UNITED STATES

Because of the inadequacy of current civil recourses and criminal laws to fully redress victims in many cases, and due to the increasing prevalence of revenge porn online, states have enacted criminal statutes to prevent the dissemination of nonconsensual pornography before it occurs.<sup>139</sup> However, not all agree that criminalizing revenge porn is the correct approach to combat the growing problem.<sup>140</sup>

Those who oppose the criminalization of revenge porn point to the availability of civil remedies or argue that existing criminal laws afford

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131. Tariq, *supra* note 27.

132. Citron & Franks, *supra* note 101, at 358–59.

133. See John Council, *Appeals Court Partially Upholds Revenge Porn Verdict*, TEX. LAW. (Jan. 22, 2016), <http://www.texaslawyer.com/id=1202747770589/Appeals-Court-Partially-Upholds-Revenge-Porn-Verdict?mcode=0&curindex=0&curpage=ALL>; Shadwick, *supra* note 54.

134. Citron & Franks, *supra* note 101, at 359–60; Tariq, *supra* note 27, at 238–39.

135. Citron & Franks, *supra* note 101, at 359–60.

136. *Id.*

137. *Id.* at 360.

138. Tariq, *supra* note 27, at 239.

139. See Gissell, *supra* note 114, at 287–88; see also Citron & Franks, *supra* note 101, at 365–74 (discussing the limitations of current criminal laws to protect victims).

140. See, e.g., Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), <https://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/>; Alain Stephens & Matti Hautala, *The Legal Case Against Criminalizing Revenge Porn*, TEX. STANDARD, (July 15, 2015, 3:47 PM), <http://www.texasstandard.org/stories/criminalizing-nude-photos-is-not-the-solution-texas-revenge-porn-laws/> (discussing the Texas Relationship Privacy Act).



sufficient protection.<sup>141</sup> Others shift the blame to the victim, proposing that revenge porn can be solved if one simply does not send sexually explicit images in the first place.<sup>142</sup> Despite opposition, legislators, tech companies, social activists, and attorneys generally support these efforts because they believe that criminalization is the most effective deterrent for perpetrators and the best safeguard of important privacy rights.<sup>143</sup> While these purposes are legitimate, a paramount limitation stands in the way: The First Amendment.<sup>144</sup> Because revenge porn does not fall within one of the enumerated categories of unprotected speech under the jurisprudence of the United States Supreme Court, legislators must narrowly craft statutes to avoid infringing on important First Amendment rights.<sup>145</sup>

#### A. *Revenge Porn and the First Amendment*

The most prominent argument against the criminalization of revenge porn centers around First Amendment concerns.<sup>146</sup> Critics postulate that overbroad statutes can lead to prosecution of the innocent.<sup>147</sup> Some First Amendment advocates recognize the harm revenge porn causes, but they do not believe it should be criminalized at the expense of curtailing freedom of speech.<sup>148</sup> The First Amendment, of course, does not protect *all* speech.<sup>149</sup> Traditionally unprotected categories of speech include true threats, child

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141. See Jeong, *supra* note 140.

142. See Merrill Hope, *Texas House Follows Senate, Criminalizes 'Revenge Porn'*, BREITBART (May 16, 2015), <http://www.breitbart.com/texas/2015/05/16/texas-house-follows-senate-criminalizes-revenge-porn/> (“Although society has turned to legislation to deal with the resulting horrors of non-consensual pornography . . . Jerry Doyle offered up one common sense measure of prevention to knowingly avoid becoming a victim of revenge porn. ‘First of all – just don’t do it,’ he said. ‘It’s that simple.’”). Ideally, victims should protect themselves and consider the consequences of sending sexually explicit images or allowing their partners to photograph or record them; however, not all victims consent to being photographed or recorded from the outset, as Tovonna Holton’s case demonstrates. See *supra* Section II.B; cf. Gissell, *supra* note 114, at 281 (“To these critics, a victim’s nude pictures are a ‘scarlet letter,’ payment for the sin of having sexual urges and confidence in their bodies.”).

143. See, e.g., Franks, *supra* note 17.

144. See, e.g., Koppelman, *supra* note 84, at 662.

145. See *id.*; Citron & Franks, *supra* note 101, at 386–90. *But cf.* Mark Bennett, *First Amendment 101*, BENNETT & BENNETT BLOG (Oct. 6, 2014), <http://blog.bennettandbennett.com/2014/10/first-amendment-101/> (criticizing Professor Citron’s article about revenge porn and the First Amendment).

146. See, e.g., Koppelman, *supra* note 84, at 662. For example, some commentators propose that revenge-porn statutes may even be considered prior restraints on speech because the distributor must first obtain consent before sharing the image. See *id.* at 667.

147. See Jeong, *supra* note 140; Stephens & Hautala, *supra* note 140.

148. See, e.g., Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, BENNETT & BENNETT BLOG (Oct. 14, 2013), <http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional/#obscenity>.

149. See *United States v. Stevens*, 559 U.S. 460, 464, 468 (2010) (declaring a statute prohibiting the “creation, sale, or possession of depictions of animal cruelty” unconstitutional under the First Amendment); see also Bennett, *supra* note 145 (discussing revenge porn and the First Amendment categories of unprotected speech).

pornography, incitement, defamation, obscenity, fraud, and speech integral to criminal conduct.<sup>150</sup>

The United States Supreme Court has also clarified that when it has identified a category of unprotected speech in the past, it has never engaged in a “simple cost-benefit analysis” of the competing interests at stake—which in the case of revenge-porn legislation would include privacy and freedom of speech and expression.<sup>151</sup> However, although revenge porn falls outside the categories of unprotected speech, that does not mean all hope is lost.<sup>152</sup> Of course, the Court could declare in the future that revenge porn falls under an unprotected category of speech.<sup>153</sup> Nonetheless, although the Court has not absolutely foreclosed that possibility, it has stated that it has no “freewheeling authority” to expand existing categories.<sup>154</sup> This declaration presents a steep uphill battle for legislators, especially considering the amount of time and expense it can take for a case to make its way up to the United States Supreme Court.<sup>155</sup> Because of this difficulty, state legislators must draft statutes carefully to avoid the many issues that accompany a poorly drafted law that enters the First Amendment domain.<sup>156</sup>

In 2014, the Court of Criminal Appeals of Texas struck down such a law.<sup>157</sup> Specifically, the Court held that the state’s former improper-photography statute under Texas Penal Code § 21.15(b)(1) was unconstitutional on its face.<sup>158</sup> Although the state argued that the statute fell outside First Amendment protection because “the act of photography is conduct and is not inherently expressive,” the Court rejected the argument and concluded that pictures are inherently expressive in nature.<sup>159</sup> Moreover,

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150. See, e.g., Koppelman, *supra* note 84, at 662.

151. *Stevens*, 559 U.S. at 471 (discussing child pornography and its analysis in *New York v. Ferber*, 458 U.S. 747 (1982)). “The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.” *Id.* at 470.

152. *Id.*

153. *Id.* at 472.

154. *Id.*

155. See generally *Supreme Court Procedures*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Oct. 2, 2017).

156. See, e.g., Citron & Franks, *supra* note 101, at 386–90.

157. See *Ex Parte Thompson*, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014); accord *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013) (holding that a statute banning online solicitation of minors was unconstitutional on First Amendment grounds).

158. *Ex Parte Thompson*, 442 S.W.3d at 351. The relevant statute provided that “[a] person commits an offense if the person: (1) photographs or by videotape or other electronic means records . . . a visual image of another at a location that is not a bathroom or private dressing room . . . .” See *id.* at 333. These statutes are more commonly known as “upskirting” laws. See Liz Fields, *Court Ruling Makes Taking Pictures Up Women’s Skirts Legal in Texas*, VICE (Sept. 21, 2014, 3:05 PM), <https://news.vice.com/article/court-ruling-makes-taking-pictures-up-womens-skirts-legal-in-texas>.

