THE INDECENT INTERNET: RESISTING UNWARRANTED INTERNET EXCEPTIONALISM IN COMBATING REVENGE PORN

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A disturbing new trend is making the modern breakup particularly messy. As the Internet has evolved into a basic necessity and as smartphones make it easier to share intimate media[1] than ever before,[2] unauthorized distribution of that media—"revenge porn"—is becoming increasingly frequent.[3] Angry exes with intimate photos or videos of their former significant others weaponize that media after the breakup by uploading it to the Internet, sometimes alongside the victim's name and other identifying information.

Revenge porn can originate in a few ways: (1) non-consensual photography or video recording (such as through the use of a hidden camera), (2) consensual photography or video recording that is later stolen (such as by hacking into an individual's computer or online account where explicit images are stored), and (3) consensual photography or video recording that is intentionally transmitted to an individual.[4] Because the third form is the most prevalent—eighty percent of cases[5]—and most relevant to the current revenge porn debate, this Note focuses on that subcategory.

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1. This term is borrowed from Derek Bambauer to refer to sexually explicit photos or videos depicting the victim-plaintiff, who is recognizable in the media itself or as a result of accompanying information. *See* Derek E. Bambauer, *Exposed* 98 MINN. L. REV. (forthcoming 2014) (manuscript at 29), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2315583.

2. One study found that "over half (53.3%) of heterosexual respondents had shared a nude photo with someone else, and nearly three-quarters (74.8%) of LGBT (lesbian, gay, bisexual, and transgender) respondents had done so." *Id.* at 3.

3. *Id.*

4. *See* Mary Anne Franks, *Combating Non-Consensual Pornography* 3 (Nov. 20, 2013) (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537.

5. *See* Heather Kelly, *New California "Revenge Porn" Law May Miss Some Victims*, CNN (Oct. 3, 2013), http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/index.html. Further, up to eighty percent of revenge porn was originally photographed by the victim and then transmitted to a partner. *Id.*

The incidence of revenge porn is startling. One researcher found that over twenty percent of survey respondents had been the victims of revenge porn.[6] These images often find their way to websites that exist specifically to host revenge porn content: "The now-defunct revenge porn site IsAnyoneUp? featured images of thousands of people and, at its height of popularity, received thirty million page views per month."[7] In the first three months the site was online, its users uploaded ten thousand images.[8] Facing the pervasiveness of revenge porn, states have begun to grapple with the question of how to best address it, while victims call for legislation at the state and federal levels.[9]

As revenge porn victims face costly litigation after finding their intimate photos and videos posted online, scholars have suggested a variety of approaches to address this widespread problem. Some argue that federal criminalization is the ideal solution because it relieves victims of the burden of identifying and litigating against the original uploader, instead imposing liability on the web hosts themselves.[10] Proponents of criminalization point out that web hosts in federal criminal cases cannot claim immunity otherwise offered under § 230,[11] an exception to the Communications Decency Act ("CDA") that relieves sites and hosts from civil liability for the illegal acts of their users.[12] Others suggest creating special exceptions to § 230 immunity to allow civil tort liability for websites and hosts in revenge porn cases.[13]

But most proposed civil and criminal solutions to the problem of revenge porn treat the Internet as a unique medium requiring special treatment tailored to revenge porn cases. This "internet exceptionalist" approach encourages the development of internet law as though the web is its own jurisdiction not subject to the existing legal framework.[14] Internet exceptionalism is not inherently intolerable; the Internet is a unique communication medium that can potentially amplify social harms. One must

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6. Bambauer, *supra* note 1 (manuscript at 3).

7. *Id.*

8. *See id.*

9. *See, e.g.*, Erica Goode, *Once Scorned, but on Revenge Sites, Twice Hurt*, N.Y. TIMES, Sept. 24, 2013, at A11.

10. *See, e.g.*, Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), http://www.concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html.

11. 47 U.S.C. § 230 (2012).

12. *See, e.g.*, Franks, *supra* note 4, at 12.

13. *See, e.g.*, Danielle Keats Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013), http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html.

14. *See infra* Section 1.A, for a history of this framework.

be cautious, however, to avoid using this as a justification for unnecessary reflexive legislation fueled by the challenges of addressing a sensitive social problem. Creating "exceptions to the exception" by amending § 230 to expose websites and hosts to liability for the specific case of revenge porn needlessly complicates the law. Instead, the focus should be on established legal frameworks. Specifically, the existing tort of intentional infliction of emotional distress ("IIED") is well suited for revenge porn cases.

Part I of this Note outlines the current status of civil solutions to revenge porn and explains the shortcomings of other common civil proposals. Part II describes criminal revenge porn statutes and shows that they are either too narrow to be useful or too broad to be constitutional. Part III argues that current tort law is the best method to address revenge porn and explains the application of the IIED tort to revenge porn cases. Part IV concludes by arguing that we should resist reflexively crafting a new legal framework to address societal problems that are not themselves unique to the Internet.

I. CIVIL SOLUTIONS TO REVENGE PORN

Although criminalization of revenge porn receives a great deal of media attention, the lack of a federal criminal statute, or a state criminal statute in the overwhelming majority of states, means that revenge porn victims have thus far had to rely on civil litigation after discovering that their images have been posted on revenge porn sites. Section 230, which grants websites and web hosts immunity from liability for the acts of their users, is a major hurdle for plaintiffs in civil revenge porn cases, who must instead identify, track down, and sue the original uploader.[15]

A. COMMUNICATIONS DECENCY ACT § 230 AND INTERNET EXCEPTIONALISM

The rapidly self-replicating nature of online revenge porn once it appears on the Internet makes web host liability appealing.[16] However, § 230 shields internet companies from liability for the acts of their users: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content

15. Although plaintiffs will likely know to whom they have sent a file, they will need to establish that the defendant was in fact the uploader, rather than perhaps the victim of computer hacking or similar interference by a third party.

16. *See* Somini Sengupta, *"Revenge Porn" Could Be Criminal Offense in California*, N.Y. TIMES BITS (Aug. 27, 2013, 8:18 AM), http://bits.blogs.nytimes.com/2013/08/27/revenge-porn-could-be-criminal-offense-in-california.

provider."[17] This immunity is a significant obstacle for victims seeking to prevent the wildfire-like spread of explicit material beyond the initial disclosure because it blocks those victims from suing the websites that host the revenge porn.[18] Some state prosecutors have attempted to persuade Congress to amend the CDA to weaken this immunity.[19]

Section 230 reflects the earliest era of "internet exceptionalism"—the idea that the Internet deserves special treatment under the law because it is inherently "different."[20] During the mid-1990s, regulators nurtured the Internet in an effort to build what some hoped would become a media "utopia."[21] The statute "is clearly exceptionalist because it treats online providers more favorably than offline publishers—even when they publish identical content."[22] Internet exceptionalism has continued to shape the application of § 230 since its enactment, with the immunity it offers to internet entities broadening over time.

