

Smile for the Camera: The Revenge Pornography Dilemma, California's Approach, and Its Constitutionality

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Introduction

Imagine this fictional, yet realistic scenario: Jane is a respectable college senior, who had been in a long-term relationship with her college boyfriend, John, for three and a half years. During the course of their relationship, Jane had sent John “sexy” pictures of herself, which included sexually explicit content. Jane trusted John and expected the pictures to remain private—only for John’s viewing pleasure. Though Jane had never specifically told John not to display or distribute the pictures to others, it never crossed her mind that it was necessary to discuss nondisclosure with John. Three and a half years after being together, the couple had a bitter breakup and Jane found her pictures available on a “revenge pornography”¹ website. The photos were disseminated around Jane’s college campus, were searchable online, and in turn, destroyed Jane’s reputation. As a result of the dissemination, Jane became depressed, has difficulty trusting others, and has had trouble securing a job after her college graduation. Jane has urged the webmaster of the cyber-revenge website and John to take down the content, but both have refused.

This increasingly common scenario that destroyed Jane’s reputation has been coined “revenge pornography,” a type of cyber-

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1. Revenge pornography websites are websites “launched as a place for ‘public humiliation.’ On sites such as IsAnyOneUp.com, users could upload sexually explicit photos and videos without a victim’s permission.” *FBI Investigates ‘Revenge Porn’ Website Founder*, May 22, 2012, (Nov. 23, 2013, 3:36 PM), <http://abcnews.go.com/Technology/fbi-investigates-revenge-porn-website-founder/story?id=16405425>.

harassment prevalent in today's internet age. Due to the First Amendment's protection of speech and expression, victims have had little legal recourse against cyber-harassers for revenge pornography. The recent passage of statutes prohibiting revenge pornography has led to the current debate about whether revenge pornography statutes are constitutionally valid. Though lacking definitive precedent regarding their constitutionality, revenge pornography falls into the First Amendment exceptions for low value speech. Low value speech remains outside the realm of First Amendment protections due to its negative effects and because any possible benefit that may arise from it "is clearly outweighed by the societal interest in order and morality."² Moreover, the government has a compelling interest to prohibit revenge pornography because of its interest to protect women, who are disproportionately impacted by revenge pornography. This Note first aims to discuss the current problem of revenge pornography as a form of cyber-harassment. Second, this Note discusses the constitutional background of traditional free speech doctrines and their application to the revenge pornography context. Courts may be able to distinguish revenge pornography as an unprotected form of speech under the fighting words doctrine and true threats doctrine, although the perfect application of either doctrine is rather unlikely. Accordingly, courts should carve out a new category of unprotected speech for revenge pornography, using the analysis in *New York v. Ferber*³ as a model. Lastly, this Note analyzes California's approach to revenge pornography and provides some suggestions for improvement. Although California remains one of only two states to implement a revenge pornography law, the law should be revised to protect more victims and punish more wrongdoers.

I. Cyber-Harassment Distinguished From Other Forms of Cyber-Victimization

Legal commentators have written about "cyber-victimization," or "online abuse[,] predominantly in terms of cyber-stalking, cyber-harassment, and cyber-bullying."⁴ Though definitions for these

2. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

3. *New York v. Ferber*, 458 U.S. 747 (1942).

4. Jacqueline Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1107 (2011).

concepts are still vague and overlap greatly, “these terms are derived from their offline counterparts—[stalking, harassment, and bullying].”⁵ Cyber-stalking, or the equivalent of physical stalking in the offline world, involves “the use of the Internet, e-mail, or other means of electronic communication to stalk or harass another individual.”⁶ Cyber-bullying involves the harassment of minors on the internet.⁷ Some commentators have used the term “cyber-harassment” to describe online speech targeted at a person or group of people based on their “membership in a protected class such as race or gender.” This Note focuses on revenge cyber-harassment, which includes revenge pornography as a form of cyber-harassment. Since courts treat minors and adults differently with regards to cyber-harassment, this Note only examines the jurisprudence involving adults.

A. Revenge Pornography

Revenge pornography, or cyber-revenge, “involves the posting of nude or sexually explicit photos without the consent of the person depicted.”⁸ In the fictional scenario of Jane and John, John’s posting of Jane’s “sexy” pictures constitutes revenge pornography because Jane’s pictures were posted without her consent and for the purpose of defaming Jane. Visible in Jane’s situation, “[i]n today’s networked society, abusive online conduct such as cyber-bullying and cyber-harassment can cause serious damage, including severe emotional distress, loss of employment, and even violence or death.”⁹ In fact, “[Ninety-three] percent [of revenge pornography victims] said they have suffered significant emotional distress as a result of being a victim.”¹⁰ Revenge pornography also disproportionately affects women as shown by The Cyber Civil Rights Initiative’s finding that “[ninety] percent of revenge pornography victims are women.”¹¹ While many states have begun to formally recognize and penalize

5. *Id.* at 1108.

6. *Id.* at 1111.

7. Jacqueline Lipton, *Cyber-Bullying and the First Amendment*, 14 FLA. COASTAL L. REV. 99, 105 (2012).

8. Cal. Assem. Comm. on Public Safety, Analysis of Sen. Bill No. 255 (2013-2014 Reg. Sess.), as amended Aug. 21, 2013.

9. See Lipton, *Combating Cyber-Victimization*, *supra* note 4, at 1104.

10. *Revenge Porn by the Numbers*, END REVENGE PORN (Nov. 23, 2014, 3:38 PM), www.endrevengeporn.org/revenge-porn-infographic/.

11. *Id.*

cyber-harassment,¹² few states actually distinguish and penalize revenge pornography.

California and New Jersey were originally the only two states to enact revenge pornography laws, but other states are finally starting to pass similar legislation.¹³ States are hesitant to curb free speech rights, which is why revenge pornography laws received significant initial pushback under constitutional concerns.¹⁴ Moreover, regulating revenge pornography is a challenge under the First Amendment's freedom of expression and speech protections. "While some laws in the United States do effectively regulate speech—notably defamation law, copyright law, and trademark law—it has proved to be very difficult to regulate private speech between individuals."¹⁵ Furthermore, even though the content may be harmful, it is not prohibited under the traditional protections of defamation or copyright law.