159. *Ex Parte Thompson*, 442 S.W.3d at 331.

the Court concluded that the First Amendment protected the purposeful creation of photographic images and other visual recordings because “it makes no difference in the First Amendment analysis whether government regulation applies to ‘creating, distributing, or consuming’ speech.”<sup>160</sup>

In light of this conclusion, the Court considered the level of scrutiny that should apply to the statute.<sup>161</sup> It reasoned that the statute was content-based rather than content-neutral because the statute intended to prohibit one category of photographic or videotaping activity that was “done with intent to arouse or gratify sexual desire,” or with sexual thought.<sup>162</sup> Content-based restrictions on speech are presumptively unconstitutional and must therefore pass strict-scrutiny analysis.<sup>163</sup> “To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a (2) compelling state interest and (3) narrowly drawn.”<sup>164</sup> A statute is “narrowly drawn” if it utilizes the least restrictive means to achieve the governmental interest.<sup>165</sup>

Although the Court recognized the state’s argument that substantial privacy interests were at stake, it ultimately held that the statute failed strict scrutiny because the statute could have employed less-restrictive alternatives to protect the interests at play, such as including language to address privacy concerns.<sup>166</sup> The Court also addressed the overbreadth doctrine, which questions whether the reach of the statute is so broad that it prohibits a “substantial amount of protected expression,” and found that it did because it applied to any nonconsensual taking of a photograph or recording, no matter where it happened, so long as the perpetrator acted with the required sexual intent.<sup>167</sup> The fact that the statute included specific-intent and lack-of-consent requirements did not save it.<sup>168</sup>

Applying the analysis of this case, revenge porn likely constitutes protected speech because nonconsensual photography and visual recordings are inherently expressive, and the First Amendment protects their distribution.<sup>169</sup> Similarly, courts would likely consider revenge-porn statutes

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160. *Id.* at 336–37 (citing *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 n.1 (2011)).

161. *Ex Parte Thompson*, 442 S.W.3d at 336–37; *see also infra* Section IV.B.2 (discussing the intent requirement in this case).

162. *Ex Parte Thompson*, 442 S.W.3d at 347.

163. *See id.* at 344; *see also* Koppelman, *supra* note 84, at 663 (discussing revenge porn and the First Amendment).

164. *Ex Parte Thompson*, 442 S.W.3d at 344; *Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2013).

165. *Ex Parte Thompson*, 442 S.W.3d at 344 (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000)).

166. *Id.* at 348–49.

167. *Id.* at 349–51 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002)). For example, the statute criminalized taking photographs of other people in bathing suits at a beach or a park. *See id.* at 351.

168. *Id.* at 337–42.

169. *See id.* at 331, 336–37.

as content-based restrictions because they “criminalize[] disclosure of a photograph of a person having sex, but not disclosure of (for example) a photograph of a person writing a blog.”<sup>170</sup> This conundrum means that in order to pass constitutional muster, states must draft statutes using the least-restrictive means to achieve the purpose of safeguarding privacy interests and ensure that the statute does not prohibit a substantial amount of protected speech for overbreadth-doctrine purposes.<sup>171</sup> Indeed, failure to design such statutes has already led to the revision of at least one state statute.<sup>172</sup>

*B. Drafting a Statute that Passes Constitutional Muster: Expert Recommendations*

Though not an easy task, “[a] narrowly crafted revenge porn criminal statute that protects the privacy of sexually explicit images can be reconciled with the First Amendment.”<sup>173</sup> Professors Mary Anne Franks and Danielle Citron, who advocate for the criminalization of revenge porn, suggest that when drafting a statute that passes constitutional muster, legislatures should consider its base elements, the malicious motive or intent requirement, its exceptions, the specificity of its definitions, and its penalty.<sup>174</sup>

*1. The Base Element*

Professor Franks states that a statute should clearly set out its base elements, requiring that the perpetrator: (1) *disclosed* private, sexually explicit images of an *identifiable* person, and (2) without the *consent* of that person.<sup>175</sup> The mens rea for the first element, disclosure, should be “purpose or knowledge” so that the law does not penalize accidental disclosures.<sup>176</sup> On the other hand, the second element—consent—should be no higher than a recklessness standard under the Model Penal Code.<sup>177</sup> A statute could also

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170. See Bennett, *supra* note 148.

171. See *Ex Parte Thompson*, 442 S.W.3d at 344, 348–51.

172. See Miriam Wasser, *AZ Revenge Porn Law Not to Be Enforced, Says Federal Judge*, PHX. NEW TIMES (July 13, 2015, 2:45 PM), <http://www.phoenixnewtimes.com/news/az-revenge-porn-law-not-to-be-enforced-says-federal-judge-7486054>.

173. Citron & Franks, *supra* note 101, at 376.

174. See *id.* at 386–90; *Guide for Legislators*, *supra* note 29, at 5–11. The following sections are modeled after recommendations that both Professor Franks and Professor Citron have suggested in their scholarly work and after Professor Franks’ guide for legislators, which is available on the CCRI website. See Citron & Franks, *supra* note 101, at 386–90; *Guide for Legislators*, *supra* note 29, at 5–11.

175. See *Guide for Legislators*, *supra* note 29, at 5.

176. *Id.* at 6.

177. *Id.* This standard requires that the offender “would have to know that there was a substantial risk that the person depicted had not consented to the disclosure and be unable to offer justification for why he took that risk.” *Id.*

“require that the defendant knowingly betrayed the privacy expectation of the person in the sexually explicit image.”<sup>178</sup> If the statute includes such requirement, it prevents the punishment of those who “foolishly” share the photos with others without knowledge that the original parties had an agreement of confidentiality.<sup>179</sup>

## 2. *The Malicious-Intent Requirement*

Many legal scholars have debated the issue of whether revenge-porn statutes should include a malicious-intent requirement.<sup>180</sup> Free speech activists, including the American Civil Liberties Union (ACLU), have criticized statutes, including the Texas statute, for their lack of a malicious-intent requirement because they believe the statutes criminalize the sharing of material by a third party wholly unrelated to the original parties or the original post.<sup>181</sup> Without this requirement, the third party becomes criminally liable when he or she redistributes a photo or video even though they did not intend to harm the depicted person and though they did not know that the victim did not consent to its dissemination.<sup>182</sup>

Considering the existing and ever-increasing prominence of online pornography, the ACLU makes a strong point because Internet users are unlikely to question the original consent of the depicted person.<sup>183</sup> Moreover, even if a person does question whether consent to distribute existed before sharing, determining whether the depicted person did consent can become difficult and time-consuming, absent explicit indicators.<sup>184</sup> Certainly, not all those who share sexually explicit images without determining consent first should be held criminally liable.<sup>185</sup>

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178. Citron & Franks, *supra* note 101, at 387; accord D.C. CODE ANN. § 22-3052(a)(3) (West 2017) (requiring that “[t]here was an agreement or understanding between the person depicted and the person disclosing that the sexual image would not be disclosed” before imposing liability).

179. Citron & Franks, *supra* note 101, at 386–90.

180. Lauren Williams, *Revenge Porn, Free Speech and the Fight for the Soul of the Internet*, THINKPROGRESS (June 22, 2015, 9:58 PM), <https://thinkprogress.org/revenge-porn-free-speech-and-the-fight-for-the-soul-of-the-internet-d5964947a401#.552eilecx>.

181. *See id.*

182. *See id.*

183. *See generally Pornography Statistics: 2015 Report*, COVENANTEYES, <http://www.covenanteyes.com/pornstats/> (last visited Aug. 28, 2017). Online pornography is a \$3 billion industry in the United States. *Id.*

184. *See generally id.* Changing social norms that advocate for the owning of one’s own sexuality on social media platforms, like Instagram, may contribute to this phenomenon because online users sometimes must decipher whether the depicted person deliberately posted sexually explicit images. *See id.* (showing that in 2015, “1 in 5 of 18 [to] 24-year-olds have sent a sext,” and nearly 70% of young men and 50% of young women have stated that “viewing porn is an acceptable way to express one’s sexuality”).