1. The Origin and Expansion of § 230 Immunity

Congress added § 230 to the CDA in response to internet service providers' concerns that they would be held liable for the acts of their users.[23] In 1995, a New York court held in *Stratton Oakmont, Inc. v. Prodigy Services Co.* that Prodigy, an internet service provider, was liable for defamatory comments posted by one of its users because of the company's significant editorial control and active moderation over the bulletin board on which the comments were posted.[24] The editorial control exercised, according to the court, made Prodigy a publisher liable for defamatory material on its website.[25] This classification of "publisher" contrasts with the classification of "distributor," which is a service provider that can only be held liable if it knew or should have known about the defamatory content.[26]

17. 47 U.S.C. § 230(c)(1).

18. *See* Sengupta, *supra* note 16.

19. *See id.*

20. *See* Eric Goldman, *The Third Wave of Internet Exceptionalism*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 165, 165 (Berin Szoka & Adam Marcus eds., 2010).

21. *Id.*

22. *Id.*

23. *See* H. Brian Holland, *Section 230 of the CDA: Internet Exceptionalism as a Statutory Construct*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET, *supra* note 20, at 189, 191.

24. Stratton Oakmont, Inc. v. Prodigy Services Co., No. 031063/94, 1995 WL 323710, at *7 (N.Y. Sup. Ct. May 24, 1995).

25. *Id.* at *4–5.

26. *Id.* at *3.

The ruling sparked apprehension among internet companies: "Representatives of the online industry argued that the Prodigy decision placed service providers in an untenable position by creating a 'Hobson's choice' between monitoring content and doing nothing, thereby insulating the service from liability."[27] Because the *Prodigy* decision turned on the editorial control the company exercised,[28] it essentially discouraged companies from monitoring hosted content in order to be considered a distributor under the law. Following *Prodigy*, and in response to the industry's concerns, Congress added § 230 to the CDA.[29]

Since *Prodigy* and the enactment of the CDA, courts have expanded the scope of § 230 immunity.[30] In *Zeran v. America Online, Inc.*, the Fourth Circuit read § 230 broadly, holding that America Online could not be held liable for a user's defamatory speech on its bulletin board.[31] The court held that distributor liability "is merely a subset, or a species, of publisher liability," and is therefore also foreclosed by § 230.[32] Although the *Prodigy* decision left open the possibility of distributor liability, the court in *Zeran* interpreted the statute to provide immunity to both publishers and distributors, thereby eroding the significance of the editorial control distinction suggested in *Prodigy*.[33]

Section 230's expansion has continued in the years since the *Zeran* decision:

> Following *Zeran*, and building on that court's reading of both the statute and the policies sought to be effected, courts have extended the reach of Section 230 immunity along three lines: (1) by expanding the class who may claim its protections; (2) by limiting the class statutorily excluded from its protections; and (3) by expanding the causes of action from which immunity is provided.[34]

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27. Holland, *supra* note 23, at 191 (internal citation omitted). "Hobson's choice" refers to a theoretically free choice where only one option is available. Hobson's Choice, Merriam-Webster, *available at* http://www.merriam-webster.com/dictionary/hobson's+choice.

28. *Prodigy*, 1995 WL 323710, at *4–5.

29. Holland, *supra* note 23, at 191.

30. *Id.*

31. Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).

32. *Id.* at 332.

33. *Id.*

34. Holland, *supra* note 23, at 192. Cases contributing to this trend include, among others, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003) (extending § 230 immunity to a case including claims for invasion of privacy, misappropriation of the right of publicity, and defamation); Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003) (holding that selecting and editing portions of content before posting did not make a website operator a content provider); DiMeo v. Max, 433 F. Supp. 2d 523, 531 (E.D. Pa. 2006) (finding that the

Section 230 immunity now applies to "[w]eb hosting services, email service providers, commercial websites like eBay and Amazon, individual and company websites, Internet dating services, privately-created chat rooms, and Internet access points in copy centers and libraries."[35] In addition to defamation, immunity applies to these entities for a variety of other claims, including negligent assistance in the distribution of child pornography, misappropriation of the right of publicity, and invasion of privacy.[36]

As *Zeran* and subsequent decisions have suggested,[37] the expansion of § 230 immunity over time, making "many of the norms and regulatory mechanisms present in the offline world . . . effectively inapplicable," has occurred "not because the very nature of cyberspace makes [the application of offline norms] impossible, or because sovereign law is necessarily ineffective or invalid, but rather because sovereign law has affirmatively created that condition"[38] in response to concerns raised by internet companies. The result of this expansion is that online entities receive more favorable treatment under the law than offline companies. Even when these entities are aware of illegal activity and have the means to stop it, they are immune from liability.[39] Despite this preferential treatment, however, the Internet has had detractors since the passage of the CDA and § 230.

2. Modern Internet Policy

Beginning in the late 1990s, legislators adopted a hardline approach to the Internet and "treated [it] more harshly than analogous offline activity."[40] States passed laws banning internet activities despite the legality of their traditional offline counterparts.[41] For example, states banned "internet hunting" as a direct response to the hunting website Live-shot.com, which allowed customers to virtually control a gun on the site's game farm and shoot real, live animals at the physical farm remotely over the Internet.[42]

operator of an online forum was simultaneously a provider and a user, both of which qualify for § 230 immunity); Barrett v. Rosenthal, 146 P.3d 510, 527 (Cal. 2006) (holding that a newsgroup user could not be held liable for redistributing libelous messages written by a third party); Doe v. Am. Online, Inc., 783 So. 2d 1010, 1017 (Fla. 2001) (allowing § 230 immunity in a child pornography case, noting that the material was analogous to the defamatory content at issue in *Zeran*).

35. Holland, *supra* note 23, at 192.
36. *See id.*
37. *See supra* note 34.
38. Holland, *supra* note 23, at 199.
39. *See id.*
40. *See* Goldman, *supra* note 20, at 165.
41. *See id.*
42. *See id.*

California Senator Debra Bowen justified the discrepancy between online and offline hunting regulation by suggesting that internet hunting amounted to a video game, and that the lack of skill required was offensive to "legitimate" hunters.[43] Despite the soundness of Senator Bowen's reasoning, it is clear that she conceptualized the Internet as fundamentally different, with these differences calling for a divergence from applicable offline law. Nevertheless, despite the harsher approach to internet regulation during this period, § 230's immunity provisions remained on the books and continued to shield internet entities from liability.[44]

In more recent years, the trend of internet exceptionalism has continued, with "each new advance in Internet technology . . . prompt[ing] exceptionalist regulations towards that technology."[45] For example, the popularity of sites like Facebook has resulted in attempts to pass social-networking laws, such as those requiring user age verification.[46] Revenge porn, given steam by the proliferation of mobile devices, is one example of an internet "innovation" currently attracting regulatory attention.