There are three types of revenge pornography, but existing revenge pornography laws in California do not protect the victims of all three types. First, while revenge pornography broadly entails the posting of one's picture without consent, the pictures may be originally photographed by the victim. Second, the pictures may alternatively be photographed by the wrongdoer. Under copyright law, the victim may not prevail in an action if they are not the "creator" of the picture.¹⁶ Under defamation law, the wrongdoer may skirt away from liability by arguing that posting the victim's picture does not involve lies about the victim. Moreover, a wrongdoer may prevail under the argument that the victim has to take responsibility for any outcome arising from the nude photographs. Revenge pornography may also fail under existing anti-harassment laws due to the challenges implicated by the lack of imminent harm and the lack of physical boundaries in cyberspace. For example, "unlike privacy law . . . cyber-[harassment] involves no physical trespass on an

12. Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 18 (2010).

13. Liz Halloran, *Race To Stop 'Revenge Porn' Raises Free Speech Worries*, NPR (Mar. 6, 2014, 11:16 AM), <http://www.npr.org/blogs/itsallpolitics/2014/03/06/286388840/race-to-stop-revenge-porn-raises-free-speech-worries>; State 'Revenge Porn' Legislation, (Nov. 23, 2014, 7:03 PM), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx>.

14. *Electronic Communication Devices: Prohibited Distribution of Personal Information: Hearing on S.B. 255 Before the S. Pub. Safety Comm., S. Appropriations Comm., & S. Floor*, 2013 Leg. (Cal. 2013) (statement of the ACLU).

15. See Lipton, *Cyber-Bullying and the First Amendment*, *supra* note 7, at 103.

16. 17 U.S.C. § 102.

individual's solitude."¹⁷ Additionally, "[f]ederal and state laws prohibiting harassment and stalking only apply if the victim can show that the non-consensual pornography is part of a larger pattern of conduct directed at the victim with intent to distress or harm, which will not apply to the many purveyors of non-consensual pornography motivated by a desire for money or notoriety."¹⁸

When pictures of the victim are posted online, a victim suffers an immediate physical danger contingent upon the viewing of the content.¹⁹ For example, in situations of "puppeting," the third form of revenge pornography, "a wrongdoer poses as the victim online."²⁰ People have been known to pose as their victims online by posting personal advertisements on services such as Craigslist, suggesting that the victim harbors rape fantasies and giving the victim's personal address and other contact details. As a result of the advertisements, some women have been physically attacked at their places of residence by third parties thinking they were answering the advertisements and fulfilling the victim's rape fantasies. While there is obviously a threat of physical harm here, if the victim never sees the advertisements, she will not be aware of the threat until it is too late."²¹ Thus, revenge pornography laws are necessary to prevent the dissemination of photographs for which a victim would not reasonably give consent. Though many defendants may attempt to claim free speech defenses, the Constitution does not provide a blanket security for all types of speech.

II. Constitutional Underpinnings

A. Historical Treatment of Unprotected Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."²² The First Amendment was designed to protect "free trade in ideas"²³ instead of unnecessarily censoring people's views and thoughts. Moreover, the First Amendment protects expressive conduct, as well as spoken and

17. *Id.*

18. Mary Anne Franks, *Criminalizing Revenge Porn*, END REVENGE PORN (Nov. 23, 2014, 3:42 PM), <http://www.endrevengeporn.org/guide-to-legislation/>.

19. See Lipton, *Cyber-Bullying and the First Amendment*, *supra* note 7, at 109.

20. *Id.*

21. *Id.* at 110.

22. U.S. CONST. amend. I.

23. Thea E. Potanos, *Dueling Values: The Clash of Cyber Suicide Speech and the First Amendment*, 87 CHI.-KENT L. REV. 669, 679 (2012).

written words, and “it covers political, social, artistic, literary, and other forms of speech.”²⁴ However, speech is not per se protected under the First Amendment for the sake of being speech. “In practice, the Court has ‘consistently held’ that [speech] is subject to interpretation, and that the freedom of speech may be restrained ‘for appropriate reasons.’”²⁵ Thus, courts consider some speech of such low value that it remains outside the realm of protected speech due to its negative effects and because any possible benefit that may arise from it “is clearly outweighed by the societal interest in order and morality.”²⁶ For example, in *Chaplinsky v. New Hampshire*,²⁷ “the Court . . . first fully enunciated what Professor Harry Kalven later termed the ‘two level’ theory of speech, under which speech is either ‘protected’ or ‘unprotected’ by the First Amendment according to the Court’s assessment of its relative value.”²⁸ The Court described that some categories of speech are inherently unprotected speech, the prohibition of which has never created any constitutional questions.²⁹ Such “categories of unprotected speech [include] obscenity, libel, true threats, fighting words and illegal advocacy.”³⁰

1. *The Fighting Words Doctrine*

The Court first broached the concept of fighting words in *Chaplinsky*.³¹ Fighting words are “those by which their very utterance inflict injury or tend to incite an immediate breach of the peace.”³² The statute in contention in *Chaplinsky* provided that “no person shall address any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . with intent to deride, offend or annoy him . . .”³³ The Court agreed with the lower court’s decision to uphold the law on policy grounds. “[T]he statute’s purpose was to preserve the public peace, no words being forbidden except such as have a direct tendency to cause an act of violence by the persons to whom, individually, the remark is

24. *Id.*

25. *Id.*

26. *Chaplinsky*, 315 U.S. at 572.

27. *Chaplinsky*, 315 U.S. 568.

28. GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 1086 (6th ed. 2009).

29. *Chaplinsky*, 315 U.S. at 568.

30. *Id.* at 680.

31. *Id.* at 572.

32. *Id.*

33. *Id.* at 569.

addressed.”³⁴ Wary about punishing all derisive and annoying words with over-inclusive regulations, the Court emphasized that speech is not considered fighting words based on one’s subjective interpretation.³⁵ In allowing for subjective interpretations, the Court worried that there would be a chilling effect on free speech rights, resulting in First Amendment protections being toothless.³⁶ Moreover, “the test [for fighting words] is what men of common intelligence would understand [to] be words likely to cause an average addressee to fight . . .”³⁷ Thus, only speech that would incite an average individual to immediately fight or cause an immediate breach of peace constitutes fighting words.

