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Chapters 859 & 863: Model Revenge Porn Legislation or Merely a Work in Progress?

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Chapters 859 & 863: Model Revenge Porn Legislation or Merely a Work in Progress?

Michelle Daniels

Code Sections Affected

- Civil Code § 1708.85 (new).
- AB 2643 (Wieckowski); 2014 STAT. Ch. 859.
- Penal Code § 647 (amended).
- SB 1255 (Cannella); 2014 STAT. Ch. 863.

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I. INTRODUCTION

In October 2011, Kayla Laws took pictures of herself posing in her mirror at home and forwarded them to her e-mail account.¹ One of the photos exposed her left breast.² Kayla, an aspiring actress and part-time waitress living in Los Angeles, did not share the photographs with anyone.³ On January 1, 2012, Kayla's e-mail account was hacked.⁴ Nine days later, she learned that someone had posted the photo showing her breast on the website IsAnyoneUp.com.⁵

Hunter Moore, a resident of Woodland, California, created IsAnyoneUp.com in 2010.⁶ Moore's website allowed individuals to submit sexually explicit photos of others and enabled viewers to make rude and insulting comments about the individuals in the images.⁷ What set IsAnyoneUp.com apart from other such websites is that Moore often included the depicted person's social media profiles—including the person's name, profession, and residence—next to the images.⁸ Moore encouraged his followers to harass depicted individuals by contacting the individuals's families, friends, and employers.⁹ Moore admitted to Nightline that the purpose of his website was to publicly humiliate his victims and claimed that his profession was ruining lives.¹⁰ In another interview, he expressed little concern about individuals killing themselves over the images on his website and pointed out how much money he would earn as a result of the increased traffic to his site.¹¹

1. Charlotte Laws, *I've Been Called the "Erin Brockovich" of Revenge Porn, and for the First Time Ever, Here Is My Entire Uncensored Story of Death Threats, Anonymous and the FBI*, XOJANE (Nov. 21, 2013, 11:00 AM), <http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn> (on file with the *McGeorge Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Notorious 'Revenge' Pornster Charged with Hacking*, KCRA (Jan. 23, 2014, 9:06 PM), <http://www.kcra.com/news/2-california-men-charged-with-hacking-email-porn/24084374#!bAB7tC> (on file with the *McGeorge Law Review*).

7. Emily Greenhouse, *The Downfall of the Most Hated Man on the Internet*, NEW YORKER (Jan. 28, 2014), <http://www.newyorker.com/tech/elements/the-downfall-of-the-most-hated-man-on-the-internet> (on file with the *McGeorge Law Review*); Neal Karlinsky et al., *FBI Investigates 'Revenge Porn' Website Founder*, ABC NEWS (May 22, 2012), <http://abcnews.go.com/Technology/fbi-investigates-revenge-porn-website-founder/story?id=16405425> (on file with the *McGeorge Law Review*).

8. Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113> (on file with the *McGeorge Law Review*).

9. Carole Cadwalladr, *Charlotte Laws' Fight with Hunter Moore, the Internet's Revenge Porn King*, OBSERVER (Mar. 29, 2014), <http://www.theguardian.com/culture/2014/mar/30/charlotte-laws-fight-with-internet-revenge-porn-king> (on file with the *McGeorge Law Review*).

10. Karlinsky, *supra* note 7.

11. Camille Doder, *Hunter Moore Makes a Living Screwing You*, VILLAGE VOICE (Apr. 4, 2012), <http://www.villagevoice.com/2012-04-04/news/revenge-porn-hunter-moore-is-anyone-up/full> (on file with the *McGeorge Law Review*).

As news of Kayla's picture spread, Kayla learned she might lose her job.¹² Additionally, some of Kayla's friends began distancing themselves from her, believing she voluntarily posted the photo.¹³ Kayla was also worried about the reaction of her then boyfriend, who was very conservative.¹⁴ Kayla's mother, Charlotte Laws, worked tirelessly to get Kayla's picture removed from Moore's site and became a well-known California advocate for nonconsensual pornography victims in the process.¹⁵ Laws' persistence led to an FBI investigation, culminating in the arrest of Moore and an alleged accomplice in January 2014 for multiple counts of aggravated identity theft and unlawful access to a computer to obtain information.¹⁶

Revenge porn is "the non-consensual publication online of explicit images."¹⁷ Revenge porn most often results from an individual posting sexually explicit images of a former partner online after the relationship ends badly, but the term also encompasses other forms of nonconsensual pornography.¹⁸ For instance, of the individuals Charlotte Laws contacted whose images Moore posted on IsAnyoneUp.com, only 36% percent believed that their exes might have submitted the photos.¹⁹ Of the women contacted, 40% claimed that they had been hacked and 12% claimed that someone had altered the images to attach their faces to other people's nude bodies.²⁰ A survey by the Cyber Civil Rights Initiative found that 49% of victims are harassed by people who saw images of them online.²¹ "At least 3,000 porn websites around the world feature the revenge genre, and the number is rising."²² Victims of revenge porn experience serious consequences, including harassment, breakups, and lost jobs; some victims even resort to suicide as a result.²³

12. Cadwalladr, *supra* note 9.

13. *Id.*

14. *Id.*

15. Greenhouse, *supra* note 7; Laws, *supra* note 1.

16. Lisa Vaas, *Revenge-Porn King Hunter Moore Indicted on 7 Counts of Aggravated Identity Theft*, NAKED SECURITY (Jan. 27, 2014), <http://nakedsecurity.sophos.com/2014/01/27/revenge-porn-king-hunter-moore-indicted-on-7-counts-of-aggravated-identity-theft> (on file with the *McGeorge Law Review*).

17. *Misery Merchants*, ECONOMIST (Jul. 5, 2014), <http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be> (on file with the *McGeorge Law Review*).

18. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014) (indicating that "revenge porn" and "nonconsensual pornography" have become synonymous and include the nonconsensual distribution of images taken with or without consent).

19. Laws, *supra* note 1.

20. *Id.*

21. *Revenge Porn by the Numbers*, END REVENGE PORN (Jan. 3, 2014), <http://www.endrevengeporn.org/revenge-porn-infographic> (on file with the *McGeorge Law Review*). The Cyber Civil Rights Initiative is a non-profit organization dedicated to assisting victims of cyber harassment and advocating for legislation that addresses online harassment. *Our Mission*, CYBER CIV. RTS. INITIATIVE, <http://www.cybercivilrights.org> (last visited Sept. 1, 2014) (on file with the *McGeorge Law Review*).

22. *Misery Merchants*, *supra* note 17.

23. *Id.*

In 2013, California became the second state to enact legislation criminalizing revenge porn.²⁴ The author of the legislation, Senator Anthony Cannella, recognized that there were flaws in the final version of the law, but believed it raised awareness of revenge porn and that more could be done in the future.²⁵ With Chapter 863, Senator Cannella intends to strengthen California's law against revenge porn to provide more protection for victims.²⁶ Separately, Assembly Member Bob Wieckowski authored Chapter 859 to create a specific civil remedy for victims of revenge porn.²⁷

II. LEGAL BACKGROUND

Federal law does not explicitly address revenge porn.²⁸ In spite of this, victims and federal prosecutors can use existing federal criminal and civil laws to pursue perpetrators of revenge porn.²⁹ However, section 230 of the Communications Decency Act makes it difficult to prosecute websites hosting revenge porn because it provides such websites with immunity for third party content so long as the content does not violate federal law.³⁰

Prior to October 2013, California law also only provided victims with criminal and civil remedies not designed for revenge porn cases.³¹ With the

24. 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> (on file with the *McGeorge Law Review*).

25. *Id.*

26. Press Release, Anthony Cannella, Senator, Cal. State Senate, Cannella Legislation to Strengthen Revenge Porn Unanimously Approved by State Senate (May 27, 2014), *available at* <http://district12.cssrc.us/content/cannella-legislation-strengthen-revenge-porn-unanimously-approved-state-senate> (on file with the *McGeorge Law Review*).

27. Press Release, Bob Wieckowski, Assembly Member, Cal. State Assembly, State Assembly Passes Wieckowski Bill to Create a Civil Remedy for Revenge Porn Victims (May 19, 2014), *available at* <http://asmdc.org/members/a25/news-room/press-releases/state-assembly-passes-wieckowski-bill-to-create-a-civil-remedy-for-revenge-porn-victims> (on file with the *McGeorge Law Review*).