185. *See generally id.*

On the other hand, attorneys and commentators argue that the intent-to-harm language creates more problems than it solves for several reasons.<sup>186</sup> First, they argue that an intent-to-harm requirement would preclude prosecution of perpetrators who had motives other than revenge or harassment to distribute the intimate images or videos.<sup>187</sup> These motives include financial gain.<sup>188</sup> Others, like the celebrity iCloud hackers, post images for fun or as a “joke.”<sup>189</sup> Dani Mather’s Snapchat of a 70-year-old exemplifies this situation.<sup>190</sup>

Revenge-porn law supporters further postulate that including this language creates more ambiguity for First Amendment purposes.<sup>191</sup> Professor Franks points out that the United States Supreme Court has never required that statutes contain such language and that some courts have found these phrases unconstitutionally vague.<sup>192</sup> However, she suggests that “[i]f legislators are compelled by political pressures to include some reference to harm or distress, a better approach would be to employ an objective standard, [for example], ‘when a *reasonable* person would know that such disclosure would cause harm or distress.’”<sup>193</sup> Additionally, proof of harm itself as an element in the statute may also help it overcome potential overbreadth challenges, according to Professor Citron.<sup>194</sup>

Notwithstanding these arguments, the Texas Court of Criminal Appeals has upheld laws that included specific intent-to-inflict-emotional-distress language.<sup>195</sup> Additionally, in its improper-pornography-statute discussion in *Ex Parte Thompson*, the Court acknowledged that the specific type of intent matters.<sup>196</sup> The Court concluded the requisite intent in the statute—“intent to arouse or gratify sexual desire”—was impermissible because sexual thought fell within protected thought under the First Amendment.<sup>197</sup> But “[w]hen the intent to do something that, if accomplished, would be unlawful and outside First Amendment protection, such as the intent to threaten or intimidate, such an intent might help to eliminate First Amendment concerns.”<sup>198</sup> Thus, this

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186. *See id.*; *Guide for Legislators*, *supra* note 29, at 7–8.

187. *Guide for Legislators*, *supra* note 29, at 8.

188. *See id.* at 7.

189. *See id.*; *see also* Perry, *supra* note 22 (providing a few examples of celebrities that hackers have targeted).

190. *See* Delbyck, *supra* note 2.

191. *Guide for Legislators*, *supra* note 29, at 7.

192. *Id.* at 8.

193. *Id.* at 9 n.51 (emphasis added).

194. *See* Franks and Citron, *supra* note 101, at 388.

195. *Ex Parte Thompson*, 442 S.W.3d 325, 337–42 (Tex. Crim. App. 2014) (citing *Scott v. State*, 322 S.W.3d 662, 669–70 (Tex. Crim. App. 2010), *abrogated by* *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014)); *see also* TEX. PENAL CODE § 42.07 (West 2015) (detailing the Texas harassment statute).

196. *Ex Parte Thompson*, 442 S.W.3d at 337.

197. *Id.* at 338–39.

198. *Id.* at 338 (citing *Virginia v. Black*, 538 U.S. 343, 359–63 (2003)).

language seems to allow the use of such phrases in statutes, at least in Texas.<sup>199</sup>

Moreover, although “[t]he First Amendment limits the government’s ability to impose sanctions for even the intentional infliction of emotional distress . . . those limits are less rigorous when the speech involves matters of purely private concern.”<sup>200</sup> Because an argument exists that privately made sexually explicit images are not matters of public concern, a Texas court might view an intent-to-harm-or-harass requirement in a statute more favorably, thereby upholding its validity.<sup>201</sup>

### 3. *The Exceptions*

Professor Franks further recommends that statutes should include an exception for “images voluntarily exposed in public or commercial settings” to protect the sharing of lawful pornography and a narrow exception for public-interest disclosures.<sup>202</sup> Public-interest disclosures can be made in the interests of medical and law-enforcement functions, but, outside of those settings, a public-interest exception would allow individuals, other than the depicted person, to contact advocacy organizations and link the video to seek help for its removal without the person’s permission.<sup>203</sup>

A major concern among those who oppose revenge-porn laws or seek changes to existing statutes, including the ACLU, is that the statutes criminalize the dissemination of sexually explicit images that serve a legitimate public purpose.<sup>204</sup> The publication of former Congressman Anthony Weiner’s provocative photos on the *New York Post* serves as a recurring example of such images.<sup>205</sup>

While Professor Franks argues that a public-interest exception further addresses the Anthony-Weiner-selfies scenario that would generally be protected under the First Amendment, a Texas attorney postulates that it raises a few important questions.<sup>206</sup> For example, who decides what

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199. *See id.*

200. *Id.* at 343.

201. *See* *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995); *see also Ex Parte Thompson*, 442 S.W.3d at 337–42.

202. *Guide for Legislators*, *supra* note 29, at 6.

203. *Id.* at 6–7.

204. *See* Williams, *supra* note 180.

205. *See* Sarah Jeong, *How Anthony Weiner’s Risque Messages Shaped Our Revenge-Porn Laws*, WASH. POST (Sept. 1, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/09/01/how-anthony-weiners-risque-messages-shaped-our-revenge-porn-laws/?utm\\_term=.93c8c7ec692a](https://www.washingtonpost.com/posteverything/wp/2016/09/01/how-anthony-weiners-risque-messages-shaped-our-revenge-porn-laws/?utm_term=.93c8c7ec692a); *see also* Rebecca Rosenberg & Bruce Golding, *Anthony Weiner Sexted Busty Brunette While His Son Was in Bed with Him*, N.Y. POST (Aug. 28, 2016, 10:11 PM), <http://nypost.com/2016/08/28/anthony-weiner-sexted-busty-brunette-while-his-son-was-in-bed-with-him/> (reporting on Anthony Weiner’s conduct).

206. *See* Mark Bennett, *2015.12: “In the Public Interest”*, BENNETT & BENNETT BLOG (Jan. 7, 2015), <http://blog.bennettandbennett.com/2015/01/2015-12-in-the-public-interest/>.

constitutes “in the public interest[?]”<sup>207</sup> Whether the police officer, the prosecutor, the jury, or even the Texas Court of Criminal Appeals decides it, the defendant’s case contains uncertainty throughout the entire process, and can become more and more expensive as it progresses.<sup>208</sup> Additionally, varying community standards may present difficulties, because not everyone might agree, for instance, that the *New York Post* published Anthony Weiner’s photographs in the interest of the public.<sup>209</sup> Notwithstanding these concerns, many statutes and the federal revenge-porn bill currently contain such public-interest exceptions.<sup>210</sup>

#### 4. Definitions

As for definitions, Franks advises against defining terms so broadly that the statute criminalizes the dissemination of unintended images—for instance, pictures of babies in bathtubs—which do not necessarily offend the recipient or cause harm to the depicted person.<sup>211</sup> On the other hand, she advises against definitions that are too narrowly drafted, which may end up excluding certain intimate material that should remain protected.<sup>212</sup> For example, a statute that requires full nudity might exclude sexually explicit images in which parties are not nude.<sup>213</sup> This scenario may include an image that contains depictions of bodily fluids on a person, indicating post-sexual conduct.<sup>214</sup>

Finally, in addition to all these requirements, Franks recommends a severability clause in case any provision of the statute is declared unconstitutional.<sup>215</sup> Considering the many potential issues that may arise, including this provision is wise.

### V. LEGAL GRAY AREAS: THE RISE OF STATE LEGISLATION AND THE ROAD TOWARD A FEDERAL BILL

Although some commentators have highly criticized the criminalization of revenge porn, and despite the debate it has caused, the number of states

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207. *Id.*

208. *Id.*

209. *See id.*

210. *Id.*; *see also infra* Part V (recognizing a variety of approaches to revenge-porn laws at the state and federal levels).

211. *See Guide for Legislators, supra* note 29, at 9.

212. *Id.*

213. *Id.*

214. *See Seven Reasons Illinois Is Leading the Fight against Revenge Porn*, CYBER C.R. INITIATIVE (Dec. 31, 2014), <https://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn/> [hereinafter *Seven Reasons*].