In *R.A.V. v. City of St. Paul*,³⁸ the Court provided further analysis of the fighting words doctrine, ultimately invalidating the St. Paul, Minnesota Bias-Motivated Crime Ordinance.³⁹ The Ordinance prohibited the public display of a burning cross, a swastika, or any other symbol that would be reasonably known to upset people on the basis of their membership in a particular race, gender, or religion.⁴⁰ The Court elucidated the idea that the government generally may not proscribe speech based on the unfavorable nature of the ideas that are expressed.⁴¹ However, the Court noted that it “ha[s] long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag of an ordinance dishonoring the flag is not.”⁴² The Court distinguished the fighting words doctrine from the curtailment of the expression of ideas, because the prohibition of fighting words is a proscription of the mode of expression, rather than the expression itself.⁴³ Moreover, the Court reasoned that “the reason why the fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary)

34. *Id.* at 573.

35. *Id.*

36. *Id.*

37. *Id.*

38. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

39. *Id.*

40. *Id.* at 380.

41. *Id.* at 382.

42. *Id.* at 385.

43. *Id.* at 433.

mode of expressing whatever idea the speaker wishes to convey.”⁴⁴ This idea stems from the *Chaplinsky* court’s idea that “our society [has] permitted restrictions upon the content of speech in a few limited areas, which are of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁴⁵

St. Paul argued that its ordinance was constitutional because its purpose was to “protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.”⁴⁶ Moreover, St. Paul urged the Court to look to the secondary effects of the cross burning and offensive conduct.⁴⁷ The secondary effects deal specifically with the marginalization of African Americans, which has been historically prevalent in the United States.⁴⁸ Additionally, St. Paul argued that due to the historical meaning of cross burning, the act of cross burning should be banned because of the secondary effects of emotional distress arising from the activity.⁴⁹ The Court rejected this argument concluding that “[t]he emotive impact of speech on its audience is not a ‘secondary effect,’”⁵⁰ and that “[l]isteners’ reactions to speech are not the type of ‘secondary effects’” the Court intended to prevent.⁵¹ The Court found that “St. Paul ha[d] not singled out an especially offensive mode of expression—it ha[d] not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner.”⁵² Instead, St. Paul had a blanket ban on fighting words of “whatever manner that communicate messages of racial, gender, or religious intolerance.”⁵³

44. *Id.* at 393.

45. *Chaplinsky*, 315 U.S. at 568.

46. *R.A.V.*, 505 U.S. at 394.

47. *Id.*

48. *Id.*

49. *Id.*

50. The secondary effects theory—also known as a time, place, and manner regulation—allows regulation of speech, not based on the content of the speech, but based on the secondary effects of the speech. *See Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

51. *R.A.V.*, 505 U.S. at 395.

52. *Id.* at 393.

53. *Id.* at 393–94.

2. True Threats

In *Virginia v. Black*,⁵⁴ the Court distinguished true threats from activities that have historically been known to threaten a person or group of people.⁵⁵ Moreover, in *Virginia*, the Court invalidated a ban on cross burning that was seen as a prima facie showing of intimidation.⁵⁶ The Court explained: “‘true threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁵⁷ Though cross burning has a particularly dangerous history in the United States and has generally been associated with hateful messages, the Court advocated that

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁵⁸

The Ninth Circuit further interpreted the true threats doctrine in *United States v. Cassel*,⁵⁹ a case involving the defendant threatening two prospective government land buyers in order to dissuade the interested buyers from purchasing the land next to his.⁶⁰ The court held that “speech is punishable if a reasonable person would understand it as a threat, whether or not the speaker meant for it to be understood.”⁶¹ Thus, the defendant need not intend to cause harm through the threatening speech. If the speech can be reasonably interpreted as a threat, it is enough to fall under the “true threat” category. The *Cassel* court also furthered the idea that the threat is “[not] necessarily limited to threats of *bodily* harm.”⁶² [Threat of]

54. *Virginia v. Black*, 538 U.S. 343 (1993).

55. *Id.*

56. *Id.*

57. *Id.* at 359.

58. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

59. *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2006).

60. *Id.* at 625.

61. *Id.*

62. *Id.* at 636.

‘[i]ntimidation,’ both in common and legal usage, can refer to the act of placing someone in fear of injury other than harm to the body.”⁶³

3. *Defamation and Libel*

Defamation and libel are additional categories of unprotected speech delineated by the *Chaplinsky* court.⁶⁴ The landmark defamation is *New York Times v. Sullivan*,⁶⁵ which established that actual malice must be present for speech to be defamatory and libelous toward public officials.⁶⁶ However, it was in *Gertz v. Robert Welch*⁶⁷ that the Court acknowledged that a different and less strict standard applies for defamation claims against private individuals.⁶⁸ The Court recognized that “the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.”⁶⁹ Moreover, the Court explained that a lesser standard is afforded to private individuals because they are “less vulnerable to injury, and the state interest in protecting them is correspondingly greater.”⁷⁰ The Court reasoned that private individuals have fewer opportunities for recourse against defamation than do public officials and officers do, because “public persons [have] more access to the media to defend themselves.”⁷¹ Additionally, the Court noted that public officials and officers not only have more channels to redress defamatory claims against them, but defamatory claims are foreseeable consequences of one’s “involvement in public affairs.”⁷² Thus, in an effort to allow states to protect individuals from defamation, the Court has allowed states to enact their own laws to deal with the punishment and condemnation of defamation against private individuals.⁷³ Moreover, the Court has dismissed requiring proof of “actual injury,” and has explained that the publication of defamatory material per se includes harms such as

63. *Id.* at 636.

64. *Chaplinsky*, 315 U.S. at 572.

65. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

66. *Id.*

67. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

68. *Id.*

69. *Id.* at 341.

70. *Id.* at 344.

71. *Id.* at 388.

72. *Id.* at 344.