28. Sula Kim, *Revenge Porn Victims Fight Back*, WDSU (May 13, 2014, 10:00 PM), <http://www.wdsu.com/news/local-news/new-orleans/revenge-porn-victims-fight-back/25953994#!bANj8L> (on file with the *McGeorge Law Review*). California Representative Jackie Speier is currently working on a federal bill addressing revenge porn. Lucia Graves, *Revenge Porn is Still Legal in Most of America*, NAT'L. J. (Jul. 1, 2014), <http://www.nationaljournal.com/politics/revenge-porn-is-still-legal-in-most-of-america-20140701> (on file with the *McGeorge Law Review*).

29. See 18 U.S.C. § 1028 (2012) (criminalizing identify theft); *Id.* § 1801 (2012) (criminalizing voyeurism); *Id.* 2261A(2) (2012) (criminalizing cyberstalking); 17 U.S.C. § 102–22 (2012) (protecting copyrights).

30. 47 U.S.C. § 230 (2012); Steven Nelson, *Federal 'Revenge Porn' Bill Will Seek to Shriveled Booming Internet Fad*, U.S. NEWS & WORLD REP. (Mar. 26, 2014, 6:01 PM), <http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shriveled-booming-internet-fad> (on file with the *McGeorge Law Review*).

31. 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/caferevenge-porn-is-awful-but-the-law-against-it-is-worse> (on file with the *McGeorge Law Review*); see also CAL. PENAL CODE § 646.9 (West 2010) (criminalizing stalking); *id.* § 647(j)(1)–(3) (criminalizing several types of voyeurism); RESTATEMENT (SECOND) OF TORTS § 46 (1965) (identifying the tort of intentional infliction of emotional distress); RESTATEMENT (SECOND) OF

enactment of Senator Canella's legislation in October 2013, California passed its first law directly addressing the problem of revenge porn.³² Although this may have been a step in the right direction, advocates for victims of revenge porn argued it was not strong or broad enough to provide adequate relief.³³ Following California's enactment of Chapter 466 in 2013, many other states have recently passed criminal laws intended to combat revenge porn.³⁴

A. Federal Criminal Remedies

If victims of revenge porn wish to pursue legal remedies in federal court, they must creatively use existing laws that criminalize, among other things, identity theft, cyberstalking, and voyeurism.³⁵ Identity theft includes the knowing transfer, possession, or use of the identification of another while committing a federal crime or a state crime that constitutes a felony.³⁶ In a study conducted by the Cyber Civil Rights Initiative, over 50% of revenge porn victims reported that their name and social network profile appeared online with their images, and over 20% reported that their e-mail addresses and phone numbers appeared with their images.³⁷ Consequently, if an individual posts identifying information on a revenge porn website while committing another federal crime, such as cyberstalking, it is possible for prosecutors to charge the offender with identity theft.³⁸ Additionally, if someone hacks into a phone or computer to obtain an intimate image or identifying information and posts this material online while committing one or more enumerated felonies, a prosecutor could charge this individual with aggravated identity theft.³⁹

Under certain circumstances, prosecutors charge individuals posting revenge porn with cyberstalking.⁴⁰ Cyberstalking occurs when an individual intentionally

TORTS §§ 652A–652E (1977) (identifying invasion of privacy torts).

32. 2013 Cal. Legis. Serv. ch. 466, § 1, at 4035 (amending CAL. PENAL CODE § 647); Julia Dahl, "Revenge Porn" Law in California Is 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> (on file with the *McGeorge Law Review*).

33. Dahl, *supra* note 32.

34. See *infra* Part II.G (discussing legislation passed by other states).

35. See 18 U.S.C. § 1028 (2012) (criminalizing identify theft); *Id.* § 1801 (criminalizing voyeurism); *Id.* 2261A(2) (criminalizing cyberstalking);

36. *Id.* § 1028(a)(7).

37. See Citron & Franks, *supra* note 18, at 350–51 (describing the results of the study).

38. See Indictment, United States v. Sayer, 748 F.3d 425 (1st Cir. 2014) (No. 2:11-cr-113-DBH) (indicting defendant Shawn Sayer with one count of cyberstalking and one count of identity theft).

39. See 18 U.S.C. § 1028A(a)(1) (2012) (defining aggravated identity theft as "knowingly transfer[ing], possess[ing], or us[ing], without lawful authority, a means of identification of another person" during the commitment of one of the felonies listed in 18 U.S.C. 1028A(c), which include theft and fraud); see also Indictment, United States v. Moore, No. CR13-0917 (C.D. Cal. Dec. 20, 2013) (indicting defendants Hunter Moore and Charles Evens for multiple counts of conspiracy, unauthorized access to protected computers to obtain information, aggravated identity theft, and aiding and abetting and causing acts to be done).

40. See Indictment, United States v. Sayer, 748 F.3d 425 (1st Cir. 2014) (No. 2:11-cr-113-DBH)

uses an interactive computer service or electronic communication system to act in a way that “causes, attempts to cause, or would reasonably be expected to cause substantial emotional distress” to another person, his or her immediate family, or his or her intimate partner.⁴¹ If an individual repeatedly posts revenge porn online with sufficient contact information to allow viewers to contact the person depicted and thereby causes the victim to suffer substantial emotional distress, prosecutors may charge the individual with cyberstalking.⁴²

Lastly, prosecution may be possible under the Video Voyeurism Prevention Act of 2004.⁴³ If an individual “has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy,” prosecutors can charge the individual capturing the image under the Act.⁴⁴ If an individual, including an intimate partner, captures revenge porn images, the individual could face voyeurism charges.⁴⁵ However, the Video Voyeurism Act may not apply to situations where a couple produced the image consensually with an expectation of privacy.⁴⁶

The downside of relying on existing federal criminal laws is that they do not often apply to situations involving revenge porn.⁴⁷ For instance, laws that require the defendant to intend to harass or cause emotional distress to the victim are inapplicable to those who post material for monetary or other reasons.⁴⁸ Furthermore, unless a website has violated federal criminal law, it is immune from liability for the material that others post on it.⁴⁹

(indicting defendant Shawn Sayer with one count of cyberstalking and one count of identity theft).

41. 18 U.S.C. § 2261A(2) (2012) (requiring that an individual engaging in cyberstalking must also have an “intent to kill, injure, harass, intimidate, or place under surveillance with the intent to kill, injure, harass or intimidate . . .”).

42. *See* *United States v. Sayer*, 748 F.3d 425, 428–429 (1st Cir. 2014) (recounting the defendant’s stalking and harassment of the victim by placing intimate images of the victim online with her contact information).

43. Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801 (2012).

44. 18 U.S.C. § 1801 (2012) (defining a private area as “the naked or undergarment clad genitals, pubic area, buttocks or female breast”). This law is limited to acts occurring within the maritime and territorial jurisdiction of the United States. *Id.*

45. *Id.*

46. *See id.* (requiring a lack of consent and expectation of privacy as elements of the crime); *see also* 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> (on file with the *McGeorge Law Review*) (noting that it is not clear if the Act would apply to a situation when individuals produce the image consensually, but later circulate the image without consent).

47. *See* Franks, *supra* note 46 (arguing that existing laws fail to address the majority of revenge porn cases).

48. *Id.*; MARY ANN FRANKS, DRAFTING AN EFFECTIVE “REVENGE PORN” LAW: A GUIDE FOR LEGISLATORS 3–4 (2014), available at <http://www.endrevengeporn.org/guide-to-legislation> (on file with the *McGeorge Law Review*) (arguing that laws against revenge porn should not include motive requirements because many perpetrators are not motivated by malice but by “a desire to entertain, to make money, or achieve notoriety”).

49. 47 U.S.C. § 230 (2012).