3. Roommates.com*: Reining in CDA § 230*

Drawing boundaries around CDA § 230 immunities offered to interactive computer services, the Ninth Circuit declined to grant Roommates.com immunity from housing discrimination claims on the grounds that its solicitation of users' discriminatory housing preferences amounted to a material contribution to unlawful conduct.[47] According to the court, "a website helps to develop unlawful content, and thus falls within the exception to § 230, if it contributes materially to the alleged illegality of the conduct."[48] In effect, the decision parallels a theory of inducement, in that the solicitation of specific data implicated Roommates.com in the discriminatory conduct.[49]

B. REVENGE PORN AND THE CDA: THE *TEXXXAN.COM* CASE

Despite the immunity that CDA § 230 affords website hosts, some plaintiffs have initiated civil suits against hosts whose sites contained revenge

43. *Id.* at 166.
44. *See id.* at 165.
45. *Id.* at 166.
46. *See id.*
47. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1168, 1175 (9th Cir. 2008).
48. *Id.* at 1168.
49. *See infra* note 140 for a brief summary of the arguments that propose the use of the *Roommates.com* holding by revenge porn victims to escape § 230 immunities.

porn. The ongoing *Texxxan.com* class action lawsuit[50] is the most widely known civil revenge porn case, generating a great deal of media attention and reinvigorating the public debate over how to address revenge porn.[51] The lawsuit against Texxxan.com and host GoDaddy, filed in the Texas District court for Orange County, draws primarily from an invasion of privacy theory and is "the most aggressive legal action taken against revenge porn thus far."[52] Hollie Toups, the lead plaintiff, alleged that an ex-boyfriend uploaded photos she had sent to him while they were dating to the website Texxxan.com.[53] She also alleged that other photos she never knowingly transmitted to anyone were taken from her phone or computer and later uploaded to the site alongside her personal information.[54] Like Texxxan.com, GoDaddy, the site's web host, argued that it is protected by § 230.[55] However, despite § 230 immunity, the court denied GoDaddy's motion to dismiss, holding that revenge porn may be obscenity unprotected by § 230 immunity.[56] The hosting company is currently in the process of appealing that decision, and the court is expected to take on the constitutional questions raised by the obscenity argument.[57]

50. Toups v. GoDaddy, No. D130018-C (Tex. Dist. Ct., Orange Cnty. Jan. 18, 2013).

51. *See, e.g.*, Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan.com?*, FORBES (Jan. 28, 2013, 1:13 PM), http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/.

52. Jessica Roy, *Two Alleged Underage Victims Sign Onto Revenge Porn Lawsuit Against Texxxan.com and GoDaddy*, BETABEAT (Feb. 11, 2013, 6:04 PM), http://betabeat.com/2013/02/two-alleged-underage-victims-sign-onto-revenge-porn-lawsuit-against-texxxan-com-and-godaddy/.

53. Plaintiff's Original Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction, Toups v. GoDaddy, No. D130018-C (Tex. Dist. Ct., Orange Cnty. Jan. 18, 2013).

54. *Id.*

55. Defendant GoDaddy.com, LLC's Notice of Motion and Motion to Dismiss Pursuant to Rule 91a of the Texas Rules of Civil Procedure, Toups v. GoDaddy, No. D130018-C (Tex. Dist. Ct., Orange Cnty. Mar. 14, 2013).

56. *See* Lorelei Laird, *Victims Are Taking on "Revenge Porn" Websites for Posting Photos They Didn't Consent To*, ABA JOURNAL (Nov. 1, 2013, 3:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/. The court did not issue a statement relating to this decision, made April 17, 2013. Memorandum of Points and Authorities in Support of Defendant GoDaddy.com, LLC's Notice of Motion and Motion to Amend and Certify the Court's April 17, 2013 Order for Interlocutory Review at 3, Toups v. GoDaddy, No. D130018-C (Tex. Dist. Ct., Orange Cnty. Apr. 29, 2013).

57. *See* Memorandum of Points and Authorities in Support of Defendant GoDaddy.com, LLC's Notice of Motion and Motion to Amend and Certify the Court's April 17, 2013 Order for Interlocutory Review at 3, Toups v. GoDaddy, No. D130018-C (Tex. Dist. Ct., Orange Cnty. Apr. 29, 2013); Laird, *supra* note 56. For an in-depth discussion of the obscenity issue in the context of criminalization, see *infra* Section II.B.

C. THE SHORTCOMINGS OF SUGGESTED CIVIL SOLUTIONS TO REVENGE PORN

Academics have suggested a variety of civil responses to revenge porn. These suggestions generally call for making changes to existing laws specifically for revenge porn cases and reflect an internet exceptionalist approach. As a result, these suggestions would unnecessarily complicate the law and, generally, do so while only very conservatively broadening the range of victims for whom a given remedy is available. These proposed civil responses are thus inadequate to address the problem of revenge porn.

First, some critics have called for changes to the Copyright Act that would allow victims of revenge porn to sue under its provisions more easily. Derek Bambauer, for example, suggests adding a provision to the Copyright Act that would allow identifiable people pictured in intimate media to block distribution despite not being "authors" under current copyright law.[58] This change would address a major hurdle for victims who did not take the photos or videos themselves and therefore have no authorship rights under current copyright law. However, because a relatively small subset of revenge porn is not self-photography, this suggestion would expand coverage in a very limited way. The overwhelming majority of revenge porn is self-photography,[59] and these victims are already able to use copyright law as a remedy because they have authorship rights in their explicit works. Victims, however, have yet to test courts' willingness to construe authorship in this way for revenge porn cases. According to Professor Mary Anne Franks, "it is not clear how much traction this theory will have in actual cases."[60]

More importantly, the marginal benefit of Professor Bambauer's solution muddles existing copyright law. It is difficult to justify, on copyright policy grounds, extending authorship rights to someone pictured in a work but who did not produce it. The goals of copyright law are to "ensur[e] fair compensation for American creators who deserve to benefit fully from the exploitation of their works," and to "stimulat[e] the creation of new works" in order to promote "the long-term volume, vitality, and accessibility of the public domain."[61] Expanding authorship to include those pictured in intimate

58. Bambauer, *supra* note 1.

59. *See* Kelly, *supra* note 5. Eighty percent of revenge porn was photographed by the victim, who would therefore already have authorship rights under existing copyright law. *Id.*

60. Franks, *supra* note 10.

61. S. REP. NO. 104-315, at 3 (1996). The Copyright Clause of the Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

media does not provide a benefit to the creator of a work (the photographer who captured the explicit photo or video), thereby encouraging the production of future works.[62] It therefore does not serve to fulfill the goals of copyright law. It is arguable that offering authorship rights to victims in these cases would make individuals feel more at ease in participating in the production of intimate works, thereby increasing access to this media as an entertainment source. It stands to reason, however, that individuals wishing to share such works would not be initiating invasion of privacy suits like the victims in *Texxxan.com*.[63] Professor Bambauer's proposal, although it would conservatively broaden the applicability of authorship rights in revenge porn cases, is an inappropriate modification to copyright law given the fundamental goals of copyright protection.