73. *Id.* at 350.

the “impairment of reputation, and standing in the community, personal humiliation, and mental anguish and suffering.”⁷⁴

B. Modern Day Application of Traditional Free Speech Doctrines

1. Standard of Review Distinguished Between Content-Neutral and Content-Based Speech Restrictions

Courts generally tend to allow the curtailment of speech in the most extreme and necessary circumstances.⁷⁵ The Court accordingly treats content-based and content-neutral speech differently.⁷⁶ Content-based restrictions are more dangerous to the free flow of ideas and freedom of speech, which is why content-based restrictions must pass the muster of strict scrutiny before being deemed constitutionally valid.⁷⁷ Content-neutral speech restrictions, however, must only survive intermediate scrutiny.⁷⁸ Courts have further provided, that “[i]n determining whether a statute is content-neutral, one must determine whether ‘the government has adopted a regulation of speech because of disagreement with the message it conveys.’”⁷⁹

For example, in *United States v. Cassidy*, the defendant was indicted for “violat[ing] a federal stalking statute, when, with the intent to harass and cause substantial emotional distress,” he used Twitter to cause emotional distress to A.Z.⁸⁰ The District Court found that the part of the anti-stalking statute that was used in the accusation was a content-based restriction “because it limits speech on the basis of whether that speech is emotionally distressing to A.Z.”⁸¹ The court contended that “[t]o survive strict scrutiny, the Government has the burden of showing that a content-based restriction ‘is necessary to serve a compelling state interest.’”⁸² Based on prior precedent in *United States v. Playboy Entertainment Group*, the court found that the statute in *Cassidy* was unconstitutional because, as in *Playboy Entertainment Group*, the state’s interest was

74. *Id.*

75. *See* Potanos, *supra* note 23, at 697.

76. *United States v. Cassidy*, 814 F. Supp. 2d 574, 583 (D. Md. 2011).

77. *Id.*

78. *Id.*

79. *Id.* at 583 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

80. *Id.* at 576.

81. *Id.* at 584.

82. *Id.* (citations omitted).

to “shield the sensibilities of listeners.”⁸³ Moreover, the government cannot restrict speech because of its interest in protecting listeners and viewers from offensive content.⁸⁴ The court further held that expression prevails in such cases, and “[w]e are expected to protect our own sensibilities simply by averting [our] eyes.”⁸⁵ Thus, the *Cassidy* court dismissed the indictment because “A.Z. had the ability to protect her ‘own sensibilities simply by averting’ her eyes from the Defendant’s blog and not looking at, or blocking his Tweets.”⁸⁶

In the case of cyber-harassment and, namely, revenge pornography, the circumstances may be similar, in which a harasser posts offensive photos on a Twitter page or a personal blog. Though the argument can be made that the victim should avoid visiting the Twitter and blog pages, the harm is much greater than a simple nuisance or abiding by the popular childhood adage, “sticks and stones may break your bones, but words can never hurt you.” Although “Twitter and blogs are today’s equivalent of bulletin board that one is free to disregard,”⁸⁷ when a Twitter page or blog contains the posting of nude pictures without consent, the prevention of negative publicity and reputation that is created by these photos is a compelling governmental interest that is distinguished from the government’s interest in the *Cassidy* case.

The District Court acknowledged that Tweeting about a person is a different mode of harassment in comparison to harassing someone via telephone, since “harassing telephone calls ‘are targeted towards a particular victim and are received outside a public forum.’”⁸⁸ However, although the *Cassidy* court correctly points out that “Twitter and blogs are today’s equivalent of a bulletin board that one is free to disregard,”⁸⁹ the court incorrectly weighs the harms emanating from such online forums. Though one can easily disregard online postings, disregarding the abuse does not necessarily mean that the harms are not present. Unlike bulletin boards being physically fixed in one location, online pages are ever-present and can be viewed and disseminated by millions of internet users. Even if the nude pictures are eventually taken down, there is no way to prevent

83. *Cassidy*, 814 F. Supp. 2d. at 585 (citing *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 585.

89. *Id.*

viewers from saving the images immediately upon viewing them. The same cannot be done with a bulletin board. Though the repercussions of having abusive content posted on physical bulletin boards are similarly embarrassing, they are not as severe as the repercussions of revenge pornography.

In one particular case further examined below, *People v. Rosa*,⁹⁰ revenge pornography victim Jennifer Vander Tuig was unaware that her ex-husband had posted her nude photographs on a website.⁹¹ In fact, Vander Tuig did not even view her nude photos before she began to suffer from the postings.⁹² She suffered embarrassment, fear, emotional distress, and faced harassment by viewers.⁹³ Thus, just because one may and should be able to avoid harmful content does not mean that the harmful effects are obliterated. The government has a compelling interest in protecting people from harmful and threatening content that causes them emotional distress, especially when the content is disseminated online.

2. Revenge Pornography as “Fighting Words” or “True Threats”

The situations in which the aforementioned unprotected speech doctrines have been applied were traditionally in the context of spoken speech and print speech via mass publication, such as newspapers.⁹⁴ Though an argument can be made that certain types of speech, such as revenge pornography, constitute the type of low value speech that is traditionally unprotected as contended by the court in *Chaplinsky*, the application of these doctrines are not perfect fits in the revenge pornography context. For example, revenge pornography constitutes “fighting words,” because as in *Chaplinsky*, revenge pornography inflicts injury in the form of emotional distress, harmed reputation, and in some cases, a threat to one’s physical well-being. In the case of Jane and John, due to the easily retrievable nude photographs of Jane on the internet, Jane became depressed and also faced damage to her personal and professional reputations.

Regardless of the increasing harms of revenge pornography, the modern-day application of the fighting words doctrine rarely goes beyond its original interpretation, which makes its application to revenge pornography challenging. Though the *Chaplinsky* decision

90. *People v. Rosa*, No. F063748, 2013 WL 941728 (Cal. Ct. App. Mar. 12, 2013), review denied (June 19, 2013).

91. *Id.* at *2.

92. *Id.*

93. *Id.*

94. *Sullivan*, 376 U.S. at 254.

has never been overturned, the Court has been wary about the overexpansion of the fighting words doctrine.⁹⁵ The Supreme Court has retreated away from using the fighting words doctrine; however, state courts still apply the “immediate breach of peace” prong of the fighting words doctrine.⁹⁶

Since the fighting words doctrine has generally been limited to face-to-face confrontations, its application to the cyber context would be very difficult, unless courts take into account the changing form of interactions in the digital era. One of the main elements in *Chaplinsky* was a face-to-face confrontation leading to an immediate breach of peace caused specifically by the fighting words.⁹⁷ However, the *Chaplinsky* case was decided in 1942 and most interactions today no longer occur face-to-face. Online conduct becomes difficult to square away under the fighting words doctrine because of the lack of in-person interactions and uncertainty regarding whether or not online insults lead to an immediate breach of peace. Commenting on the application of the fighting words doctrine to cyber-bullying, District Court Judge Terrence F. McVerry explained that “[an] Internet page is not outside of the protections of the First Amendment under the fighting words doctrine because there is simply no in-person confrontation in cyber-space such that physical violence is likely to be instigated.”⁹⁸

An additional challenge to the application of the fighting words doctrine is determining when the “immediate” breach of peace occurs; since some cyber-harassment in the form of revenge pornography may occur over the course of hours, days, or even weeks, it is extremely difficult to pinpoint exactly when the breach of peace occurs. Moreover, courts are likely to find it difficult to make an exact temporal connection between revenge pornography and an immediate breach of peace. However, courts must recognize that much cyber-harassment directly leads to harmful effects, such as suicide. Revenge pornography has the potential to immediately breach peace since suicides could occur immediately after the postings. Additionally, “[v]ictims are routinely threatened with sexual assault, stalked, [and] harassed,” which can occur as immediately as the posting of the picture.⁹⁹ With the possibility of

95. Lipton, *Combating Cyber-Victimization*, *supra* note 4, at 1107.

96. *State v. Drahot*, 280 Neb. 627 (2010).