B. *The Federal Communications Decency Act*

Section 230 of the Communications Decency Act hinders the prosecution of websites that host revenge porn if the provider is not violating federal law or directly engaging in the creation of unlawful content.⁵⁰ Section 230 states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁵¹ However, this immunity does not extend to child pornography, obscenity, or copyright laws.⁵² In a recent lawsuit, revenge porn victims unsuccessfully tried to overcome section 230.⁵³ The victims argued that section 230 did not preempt their intentional tort law claims against the webhost of a revenge porn website or render the webhost immune because the First Amendment did not protect the website’s content.⁵⁴ The court held that section 230 barred the plaintiff’s claims because they were attempting to hold a publisher of website content liable.⁵⁵ Consequently, by protecting website operators, section 230 of the Communications Decency Act ensures that individuals desiring to post revenge porn have a stage upon which to do so, “even if it is defamatory, privacy invading, and harassing.”⁵⁶

C. *Federal Civil Remedies*

Victims can also sue individuals posting revenge porn and web providers hosting revenge porn under copyright laws.⁵⁷ “[O]riginal works of authorship fixed in any tangible medium of expression,” which includes photographs and videos, qualify for copyright protection.⁵⁸ According to a survey conducted by the Cyber Civil Rights Initiative, revenge porn victims create the images or videos used against them about 80% of the time.⁵⁹ Since victims create most of the content that eventually becomes revenge porn, they usually own the copyrights in

50. See *id.* § 230(c) (limiting the liability of a service provider for content provided by another); *id.* § (e)(1)–(2) (excepting violations of federal law from the protections of section 230).

51. *Id.* § 230(c)(1).

52. *Id.* § 230(e)(1)–(2).

53. See *GoDaddy.com v. Toups*, 429 S.W.3d. 752, 762 (Tex. App. 2014) (“[P]laintiffs’ claims are barred under 47 U.S.C. § 230.”).

54. *Id.* at 753.

55. *Id.* at 762.

56. Danielle Citron, *Revenge Porn and the Uphill Battle to Sue Site Operators*, CONCURRING OPINIONS (Jan. 25, 2013), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-sue-site-operators.html> (on file with the *McGeorge Law Review*).

57. See 17 U.S.C. § 102–22 (2012) (protecting copyrights); see also Lorelei Laird, *Striking Back at Revenge Porn*, A.B.A. J., Nov. 2013, at 45, 47 (noting that with no other clear legal avenue available, revenge porn victims often rely on copyright law).

58. 17 U.S.C. § 102(a).

59. Press Release, Cyber Civil Rights Initiative, Proposed CA Bill Would Fail to Protect up to 80% of Revenge Porn Victims (Sept. 10, 2013), available at http://www.cybercivilrights.org/press_releases (on file with the *McGeorge Law Review*).

these images and videos.⁶⁰ Federal law protects both published and unpublished works.⁶¹ Subject to some limitations, which generally would not apply in the context of revenge porn,⁶² victims who author their own images have exclusive rights in these works and can sue website operators for copyright infringement.⁶³

So long as a web service provider removes the copyrighted material at the request of the author,⁶⁴ it is generally not liable for material posted by a third party when the provider is not aware of the infringement.⁶⁵ If a revenge porn victim submits a signature, identification of the work, identification of the infringing material, contact information, and a statement under penalty of perjury that the use of the material is unauthorized to a service provider, the provider must quickly remove or disable access to infringing material.⁶⁶

However, copyright laws do not afford protection to all revenge porn victims.⁶⁷ If the victim did not take the picture or video, copyright law likely provides no remedy.⁶⁸ Even if the victim owns the copyright and the website provider complies with a request to remove the image, the victim may still experience little relief.⁶⁹ Websites that have reposted the images are under no obligation to take the image down until similarly notified and a request to remove the image can actually encourage the original poster and other users to submit the image to other websites.⁷⁰ Users can locate the images on websites that have not removed them by using the image search function on search engines like Google or Yahoo.⁷¹ If the victim owns the copyright and demands that a search engine disable the links to the photo, the search engine may do so, but may make a note

60. 17 U.S.C. § 201(a).

61. *Id.* § 104(a)–(b).

62. *See id.* §§ 107–22 (identifying exceptions to exclusive rights in the copyright, which include, but are not limited to, fair use, reproduction by libraries, secondary transmission of broadcasting, and reproduction for the disabled). These exceptions are primarily concerned with the use of copyrighted images for scholarship, research, and education, which makes it unlikely revenge porn would fall under any of these exceptions. *Id.*

63. *Id.* § 501.

64. *Id.* § 512(c).

65. *Id.* § 512(a)–(c).

66. *Id.* § 512(c).

67. *See* Citron & Franks, *supra* note 18, at 360 (arguing that copyright claims are only a supplemental method of relief and that the harm of revenge porn “cannot be reduced to a property claim”); Mitchell J. Matorin, *In the Real World, Revenge Porn is Far Worse Than Making It Illegal*, TALKING POINTS MEMO (Oct. 18, 2013, 6:00 AM), <http://talkingpointsmemo.com/cafe/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn> (on file with the *McGeorge Law Review*) (arguing “civil lawsuits are no remedy at all” and that trying to classify revenge porn as a copyright matter is “absurd”).

68. Citron & Franks, *supra* note 18, at 360.

69. *See* Matorin, *supra* note 67 (describing the ongoing process of trying to keep images from spreading to other sites and search results).

70. *See* Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC (Feb. 4, 2014, 1:03 PM), http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/?single_page=true (on file with the *McGeorge Law Review*) (indicating that revenge porn websites encourage users to submit photos to other websites upon receiving a request to have content removed).

71. Matorin, *supra* note 67.

of this on its search results and show users how to find information on the take down request and possibly the photo itself by linking to ChillingEffects.Org.⁷² Chilling Effects is a research project that collects and provides a searchable database of cease and desist letters and complaints about content on the internet, particularly removal requests.⁷³

D. California Criminal Law Relevant to Revenge Porn

Victims may find some relief under existing California criminal laws that do not directly involve revenge porn.⁷⁴ Under certain circumstances, district attorneys may prosecute individuals using laws relating to harassment and viewing or recording another person in an area where that person had a reasonable expectation of privacy.⁷⁵ “Any person who willfully, maliciously, and repeatedly . . . harasses another person,” while making credible threats against that person or “his or her immediate family[,] is guilty of stalking.”⁷⁶ Repeated harassment of the victim is required for prosecution under this statute, which can be problematic because an individual posting revenge porn online typically does not directly contact the victim at all, much less repeatedly.⁷⁷ California’s voyeurism laws require the offender to record another person secretly when that person has a reasonable expectation of privacy.⁷⁸ Remedies under these laws may also be unavailable for victims of revenge porn who knowingly and consensually create photos or videos.⁷⁹

Recently, the California Attorney General’s Office has begun prosecuting revenge porn website operators under identity theft and extortion laws.⁸⁰ It is a

72. *Id.*

73. *About Us*, CHILLING EFFECTS, <http://www.chillingeffects.org/pages/about> (last visited Dec. 30, 2014) (on file with the *McGeorge Law Review*).

74. *See* Reisenwitz, *supra* note 31 (listing “extortion and blackmail, child pornography, invasion of privacy, copyright infringement, voyeurism, intent and violation of the Consumer Protection Act” among the laws that revenge porn may violate); *see also* CAL. PENAL CODE § 646.9 (West 2010) (criminalizing stalking); *id.* § 647(j)(1)–(3) (West Supp. 2014) (criminalizing several types of voyeurism).

75. *See* PENAL § 646.9 (criminalizing stalking); *id.* § 647(j)(1)–(3) (criminalizing several types of voyeurism).

76. *Id.* § 646.9.

77. *Id.*; Citron & Franks, *supra* note 18, at 365–66.

78. PENAL § 647(j)(1)–(3).

79. Jessica Valenti, *It’s Still Revenge Porn When the Victim is a Man and the Picture is of His Penis*, GUARDIAN (June 26, 2014, 7:30 AM), <http://www.theguardian.com/commentisfree/2014/jun/26/revenge-porn-victim-conservative-man-penis> (on file with the *McGeorge Law Review*) (arguing that voyeurism laws do not address “consensual sharing of images that are later spread without permission”).