Another suggested civil response to the revenge porn problem is that courts should understand the exchange of intimate media to carry with it an implied confidentiality contract, based on an implied "right to be forgotten."[64] This proposal is an attractive solution because it allows for a clear-cut breach of contract cause of action once revenge porn hits the web. However, this suggestion appears to be little more than a convenient sidestep around the First Amendment, allowing courts to assume that the parties contracted around their free speech rights from the outset.[65] Further, if the implied contract is thought to be based on the parties' reasonable expectations, it may not always be reasonable to assume confidentiality in the context of sharing images and videos. Certainly, there is no such assumption with other forms of personal media.[66] Although societal norms may suggest that those who share intimate media likely do not want it shared online, one

62. Although it may seem counterintuitive to want to encourage the production of this type of material, it is a fundamental aim of copyright law to encourage the production of creative works. The focus is on the material itself (here, intimate media), rather than specifically the act of using that material for the purpose of revenge.

63. *See* Plaintiff's Original Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction at 4, Toups v. GoDaddy, No. D130018-C (Tex. Dist. Ct., Orange Cnty. Jan. 18, 2013).

64. *See, e.g.*, Robert Kirk Walker, *The Right to Be Forgotten*, 64 HASTINGS L.J. 257 (2012) (arguing that Congress should recognize such a right to address the harm caused by the disclosure of personal data, including intimate media in instances of revenge porn). The "right to be forgotten" has been proposed by European policymakers to give individuals the right to have personal information/data deleted from a website if removal does not interfere with others' rights to free expression. *Id.* at 274.

65. Walker acknowledges that applying the "right to be forgotten" as it exists in Europe would violate the First Amendment. *Id.* at 274–78. He suggests the contractual approach in the United States to overcome this problem. *Id.* at 278.

66. Imagine, for example, breaching an implied confidentiality contract by posting a picture of yourself at dinner with a friend on Facebook.

might also argue that the recipient of such media operated under the assumption that because it was shared with them, the sender was open to sharing it in general. With no obvious limiting principle, implying a confidentiality contract as a rule could easily capture cases where it is inappropriate and override individuals' freedom to contract as they so choose.

Another frequent recommendation is that § 230 should be modified to expose websites showcasing revenge porn to liability. Professor Danielle Keats Citron, for example, argues that a revenge porn website qualifying for § 230 immunity is incompatible with the congressional purpose of the CDA.[67] According to Citron, "[b]lanket immunity ensures that revenge porn victims have no leverage to press site operators to take down injurious material or retain IP addresses that might enable them to identify wrongdoers."[68] Nevertheless, as Citron acknowledges, courts generally have not accepted a reading of § 230 that allows immunity only to "decent" websites.[69] Instead, Professor Citron suggests, "Congress should . . . adopt a narrow amendment to Section 230, excluding from its safe harbor provisions websites designed to facilitate illegal conduct or are principally used to that end."[70] On the other hand, many lawyers and scholars oppose such carve-outs to § 230 as harmful to the protective arena for online innovation created by Congress. As Matt Zimmerman, senior staff attorney at the Electronic Frontier Foundation, has argued, "Going after intermediaries is a really bad idea . . . . The entire speech ecosystem ends up suffering because those service providers [would] decide what people can and cannot post, even if it isn't illegal."[71] As discussed in greater depth in Part III, adopting such an exception without engaging in the broader debate over whether the Internet has evolved beyond the need for broad § 230 immunity misses the mark.

These proposed civil solutions all endeavor to improve remedies available to victims of revenge porn, but, unfortunately, they also make the same misstep: they treat the social harm caused by revenge porn as being a unique animal by virtue of the Internet's ability to magnify the scope of the harm. This amplification is cause for concern, but not necessarily new

67. Danielle Keats Citron, *Revenge Porn and the Uphill Battle to Sue Site Operators*, CONCURRING OPINIONS (Jan. 25, 2013, 3:13 PM), http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-sue-site-operators.html.

68. *Id.*

69. Citron, *supra* note 13.

70. *Id.*

71. *See* Steven Nelson, *New Federal Legislation Could Take a Nip Out of "Revenge Porn,"* U.S. NEWS & WORLD REPORT (Nov. 21, 2013), http://www.usnews.com/news/articles/2013/11/21/new-federal-legislation-could-take-a-nip-out-of-revenge-porn_print.html.

legislation. As discussed in Part III, because society's objections to revenge porn are rooted in precisely the types of harms that IIED is intended to address,[72] the development of special laws or exceptions to address revenge porn is unnecessary.

II. CRIMINALIZING REVENGE PORN

The alternative to pursuing changes in civil remedies for revenge porn is criminalization. Criminalization of revenge porn distribution relieves victims of the burden of funding civil litigation and, on the federal level, escapes the problem of § 230 immunity, which does not apply in federal criminal cases.[73] Federal criminal statutes could therefore be constructed to allow victims to go directly after a website hosting revenge porn rather than being forced to track down the original uploader as the only option for recourse. In contrast to federal criminal statutes, however, state criminal laws are not included in the exemptions to § 230 immunity.[74] As a result, they do not carry the benefit of being enforceable against websites. Further, few states have passed criminal revenge porn statutes, making them a viable option for only a small subset of victims.[75] Although calls for criminal statutes get a great deal of the media attention surrounding the issue of revenge porn, statutory construction and constitutional problems with the laws in place in a handful of states demonstrate that criminalization is not a viable solution.

72. Severe embarrassment is one example. *See infra* note 123 and accompanying text. The IIED tort is intended to address this type of emotional harm. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (2012).

73. *See* 47 U.S.C. § 230(e)(1) (2012) ("Nothing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute.").

74. *See* 47 U.S.C. § 230(e)(1) (2012) ("Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, *or any other Federal criminal statute*.") (emphasis added); Voicenet Commc'ns v. Corbett, No. 04-1318, 2006 WL 2506318, at *3–4 (E.D. Pa. 2006) (stating that "if Congress had wanted state criminal statutes to trump the CDA as well, it knew how to say so"); Eric Goldman, *47 USC 230 Preempts State Criminal Law—Voicenet Communications v. Corbett*, TECH. & MKTG. L. BLOG (Sept. 4, 2006), http://blog.ericgoldman.org/archives/2006/09/47_usc_230_pree.htm (noting that the general consensus has been that § 230 preempts state criminal liability, and that the Eastern District of Pennsylvania's decision in *Voicenet* marks the first time a court has directly stated this).

75. *See* CAL. PENAL CODE § 647(j)(4)(A) (West 2013); N.J. STAT. ANN. § 2C: 14-9 (West 2004).