97. *Chaplinsky*, 315 U.S. 568.

98. See Calvert, *supra* note 12, at 39.

99. Mary Anne Franks, *Criminalizing “Revenge Porn”: Frequently Asked Questions*, (Nov. 23, 2014, 1:45 PM), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337998.

constant online harassment, it is harder to pinpoint the exact point in which a direct breach of peace has occurred, unlike with an in-person encounter. Thus, by focusing on the temporal element of breaches of peace in the cyberspace context, courts will find it difficult to apply the fighting words doctrine to the revenge pornography context.

The application of the true threats doctrine is more persuasive in deeming revenge pornography as constitutionally proscribable. Applying the true threats doctrine, the Ninth Circuit explained that “a threat is ‘an expression of an intention to inflict evil, injury, or damage on another.’”¹⁰⁰ In *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*,¹⁰¹ defendants were anti-abortion activists that created “GUILTY” posters with the names, addresses, and pictures of doctors who performed abortions.¹⁰² Though the defendants claimed that they had a free speech right to disseminate the posters, the court found the posters to be true threats based on the true threats test.¹⁰³ Similar to the revenge pornography context, the court considered “[w]hether [the] posters can be considered ‘true threats’ when in fact the posters on their face contain no explicitly threatening language.”¹⁰⁴ The incidence of revenge pornography sparks a similar question about whether the dissemination of one’s nude photographs can be considered ‘true threats.’ Based on the Ninth Circuit’s reasoning in *Planned Parenthood*, revenge pornography would constitute true threats.

As analyzed in the next section, revenge pornography is often disseminated through the form of personal advertisements, where the perpetrator misleads advertisement viewers into thinking that the victim is soliciting herself for sex.¹⁰⁵ As a result, women are actually in physical danger of sexual violence and harassment. Even without the personal advertisements, women may reasonably fear harassment and stalking by those who have viewed their nude photographs online. It is also justified for victims to feel a sense of paranoia.

100. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1070.

105. *People v. Rosa*, No. F063748, 2013 WL 941728 (Cal. Ct. App. Mar. 12, 2013), review denied (June 19, 2013).

The *Cassel* court recognized that no actual intent to threaten is required.¹⁰⁶ The court even went as far to say that this “standard does not violate the First Amendment.”¹⁰⁷ This holding is applicable in the revenge pornography context because the victim may not have direct proof of the perpetrator’s intent to intimidate. However, it is reasonable for a woman to be fearful after finding out that her nude pictures are attracting the attention of internet predators.

Unlike cross burning in *Virginia*, the invasion of a woman’s right of privacy regarding her own body is a true threat and should be constitutionally protected. It is low value speech and no woman should be susceptible to gender violence resulting from the nonconsensual posting of her nude pictures. Deeming revenge pornography as unconstitutional is also the least restrictive means of protecting the rights of revenge pornography victims, and it does not infringe upon one’s right to view nudity online. One has the liberty to access other pornographic content through pornography websites and via adult content stores.

C. Carving-Out a Previously Unidentified Category of Unprotected Speech

Many of the traditional exceptions to the freedom of speech doctrine involve outdated examples, making it difficult for courts to pigeonhole new forms of “speech” into the already existing categories. Accordingly, the Court needs to revisit the meaning of “speech” in the 21st Century in order to recognize cyber-harassment, including revenge pornography, as a previously unidentified category of unprotected speech, as was done in *Ferber*.¹⁰⁸ Previous Supreme Court decisions demonstrate that the recognition of a new category of unprotected speech is infrequent and is based on a stringent analysis.¹⁰⁹ The Court does not preclude the idea of new categories being recognized; however, it stated that the “Constitution forecloses any attempt to revise [the First Amendment’s protections] simply on the basis that some speech is not worth it.”¹¹⁰ Free speech rights often prevail over one’s dislike of a particular type of speech because the First Amendment prevents the censorship of speech based on the subjective disapproval of a particular idea.¹¹¹ Moreover, the

106. *Cassel*, 408 F.3d at 629.

107. *Id.*

108. *Ferber*, 458 U.S. 747.

109. *See Potanos*, *supra* note 23, at 697.

110. *United States v. Stevens*, 559 U.S. 460, 470 (2009).

111. *Id.*

Constitution also requires more than just a cost-benefit analysis when deciding to inhibit speech.¹¹² Thus, although there are strong policy arguments in favor of restricting certain forms of speech, the Court will not blindly adhere to policy arguments without ascertaining that the statutes are carefully crafted to prevent unnecessary restrictions of lawful speech.¹¹³

The government's regulation of speech is constitutional only if the regulation fosters a compelling interest and if the regulation is narrowly tailored.¹¹⁴ In *Ferber*, the Court carved out a new area of unprotected speech when upholding a New York statute that prohibited the creation and distribution of child pornography.¹¹⁵ The Court "noted that the state of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actions) was *de minimus*."¹¹⁶ A cost-benefit analysis was involved in the process of labeling child pornography as unprotected speech; however, the statute still needed to further the compelling interest in the least restrictive means.¹¹⁷ The *Ferber* Court recognized that the protection of children holds a special place in United States jurisprudence.¹¹⁸ Moreover, the Court held that "a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling[.]'"¹¹⁹ and that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."¹²⁰ However, beyond the government's compelling interest, the Court also found that prohibiting the creation and dissemination of child pornography combats the actual abuse against children and is the least restrictive means for doing so.¹²¹ Legislators found that "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."¹²² Thus, the statute was designed to curb actual harms against children,

112. *Id.* at 471.