80. *See* Press Release, Cal. Attorney Gen., Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator (Dec. 10, 2013), *available at* <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-revenge-porn-website-operator> (on file with the *McGeorge Law Review*) (describing the charges against Kevin Christopher Bollaert); Press Release, Cal. Attorney Gen., Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Operator in Oklahoma (Feb. 14, 2014), *available at* <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-revenge-porn-operator-oklahoma> (on file with the *McGeorge Law Review*) (describing the charges against Casey E.

crime in California to willfully obtain the identifying information of another person and use it for an unlawful purpose,⁸¹ such as extortion,⁸² or to make repeated contact with someone by means of an electronic communication device with the intent to annoy or harass.⁸³ Recently, the Attorney General's Office arrested individuals who owned and operated revenge porn websites and that charged fees to revenge porn victims seeking to have their images removed.⁸⁴ However, these identity theft and extortion statutes would not apply to website operators who did not engage in extortion-like activities.⁸⁵

E. California Civil Laws Relevant to Revenge Porn

In addition to the above, revenge porn victims can utilize other civil remedies available under California law.⁸⁶ For instance, victims can sue under the tort theories of invasion of privacy and intentional infliction of emotional distress.⁸⁷ In February 2014, a California jury awarded a revenge porn victim \$250,000 based upon these claims, among others.⁸⁸ According to the attorney for the plaintiff, this was the first civil verdict in a revenge porn case in the United States.⁸⁹ However, civil suits may not help all revenge porn victims because many cannot afford to hire attorneys or are reluctant to disclose their names.⁹⁰ Additionally, most defendants would be unable to pay large damage awards, making a civil suit a waste of money and time.⁹¹

Meyering).

81. PENAL § 530.5(a).

82. *Id.* § 518–519.

83. *Id.* § 653m(b).

84. See Press Release, Cal. Attorney Gen., Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator, *supra* note 80.

85. See Citron & Franks, *supra* note 18, at 369 (suggesting operators of revenge porn sites will cease offering to remove images for a price if they risk being convicted of extortion).

86. See 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> (on file with the *McGeorge Law Review*) (arguing that remedies already exist for revenge porn victims through the torts of public disclosure of private facts and intentional infliction of emotional distress).

87. A plaintiff can sue for invasion of privacy if a person intruded upon the plaintiff's solitude, appropriated the plaintiff's name or likeness, publicly disclosed private facts about the plaintiff, or engaged in publicity that placed the plaintiff in a false light before the public. RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). If another person's "outrageous conduct intentionally or recklessly causes [a plaintiff to suffer] severe emotional distress," the plaintiff can sue for intentional infliction of emotional distress. RESTATEMENT (SECOND) OF TORTS §§ 46 (1965).

88. *Today on CLBR: Karl Kronenberger on Winning a Landmark Revenge Porn Verdict*, CYBER L. & BUS. REP. (Mar. 5, 2014), <http://cyberlawradio.wordpress.com/2014/03/05/today-on-clbr-karl-kronenberger-on-winning-a-landmark-revenge-porn-verdict> (on file with the *McGeorge Law Review*).

89. *Id.*

90. Citron & Franks, *supra* note 18, at 358–59.

91. *Id.* at 358; see also Brian Rogers, *Jury Awards \$500,000 in 'Revenge Porn' Lawsuit*, HOUSTON CHRON. (Feb. 21, 2014, 10:33 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php> (on file with the *McGeorge Law Review*) (reporting that

F. Chapter 466: California's First Attempt to Address Revenge Porn

Enacted on October 1, 2013, Chapter 466 amended the Penal Code to make revenge porn a crime in California.⁹² Under Chapter 466, an individual was guilty of a misdemeanor⁹³ if he or she recorded and distributed images showing intimate body parts of an identifiable individual when he or she agreed or understood the image would remain private.⁹⁴ The law also required that the person distributing the images do so “with the intent to cause serious emotional distress” and that the individual depicted actually suffer serious emotional distress.⁹⁵ The legislation defined “intimate body parts” to mean “any portion of the genitals,” and any portion of a woman’s “breasts below the top of the areola, that is either uncovered or visible through less than fully opaque clothing.”⁹⁶ As a misdemeanor, a violation carried a maximum punishment of six months in jail, a \$1,000 fine, or both.⁹⁷ A second violation was punishable by imprisonment for not more than one year, by a fine not more than \$2,000, or both.⁹⁸ Conviction under this section did not preclude greater punishment under any other law.⁹⁹

Critics of Chapter 466 immediately argued that the law contained too many loopholes to be effective.¹⁰⁰ In particular, Chapter 466 did not address “selfies,” which are images people record of themselves.¹⁰¹ Additionally, Chapter 466’s intent requirement was a difficult hurdle for prosecutors to overcome because intent to cause serious emotional distress can be difficult to prove without a defendant’s admission.¹⁰² Chapter 466 also did not apply to hackers who stole images, or those who did not record an image but instead redistributed it, which

a defendant in a Texas revenge porn case may never be able to pay the plaintiff the \$500,000 the jury awarded her for emotional distress).

92. See Press Release, Anthony Cannella, Senator, Cal. State Senate, Cannella Legislation to Combat Revenge Porn Signed by Governor Brown (October 1, 2013), available at <http://district12.cssrc.us/content/cannella-legislation-combat-revenge-porn-signed-governor-brown> (on file with the *McGeorge Law Review*) (announcing the enactment of Chapter 466).

93. 2013 Cal. Legis. Serv. ch. 466, § 1, at 4036 (amending CAL. PENAL CODE § 647).

94. *Id.* at 4037.

95. *Id.*

96. *Id.*

97. CAL. PENAL CODE § 19 (West 2014).

98. 2013 Cal. Legis. Serv. ch. 466, § 1, at 4038 (amending CAL. PENAL CODE § 647).

99. *Id.*

100. See Heather Kelly, *New California ‘Revenge Porn’ Law May Miss Some Victims*, CNN (Oct. 3, 2013, 6:32 AM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california> (on file with the *McGeorge Law Review*) (stating the law “has some glaring loopholes.”); Eric Goldman, *California’s New Law Shows It’s Not Easy to Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:03 PM), <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn> (on file with the *McGeorge Law Review*) (listing situations the law fails to cover).

101. Michael L. Baroni, *New “Revenge Porn” Law is Impotent*, ORANGE CNTY. LAW. (Feb. 2014), available at http://www.virtualonlineditions.com/article/_New_%E2%80%9CRevenge_Porn%E2%88%9D_Law_Is_Impotent/1620323/193946/article.html (on file with the *McGeorge Law Review*).

102. Goldman, *supra* note 100.

included operators of revenge porn websites.¹⁰³ Victims also faced challenges proving that the parties had an expectation that the image would remain private.¹⁰⁴

G. Criminal Revenge Porn Legislation in Other States

New Jersey was the first state to enact legislation that was broad enough to address revenge porn.¹⁰⁵ In 2004, New Jersey made it a felony to knowingly disclose any recording of the image of “another person whose intimate body parts are exposed or who is engaged . . . in sexual contact” without that person’s consent.¹⁰⁶ However, the individual disclosing the image can establish an affirmative defense if he or she acted with a lawful purpose and gave notice to the person depicted prior to distribution.¹⁰⁷ Advocates for the criminalization of revenge porn contend that the New Jersey statute is a “helpful model” for other states considering revenge porn legislation.¹⁰⁸ On the other hand, the exception to the statute may prevent any meaningful prosecutions if courts decide that the intent to humiliate another person is a lawful purpose.¹⁰⁹

Since California enacted Chapter 466 in October 2013, criminal revenge porn legislation has been enacted in Arizona,¹¹⁰ Colorado,¹¹¹ Delaware,¹¹² Georgia,¹¹³ Hawaii,¹¹⁴ Idaho,¹¹⁵ Maryland,¹¹⁶ New York,¹¹⁷ Pennsylvania,¹¹⁸ Utah,¹¹⁹ Virginia¹²⁰ and Wisconsin.¹²¹ The elements for each crime vary significantly from state to

103. Baroni, *supra* note 101.

104. Goldman, *supra* note 100.

105. Citron & Franks, *supra* note 18, at 371.

106. N.J. STAT. ANN. § 2C:14-9(c) (West 2005).

107. *Id.* § 2C:14-9(d).

108. See, e.g., Danielle Keats Citron, ‘Revenge Porn’ Should Be a Crime in U.S., CNN (Jan. 16, 2014, 3:49 PM), <http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn> (on file with the *McGeorge Law Review*).

109. See Mark Bennett, *Is New Jersey’s Revenge Porn Statute Constitutional?*, BENNETT & BENNETT BLOG (Oct. 16, 2013), <http://blog.bennettandbennett.com/2013/10/is-new-jerseys-revenge-porn-statute-constitutional.html> (on file with the *McGeorge Law Review*) (arguing that embarrassing another is a lawful purpose).