215. *See Guide for Legislators, supra* note 29, at 7.



criminalizing it has more than doubled within the span of a few years.<sup>216</sup> In April 2015, only sixteen states had revenge-porn laws on the books.<sup>217</sup> As of November 2016, thirty-four states had enacted revenge-porn laws and seven had pending legislation.<sup>218</sup> However, because victims remain unprotected in several states, in July 2016 a United States Representative introduced a federal bill to provide uniform revenge-porn legislation across the nation.<sup>219</sup> These widespread efforts demonstrate that states and the federal government recognize the plight of revenge-porn victims and their need for protection.<sup>220</sup> Revenge-porn statutes vary widely throughout the United States, each with their own base elements, intent requirements, exceptions, definitions, and penalties.

*A. Survey of Selected State Laws: The Good, the Bad, and the Ugly*

*1. The Good*

One of the most commented-on revenge-porn statutes today is the California statute, a law that has been changed several times since its enactment in 2013.<sup>221</sup> The California statute requires the distribution of an image to be intentional, that the person depicted can be identified, and that “the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.”<sup>222</sup> Thus, it includes the intent-to-harm requirement that

216. See Bibi Deitz, *What Are the Laws on Revenge Porn in the US? While It's Now Illegal in England, You Can Still Lawfully Post Naked Photos of Your Ex in Most States*, BUSTLE (Apr. 14, 2015), <https://www.bustle.com/articles/76123-what-are-the-laws-on-revenge-porn-in-the-us-while-its-now-illegal-in-england>; Hinduja, *supra* note 28.

217. See Deitz, *supra* note 216.

218. See *State Revenge Porn Laws*, *supra* note 50.

219. Colin Daileida, *Congresswoman Introduces Bill to Criminalize Revenge Porn across the U.S.*, MASHABLE (July 14, 2016), <http://mashable.com/2016/07/14/jackie-speier-revenge-porn-federal-law/#M.aJhzIGUaqC>; ‘Revenge Porn’ Bill Will Be Reintroduced Next Congress, Get More Support, Says Speier, WASH. INTERNET DAILY (Oct. 3, 2016) (on file with Washington Internet Daily and the author) [hereinafter ‘Revenge Porn’ Bill Will be Reintroduced]. The United States attempted to join the many countries that have enacted nationwide legislation in the past decade to curb revenge porn, including the Philippines, Israel, Canada, Japan, England, Wales, Ireland, and Scotland. *Guide for Legislators*, *supra* note 29, at 3–4.

220. Aaron Minc, *Revenge Porn: How to Fight Back [50 State Interactive Map]*, DEFAMATION REMOVAL L. (May 4, 2017), <http://defamationremovalaw.com/fighting-back-revenge-porn/>.

221. See CAL. PENAL CODE § 647(j)(4)(A) (West 2017); see also Citron & Franks, *supra* note 101, at 373–74 (discussing the California law); Gissell, *supra* note 114, at 296–97 (discussing the California law).

222. CAL. PENAL § 647(j)(4)(A). Specifically, the statute provides that:

A person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons

the ACLU advocates for.<sup>223</sup>

Interestingly, the victim in the Dani Mathers case pressed charges against Mathers, notwithstanding the malicious-intent requirement.<sup>224</sup> Mathers could, in effect, argue that she did not intend to harm the 70-year-old victim, but instead sent the image as a joke; however, because the statute adds an objective component to the intent requirement, her argument might fail so long as the prosecutor can show that she *should have known* that the image would cause distress.<sup>225</sup>

In addition to the malicious-intent requirement, the California statute takes an extra step by requiring that the victim *actually* suffer emotional distress.<sup>226</sup> Commentators argue that “[t]his requirement is not only difficult and unnecessary, but it forces victims to expose even more of their private lives to the public.”<sup>227</sup> Indeed, the harm requirement may possibly become burdensome for victims who do not suffer tangible harm.<sup>228</sup>

Inapposite to California is the Illinois law because of its comprehensiveness.<sup>229</sup> In fact, the CCRI has stated that the Illinois law is “leading the fight against revenge porn.”<sup>230</sup> It lays out many definitions, including an extensive one for “[s]exual activity.”<sup>231</sup> The Illinois law also considers situations other than those involving full nudity; “the Illinois law would apply when a victim is depicted performing oral sex or has been ejaculated upon, regardless of whether the victim is nude.”<sup>232</sup>

Additionally, the statute does not require malicious intent, but requires that the depicted person be identifiable from the image itself or from information connected to the image.<sup>233</sup> Unique to the Illinois statute, though, is the punishment: the statute classifies the violation as a Class 4 Felony that can land a perpetrator up to three years in prison.<sup>234</sup> Moreover, the fine for

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agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

*Id.*

223. See Williams, *supra* note 180. As a matter of fact, many states do include this requirement. See *infra* Section VII.B.

224. See Delbyck, *supra* note 2.

225. See CAL. PENAL § 647(j)(4)(A); Delbyck, *supra* note 2, at 9 n.51.

226. See CAL. PENAL § 647(j)(4)(A).

227. Gissell, *supra* note 114, at 297.

228. See *id.*

229. See 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2016); *Seven Reasons*, *supra* note 214. But see Mark Bennett, 2015.22: *Illinois's Revenge-Porn Statute*, BENNETT & BENNETT BLOG (Jan. 17, 2015), <http://blog.bennettandbennett.com/2015/01/2015-22-illinois-revenge-porn-statute/> (criticizing Illinois's statute).

230. See *Seven Reasons*, *supra* note 214.

231. See ILL. 5/11-23.5(a).

232. See ILL. 5/11-23.5(a)(2); *Seven Reasons*, *supra* note 214.

233. See ILL. 5/11-23.5(b).

234. See *Seven Reasons*, *supra* note 214.

disclosing nonconsensual pornography can range up to \$25,000.<sup>235</sup> The CCRI also believes the statute honors the First Amendment because it allows certain public-interest exceptions, including criminal investigations and the reporting of unlawful conduct.<sup>236</sup>

## 2. *The Bad*

Although most statutes offer extensive protection, a few statutes have failed to protect some victims due to their requirements.<sup>237</sup> For example, the Pennsylvania statute requires not only an “intent to harass, annoy or alarm,” but also that the victim and offender be “current or former sexual or intimate partner[s].”<sup>238</sup> This relationship requirement excludes many types of perpetrators, including cases in which a jilted prior lover discovers and posts a photo or video depicting their partner’s former lover in a fit of jealousy.<sup>239</sup> While statutory language should limit third-party liability to some extent, when a current lover maliciously invades the former lover’s privacy knowing that the person will suffer harm or distress, the person should be criminally liable.<sup>240</sup> In addition to this limitation, a potential downside of the law is that it requires a state of nudity, excluding sexually explicit non-nudity scenarios.<sup>241</sup>

Another statute that fails to fully protect sexual-privacy violations is Georgia’s law.<sup>242</sup> This statute’s main fault lies in the fact that it excludes one of today’s most commonly used methods of photography: Selfies.<sup>243</sup> Specifically, it states that the statute does not apply to “[a]ny person who transmits or posts a photograph or video depicting only himself or herself

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235. *See id.*

236. *See id.*; ILL. 5/11-23.5(c)(4). The statute includes an exception for “[t]he intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination serves a lawful public purpose.” *Id.*

237. *See, e.g.*, John Kopp, *Lawmakers Seek Wider Net for Pennsylvania’s ‘Revenge Porn’ Law*, PHILLYVOICE (Aug. 17, 2015), <http://www.phillyvoice.com/lawmakers-changes-revenge-porn-law/> (reporting on Pennsylvania legislators’ wishes to change the existing law).

238. 18 PA. STAT. AND CONS. STAT. ANN. § 3131 (West 2016). The statute states that “a person commits the offense of unlawful dissemination of intimate image if, with intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.” *Id.*

239. *See, e.g.*, Elizabeth Hewitt, *Judge Finds ‘Revenge Porn’ Law Unconstitutional*, VTDIGGER (Aug. 1, 2016, 6:38 PM), <https://vtdigger.org/2016/08/01/judge-finds-revenge-porn-law-unconstitutional/>.