113. *Id.* at 470.

114. *Ferber*, 458 U.S. at 747.

115. *Id.*

116. *Stevens*, 559 U.S. at 471.

117. *Ferber*, 458 U.S. at 747.

118. *Id.* at 757.

119. *Id.*

120. *Id.* at 758.

121. *Id.* at 759.

122. *Id.*

unlike the statute in *Ashcroft v. Free Speech Coalition*,¹²³ which unlawfully restricted simulated child pornography and adult actions.¹²⁴

In *Ferber*, the Court also found that the law in contention was the least restrictive and “only practical” means to “dry up the market” for child pornography because it would directly prevent child abuse that occurred in the making of child pornography.¹²⁵ Although a state might have a compelling interest in protecting children, the Court’s “decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”¹²⁶ For example, *Reno v. American Civil Liberties Union*¹²⁷ was the first case to deal with free speech in the realm of the internet.¹²⁸ The Court found that two sections of the Communications Decency Act of 1996 (“CDA”) were unconstitutional, even though they were designed to protect minors from “indecent” and “patently offensive” speech.¹²⁹ While the CDA’s goal was similar to the statute’s goal in *Ferber*, it was not narrowly tailored to further the state’s compelling interest.¹³⁰ The Court explained that the interest of protecting children “does not justify an unnecessarily broad suppression of speech addressed to adults . . . the Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for children.’”¹³¹ Moreover, the statute was not the least restrictive means for protecting children from indecent and patently offensive speech on the internet because there were other ways to censor indecent speech from children, such as through parental control features on websites.¹³² Since these alternative means were not used and the CDA restricted the rights of adults, the statute was found to be over-inclusive and unconstitutional.¹³³

123. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

124. The Court in *Ashcroft* found unconstitutional the Child Pornography Prevention Act of 1996 that prohibited depictions of child pornography using adult actors. The Court found that the statute was overly broad and curbed lawful expression of ideas because the use of adult actors to depict children did not harm children in the making and unlawfully prohibited adults’ rights to free speech.

125. *Ferber*, 458 U.S. at 760.

126. *Stevens*, 559 U.S. at 472.

127. *Reno v. ACLU*, 521 U.S. 844 (1997).

128. *Id.*

129. *Id.*

130. *Id.* at 846.

131. *Id.* at 875.

132. *Id.*

133. *Id.*

Given the strict requirements for carving out a new category of unprotected speech, courts should apply the *Ferber* reasoning when labeling cyber-harassment as a previously unidentified category of unprotected speech. As mentioned before, cyber-harassment and revenge pornography have been all too common problems in today's society. The internet's ubiquitous nature exacerbates the harms of "harassment" in the digital era. Because the internet is global and easily accessible, "no longer can [bullied] individuals find refuge in their homes because they can now be reached at all times of day via electronic communication."¹³⁴ The timelessness, lack of boundaries, and constant presence of the internet distinguishes in-person harassment from cyber-harassment. Cyber-harassment and the dissemination of revenge pornography have lasting repercussions, with vicious rumors, photographs and videos being easily traceable for years to come on the internet.¹³⁵ Such permanence may affect the victims' reputations for many years, impacting their employment opportunities, social lives, and psychological well-being. In fact, due to the long-lasting effects and the "serious psychological harm, including depression, low self-esteem, anxiety, alienation, and suicidal intentions,"¹³⁶ states have a strong compelling interest in protecting women, who are disparately impacted, from cyber-harassment. In enacting revenge pornography laws, states would not only promote awareness of the problem, but would emphasize that revenge pornography is socially and legally unacceptable in society. Curtailing the use of revenge pornography is also the least restrictive means for protecting victims. Through the Court's recognition of revenge pornography as a new category of unprotected speech, only media that fits the definition of "revenge pornography" would be prohibited. Consensual pornography would still exist as protected speech, and those who want to access pornographic materials would still have the liberty to do so.

III. California's Approach to Revenge Pornography

A. *People v. Rosa*

The bill analysis of California's "revenge pornography law" cited *Rosa* as an example of a situation in which a revenge pornography

134. See Calvert, *supra* note 12, at 16.

135. *Id.*

136. *Id.*

law would have been applicable.¹³⁷ Plaintiff, Vander Tuig, and defendant, Rosa, ended their rocky marriage, during which Rosa threatened to kill Vander Tuig numerous times.¹³⁸ In August 2009, Vander Tuig received a confusing phone call at the bank where she worked.¹³⁹ The voice on the other line explained that he was responding to Vander Tuig's advertisement from a website.¹⁴⁰ Vander Tuig was unaware of any personal advertisements on any website and informed the man that he was calling the wrong number.¹⁴¹ That same week, Vander Tuig received dozens of phone calls responding to the advertisement and even had people approach her while at work regarding the advertisement.¹⁴² In fact:

One man yelled at her that she should be ashamed, teasing men by placing an ad like that on the Internet. Another man waited at her car for her to get off work and made rude comments to her. The calls went on for weeks. [Vander Tuig] had to change jobs and her residence because of the constant harassment.¹⁴³

Vander Tuig eventually learned about the personal advertisement that callers were referring to and found four of her nude pictures on the website with the text "call for a good time" attached to it.¹⁴⁴ These pictures were ones that were taken during her marriage to Rosa, which were not intended for anyone else but Rosa to view.¹⁴⁵

As a result of the dissemination of her nude pictures, Vander Tuig lived her life in fear, worried about her children's safety, and "constantly checked to see if Rosa was following her whenever she went to the store."¹⁴⁶ Vander Tuig's current husband, James, testified that her demeanor had completely changed as a result of the cyber-

137. Cal. Assem. Comm. on Public Safety, Analysis of Sen. Bill No. 255 (2013-2014 Reg. Sess.), as amended Aug. 21, 2013.

138. *People v. Rosa*, No. F063748, 2013 WL 941728 (Cal. Ct. App. Mar. 12, 2013), review denied (June 19, 2013).

139. *Id.* at *2.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at *4.