110. ARIZ. REV. STAT. ANN. § 13-1425 (Supp. 2014).

111. COLO. REV. STAT. ANN. § 18-7-107 (Supp. 2014).

112. DEL. CODE ANN. tit. 11, § 1335 (West, Westlaw through 79 Laws 2014, ch. 443).

113. GA. CODE ANN. § 16-11-90 (West Supp. 2014).

114. HAW. REV. STAT. § 711-1110.9 (LexisNexis Supp. 2014).

115. IDAHO CODE ANN § 18-6609 (West, Westlaw through the 2014 Second Reg. Sess. of the 62nd Idaho Leg.).

116. MD. CODE ANN., CRIM. LAW. § 3-809 (LexisNexis Supp. 2014).

117. N.Y. PENAL LAW § 250.45 (West, Westlaw through L.2014, chapters 1 to 550).

118. 18 PA. CONS. STAT. ANN. § 3131 (West Supp. 2014).

119. UTAH CODE ANN. § 76-5b-203 (West, Westlaw through 2014 Gen. Sess.).

120. VA. CODE ANN. § 18.2-386.2 (2014).

121. WIS. STAT. § 942.09 (2013–2014).

state.¹²² Due to recent public attention, it is likely that in the future more states will enact statutes addressing revenge porn.¹²³

III. CHAPTERS 859 & 863

Chapter 863 primarily amends the Penal Code to broaden the scope of the prohibition against revenge porn to include nonconsensual distribution of sexually explicit images that victims may have taken of themselves.¹²⁴ Chapter 859, introduced by Assembly Member Bob Wieckowski, provides revenge porn victims with a civil cause of action through which they may obtain injunctive relief.¹²⁵

A. Penal Code Amendments

Pursuant to Chapter 863, a person who intentionally distributes an image of an identifiable person engaging in various sexual acts¹²⁶ or with an intimate body part exposed¹²⁷ is guilty of a misdemeanor if the parties had previously agreed or understood that the image would remain private.¹²⁸ A violation of Chapter 863 requires that the distributor of the image “know[] or should know that distribution of the image will cause serious emotional distress” and the person depicted must actually suffer such distress.¹²⁹ An individual is not in violation of Chapter 863 if he or she distributes the image while “reporting unlawful activity,” complying “with a subpoena or court order,” or participating in “a lawful public proceeding.”¹³⁰

B. Civil Code Enactment

Chapter 859 creates a private cause of action against “a person who intentionally distributes by any means” an image of another, without consent, if

122. See *supra* notes 110–121.

123. See *Misery Merchants*, *supra* note 17 (indicating that lawmakers worldwide are trying to draft laws to combat revenge porn).

124. Compare CAL. PENAL CODE § 647(j)(4)(A) (amended by Chapter 863), with 2013 Cal. Legis. Serv. ch. 466, § 1, at 4037 (amending CAL. PENAL CODE § 647).

125. CIV. § 1708.85 (enacted by Chapter 859).

126. PENAL § 647(j)(4)(A) (enacted by Chapter 863) (defining sexual acts as the “act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates”).

127. *Id.* § 647(j)(4)(A) (amended by Chapter 863). An intimate body part is defined as “any portion of the genitals, the anus and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.” *Id.* § 647(j)(4)(C) (enacted by Chapter 863).

128. *Id.* § 647(j)(4)(A)–(B) (amended by Chapter 863) (explaining that intentional distribution occurs when an individual “personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image”).

129. *Id.* § 647(j)(4)(A) (amended by Chapter 863).

130. *Id.* § 647(j)(4)(D) (amended by Chapter 863).

the distributor knew the person depicted had a reasonable expectation that the image would remain private.¹³¹ The distributed material must expose “an intimate body part of the other person, or show[] the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration” and the depicted person must suffer from general or special damages.¹³² The individual distributing the material is not liable if: (1) the person depicted in the material agreed or otherwise intended the material for public use and distribution;¹³³ (2) the individual in possession had permission to distribute the material;¹³⁴ (3) the person depicted had no expectation of privacy in the material because he or she made it publicly accessible;¹³⁵ (4) the material is a matter of public concern;¹³⁶ (5) there was no reasonable expectation of privacy because the material was produced in a public place;¹³⁷ or (6) another person previously distributed the material.¹³⁸ A plaintiff can seek a temporary restraining order, preliminary injunction, or permanent injunction ordering the defendant to stop distributing the material.¹³⁹ Chapter 859 also allows a plaintiff to file an action under a pseudonym and exclude or redact identifying characteristics from filed documents.¹⁴⁰

IV. ANALYSIS OF CHAPTERS 859 & 863

While Chapters 859 and 863 provide greater protection against revenge porn in California,¹⁴¹ but they will not afford protection to all victims.¹⁴² Additionally, the constitutionality of such laws must be considered.¹⁴³ Laws against revenge

131. Civ. § 1708.85(a) (enacted by Chapter 859).

132. *Id.* The new statute defines intimate body part as “any portion of the genitals, and, in the case of a female . . . any portion of the breast below the top of the areola, that is uncovered or visible through less than fully opaque clothing. *Id.* § 1708.85(b) (enacted by Chapter 859). California law defines general damages as “damages for loss of reputation, shame, mortification and hurt feelings” and special damages as all damages “suffered in respect to . . . property, business trade, profession or occupation, including such amounts of money” the plaintiff has expended as result of the alleged act. *Id.* § 48a(4) (West 2007).

133. *Id.* § 1708.85(c)(1) (enacted by Chapter 859).

134. *Id.* § 1708.85(c)(2) (enacted by Chapter 859).

135. *Id.* § 1708.85(c)(3) (enacted by Chapter 859).

136. *Id.* § 1708.85(c)(4) (enacted by Chapter 859).

137. *Id.* § 1708.85(c)(5) (enacted by Chapter 859).

138. *Id.* § 1708.85(c)(6) (enacted by Chapter 859).

139. *Id.* § 1708.85(d) (enacted by Chapter 859). Chapter 859 does not modify the “rights, obligations, or immunities of an interactive service provider under Section 230 of Title 47 of the United States Code. . . . or preclude a plaintiff from [seeking] any other available remedy. *Id.* § 1708.85(h) (enacted by Chapter 859).

140. *Id.* § 1708.85(d), (f) (enacted by Chapter 859) (explaining that an identifying characteristic “includes, but is not limited to, name or any part thereof, address or any part thereof, city or unincorporated area of residence, age, marital status, relationship to defendant, and race or ethnic background”).

141. *See infra* Part IV.A (discussing the additional protections that Chapters 859 and 863 provide for victims of revenge porn).

142. *See infra* Part IV.B (discussing difficulties some victims may face in seeking remedies under Chapters 859 and 863).

143. *See infra* Part IV.C.1 (discussing First Amendment law and its application to revenge porn as

porn inhibit speech,¹⁴⁴ but courts may conclude that the First Amendment does not protect revenge porn as rigorously as other forms of speech.¹⁴⁵ Defendants and free speech proponents will likely challenge the constitutionality of Chapter 863 under the First Amendment, and it is unclear whether Chapter 863 will survive such scrutiny.¹⁴⁶ Chapter 859, on the other hand, may go unchallenged due to its narrow scope.¹⁴⁷

A. *Chapters 859 and 863 Provide Victims with More Protection*

Chapter 863 broadens the language codified by Chapter 466 to offer protection to a wider range of victims.¹⁴⁸ Chapter 863 deletes the requirement that the person engaging in revenge porn take the video or picture, making the law applicable to images taken by the victim.¹⁴⁹ Since the majority of revenge porn cases involve selfies, Chapter 863 protects significantly more victims than Chapter 466.¹⁵⁰ Additionally, Chapter 863 removes the requirement that the person posting the images intend to cause the victim serious emotional distress.¹⁵¹ Now, prosecutors need only prove that the defendant knew or should have known that the posting of the image would cause serious emotional distress.¹⁵² This change will make it easier for prosecutors to convict individuals engaging in revenge porn.¹⁵³

speech).

144. Reisenwitz, *supra* note 31.

145. *See infra* Part IV.C.1 (discussing First Amendment law and its application to revenge porn as speech).

146. *See infra* Part IV.C.2 (discussing the components of Chapter 863 that will raise constitutional questions).

147. *See infra* Part IV.C.3 (discussing why Chapter 859 is unlikely to be a target for a constitutional challenge).