240. *See id.* (arguing that former lovers acting out of jealousy should not be excluded from liability).

241. *See* PA § 3131; *see also Seven Reasons*, *supra* note 214 (praising Illinois’s law).

242. *See* GA. CODE ANN. § 16-11-90 (West 2016). *But see* Anna Hopkins, *Police Officer, 24, Arrested after ‘Posting Nude Photos of Another Female Cop on Social Media’*, DAILYMAIL (Jan. 18, 2017, 1:39 PM), <http://www.dailymail.co.uk/news/article-4130918/Police-officer-arrested-revenge-porn-cop.html> (reporting on the arrest of a woman who disseminated naked pictures of another woman on social media).

243. *See* GA. § 16-11-90; *see also Pornography Statistics: 2015 Report*, *supra* note 183 (discussing the number of young adults who sext).

engaged in nudity or sexually explicit conduct.”<sup>244</sup> This requirement certainly makes it difficult to prosecute anyone for disseminating most Snapchat images, so it fails to address a major concern in the modern era.<sup>245</sup>

### 3. *The Ugly*

Although the criminalization of revenge porn is a recent phenomenon, some statutes have already failed to survive constitutional challenges.<sup>246</sup> In 2015, Arizona publishers, booksellers, photographers, librarians, and the ACLU sued Arizona’s attorney general, contending the statute was unconstitutional.<sup>247</sup> The Arizona statute provided that it was a felony “to intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.”<sup>248</sup>

Due to its broad wording lacking a requirement of malicious intent, the ACLU and the plaintiffs worried that it would criminalize even the sharing of educational materials in a classroom or newsworthy photographs in a newspaper.<sup>249</sup> Due to concerns about the constitutionality of the statute, the state’s attorney general’s office agreed to settle the case and prevent the enforcement of the statute until its revision met constitutional standards.<sup>250</sup> The new statute added the requirement that the image be “disclosed with the intent to harm, harass, intimidate, threaten or coerce the depicted person.”<sup>251</sup> Moreover, it includes exceptions to allow the “reporting of unlawful conduct,” among others, though it does not include a generalized public-interest exception.<sup>252</sup>

## B. *Legal Gray Areas in State Statutes*

### 1. *The Base Elements and Malicious Intent Requirement*

Most statutes generally follow Professor Franks’s recommendations as to the general base elements, requiring both that the offender knowingly disclose an image and that the depicted person did not consent and is

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244. GA. § 16-11-90(e)(3).

245. See generally Klee, *supra* note 8.

246. See generally Hewitt, *supra* note 239; Wasser, *supra* note 172.

247. See Wasser, *supra* note 172.

248. *Id.*

249. See *id.*

250. See *id.*

251. ARIZ. REV. STAT. ANN. § 13-1425 (2016).

252. *Id.*

identifiable from the image itself or from information available in connection with the image.<sup>253</sup> In contrast, however, most do not follow her recommendation to eliminate the malicious-intent requirement, though the language varies among the statutes.<sup>254</sup> In fact, Illinois, North Dakota, Texas, and recently Maryland are some of the only states to eliminate this phrase or similar language.<sup>255</sup>

Additionally, like California, Texas and North Dakota further require proof of actual distress or harm.<sup>256</sup> These requirements demonstrate a general consensus in state legislation throughout the United States that the offender should act with a malicious motive or that only those who suffer harm merit protection.<sup>257</sup> Nonetheless, at least two states, including California and Washington, include an objective standard with their intent requirement, which extends protection to victims by punishing those who *should* have known that his or her acts would cause harm or emotional distress.<sup>258</sup>

## 2. Exceptions and Definitions

Most states include a public-interest exception, worded in different manners.<sup>259</sup> For example, Washington D.C. calls it “[c]onstitutionally protected activity.”<sup>260</sup> Maryland, Arizona, and Maine are among the few states that do not include such exception.<sup>261</sup> Although a public-interest exception may not save an otherwise unconstitutional statute, like the

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253. See, e.g., ARIZ. § 13-1425; CAL. PENAL CODE § 647(j)(4)(A) (West 2016); ILL. COMP. STAT. ANN. 5/11-23.5 (West 2016).

254. See, e.g., N.M. STAT. ANN. § 30-37A-1 (West 2016). For example, New Mexico’s law criminalizes the distribution of private images if it is done

with the intent to: (a) harass, humiliate or intimidate that person; (b) incite another to harass, humiliate or intimidate that person; (c) cause that person to reasonably fear for that person’s own or family members’ safety; (d) cause that person to suffer unwanted physical contact or injury; or (e) cause that person to suffer substantial emotional distress.

*Id.* Interestingly, the D.C. statute addresses the financial gain concern by requiring that “[t]he person disclosed the sexual image with the intent to harm the person depicted or to receive financial gain.” D.C. CODE ANN. § 22-3052 (West 2017).

255. See ILL. 5/11-23.5; MD. CODE ANN., CRIM. LAW § 3-809 (West 2016); N.D. CENT. CODE ANN. § 12.1-17-07.2 (West 2017); TEX. PENAL CODE § 21.16 (West 2017). Arguably, the Maryland law offers less protection to victims because it requires that the perpetrator posts images on the Internet, which seems to exclude Snapchat. See MD. CRIM. LAW § 3-809 (“A person may not intentionally cause serious emotional distress to another by intentionally placing on the *Internet* a photograph, film . . . 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 . . . .” (emphasis added)).

256. See CAL. PENAL § 647(j)(4)(A); N.D. § 12.1-17-07.2; TEX. PENAL § 21.16.

257. See CAL. PENAL § 647(j)(4)(A); N.D. § 12.1-17-07.2; TEX. PENAL § 21.16.

258. See CAL. PENAL CODE § 647(j)(4)(A); WASH. REV. CODE ANN. § 9A.86.010 (West 2016).

259. See, e.g., WASH. § 9A.86.010.

260. See, e.g., D.C. CODE ANN. § 22-3055 (West 2017).

261. See ARIZ. REV. STAT. ANN. § 13-1425 (2016); ME. REV. STAT. tit. 17-A, § 511-A (West 2016); MD. CODE ANN., CRIM. LAW § 3-809 (2016).

malicious-intent requirement, this exception and similar ones show an attempt by the states to avoid encroaching on images that the First Amendment protects.<sup>262</sup>

As for definitions, in accordance with their requirements and language, some define “disclose,” “distribute,” or “disseminate.”<sup>263</sup> However, most statutes primarily focus on defining what constitutes “sexual activity” or “nudity.”<sup>264</sup> And while some require full nudity, some extend coverage to images that display private parts that are “partially unclothed or transparently clothed.”<sup>265</sup>

### C. A Federal Bill Attempts to Bridge State Legislation Gaps

Because of the gaps that state statutes have created and the lack of uniformity among the states, United States House Representative Jackie Speier introduced a federal revenge-porn law in July 2016, entitled the Intimate Privacy Protection Act (IPPA).<sup>266</sup> The IPPA will not preempt state laws but instead will serve as an additional tool to prosecute perpetrators.<sup>267</sup> The bill provides that:

Whoever knowingly uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of the person, with reckless disregard for the person’s lack of consent to the distribution, shall be fined under this title or imprisoned not more than 5 years, or both.<sup>268</sup>

Though the bill has bipartisan support and was referred to a House subcommittee, it did not receive a hearing this year.<sup>269</sup> “We have more work to do to get this bill passed,” Speier said.<sup>270</sup> Speier plans on reintroducing

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262. See Bennett, *supra* note 206.

263. See, e.g., N.D. CENT. CODE ANN. § 12.1-17-07.2 (West 2015). For example, North Dakota’s statute defines “distribute” as “selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, providing access to, or otherwise transferring or presenting an image to another individual, with or without consideration.” *Id.*

264. See *id.*; ME. § 511-A.

265. ME. § 511-A.

266. Steven Nelson, *Lawmakers Unveil Proposal to Take Nip Out of Revenge Porn*, U.S. NEWS (July 14, 2016, 2:07 PM), <http://www.usnews.com/news/articles/2016-07-14/lawmakers-lay-bare-proposal-to-take-nip-out-of-revenge-porn>.