144. *Id.*

145. *Id.*

146. *Id.* at *5.

harassment.¹⁴⁷ James also testified that he saw Vander Tuig's nude photos on the internet while Tuig was with him.¹⁴⁸ As a result, Vander Tuig became extremely upset.¹⁴⁹ James further explained that "[t]he photos caused significant stress in their lives."¹⁵⁰

The jury found Rosa guilty of "stalking, identity theft, six counts of false personation, and six counts of unauthorized electronic distribution of personal information."¹⁵¹ In discussing Rosa's violation of identity theft, the court also used libel law to explain that Rosa "exposed [Vander Tuig] to hatred, contempt, ridicule, and obloquy within the meaning of Civil Code section 45."¹⁵²

Rosa provides us with a preliminary understanding for why revenge pornography laws are necessary: for a broader rule that focuses more on the victim rather than on the perpetrator. Emotional distress is not addressed directly by any of the statutes under which Rosa was convicted. While existing criminal laws were applicable in *Rosa*, not all situations will allow for the easy application of such laws. For example, if a perpetrator simply posts a picture online without impersonating the victim or giving out her information, he could avoid prosecution for false personation and unauthorized electronic distribution of personal information. In such a situation, there are fewer avenues of justice available for the victim.

Civil actions through defamation and libel are also inadequate to remedy victims' pain and suffering. Professor Mary Anne Franks explains that "civil suits are costly, time-consuming, and extremely burdensome to victims."¹⁵³ Thus, it would be most efficient to address revenge pornography cases through a broader victim-centered criminal rule. Rather than applying criminal laws that may or may not apply in a certain case, or dealing with burdensome and costly civil litigation, a victim-centered criminal rule would provide a legal avenue in situations that do not mirror the facts of *Rosa*.

147. *Id.* at *6.

148. *Id.*

149. *Id.*

150. *Id.* at *6.

151. *Id.*

152. *Id.* at 30–31.

153. Kaimipono D. Wenger, *Legal Developments in Revenge Porn*, CONCURRING OPINIONS (Nov. 23, 2014, 4:12PM), <http://www.concurringopinions.com/archives/2013/10/legal-developments-in-revenge-porn-an-interview-with-mary-anne-franks.html>.

B. California Legislation

In late fall of 2013, California Governor Jerry Brown signed the anti-revenge pornography bill into law.¹⁵⁴ California is the second state, after New Jersey, to penalize revenge pornography.¹⁵⁵ An impetus behind the bill was the suicide of a Northern California teenager, Audrie Pott, who committed suicide in response to the dissemination of explicit photographs of three boys sexually assaulting her.¹⁵⁶ Though Pott's assaulters served some time in juvenile hall for their crimes of assault, they were not prosecuted for circulating the photographs. Moreover, "prosecutors did not have enough evidence to prove the boys circulated the photos widely."¹⁵⁷ The anti-revenge pornography bill sought to redress this gap in justice and attempted to address the changing nature of assault and harassment in the age of technology.¹⁵⁸ The law deems a misdemeanor

[a]ny person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.¹⁵⁹

The case of Pott is distinguishable because it involved minors and was about the assault of a minor while she was passed out and intoxicated. Though proof of dissemination was an issue, the assaulters can be punished under criminal law for statutory rape and the prosecution has a case for cyber-bullying, which is a crime in

154. *Electronic communication devices: prohibited distribution of personal information*, S.B. 255, 2013 Leg. (Cal. 2013).

155. Katy Steinmetz, *A New Strategy for Prosecuting Revenge Porn*, TIME (Dec. 10, 2013), <http://nation.time.com/2013/12/10/a-new-strategy-for-prosecuting-revenge-porn/>.

156. Samantha Tata, *California Lawmakers Pass "Revenge Porn" Bill*, NBC LOS ANGELES, <http://www.nbclosangeles.com/news/local/Cyber-Revenge-Porn-California-Law-Gov-Jerry-Brown-223549611.html> (last visited Apr. 17, 2014).

157. Julia Prodis Sulek, *Audrie Pott*, MERCURY NEWS (Jan. 14, 2014), http://www.mercurynews.com/crime-courts/ci_24913018/audrie-pott-boys-admit-sexually-assaulting-saratoga-teen (last visited Apr. 17, 2014).

158. *Id.*

159. CAL. PENAL CODE § 647.

California.¹⁶⁰ The anti-revenge pornography law, in its current form, protects victims of sexual harassment in the form of reputational harm.¹⁶¹ The law focuses on the key word, “consent,” and helps prosecutors make the point that though the photographs may have been taken with consent at some point, there is an implicit understanding that the photographs would remain private between the involved parties.¹⁶² Of course, the law also penalizes nonconsensual photographers, such as with Audrie Pott, where one takes photos of the victim without her consent or under duress.¹⁶³

The American Civil Liberties Union (“ACLU”) is one of the main organizations that opposed the passage of the anti-revenge pornography bill.¹⁶⁴ The ACLU contends that “[t]he posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected.”¹⁶⁵ The ACLU further contends that speech must be a true threat under the meaning of constitutional precedent, or must violate “another otherwise lawful criminal law, such as stalking or harassment statute, in order to be made illegal.”¹⁶⁶ Arguing that the anti-revenge pornography law violates free speech standards, the ACLU urges that California legislatures reconsider the bill.¹⁶⁷

C. Criticisms of California’s Approach

1. *The Law Does Not Protect Victims Who Took “Selfies”*

Although it is commendable that California is one of the first two states that have enacted a revenge pornography law, California’s law does not fully afford victims protection against cyber-harassment. Moreover, the law does not penalize the unauthorized posting of photos taken by the victims themselves, otherwise known as “selfies.” Though not all cases of revenge pornography are based on photos taken by the victims themselves, “[a] survey conducted by the Cyber Civil Rights Initiative, a non-profit that confronts abuse online, found that eighty percent of photos published in revenge porn cases were self-taken shots, so the California law would only protect a minority

160. CAL. PENAL CODE § 653.2.

161. S.B. 255 2013 Leg. (Cal. 2013).

162. *Id.*

163. *Id.*

164. S.B. 255, 2013 Leg. (Cal. 2013).

165. *Id.*

166. *Id.*

167. *Id.*

of victims.”¹⁶⁸ Though the bill may be expanded to include self-shots by victims in the future, “much of the pushback that came from California legislators was rooted in ‘victim-blaming.’”¹⁶⁹ Victim-blaming entails a negative view of the victim, and includes beliefs that the victims are at fault for taking such risqué photos, given that dissemination is a foreseeable risk. However, this “victim-blaming” approach is erroneous. The victim-blaming approach has led to oversight of the fact that “[c]onsent is contextual.”¹⁷⁰ Law professor Danielle Citron elaborated on the fact that victims should not be viewed as foolish for taking these pictures because they never gave consent to the broad dissemination of the photos.¹⁷¹ Moreover, Citron argues that “[c]onsent to sharing with a loved one is not consent to sharing with the world.”¹⁷² Thus, the law should center on the lack of consent and should include protection for victims who took the photos themselves, as well as victims who had their photos taken by someone else. Law Professor Mary Anne Franks, provided a good analogy that can help us better understand how selfies shared with others bring up an implicit understanding of limited consent. According to Franks, “[i]f you give your credit card to a waiter, you aren’t giving him permission to buy a yacht.”¹⁷³ Similarly, if a woman shares a nude picture with her significant other, she has not given this person free reign to distribute the picture and abuse the woman’s autonomy and privacy with regards to the picture. If legislators could understand this, more victims might be better protected under a more expansive law including selfies.