148. *Compare* 2013 Cal. Legis. Serv. ch. 466, § 1, at 4037 (amending CAL. PENAL CODE § 647), with CAL. PENAL CODE § 647(j)(4)(A) (amended by Chapter 863); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1255, at 4 (June 24, 2014) (describing the changes Chapter 863 makes to California Penal Code section 647),

149. *Compare* 2013 Cal. Legis. Serv. ch. 466, § 1, at 4037 (amending CAL. PENAL CODE § 647), with PENAL § 647(j)(4)(A) (amended by Chapter 863); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1255, at 4 (June 24, 2014) (describing the changes Chapter 863 makes to California Penal Code section 647).

150. Press Release, Anthony Cannella, Senator, Cal. State Senate, Cannella Legislation to Strengthen Revenge Porn Unanimously Approved by State Senate (May 27, 2014), *available at* <http://district12.cssrc.us/content/cannella-legislation-strengthen-revenge-porn-unanimously-approved-state-senate> (on file with the *McGeorge Law Review*).

151. *Compare* 2013 Cal. Legis. Serv. ch. 466, § 1, at 4037 (amending CAL. PENAL CODE § 647), with PENAL § 647(j)(4)(A) (amended by Chapter 863); *see also* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1255, at 4 (June 24, 2014) (describing the changes Chapter 863 makes to California Penal Code section 647).

152. CAL. PENAL CODE § 647(j)(4) (amended by Chapter 863).

153. *See* 21 AM. JUR. 2D *Criminal Law* §§ 118–19 (2008) (indicating that with a general intent crime, the prosecution only needs to prove that the defendant intended to commit the act whereas with a specific intent crime, the prosecution must prove not only that the defendant intended to commit the act, but also intended to

Chapter 859 provides revenge porn victims with a clear, specific civil remedy, unlike other claims under existing tort law.¹⁵⁴ The law allows victims to obtain preliminary or permanent injunctions preventing the defendant from continuing to distribute the images.¹⁵⁵ In addition, Chapter 859 permits a victim to file an action under a pseudonym so that he or she can avoid further embarrassment and attacks that may otherwise occur from the increased public attention created by a lawsuit.¹⁵⁶ Victims pursuing a civil remedy also do not need to prove severe emotional harm; instead, victims only need to prove they have suffered damage to their “property, business, trade, profession or occupation” or that they should receive damages for “loss of reputation, shame, mortification, or hurt feelings.”¹⁵⁷ The California Partnership to End Domestic Violence believes that Chapter 859 “empowers victims with an option for getting the images out of the public eye as quickly as possible.”¹⁵⁸

B. Chapters 859 and 863 May Not Protect All Victims

Although Chapter 863 strengthens California’s law against revenge porn, it does not address all of the concerns advocates for revenge porn victims had with Chapter 466.¹⁵⁹ For instance, Chapter 863 still requires the victim to prove he or she has suffered serious emotional distress.¹⁶⁰ Prosecutors and victims may find that difficult to prove.¹⁶¹ Chapter 863 also does not change the requirement that the person depicted in the images be identifiable, which is a term that is not defined and will leave victims who are considered “unidentifiable” without a clear remedy.¹⁶² Additionally, a conviction under Chapter 863 remains a misdemeanor.¹⁶³ In comparison, some states that have recently criminalized

achieve an additional consequence or purpose).

154. Press Release, Bob Wieckowski, Assembly Member, Cal. State Assembly, Assembly Judiciary Committee Passes Bill on Non-Consensual Distribution of Intimate Images (Apr. 22, 2014), available at <http://asmdc.org/members/a25/news-room/press-releases/assembly-judiciary-committee-passes-bill-on-non-consensual-distribution-of-intimate-images> (on file with the *McGeorge Law Review*).

155. CIV. § 1708.85(d) (enacted by Chapter 859).

156. *Id.* § 1708.85(f) (enacted by Chapter 859); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2643, at 6–8 (June 17, 2014).

157. CIV. § 1708.85(a) (enacted by Chapter 859); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2643, at 5–6 (June 17, 2014).

158. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2643, at 5 (June 17, 2014).

159. See Citron & Franks, *supra* note 18, at 374–75 (2014) (criticizing Chapter 466 for: (1) requiring the defendant to intend to cause serious emotional distress, (2) requiring the victim to suffer serious emotional distress, and (3) having a weaker penalty than those in other states).

160. PENAL § 647(j)(4)(A) (amended by Chapter 863).

161. See Baroni, *supra* note 101 (“Tears or general depression won’t be enough to prove ‘serious’ emotional harm.”).

162. PENAL § 647(j)(4)(A) (amended by Chapter 863).

163. Compare 2013 Cal. Legis. Serv. ch. 466, § 1, at 4036 (amending CAL. PENAL CODE § 647), with PENAL § 647 (amended by Chapter 863) (indicating that all violations of section 647 result in a misdemeanor); see also PENAL § 19 (West 2014) (explaining that the punishment for a misdemeanor can be up to a year in jail, a fine of up to \$1,000, or both).

revenge porn have made the crime a felony and instituted potentially significantly longer prison terms and larger fines than California.¹⁶⁴

The bill that would ultimately become Chapter 859 offered significantly stronger civil remedies for revenge porn victims when it was first introduced.¹⁶⁵ The initial bill did not require the person depicted to prove that he or she had a reasonable expectation of privacy when the image was taken, nor was the plaintiff required to prove that he or she suffered damages.¹⁶⁶ The American Civil Liberties Union (ACLU) objected to these terms, prompting changes.¹⁶⁷ Later revisions also relieved a defendant of liability if another individual had previously distributed the material, thereby protecting those who obtain an image online and distribute it elsewhere without any awareness that someone initially posted it without consent.¹⁶⁸ While these changes will help protect First Amendment rights, they also create greater hurdles for plaintiffs to overcome in order to prevail against individuals posting revenge porn.¹⁶⁹

C. Do Revenge Porn Laws Violate the First Amendment?

Organizations like the ACLU, Electronic Frontier Foundation, and other free speech advocates argue that laws addressing revenge porn, particularly those criminalizing revenge porn, may violate the First Amendment.¹⁷⁰ However, revenge porn may be a category of speech that the First Amendment does not protect.¹⁷¹ Therefore, a carefully crafted statute addressing revenge porn may be constitutional.¹⁷² While it appears likely that Chapter 863 will face constitutional

164. See Citron & Franks, *supra* note 18, at 374 (criticizing the weaker penalties of the California law compared with those of other states). A violation of the Arizona statute against revenge porn is a class five felony, unless the person depicted is recognizable, in which case it is a class four felony. ARIZ. REV. STAT. ANN. § 13-1425 (2014). For a first-time offender in Arizona, a class 5 felony has a maximum prison sentence of two years, and a class four felony has a maximum sentence of three years. ARIZ. REV. STAT. ANN. § 13-702 (2010). Violation of the Hawaiian law against revenge porn is a class C felony, which is punishable by a fine up to \$10,000, and a maximum prison sentence of five years. HAW. REV. STAT. § 711-1110.9 (1993); *id.* §§ 706-640, 706-660 (1993). A violation of the revenge porn law in Idaho is a felony. IDAHO CODE ANN § 18-6609 (West, Westlaw through the 2014 Second Reg. Sess. of the 62nd Idaho Leg.), Violation of said law is punishable by a maximum fine of \$50,000 or imprisonment up to five years or both. *Id.* § 18-112 (2004).

165. Compare AB 2643, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (as introduced on Feb. 21, 2014, but not enacted), with CAL. CIV. CODE § 1708.85 (enacted by Chapter 859).

166. AB 2643, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (as introduced on Feb. 21, 2014, but not enacted).

167. See ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2643, at 7–8 (Apr. 22, 2014) (discussing the concerns of the ACLU).

168. Compare AB 2643, 2014 Leg., 2013–2014 Sess. (Cal. 2014) (as introduced on Feb. 21, 2014, but not enacted), with CAL. CIV. CODE § 1708.85 (enacted by Chapter 859).

169. See ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2643, at 8 (Apr. 22, 2014) (describing changes made to the bill to protect First Amendment rights).

170. Jess Remington, *Should Government Ban Revenge Porn?*, REASON (Oct. 9, 2013, 1:30 PM), <http://reason.com/blog/2013/10/09/should-government-ban-revenge-porn> (on file with the *McGeorge Law Review*).