A. EXISTING CRIMINAL REVENGE PORN STATUTES

New Jersey became the first state to successfully criminalize revenge porn in 2004.[76] The law outlaws "the non-consensual observation, recording, or disclosure of intimate images" and has never faced serious challenge.[77] As of January 2014, two revenge porn defendants have been prosecuted.[78]

In October 2013, California passed its own criminal statute, under which defendants could face six months in jail and a fine for taking intimate photos or videos of an individual and distributing them without that individual's consent, with the intent to cause the victim serious emotional distress.[79] The law only covers cases where the accused was also the photographer and, as a result, misses a large segment of revenge porn: those images taken by the victim and then shared.[80] In cases where the victim took the photo or video, he or she would need to rely on copyright law, as the author of the work, or pursue other civil causes of action.[81]

In 2013, the Florida House of Representatives considered a bill criminalizing revenge porn. The bill, in contrast to the New Jersey and California laws, included as an element of the crime that the revenge porn be disclosed in conjunction with personal information identifying the pictured victim.[82] Commentators have attributed the bill's failure in committee to this added element, and to possible First Amendment violations.[83]

Wisconsin legislators, meanwhile, introduced a revenge porn bill in October 2013 under which those convicted would face up to nine months in jail, a $10,000 fine, or both.[84] As introduced, the law would outlaw the distribution of "an image of a person who is nude or partially nude or who is engaging in sexually explicit behavior without the consent of the person,"

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76. *See* N.J. STAT. ANN. 2C: 14-9 (West 2004); Franks, *supra* note 4, at 8–9.

77. Franks, *supra* note 4, at 8–9.

78. *See* State v. Parsons, No. 10-06-01372, 2011 WL 6089210 (N.J. Super. Ct. App. Div. Dec. 8, 2011); Michaelangelo Conte, *Bayonne Man Charged with Posting Nude Photos of Ex-Girlfriend on Internet*, NJ.COM (Oct. 23, 2013), http://www.nj.com/hudson/index.ssf/2012/10/bayonne_man_charged_with_posti.html.

79. CAL. PENAL CODE § 647(j)(4)(A) (West 2013); Franks, *supra* note 4, at 10.

80. As noted above, up to eighty percent of revenge porn falls outside of this category. *See supra* note 5 and accompanying text.

81. See *supra* Part I for a discussion of these options.

82. *See* S. 946, 2013 Leg., Reg. Sess. (Fla. 2013).

83. *See* Suzanne Choney, *"Revenge Porn" Law in California Could Pave Way for Rest of Nation*, NBC NEWS (Sept. 3, 2013), http://www.nbcnews.com/technology/revenge-porn-law-california-could-pave-way-rest-nation-8C11022538.

84. Assemb. 462, 2013–2014 Leg., Reg. Sess. (Wisc. 2013), *available at* https://docs.legis.wisconsin.gov/2013/related/proposals/ab462.

regardless of the identity of the original photographer.[85] The bill most closely resembles the New Jersey law; it does not contain the proposed Florida element that intimate media be disclosed alongside personally identifiable information (such as the victim's name and Facebook link) or the California requirement that the defendant disclose the media with the intent to cause emotional distress.[86]

B. TOO NARROW TO WORK; TOO BROAD TO BE CONSTITUTIONAL

Because of the economic and practical challenges of pursuing a civil revenge porn case—funding litigation, avoiding § 230 immunity, and tracking down the original uploader—some commentators argue for criminalizing revenge porn and shifting the burden of litigation to the government.[87] However, existing state criminal statutes are problematic beyond being preempted by § 230 immunity.[88] Criminal statutes seem to fall into one of two categories: overbroad and potentially unconstitutional, or so narrow that they are ineffective for the overwhelming majority of revenge porn cases.

For example, New Jersey's law, despite being described by one commentator as "offer[ing] an extremely promising approach,"[89] was narrowly written such that it has a peculiar loophole. It offers the discloser of intimate media an affirmative defense if they "posted or otherwise provided prior notice to the person of the actor's intent" to distribute intimate media and did so "with a lawful purpose."[90] All a distributor would need to do to

85. *Id.*

86. New York, Georgia, and Texas may soon consider legislation to criminalize revenge porn. *See* Cathy Reisenwitz, *Revenge Porn Is Awful, but the Law Against It Is Worse*, TALKING POINTS MEMO (Oct. 16, 2013, 9:35 AM), http://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse. The Virginia House of Delegates is now considering a criminal revenge porn bill. *See* Jason Spencer, *Bill Would Outlaw "Revenge Porn" in Virginia*, MCLEANPATCH (Dec. 3, 2013, 4:29 PM), http://mclean.patch.com/groups/politics-and-elections/p/bill-would-outlaw-revenge-porn-in-virginia. Legislators in Pennsylvania and Rhode Island have expressed their intent to propose bills that would criminalize revenge porn. Karen Shuey, *Pa. Lawmakers Looking to Crack Down on Revenge Porn*, LANCASTER ONLINE (Dec. 15, 2013, 8:32 PM), http://lancasteronline.com/article/local/932000_Pa--lawmakers-looking-to-crack-down-on-revenge-porn.html; Press Release, Rhode Island Department of the Attorney General, Attorney General Kilmartin, Senator Lynch and Representative Lally to File Legislation Prohibiting "Revenge Porn" (Dec. 16, 2013), *available at* http://www.ri.gov/press/view/20921.

87. *See, e.g.*, Franks, *supra* note 4. See *infra* Section II.C for a discussion of litigation cost burden-shifting. .

88. *See* Goldman, *supra* note 74.

89. *See* Franks, *supra* note 4, at 9.

90. *See id.*; N.J. STAT. ANN. 2C: 14-9 (West 2004). It is unclear what a "lawful purpose" might be, though this may be intended to make clear that professional pornographers uploading their work are not included within the statute.

avoid liability and negate the remedy offered by the statute is announce to the victim his or her intent to turn intimate media into revenge porn before doing so.[91] This is a real concern. For example, a Maryland victim's ex-boyfriend told her in advance that he planned to auction off a CD of her intimate photos on eBay.[92] In Wisconsin, a victim's ex-boyfriend warned her in advance that he planned to post her nude photos on Facebook.[93] Under the terms of the New Jersey statute, these defendants provided their victims with prior notice and would therefore have legitimate affirmative defenses.

California's law, meanwhile, is so narrowly written that it potentially applies to just twenty percent of revenge porn.[94] Considering the difficulty states face in criminalizing revenge porn, one commentator noted that:

> An overbroad criminal law is a threat to the public, runs the risk of being struck down by a court (for violating the First Amendment), or even worse, becomes the basis of questionable convictions and imprisonments. But an overly narrow law—like the final version of the California revenge porn law . . . — is little more than lip service to the harm suffered by victims.[95]

The California law does little to improve victims' remedies, instead requiring the overwhelming majority to turn to civil litigation, just as they would without the criminal law in place. An earlier, broader version of the California law would have amended another portion of the California Penal Code to outlaw the distribution of nude photos without consent and with the intent to cause emotional distress in general, regardless of whether the distributor personally took the photos.[96] Instead, California legislators

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91. *See* Mark Bennett, *Is New Jersey's Revenge Porn Statute Constitutional?*, DEFENDING PEOPLE (Oct. 16, 2013), http://blog.bennettandbennett.com/2013/10/is-new-jerseys-revenge-porn-statute-constitutional.html.