267. *‘Revenge Porn’ Bill Will be Reintroduced*, *supra* note 219.

268. Intimacy Privacy Protection Act, H.R. 5896, 114th Cong. (2015–16).

269. *‘Revenge Porn’ Bill Will Be Reintroduced*, *supra* note 219.

270. *Id.*

IPPA next year, and she believes that Congress will support its passage.<sup>271</sup> Despite the IPPA's lack of malicious-intent requirement, tech giants like Facebook and Twitter, national organizations, and constitutional scholar Erwin Chemerinsky support the bill.<sup>272</sup>

## VI. TEXAS CRIMINALIZES REVENGE PORN WITH TOUGH LAW: THE RELATIONSHIP PRIVACY ACT

As a result of the efforts of Hollie Toups after she failed to obtain civil redress from GoDaddy, in June 2015, Texas passed the Relationship Privacy Act (RPA).<sup>273</sup> The RPA provides both criminal penalties and civil remedies for revenge-porn victims.<sup>274</sup> The criminal statute, found in Texas Penal Code § 21.16, comprehensively lays out definitions, elements, affirmative defenses, and penalties.<sup>275</sup> Moreover, the civil statute under Chapter 98B of the Texas Civil Practice & Remedies Code also provides civil remedies specifically designated for revenge-porn victims that were previously unavailable to them, such as injunctive relief.<sup>276</sup> Texas practitioners have already criticized both statutes.<sup>277</sup>

### A. *The Criminal Provision: The Positives and Its Shortcomings*

The Texas revenge-porn statute under Texas Penal Code § 21.16, entitled “Unlawful Disclosure or Promotion of Intimate Visual Material,” is extensive.<sup>278</sup> In fact, Professor Franks stated that the Texas law is “tougher than other states.”<sup>279</sup> The Texas statute extends protection to a variety of

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271. *Id.*

272. Nelson, *supra* note 266.

273. GoDaddy.com, LLC v. Toups, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied); see Liz Crampton, *Taking New Steps to Put an End to “Revenge Porn”*, TEX. TRIB. (Aug. 21, 2015, 6:00 AM), <https://www.texastribune.org/2015/08/21/texas-law-criminalizing-revenge-porn-goes-effect/>.

274. See TEX. PENAL CODE ANN. § 21.16 (West 2017); TEX. CIV. PRAC. & REM. CODE ANN. § 98B.002 (West 2015).

275. See TEX. PENAL § 21.16.

276. See TEX. CIV. PRAC. & REM. §§ 98B.002–.004.

277. See Mark Bennett, *2015.61: Unlawful Disclosure or Promotion of Intimate Visual Material*, BENNETT & BENNETT BLOG (July 7, 2015), <http://blog.bennettandbennett.com/2015/07/2015-61-unlawful-disclosure-or-promotion-of-intimate-visual-material/comment-page-1/>. Although a full discussion of the civil statute under the RPA falls outside of the scope of this Comment, at least one Texas attorney has noticed potential issues with its wording. See Pierre Grosdidier, “Revenge Porn” Banned in Texas as of September 1, 2015, HAYNESBOONE (Aug. 25, 2015), <http://www.haynesboone.com/~media/files/attorney%20publications/texas%20revenge%20porn%20act%20becomes%20effective.ashx>.

278. See TEX. PENAL § 21.16.

279. Ryan Loyd & RJ Marquez, *KSAT.com Special Report: Texas Revenge Porn Law Goes into Effect, How State Will Crack Down on Offenders*, KSAT (Sept. 1, 2015, 4:38 PM), <http://www.ksat.com/news/ksatcom-special-report-texas-revenge-porn-law-goes-into-effect-how-state-will-crack-down-on>.

nonconsensual-pornography victims through its requirements.<sup>280</sup> The statute makes the distribution of intimate visual material a Class A Misdemeanor, which is punishable by up to one year in prison, a \$4,000 fine, or both.<sup>281</sup> Texas Penal Code § 21.16(b) states the following:

A person commits an offense if:

- (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
- (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
- (3) the disclosure of the visual material causes harm to the depicted person; and
- (4) the disclosure of the visual material reveals the identity of the depicted person in any manner, including through:
  - (A) any accompanying or subsequent information or material related to the visual material; or
  - (B) information or material provided by a third party in response to the disclosure of the visual material.<sup>282</sup>

Thus, this Section addresses not only the typical revenge-porn case but also covers other nonconsensual distribution scenarios.

### 1. Base Elements

Like many other statutes, Texas requires that the perpetrator intentionally disclose the visual material.<sup>283</sup> This requirement protects purely accidental dissemination, which can result from technological malfunctions or from carelessness.<sup>284</sup> However, the mens rea for the second element—consent—is not a recklessness standard.<sup>285</sup> Instead, the statute requires that the offender made the disclosure “without the effective consent of the depicted person.”<sup>286</sup> The RPA does not define effective consent, but under Texas Penal Code § 1.07(a)(19), effective consent is defined as follows:

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280. See TEX. PENAL § 21.16.

281. See *id.* §§ 12.21, 21.16.

282. See *id.* § 21.16(b).

283. See *id.* “A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.” *Id.* § 6.03(a).

284. See *Guide for Legislators*, *supra* note 29, at 6.

285. See TEX. PENAL § 21.16(b)(1).

286. See *id.*



“Effective consent” includes consent by a person legally authorized to act for the owner. Consent is not effective if:

- (A) induced by force, threat, or fraud;
- (B) given by a person the actor knows is not legally authorized to act for the owner;
- (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable decisions; or
- (D) given solely to detect the commission of an offense.<sup>287</sup>

Thus, this requirement seems to include situations in which the depicted person was intoxicated or underage and might have consented to distribution.<sup>288</sup> Moreover, the statute clarifies that “[i]t is not a defense to prosecution . . . that the depicted person [actually] (1) created or consented to the creation of the visual material; or (2) voluntarily transmitted the visual material to the actor.”<sup>289</sup> In other words, under the RPA, consent is contextual; even if the person created the video or photographed himself and then sent the video or photo voluntarily, the perpetrator cannot use that fact as a defense.<sup>290</sup> This provision is particularly important in the Internet and social media era because it extends protection to a person who takes a selfie and transmits it to another party with the expectation that the selfie will remain confidential between the two.<sup>291</sup>

The statute also requires that third parties be able to identify the depicted person by any means, including “(A) any accompanying or subsequent information or material related to the visual material; or (B) information or material provided by a third party in response to the disclosure of the visual material.”<sup>292</sup>

The meaning of “subsequent information or material related to the visual material” is not clear under § 21.16(d)(A).<sup>293</sup> One may argue that if pictures or unique objects in the background can lead a third party to decipher the identity of the depicted person, then this element is met, even if the person’s face is pixilated.<sup>294</sup> For example, a woman with a discernible tattoo

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287. *Id.* § 1.07(a)(19).

288. *See id.* § 21.16(b)(1).

289. *Id.* § 21.16(e).

290. *See id.*; Citron & Franks, *supra* note 101, at 355.

291. *See generally id.* *But cf.* GA. CODE ANN. § 16-11-90(e)(5) (West 2015) (indicating that a person who photographs himself in a public place would not be protected).