171. See *infra* Part IV.C.1 (discussing whether revenge porn is a category of unprotected speech).

172. Danielle Citron, *Squaring Revenge Porn Criminal Statutes with First Amendment Protections*,

challenges,¹⁷³ Chapter 859 may avoid similar challenges due to the specificity of its requirements and its narrow scope.¹⁷⁴

1. *Does the First Amendment Protect Revenge Porn?*

Though the First Amendment prevents the government from regulating most speech, the United States Supreme Court has established exceptions to the First Amendment's protections based on our traditions.¹⁷⁵ Courts could find that revenge porn falls within a category of speech that the First Amendment has historically not protected or protected less rigorously.¹⁷⁶

a. *First Amendment Law*

The First Amendment prohibits the government from making laws restricting the content of speech, but it does not protect all speech.¹⁷⁷ The Supreme Court has established that the First Amendment does not protect certain types of speech, such as obscenity and defamation.¹⁷⁸ The First Amendment provides less protection for obscene speech because “such utterances are no essential part of any exposition of ideas, and are of such slight social value” that any benefits of such speech are “clearly outweighed by the social interest in order and morality.”¹⁷⁹ Similarly, defamatory speech is accorded less protection because limiting such content does not threaten the open discussion of matters of public

CONCURRING OPINIONS (Oct. 13, 2013), <http://www.concurringopinions.com/archives/2013/10/squaring-revenge-porn-criminal-statutes-with-first-amendment-protections.html> (on file with the *McGeorge Law Review*); 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> (on file with the *McGeorge Law Review*).

173. See *infra* Part IV.C.2 (discussing the reasons Chapter 863 is likely to face constitutional challenges).

174. See *infra* Part IV.C.3 (discussing the reasons Chapter 859 is unlikely to face constitutional challenges).

175. See *infra* Part IV.C.1.a (discussing First Amendment law in general).

176. See *infra* Part IV.C.1.b–d (discussing whether revenge porn could fall under categories of unprotected speech like obscenity and defamation, or if it may be another type of speech traditionally unprotected by the First Amendment).

177. U.S. CONST. amend. I; *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

178. See *Miller v. California*, 413 U.S. 15, 18–19 (1973) (holding that states may regulate obscene material without offending the First Amendment); *Beauharnais v. Illinois*, 343 U.S. 250, 255–57 (1952) (stating that the prevention and punishment of libelous speech does not raise a constitutional issue). The First Amendment also does not protect other categories of speech, including incitement to unlawful action, words that are likely to produce a violent reaction, “fighting” words, and child pornography. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (confirming that states may prohibit the advocacy of a violation of law when it is directed to inciting an imminent violation of law and is likely to produce such a violation); *Feiner v. New York*, 340 U.S. 315, 320 (1951) (finding that states have the right to punish individuals for words that are “likely to produce violence in others” when there is an immediate threat to public safety); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (listing “‘fighting’ words” as a limited category of speech that states may regulate without violating the First Amendment); *New York v. Ferber*, 458 U.S. 747, 756 (1982) (finding that child pornography is not protected by the First Amendment);

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

concern.¹⁸⁰ Apart from such categories, the Court has acknowledged that it would create new exceptions to the protections of the First Amendment so long as it is persuaded that the content the state seeks to regulate is one that has traditionally been regulated.¹⁸¹ However, based on recent case law, it may be unlikely that the Court will recognize any new exceptions.¹⁸²

b. Is Revenge Porn Obscene?

Courts could find that revenge porn is obscene and thus not protected by the First Amendment.¹⁸³ In *Miller v. California*, the Supreme Court defined obscene speech as material that (1) “taken as a whole, appeals to the prurient interest” of an average person based on “contemporary community standards;” (2) describes sexual conduct “in a patently offensive way;” and (3) “taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁸⁴ The Court further clarified that individuals can only be prosecuted for disclosing obscene materials that “depict or describe patently offensive ‘hard core’ sexual conduct.”¹⁸⁵

Courts may find images showing an individual’s naked body obtained without consent satisfy the first two prongs of the Miller test.¹⁸⁶ Unlike the third prong, these prongs account for community values.¹⁸⁷ As a result, the lack of a victim’s consent could lead juries interpreting community standards to conclude the material appeals to the prurient interest and is patently offensive, satisfying the first two prongs of the *Miller* test.¹⁸⁸ However, the application of community standards may create complicated cleavages within the constitutional analysis; for example, a picture obtained without the victim’s consent may only become obscene under the *Miller* test if it contains identifying information about the victim, but it is unclear how courts and juries will apply the law to revenge porn.¹⁸⁹ The First Amendment protects pornography, and without more, nudity is

180. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

181. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012).

182. *See United States v. Stevens*, 559 U.S. 460, 469 (2010) (finding that there is no tradition of “excluding depictions of animal cruelty” from First Amendment protection).

183. *See Citron*, *supra* note 108 (arguing that courts may find nonconsensual pornography is obscene and is an unprotected form of speech).

184. *Miller v. California*, 413 U.S. 15, 24 (1973).

185. *Id.* at 27.

186. *Citron & Franks*, *supra* note 18, at 385.

187. *Pope v. Illinois*, 481 U.S. 497, 500 (1987).

188. *See Mark Bennett, A Better Revenge-Porn Statute*, BENNETT & BENNETT BLOG (Oct. 26, 2013), <http://blog.bennettandbennett.com/2013/10/a-better-revenge-porn-statute.html> (on file with the *McGeorge Law Review*) (arguing that juries may find some revenge porn patently offensive because the image was published without consent).

189. *See id.*; Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 *Loy. L.A. L. Rev.* (forthcoming 2014) (manuscript at 47), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385620 (on file with the *McGeorge Law Review*) (analogizing revenge porn to “crush videos,” which the Supreme Court has acknowledged are protected speech).

not obscene under the standards set forth in *Miller*.¹⁹⁰ Furthermore, if an image is not offensive at the time of its creation, a court is unlikely to find it becomes offensive when it is posted online without the consent of its subject.¹⁹¹ The third prong of the *Miller* test also poses a challenge because “the nonconsensual nature of the publication may imbue an image with artistic value that it otherwise wouldn’t have.”¹⁹² As a result, it is unlikely a court would conclude that revenge porn is obscene under *Miller*, and as a result, the revenge porn may receive some constitutional protections.¹⁹³

c. Is Revenge Porn Defamation?

Courts may find that revenge porn is a type of defamation, which the First Amendment provides less protection because it relates to purely private matters.¹⁹⁴ The Supreme Court has not found that tort laws, such as those describing defamation and intentional infliction of emotional distress, violate the First Amendment.¹⁹⁵ Instead, the Court has made it more difficult for plaintiffs to prevail when they are public officials or public figures, or when the speech in question constitutes a matter of public concern.¹⁹⁶ Conversely, if a plaintiff is a private person and the speech relates to private matters only, the First Amendment provides less protection and states have more latitude to regulate the speech.¹⁹⁷

Since revenge porn typically involves very private images of private persons that are unrelated to matters of public concern, revenge porn may be defamation, and as such, speech that the First Amendment does not rigorously protect.¹⁹⁸

190. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); KATHLEEN ANN RUANE, CONG. RESEARCH SERV., FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 2 (Sept. 8, 2014), available at <http://fas.org/spp/crs/misc/95-815.pdf> (on file with the *McGeorge Law Review*).

191. Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, BENNETT & BENNETT BLOG (Oct. 14, 2013), <http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional.html> (on file with the *McGeorge Law Review*).

192. *Id.*

193. *Id.*

194. *See Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 758–761 (1985) (describing the difference between public and private speech in terms of First Amendment interests).

195. *Citron & Franks*, *supra* note 18, at 382.

196. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a public official cannot recover damages for a false defamatory statement relating to his official conduct unless the official can prove it was made with actual malice). The Court also noted that its prior decisions confirm that the First Amendment protects freedom of expression regarding public matters. *Id.* at 269. *See also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that both public figures and public officials cannot recover for intentional infliction of emotional distress unless the publication contains a false factual statement made with actual malice).

197. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that so long as states do not “impose liability without fault” they have broad latitude to define their own standards of liability for defamatory false statements about a private individual whose reputation has been damaged).

198. *See Citron*, *supra* note 172 (explaining that speech regarding purely private matters is less vigorously protected because regulation of such speech does not threaten the public exchange of ideas).