92. Anne Flaherty, "*Revenge Porn" Victims Pursue New Laws, but ACLU Urges Caution*, BOSTON GLOBE (Nov. 16, 2013), http://www.bostonglobe.com/news/nation/2013/11/16/revenge-porn-victims-press-for-new-laws/cXQNeLzOcy7oSDTUh3W5fK/story.html.

93. Nico Savidge, *Law Offers Few Options for Victims of "Revenge Porn,"* GAZETTEXTRA (Nov. 5, 2013), http://gazettextra.com/article/20131105/ARTICLES/131109882.

94. See *supra* note 5 and accompanying text. The law only applies to cases where the accused was also the photographer or videographer and does not reach those instances of revenge porn where the victim independently photographed or recorded him- or herself and then sent the media to a partner who later distributed it without consent. *Id.*

95. Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), http://www.wired.com/opinion/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/.

96. *See* May 7, 2013 Senate amendments to SB 255, *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB255. The proposed changes would have amended Section 653.2(a)(2) of the California Penal Code to read:

> Every person who, with the intent to cause substantial emotional distress or humiliation, by means of an electronic communication device, and

dramatically cut back the scope of the law such that its final enacted form applies in substantially fewer scenarios.[97]

The constitutional problem with criminalizing revenge porn is that such laws necessarily implicate First Amendment concerns. Consensually recorded intimate media does not seem to fit within the categories of unprotected speech, which include child pornography, false statements of fact, fighting words, obscenity, incitement, solicitation of crime, and threats.[98] Some have argued that revenge porn does fit within the "obscenity" category and that criminalization is therefore constitutional.[99] This argument, however, relies on an extension of the relevant case law that precedent does not support.

In *Miller v. California*, the Supreme Court outlined the three-prong obscenity test.[100] The relevant factors for material to be considered obscene and therefore unprotected by the First Amendment under *Miller* are:

> without consent of the other person, electronically distributes, publishes, emails, hyperlinks, or makes available for downloading nude images of the other person along with personal identifying information of the other person, is guilty of a misdemeanor punishable by up to one year in a county jail, by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

Id. Note that this proposal, in contrast to the enacted law, would not have required that the uploader/discloser had personally taken the photo. As a result, the final version of the law is considerably narrower than this early version and covers dramatically fewer revenge porn cases. In relevant part, the amended law reads:

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

CAL. PENAL CODE § 647(j)(4)(A) (West 2013).

97. *See* Jessica Roy, *California's New Anti-Revenge Porn Bill Won't Protect Most Victims*, TIME (Oct. 3, 2013), http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/ (quoting Natalie Webb, Director of Communications for the anti-cyber harassment non-profit Cyber Civil Rights Initiative, as saying that the law "doesn't really offer meaningful coverage to most victims who have reached out to [the non-profit]"). The bill's sponsor, Senator Anthony Cannella, has acknowledged this gap in protection in the final bill, stating that "at least we got people talking about it." *Id.* Victims, meanwhile, have accused California legislators of narrowing the scope of the legislation as a result of victim-blaming. Holly Jacobs, victim and founder of the Cyber Civil Rights Initiative, has said that one of the law's drafters told her that "people who take intimate self-shots are 'stupid.'" *Id.*

98. *See* Eugene Volokh, *First Amendment Exceptions and History*, THE VOLOKH CONSPIRACY (Apr. 20, 2010, 5:28 PM), http://www.volokh.com/2010/04/20/first-amendment-exceptions-and-history/.

99. *See, e.g.*, Franks, *supra* note 4, at 16.

100. Miller v. California, 413 U.S. 15 (2007).

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[101]

The Court has not held pornography in general to be obscene. To the contrary, in *Reno v. American Civil Liberties Union*, the Court held that sexual expression that is indecent or offensive to some is not inherently obscene.[102] Instead, pornography must be found to be obscene under the *Miller* test, and such obscenity must be clearly defined by the community: "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."[103]

The Court has not, however, held that transmission of material, such as the act of uploading pornography to a website, can render material obscene if it is not otherwise so under relevant state law. In other words, if a state does not pronounce pornographic images themselves to be obscene, relevant precedent does not support the proposition that the circumstances surrounding the production or transmission of pornography depicting consenting adults are relevant in the First Amendment obscenity analysis. Considering revenge porn obscene thus essentially requires that the material become obscene merely because it is distributed, unless a state outlaws pornography entirely—a framework that the *Miller* test does not support. The Supreme Court in *Miller* gave no indication that obscenity hinges on distribution. To the contrary, the Court emphasized the content of the material, rather than its mass-mailing distribution.[104] Although it is possible

101. *Id.* at 24 (internal citations omitted).

102. Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

103. *Miller*, 413 U.S. at 27.

104. *Id.* at 18 (noting that "[t]his Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material" before going on "to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment. . . ."). In other words, the Court provided a framework for determining what is obscene and can therefore be restricted by the states, but did not suggest that the distribution of the work itself was a relevant factor in establishing obscenity. This was the case despite that the facts in *Miller* involved mass distribution through the mail. The Court was only concerned with this to the extent that the

that the Supreme Court will uphold criminal revenge porn statutes in the future, the lack of significance the Court attached to transmission or distribution in the obscenity analysis leaves criminal statutes vulnerable to First Amendment challenges.[105]

C. THE COSTS OF BURDEN-SHIFTING THROUGH CRIMINALIZATION

Criminalization can relieve victims of the burdens of financing civil litigation. This burden-shifting comes at a cost that is seldom addressed when discussing the merits of criminalization. In describing the global legislative phenomenon of turning immediately to criminalization, Professor Nils Jareborg notes that "[c]riminalization is regularly used as a first resort . . . , partly because a new criminalization does not involve obvious immediate costs that have to be taken into consideration . . . . As a result, we have to live with 'criminal law inflation.'"[106] Because it is difficult to establish the cost of a new criminalization, particularly when comparable criminal statutes in other jurisdictions have been used on just a handful of occasions and therefore offer few data points,[107] it is easy to be dismissive of the reality that there are still costs associated with criminalization. Nevertheless, these costs do exist, and are important to consider when attempting to justify criminalization on the ground that it relieves victims of the cost of litigation.

III. PROPOSED SOLUTION: A SOCIETAL PROBLEM, NOT AN INTERNET PROBLEM

The proposed civil and criminal solutions are similar in that they treat revenge porn as a harm that requires special treatment in the law. This view reflects the internet exceptionalist ideology, discussed in Section I.A, in which "[t]he Internet's perceived novelty has prompted regulators . . . [to] craft[] Internet-specific laws that diverge from regulatory precedents in other media."[108] Revenge porn is no exception to the modern trend of attempting

possible exposure of the material to children and unwilling recipients justified the states' interest in having clear guidance in determining what materials are obscene and can therefore be restricted. *Id.* at 18–19.