2. *The Law Shields Perpetrators Who Can Successfully Claim That Their Intent Was Not to Cause Emotional Distress*

An additional criticism of California’s revenge pornography law is regarding its “language stating that in order to run afoul of the law, the perpetrator must have distributed the image with ‘intent to cause serious emotional distress,’” rather than, as journalist Emily Bazelon

168. Jessica Roy, *California’s New Anti-Revenge Porn Bill Won’t Protect Most Victims*, TIME (Nov. 23, 2014, 4:17 PM), <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/>.

169. *Id.*

170. Julia Dahl, “Revenge porn” law in California a good first step, but flawed, experts say, CBS NEWS (Oct. 3, 2013, 11:54 AM), <http://www.cbsnews.com/news/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/>.

171. *Id.*

172. *Id.*

173. Anne Flaherty, ‘Revenge porn’ victims press for new laws, BIG STORY (Nov. 15, 2013, 12:34 PM), <http://bigstory.ap.org/article/revenge-porn-victims-press-new-laws>.

puts it, “treating the act of posting a sexual photo without consent as an objectively harmful invasion of privacy.”¹⁷⁴ Though the reasoning behind the posting of revenge pornography might be to cause the victim emotional distress, a perpetrator might be able to escape liability if he proves that his primary aim was not to cause emotional distress. For example, a perpetrator who attempts to profit by selling the pictures of the victim would be protected. Current California legislation unfairly overlooks the victim’s emotional distress and allows invasion of privacy, especially if the perpetrator’s intent remains unknown. Thus, the revenge pornography law should be redrafted to exclude the intent of the perpetrator.

3. The Law Does Not Punish Webmasters of Websites for Allowing and Encouraging the Posting of Revenge Pornography

In the scenario of Jane and John, John’s refusal to take down pictures of Jane was only one part of the problem. The webmaster of the revenge pornography website also took no steps to remove the photographs and California’s revenge pornography law does not punish such webmasters. In fact, webmasters of websites often receive additional protection under Section 230 of the Communications Decency Act.¹⁷⁵ However, protecting webmasters under the Communications Decency Act is contrary to the Legislature’s policy “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”¹⁷⁶ Furthermore, the Communications Decency Act provides that an online service provider (such as a webmaster) is not the publisher of content posted by third parties.¹⁷⁷ In an effort to promote the development of the internet, a service provider is only liable for content posted by users if the service provider has an active role in selecting and editing the allegedly defamatory material.¹⁷⁸

Websites such as IsAnyoneUp.com and Myex.com exist primarily for the purpose of posting revenge pornography. The webmasters profit from selling perpetrators the opportunity to post nude pictures of their victims without the victims’ consent and from the advertisements that third parties pay the webmaster to post on the website next to the pictures. Additionally, these websites benefit

174. See Dahl, *supra* note 170.

175. 47 U.S.C. § 230.

176. 47 U.S.C. § 230(b)(5).

177. *Id.*

178. *Id.*

economically from the emotional distress of victims. The webmasters often have “reputation protection” services attached to them with a heavy price for victims to pay in order for them to have their photos removed.¹⁷⁹ While the promotion of internet and freedom of speech are important values in the United States, it is troubling to see that webmasters can go unpunished and can allow for revenge pornography to be massively disseminated, further impacting victims’ emotional well-being and sense of physical security. In fact, webmasters that have “reputation protection” services contribute to the creation and development of information, and thus, would not be content providers, but content creators under the Communications Decency Act.

4. The Law Should Require Stricter Remedial Punishment to Increase the Deterrent Effect

Given the fact that many other states are following in California’s footsteps, the passage of California’s revenge pornography law is a significant first step.¹⁸⁰ However, the punishment provided in the statute is too lenient. A violation of California’s revenge pornography is a misdemeanor and punishable by up to six months of jail time and up to \$1,000 in fines.¹⁸¹ The punishment for revenge pornography in California is less severe than that under California’s cyber-stalking laws, which deems cyber-stalking a felony punishable by up to one year of jail time and up to \$1,000 in fines.¹⁸² Since the effects of revenge pornography are just as severe, if not more severe, than cyber stalking, the punishment for the two crimes should be equal. Thus, California legislators should make perpetrators of revenge pornography felons subject to punishment of at least a year in jail and/or \$1,000 in fines.

Conclusion

Cyber-harassment in the form of revenge pornography has become an increasingly prevalent problem in today’s internet era. Women are disproportionately impacted and, as demonstrated in the

179. Disgustingly enough, some webmasters of revenge pornography use the helplessness of victims to further manipulate and humiliate victims—some webmasters have demanded that victims “[d]ump \$500 into a PayPal account, and maybe they will take down [the] photo.” See Flaherty, *supra* note 173.

180. Jessica Roy, *California’s New Anti-Revenge Porn Bill Won’t Protect Most Victims*, TIME (Nov. 23, 2014, 12:23 PM), <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/>.

181. *Id.*

182. *Id.*

example of Jane and John, female victims face life-altering consequences, including depression, ruined reputations, and even threats to their physical safety. The First Amendment provides constitutional protection for one's freedom of speech; however, revenge pornography should be deemed an exception. Courts can categorize revenge pornography as a type of true threat, an example of fighting words, or a new form of unprotected speech.

Though California's revenge pornography law is a commendable first step in prohibiting revenge pornography, California still has room to improve. More specifically, California should revise its law to: prohibit the posting of selfies by someone other than the photographer, punish webmasters of revenge pornography websites if they have any role in profiting from the posting of these pictures, and increase the severity of punishment for violations of the revenge pornography law.