292. TEX. PENAL § 21.16(b)(4).

293. *See id.*

294. *See, e.g.,* Michael B. Cohen, *South Florida Man Arrested under New Revenge Porn Law*, S. FLA. CRIM. ATTY’S BLOG (Nov. 16, 2016), <http://www.southfloridacriminalattorneysblog.com/2016/11/south-florida-man-arrested-new-revenge-porn-law.html>.

might claim harm, though her face has been cropped out.<sup>295</sup> This leads one to ask: To what extent should these types of images serve as proof of identifiability, and should the offender be prosecuted, despite the fact that the person is not easily identifiable? And how does a victim prove harm if not many people can easily identify him or her? Moreover, section (B) also raises the question of what “material provided by a third party in response to the disclosure” means.<sup>296</sup> While the element requiring the victim to be identifiable usually functions to limit liability, it seems that the Texas Legislature here attempted to protect any person whose identity can be determined in any way, shape, or form, even if the means are far removed from the original image.<sup>297</sup>

## 2. *The Harm Requirement*

To be sure, the criminal statute maximizes protection for nonconsensual-pornography victims because it lacks any malicious-intent requirement.<sup>298</sup> But although it does not require an intent to harm from the perpetrator, it does require that “the disclosure of the visual material causes harm to the depicted person” as an element for prosecution.<sup>299</sup>

Requiring that the victim suffer harm may alleviate some of the problems that have arisen under other laws, including the unconstitutional Arizona law.<sup>300</sup> Under Texas Penal Code § 1.07(a)(25), “harm” is defined as “anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.”<sup>301</sup> This definition, though, might be difficult to meet in some circumstances in which the victim did not suffer tangible harm, such as loss of a job, or in situations in which the person did not seek psychological help.<sup>302</sup> Moreover, proving harm might be difficult if the person is not easily identifiable.<sup>303</sup>

## 3. *Exceptions*

The RPA does not include exceptions.<sup>304</sup> Instead, it provides affirmative defenses.<sup>305</sup> Specifically, Texas Penal Code § 21.16(f) states that:

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295. *See id.* In fact, Florida prosecuted a man for a picture he posted of his ex-girlfriend on Facebook displaying “her pelvic area [with] an easily identifiable tattoo.” *Id.*

296. *See* TEX. PENAL § 21.16(b)(4).

297. *See id.*

298. *See generally* Williams, *supra* note 180.

299. TEX. PENAL § 21.16(b)(3).

300. *See generally* Wasser, *supra* note 172.

301. TEX. PENAL § 1.07(25).

302. *See generally* *Guide for Legislators*, *supra* note 29, at 12.

303. *See generally* Cohen, *supra* note 294.

304. *See* TEX. PENAL § 21.16(f).

305. *See id.*

- It is an affirmative defense to prosecution under Subsection (b) or (d) that:
- (1) the disclosure or promotion is made in the course of:
    - (A) lawful and common practices of law enforcement or medical treatment;
    - (B) reporting unlawful activity; or
    - (C) a legal proceeding, if the disclosure or promotion is permitted or required by law;
  - (2) the disclosure or promotion consists of visual material depicting in a public or commercial setting only a person's voluntary exposure of:
    - (A) the person's intimate parts; or
    - (B) the person engaging in sexual conduct; or
  - (3) the actor is an interactive computer service, as defined by 47 U.S.C. Section 230, and the disclosure or promotion consists of visual material provided by another person.<sup>306</sup>

Thus, it does preclude prosecution of some legitimate-purpose disclosures.<sup>307</sup> Like the exceptions included in other statutes, the affirmative-defenses provision allows parties to disseminate sexually explicit material for the purpose of reporting unlawful acts or for medical or law enforcement purposes.<sup>308</sup> As the CCRI points out, “[l]aw enforcement officers and medical professionals often have to deal with intimate materials, such as visual evidence of injuries from domestic violence or rape.”<sup>309</sup>

Unlike the federal bill, though, and many other statutes, the RPA does not include the public-interest exception that Franks recommends for cases that legitimately serve a public purpose, such as the reporting on a politician's conduct.<sup>310</sup>

#### 4. Definitions

Texas Penal Code § 21.16(a) defines “intimate parts,” “promote,” “sexual conduct,” “simulated,” and “visual material.”<sup>311</sup> Interestingly, it does not define the term “disclose,” but instead defines “promote,” which is only used in section (d) of the statute.<sup>312</sup> It is unclear why the legislature failed to define “disclose.”<sup>313</sup>

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306. *Id.*

307. *See id.*

308. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-1425 (West 2016).

309. *Guide for Legislators, supra* note 29, at 6.

310. *See supra* Part V (discussing different state and federal attempts at enacting revenge-porn statutes and the public-purpose exception that several states use).

311. *See* TEX. PENAL § 21.16(a).

312. *See id.*

313. *See generally id.*

Moreover, the statute defines “intimate parts” as “naked genitals, pubic area, anus, buttocks, or female nipple of a person.”<sup>314</sup> Thus, this language seems to exclude sexually explicit images involving partial or no nudity.<sup>315</sup> However, it does define sexual conduct broadly to include “[s]exual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse.”<sup>316</sup> This definition is probably broad enough to cover most types of sexual encounters or conduct.<sup>317</sup>

### *B. Additional Aspects of the Criminal Provision*

#### *1. Blackmail*

Texas Penal Code § 21.16(c) lays out a comprehensive blackmail provision that prohibits a person from threatening another with intimate visual material “to obtain a benefit: (1) in return for not making the disclosure; or (2) in connection with the threatened disclosure.”<sup>318</sup> Sexual-privacy advocates have praised this type of protection because “it recognizes the cost of the threat, which could affect people in abusive relationships who stay longer than they would [normally] because of fear they will be exposed.”<sup>319</sup>

This provision would also cover situations like Nadia’s case in which Patel threatened disclosure for over a year in return for Nadia’s attention.<sup>320</sup> Though speculative, a provision like this could have possibly prevented Patel’s eventual disclosure of Nadia’s intimate video because a single threat of disclosure can be prosecuted.<sup>321</sup>

#### *2. Additional Liability*

In addition to threats, Texas Penal Code § 21.16(d) extends liability to any person who promotes visual material on a website “that is owned or operated by the person.”<sup>322</sup> This provision does not apply to interactive computer services, which the CDA protects, but instead likely applies to those who run their own websites or create content, like bloggers.<sup>323</sup>

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314. *Id.*

315. *See id.*

316. *Id.*

317. *See id.*; *cf.* N.D. CENT. CODE ANN. § 12.1-17-07.2 (West 2015).

318. TEX. PENAL § 21.16(c).

319. *See Williams, supra* note 180.

320. *See Patel v. Hussain*, 485 S.W.3d 153, 158–69 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

321. *See generally id.*

322. TEX. PENAL § 21.16(d).

323. *See id.*

VII. FITTING A SQUARE PEG INTO A ROUND HOLE: ADDRESSING ISSUES IN TEXAS'S RELATIONSHIP PRIVACY ACT

A good law created with the best of intentions can result in many negative, unintended consequences.<sup>324</sup> Unfortunately, no panacea exists to solve all the potential issues that could arise or to even solve revenge porn in the first place.<sup>325</sup> The legislature must strike a balance between sexual-privacy rights and the First Amendment.<sup>326</sup> As it stands, the RPA might survive a constitutional challenge because it involves substantial privacy rights and requires proof of actual harm.<sup>327</sup>

However, many legal scholars do not think the statute passes constitutional standards because it lacks a malicious-intent requirement, which might indicate that the statute failed to use the least-restrictive means to achieve the compelling governmental interest of privacy.<sup>328</sup> Moreover, it may fail under the overbreadth doctrine because it may criminalize a substantial portion of protected speech.<sup>329</sup> The following sections recommend possible changes to the RPA to address these concerns.

*A. The Base Elements*

The base elements likely do not present a major concern because they do not criminalize accidental disclosures, and they require that the offender had the effective consent of the depicted person.<sup>330</sup> While a recklessness standard for consent might extend protection for victims, what matters here is that consent to take the photograph or videotape does not equate to “consent to distribute” under the statute.<sup>331</sup> Moreover, the requirement that “the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private” further emphasizes what is at stake: Privacy.<sup>332</sup> Thus, a court might look at this requirement favorably in evaluating whether the statute has been narrowly drawn.<sup>333</sup> This phrase also limits liability to those situations in which the victim truly intended the

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324. See generally Williams, *supra* note 180.

325. See generally Grosdidier, *supra* note 277.

326. See Cohen, *supra* note 294; see also *supra* Part IV (explaining the dilemma between proscribing revenge porn and protecting the First Amendment).