105. This remains an undecided question. Although it may be the case that transmission is ultimately relevant in the obscenity analysis, the Court has not incorporated that into the test thus far.

106. Nils Jareborg, *Criminalization as a Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 524 (2005).

107. New Jersey's statute, for example, has been used for just two prosecutions as of January 2014. *See supra* note 78 and accompanying text.

108. Goldman, *supra* note 20, at 165.

to regulate each new internet innovation in a unique, Internet-specific way.[109] Although internet exceptionalism is sometimes justified,[110] in many cases it reflects "regulatory panic."[111] Such a panic is an understandable reaction in the revenge porn context, in light of the proliferation of intimate-media sharing. As Professor Eric Goldman explains, "Unfortunately, emotional overreactions to perceived Internet threats or harms typically trump . . . a rational regulatory process" in which "regulators . . . articulate how the Internet is unique, special or different and explain why these differences justify exceptionalism."[112]

Instead, to avoid reflexively creating Internet-specific laws where they are unnecessary, revenge porn should be evaluated according to the underlying basic harm—the humiliating disclosure of intimate photos without consent. That harm is one that is not unique to the Internet and which is already covered by the intentional infliction of emotional distress tort.[113]

A. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of IIED is well suited for application in cases of revenge porn and has already been included in revenge porn suits like the *Texxxan.com* class action.[114] The tort "originated as a catchall to permit recovery in the narrow instance when an actor's conduct exceeded all permissible bounds of a civilized society but an existing tort claim was unavailable."[115] After Professor William Prosser initially outlined and named the tort in 1937, the *Restatement of the Law of Torts* recognized IIED in 1948.[116] In its current form, the Restatement describes the tort as follows: "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm

109. *See supra* Section I.A for an in-depth discussion of this trend.

110. *See* Goldman, *supra* note 20, at 167.

111. *Id.*

112. *Id.* at 167.

113. In fact, even the specific concept of revenge porn is not unique to the Internet. In 2007, for example, David Feltmeyer was charged in connection with producing and distributing pornographic DVDs of his ex-girlfriend. Feltmeyer left them on the windshield of cars in his area. *Former Boyfriend Pleads No Contest over Sex DVDs*, CHESTERFIELD OBSERVER (Apr. 25, 2007), http://www.chesterfieldobserver.com/news/2007-04-25/news/009.html.

114. *See* Plaintiff's Original Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction at 4, Toups et al. v. GoDaddy, No. D130018-C (Tex. Dist. Ct., Orange Cnty. Jan. 18, 2013).

115. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 cmt. a (2012).

116. *See* Daniel Zharkovsky, *"If Man Will Strike, Strike Through the Mask": Striking Through 230 Defenses Using the Tort of Intentional Infliction of Emotional Distress*, 44 COLUM. J.L. & SOC. PROBS. 193, 205 (2010).

to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm."[117]

In practice, the application of IIED can be reduced to an analysis of the outrageousness element.[118] Predictably, it is the muddiest part of the tort: it "is a naturally imprecise term, but this lack of precision is also a virtue of the tort, allowing it to evolve with changes in time and place" and making the tort one "that reflects social norms."[119] Courts have found "certain extreme practical jokes" to be outrageous, and even words alone have sometimes been found to fit the standard, particularly in cases of employer liability for employees insulting customers.[120] The tort is more concerned with context than it is with the act alone.[121] Outrageousness under IIED

> depends on the facts of each case, including the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged.[122]

1. Applying IIED to Revenge Porn

Although the spread of revenge porn is accelerated through the use of the Internet, the harm is not unique to the Internet, and it is a mistake to treat it as such. Revenge porn is objectionable to society for reasons that are not Internet-specific, but instead grounded in the same moral instincts that support recognition of torts like IIED.[123] IIED allows the punishment of "conduct beyond the bounds of decency in a civilized society,"[124] a category in which revenge porn unmistakably falls. The transmission medium is irrelevant to the type of harm caused by revenge porn. "The choice of

117. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (2012).

118. *See* Zharkovsky, *supra* note 116, at 206 (noting that "[c]ontemporary commentators note that analysis of IIED reduces to one element: the outrageousness of the conduct").

119. *Id.* at 207 (internal citations omitted).

120. *See id.* at 205.

121. *See id.* at 206 ("More crucial than what a defendant does is an analysis of when and where he or she did it." (internal citations omitted)).

122. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 cmt. d (2012).

123. *See, e.g.*, Citron, *supra* note 67 (describing harms including embarrassment and shame, reputational damage, and incitement of harassment by third parties); Goode, *supra* note 9; Caille Millner, *Public Humiliation over Private Photos*, SFGATE (Feb. 10, 2013, 3:21 PM), http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php (describing public humiliation as a result of revenge porn).

124. Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 42 (2009).

communication medium might affect the magnitude of the harm, but if it is illegal for A to communicate X to B without C's permission, there is no reason to fashion new rules of liability that depend on the mode of communication used."[125] Although the Internet can magnify the scale of the social harm caused by revenge porn,[126] the application of IIED to revenge porn victims obviates the need for creating new civil remedies. It is unnecessary to create new law for a new transmission medium when the magnitude of the harm can be considered in applying IIED.

Daniel Zharkovsky suggests that IIED is ideal to address social harms like revenge porn because its "built-in contextual analysis makes it uniquely adept at dealing with bad behavior on the Internet."[127] Although Zharkovsky takes the additional step of arguing for exposing internet entities to liability rather than uploaders,[128] his argument that the tort of IIED is particularly well suited to address revenge porn because of its flexibility is useful. Because "outrage is a flexible standard,"[129] courts can evaluate revenge porn cases independently according to the contextual analysis that application of IIED requires. Rather than rigid criminal statutes such as those described in Part II, applying the adaptable outrageousness standard through IIED would take into account the relationship between the parties, the expectations of each as to sharing intimate media, and, perhaps most importantly, current social norms. In an environment as rapidly changing as the Internet, with entire social networks breaking to the forefront seemingly overnight,[130] taking into account social norms is an important task. Applying the existing IIED tort allows courts to do this without crafting any new Internet-specific law,[131]

125. Alex Kozinski & Josh Goldfoot, *A Declaration of the Dependence of Cyberspace*, 32 COLUM. J.L. & ARTS 365, 372 (2009).

126. *See* Zharkovsky, *supra* note 116, at 195 (stating that "[t]he Internet . . . is not reined in by social restraints or physical limitations").

127. *Id.* at 207.

128. *See id.* at 195–96.

129. *Id.* at 206.