However, opponents of criminalizing revenge porn contend that the Supreme Court has only made a distinction between private and public matters in civil—but not in criminal—cases.¹⁹⁹ The argument that criminal statutes against revenge porn are constitutionally permissible on the basis that revenge porn involves matters of private significance may therefore be misleading.²⁰⁰ Nevertheless, the Supreme Court has never explicitly stated that such a distinction exists between civil and criminal regulations.²⁰¹ Rather, the Court has noted that the fear of a damage award under civil law may be more inhibiting to speech than the fear of prosecution under a criminal law because criminal law provides defendants with more safeguards.²⁰² Courts may find that narrowly crafted statutes criminalizing revenge porn are just as permissible as civil statutes tackling revenge porn because they both address the private concerns of private persons.²⁰³

d. Is Revenge Porn a New Category of Speech that has Traditionally been Less Vigorously Protected by the First Amendment?

The Supreme Court has noted that there may be additional exceptions to the protections of the First Amendment that it has not yet explicitly acknowledged.²⁰⁴ However, for the Court to acknowledge the existence of an additional category of unprotected speech, the proponent must provide “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.”²⁰⁵ When recently presented with the opportunity to recognize new categories of unprotected speech, the Court has declined to do so.²⁰⁶ In *U.S. v. Stevens*, for instance, the Court considered whether the First Amendment protected videos depicting animal cruelty.²⁰⁷ Though the intent of the statute in question was to criminalize “crush videos” wherein women crushed animals to death for the benefit of “persons with a very specific sexual fetish,” the Court found that there was no tradition restricting depictions of animal cruelty.²⁰⁸

Advocates for laws against revenge porn argue that courts may recognize revenge porn as a new category of less vigorously protected speech because it

199. Bennett, *supra* note 191.

200. *Id.* (arguing that if the Supreme Court intended to apply the distinction between private and public matters to criminal statutes it would have done so in *United States v. Stevens* to find a criminal statute against animal crush videos constitutional, but did not do so).

201. Citron & Franks, *supra* note 18, at 376.

202. *Id.*

203. *See id.* at 381 (discussing the Supreme Court’s treatment of sexually explicit images as matters of private concern in prior cases).

204. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012).

205. *Id.*

206. *See id.* (finding that false statements are not a traditionally unprotected form of speech); *Brown v. Entertainment Merchants Ass’n.*, 131 S. Ct. 2729, 2736 (2011) (finding that there is no “longstanding tradition in this country of specially restricting children’s access to depictions of violence”).

207. *United States v. Stevens*, 559 U.S. 460, 468 (2010).

208. *Id.* at 465–466, 472.

violates an individual's right to privacy.²⁰⁹ The First Amendment traditionally allows states to protect an individual's right to privacy.²¹⁰ The Supreme Court has acknowledged that "[p]rivacy of communication is an important interest" and that publicizing private speech may chill future private communication.²¹¹ Since revenge porn violates the privacy of the person depicted in the image, revenge porn could fall within a category of speech that the states have traditionally regulated, which the Supreme Court has not yet explicitly recognized.²¹² However, free speech proponents contend the Supreme Court is unlikely to create any new exceptions or broaden the scope of existing exceptions to the First Amendment given its recent decisions.²¹³ Furthermore, even though revenge porn arguably invades an individual's right to privacy, revenge porn itself is a relatively new phenomenon for which there is no long history of exclusion from First Amendment protections, leaving states with a difficult "burden of proving their revenge porn criminal statutes pass constitutional muster."²¹⁴

2. Does Chapter 863 Violate the First Amendment?

Defendants and free speech advocates may claim that Chapter 863 violates the First Amendment.²¹⁵ Chapter 863 may be overbroad because it does not amend the law to provide any explicit exceptions for images that are a matter of public concern or legitimately newsworthy.²¹⁶ Without such an exception, the statute may inhibit legitimate speech, such as publishing compromising images of a political candidate running for office.²¹⁷ Even proponents of the criminalization of revenge porn acknowledge that revenge porn laws should include exceptions preventing the prosecution of those who publish images pertaining to matters of public concern.²¹⁸ However, the first step in determining whether a statute is overbroad for First Amendment purposes is for state courts to

209. See *id.* at 379 (discussing "the state interest in protecting the privacy of communications" for matters that are of no public concern).

210. See *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) ("To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition . . . [and] the publication of any information so acquired.").

211. *Bartnicki v. Vopper*, 532 U.S. 514, 532–533 (2001).

212. *Citron & Franks*, *supra* note 18, at 382.

213. Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 673, 683 (2014).

214. *Id.* at 684.

215. See Michael Smith, *The First Conviction Under California's Revenge Porn Law*, MICHAEL SMITH'S LAW BLOG (Dec. 3, 2014), <http://smithblawg.blogspot.com/2014/12/the-first-conviction-under-californias.html> (on file with the *McGeorge Law Review*) (noting that California's appellate courts will likely address First Amendment issues in upcoming cases prosecuted under California's revenge porn law).

216. CAL. PENAL CODE § 647(j)(4) (amended by Chapter 863).

217. Suzanne Choney, *'Revenge Porn' Law in California Could Pave Way for Rest of Nation*, NBC NEWS (Sept. 3, 2013, 1:34 PM), <http://www.nbcnews.com/tech/internet/revenge-porn-law-california-could-pave-way-rest-nation-f8C11022538> (on file with the *McGeorge Law Review*).

218. *Citron & Franks*, *supra* note 18, at 388.

determine how to apply the challenged statute.²¹⁹ If California courts choose to construe Chapter 863 as applying only to matters of private concern, Chapter 863 could withstand constitutional scrutiny.²²⁰ Furthermore, it is possible so few images constituting matters of public concern will fall under the category of revenge porn, that courts may not find Chapter 863 overbroad.²²¹ Regardless, the ACLU has made it clear that it does not agree with the removal of the requirement that the defendant intend to cause serious emotional distress, which will likely result in challenges on at least that basis.²²²

3. *Does Chapter 859 Violate the First Amendment?*

Chapter 859 is unlikely to face the same challenges as Chapter 863 because it is narrowly tailored to apply only to situations involving matters of private concern when the person depicted in the image had a reasonable expectation of privacy.²²³ The ACLU objected to Chapter 859 as initially introduced because it may have prohibited distribution of images obtained when there was no expectation of privacy and provided for liability when there was no showing of harm by the plaintiff.²²⁴ The bill was subsequently modified to address these concerns, and the ACLU withdrew its prior objections.²²⁵

V. CONCLUSION

Even free speech advocates who have expressed concern about the constitutionality of revenge porn legislation admit that revenge porn is a serious problem.²²⁶ Legislators in California and other states have rapidly responded to the growing problem of revenge porn by criminalizing the conduct of distributing sexually explicit images of another without consent or in situations where there was an expectation of privacy.²²⁷ Revenge porn advocates believe that

219. *United States v. Stevens*, 559 U.S. 460, 474 (2010).

220. See Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill> (on file with the *McGeorge Law Review*) (positing that a law's failure to exempt the few situations in which publishing nude photos may pertain to a matter of public concern is unlikely to make the law substantially overbroad).

221. *Id.*

222. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 1255, at 4 (June 24, 2014) (quoting the ACLU as urging for the reinstatement of the requirement that a defendant act with malicious intent).

223. CAL. CIV. CODE § 1708.85 (enacted by Chapter 859).

224. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2643, at 7–8 (April 22, 2014).

225. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2643, at 9 (June 17, 2014).

226. See Reisenwitz, *supra* note 31 (admitting that it is difficult not to sympathize with revenge porn victims).

227. See *State 'Revenge Porn' Legislation*, NAT'L CONFERENCE OF STATE LEGISLATORS (Sept. 2, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx> (on file with the *McGeorge Law Review*) (reporting that ten states have passed revenge porn legislation in 2014 alone).

criminalizing revenge porn is necessary to deter such conduct and convey an appropriate “level of social condemnation.”²²⁸ The difficulty in dealing with revenge porn is in drafting legislation that properly balances privacy rights with the right to free speech.²²⁹ Though Chapter 859 may strike the proper balance between providing victims with remedies while ensuring that legitimate speech is not restricted, Chapter 863 will likely face serious constitutional challenges.²³⁰

228. Citron & Franks, *supra* note 18, at 349.

229. 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> (on file with the *McGeorge Law Review*).

230. See Mary Adkins, *The Revenge Porn of #Twitterpurge*, SLATE (July 21, 2014, 6:04 PM), http://www.slate.com/articles/double_x/doublex/2014/07/_twitterpurge_is_revenge_porn_we_need_laws_to_stop_the_non_consensual_posting.html (on file with the *McGeorge Law Review*) (arguing that overbroad revenge porn laws “will almost certainly be challenged”).