327. See TEX. PENAL § 21.16.

328. *Ex Parte* Thompson, 442 S.W.3d 325, 348–49 (Tex. Crim. App. 2014); see also Stephens & Hautala, *supra* note 140.

329. See *Ex Parte* Thompson, 442 S.W.3d at 349–51.

330. See TEX. PENAL § 21.16(b)(1).

331. See *CCRI Model State Law*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/model-state-law/> (last visited Sept. 24, 2017).

332. See TEX. PENAL § 21.16(b)(2).

333. See *Ex Parte* Thompson, 442 S.W.3d at 344.

images to remain confidential.<sup>334</sup>

A problem may also arise under § 21.16(b)(4)(B), which states that “information or material provided by a third party in response to the disclosure of the visual material” can be used to determine whether the person is identifiable.<sup>335</sup> This phrase is ambiguous.<sup>336</sup> It raises the question of what “in response to the disclosure” means. For example, does it mean a comment on an image by a third party on, say, Facebook? Or does it mean a phone call by a third party who recognizes the person—who may not otherwise be identifiable to the general public—to another third party about the image? While this phrase seeks to expand protection, limiting the identifiability requirement to scenarios in which the person can be identified from the image itself or from information that accompanies the image, as many statutes already do, might reduce ambiguity.<sup>337</sup>

### *B. The Intent Requirement*

While the intent-to-harm requirement has caused much disagreement and debate, the Court of Criminal Appeals of Texas, the ultimate arbiter in these cases in Texas, seems to look favorably upon an intent-to-cause-emotional-distress requirement, especially when it accompanies an important interest.<sup>338</sup> Sexual privacy certainly constitutes a substantial interest in this case.<sup>339</sup> Moreover, such a requirement might be useful to narrow the means to achieve that interest.<sup>340</sup>

An intent-to-harm-or-cause-emotional-distress requirement might also alleviate overbreadth issues.<sup>341</sup> Under the statute, someone who simply shows a private image of another without any ill intent can be prosecuted, so long as the victim can show actual harm, which may or may not be a difficult hurdle.<sup>342</sup>

Such cases could include some third party far-removed from the original parties.<sup>343</sup> For example, parties A and B break up. B distributes A’s sexually explicit images on Instagram. C finds the image and shows it to D on her phone during lunch, D screenshots it and sends it to E, then E to F, and so on. A can show harm because she lost her job because of the distribution. Should C, D, and all the subsequent parties be subject to prosecution under the

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334. See *CCRI Model State Law*, *supra* note 331.

335. See TEX. PENAL § 21.16 (b)(4)(B).

336. See *generally id.*

337. See *generally id.*

338. See *Ex Parte Thompson*, 442 S.W.3d at 337–42.

339. See *generally id.*

340. See *id.* at 344.

341. See *id.* at 349–51.

342. See Grosdidier, *supra* note 277.

343. See *id.*

statute? After all, the mass distribution is what caused the harm. But because the statute does not seem to require that the distributor himself knew that the victim expected confidentiality, anyone who subsequently discloses the image faces potential criminal liability.<sup>344</sup>

A malicious-intent requirement might address this issue.<sup>345</sup> Moreover, adding an objective standard might strike a balance in this case.<sup>346</sup> The statute could state that anyone who discloses images with intent to cause emotional distress, or who *should* know that the disclosure will cause emotional distress, will be subject to prosecution.<sup>347</sup> Coupled with its proof-of-actual-harm requirement, the statute could potentially survive a constitutional challenge.<sup>348</sup>

### C. The Exceptions

The current affirmative-defense provision already protects important interests.<sup>349</sup> However, to appease those who worry about Anthony Weiner-type situations, adding a public-interest defense might alleviate those concerns.<sup>350</sup> Many statutes, including the federal bill, provide such exceptions, so society has recognized the importance of safeguarding those disclosures that advance the public interest.<sup>351</sup>

While in some instances the language might create some ambiguity regarding what falls under the exception, a general understanding usually exists on what information serves a public purpose.<sup>352</sup> Nadia's private images in *Patel*, for instance, would necessarily fall outside the scope.<sup>353</sup> Moreover, news companies have their own journalistic parameters, which guide their publication decisions.<sup>354</sup> These parameters should ensure that news companies only publish nonconsensual sexually explicit images when they are of paramount importance to society.<sup>355</sup>

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344. See *id.*; Williams, *supra* note 180.

345. See Stephens & Hautala, *supra* note 140.

346. See *Guide for Legislators*, *supra* note 29, at 9 n.1.

347. See *id.*

348. See Citron & Franks, *supra* note 101, at 388.

349. See TEX. PENAL CODE ANN. § 21.16(f) (West 2017).

350. See Bennett, *supra* note 206.

351. See Intimacy Privacy Protection Act, H.R. 5896, 114th Cong. (2015–16).

352. See Bennett, *supra* note 206.

353. See *generally* *Patel v. Hussain*, 485 S.W.3d 153 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

354. See *generally* *SPJ Code of Ethics*, SOC'Y PROF. JOURNALISTS, [http://www.spj.org/ethics\\_code.asp](http://www.spj.org/ethics_code.asp) (last updated Sept. 6, 2014, 4:49 PM).

355. See *generally id.*

#### D. Definitions

The statute's definitions cover an extensive amount of material.<sup>356</sup> However, the definition of "sexual parts" eliminates sexually explicit images that do not involve nudity.<sup>357</sup> While this definition excludes the Anthony Weiner photographs because he wore underwear, this means that it excludes the same type of images of *private* individuals.<sup>358</sup> Additionally, the RPA's language does not protect images depicting post-sexual conduct if they do not contain nudity.<sup>359</sup>

To solve this issue, the Texas statute might adopt a definition similar to the Illinois statute, which protects images exposing intimate parts "in whole or in part."<sup>360</sup> Additionally, Texas should define the term "disclose" or clarify when the term "promote" applies in addition to section (d), if at all. Defining the term would ensure that no offender goes free due to the statute's ambiguity or vagueness.<sup>361</sup>

### VIII. CONCLUSION

As states continue to criminalize revenge porn and adjust their statutes to comply with constitutional standards, Texas should lead the fight. Nonetheless, in crafting and amending the law, legislators should take First Amendment principles into consideration to avoid encroaching on citizens' rights, and ultimately, to prevent perpetrators from escaping liability.<sup>362</sup>

Undoubtedly, revenge porn is a growing problem that the technological era has helped cultivate at an unwelcome rate.<sup>363</sup> But as Justice Breyer stated, "the Constitution embodies basic values that must endure over time, such as freedom of expression . . . . George Washington did not know about the Internet, but the value of 'free speech' must apply to the Internet."<sup>364</sup> Nonetheless, society's increasing acceptance of one's own sexuality in the modern age should not equate to a complete loss of privacy rights, however.<sup>365</sup> In fact, the opposite is true—sexual-privacy rights need to be safeguarded in this era so that those who desire to expose themselves can do

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356. See TEX. PENAL CODE ANN. § 21.16(a) (West 2017).

357. See *id.*

358. TEX. PENAL § 21.16; TEX. CIV. PRAC. & REM. CODE ANN. § 98B.002; see also Rosenberg & Golding, *supra* note 205.

359. *Seven Reasons*, *supra* note 214.

360. See 720 ILL. COMP. STAT. ANN. 5/11-23.5(b)(C) (West 2015).

361. See TEX. PENAL § 21.16(a).

362. See generally *Ex Parte* Thompson, 442 S.W.3d 325, 337–42 (Tex. Crim. App. 2014).

363. See Bahadur, *supra* note 18; Marcotte, *supra* note 20; MERRIAM-WEBSTER, *supra* note 19; SNAPCHAT.COM, *supra* note 1.

364. STEPHEN BREYER, THE COURT AND THE WORLD 275 (2015).

365. See generally Franks, *supra* note 17.



so freely and those who desire otherwise may equally follow their will.<sup>366</sup> As Dani Mathers stated herself, “If I can’t unsee this then you can’t either.”<sup>367</sup>

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366. *See id.*

367. Delbyck, *supra* note 2.