130. *See, e.g.*, SNAPCHAT, http://www.snapchat.com (last visited Feb. 9, 2014). Snapchat, a mobile application that allows users to send photos and videos that disappear from recipients' phones after several seconds, started as a Stanford student's school project in mid-2011 and was met with great skepticism. *See* J.J. Colao, *Snapchat: The Biggest No-Revenue Mobile App Since Instagram*, FORBES (Nov. 27, 2012, 1:36 PM), http://www.forbes.com/sites/jjcolao/2012/11/27/snapchat-the-biggest-no-revenue-mobile-app-since-instagram/. As of November 2013, Snapchat now handles 400 million photos and videos daily. Jon M. Chang, *70 Percent of Snapchat Users Are Women*, ABC NEWS (Nov. 21, 2013), http://abcnews.go.com/Technology/70-percent-snapchat-users-women-ceo/story?id=20964409.

131. The IIED tort is available in all states. *See* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 806 (2007).

instead addressing the social harm through the tort law mechanisms already established to regulate behavior in society. Although this flexibility could also chill speech to the extent that it does not clearly set the boundaries of acceptable social behavior in the same way that a criminal statute does, this risk is a compromise already made in the acceptance of the tort of IIED in general.

In addition to the tort's contextual adaptability, the tort is accessible to victims seeking recourse. All states have recognized IIED in some form.[132] This universality is significant, given that copyright law requires authorship rights and criminal statutes have only been passed in a few states.[133] IIED provides all victims with an available cause of action even in the absence of a criminal statute or modifications to civil remedies, and victims can be awarded damages in every state.[134]

Like the state criminalization proposals discussed in Part II, using IIED to address revenge porn does not avoid triggering § 230 immunities. Additionally, victims still face the problem of needing to sue the original uploader directly, unless victims prove successful in using the inducement-like reasoning of the Ninth Circuit's *Roommates.com* decision to open up revenge porn websites to civil liability. Criminalization suffers from serious statutory construction issues such that statutes have bizarre loopholes that severely restrict their applicability, or are so broad that constitutional challenge appears likely.[135] Rather than forcing victims to fight these constitutional battles or accept criminal statutes that are "little more than lip service to the harm suffered,"[136] IIED offers a civil remedy that carries with it ample precedent to guide courts in balancing constitutional rights and victims' interests.

As described in Part I, some have argued that the inability to sue a revenge porn website is cause for poking holes in § 230 immunities to make it easier for victims to go directly after the hosting websites.[137] It may be the case that § 230 immunity is outdated and inappropriate for the modern Internet.[138] Nevertheless, choosing to poke holes in § 230 protections for the

132. *See id.*

133. *See supra* Section II.A.

134. *See* Carmen Naso, *Sext Appeals: Re-Assessing the Exclusion of Self-Created Images from First Amendment Protection*, 7 CRIM. L. BRIEF 4, 25 n.191 (2011).

135. *See supra* Section II.B.

136. *See supra* note 78 and accompanying text.

137. *See, e.g.*, Citron, *supra* note 67.

138. For an example of this argument, see Matthew J. Jeweler, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 PITT. J. TECH. L. & POL'Y 3 (2008).

specific case of revenge porn is a form of internet exceptionalism in and of itself. Revenge porn exceptions to § 230 immunity would introduce an additional level of exceptionalism rather than getting at the underlying argument that the Internet has "aged out" of the need to protect web hosts in order to encourage rapid innovation and growth.[139] If we are to say that the problem is not merely the disclosure of the photos, but that websites can host them while retaining immunity under § 230, then it is time to evaluate the value of the internet exceptionalist statute as a whole, rather than create exceptions for special case scenarios without engaging in that broader debate.[140]

Unlike IIED, suggestions like Professor Bambauer's recommendation that copyright law be modified to broaden authorship rights to those pictured in explicit photos or videos escape the problem of § 230 immunity without the need to amend the CDA.[141] Nevertheless, as discussed in Section I.B, such a modification is insincere to the fundamental goals of copyright law.[142] It is important to consider the possibility that making a special modification to copyright law for revenge porn could have unforeseen consequences for the legitimacy of copyright law as a mechanism to reward authors for developing creative works.

Unfortunately, using IIED to address revenge porn comes at the cost of restricting victims' ability to civilly sue web hosts and, unlike criminalization, does not relieve victims of the financial burden of civil litigation.

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139. *See, e.g.*, David Thompson, *The Communications Decency Act of 1996 Meets the Closed Frontier*, THE VOLOKH CONSPIRACY (June 8, 2010, 12:15 PM), http://www.volokh.com/2010/06/08/the-communications-decency-act-of-1996-meets-the-closed-frontier/ (noting that "many think that [§ 230] has run its course" and believe that "the Internet has matured and no longer needs a special exemption from offline law").

140. Meanwhile, there are some signs that plaintiffs could use an inducement theory to escape CDA § 230 immunity without the addition of a new, revenge porn-specific exception, though such an approach does not yet appear to have caught on. This theory originates from *MGM Studios Inc. v. Grokster*, where the Supreme Court held that the distributor of peer-to-peer file-sharing software could be held liable for inducing copyright infringement as a result of the distributor's promotion of the infringing use. 545 U.S. 913 (2005). For an application of this theory, see Zharkovsky, *supra* note 116, at 229–30 (suggesting the application of the Ninth Circuit's *Roommates.com* analysis to hold websites liable). *See also* Eric Goldman, *Two 47 USC 230 Defense Losses—StubHub and Alvi Armani Medical*, TECH. & MKTG. L. Blog (Apr. 29, 2009), http://blog.ericgoldman.org/archives/2009/04/two_47_usc_230.htm (describing NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009) as "the first case to expressly link the *Grokster* 'inducement' standard with a possible 230 exclusion"); Zac Locke, *Asking for It: A* Grokster*-Based Approach to Internet Sites That Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151 (2008) (arguing for the application of the *Grokster* inducement test to the CDA).

141. *See supra* Section I.C.

142. *See supra* notes 61–62 and accompanying text.

Nevertheless, IIED achieves the overarching goal of punishing revenge porn uploaders and addresses the harms caused by revenge porn[143] without the need for new law. The use of IIED also provides courts with relevant precedent to rely on in balancing constitutional rights and victims' interests rather than needlessly requiring that courts trudge a new and uncertain path. The act of sharing private intimate media without consent reflects a broader societal problem that reaches beyond the Internet, and it should be addressed as such through the existing tort of IIED.

IV. CONCLUSION

Revenge porn is a difficult issue to address. It is troublesome to suggest that victims ought to continue to be limited to the costly and difficult civil remedies already available when it is easy to empathize with the ramifications of revenge porn in victims' lives. Nevertheless, regulatory panic is an inappropriate response and serves to unacceptably perpetuate unwarranted internet exceptionalism. The existing legal framework already provides an appropriate, flexible cause of action that is suitable for revenge porn cases—IIED. It may be time to evaluate the appropriateness of § 230 in general, but that process is one that should consider the statute's purpose and the Internet's maturity as a whole, rather than haphazardly chipping away at the immunity it offers as a knee-jerk reaction to a difficult, emotionally charged problem.

143. *See supra* note 123.

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