CRIMINALIZING REVENGE PORN

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INTRODUCTION

"Jane" allowed her ex-boyfriend to photograph her naked because, as he assured her, it would be for his eyes only.[1] After their breakup, he betrayed her trust.[2] On a popular "revenge porn" site, he uploaded her naked photo along with her contact information.[3] Jane received e-mails, calls, and Facebook friend requests from strangers, many of whom wanted sex.[4]

According to the officers, nothing could be done because her ex had not violated her state's criminal harassment law.[5] One post was an isolated event, not a harassing course of conduct as required by the law.[6] Also, her ex had not threatened her or solicited others to stalk her.[7] If Jane's ex had secretly photographed her, he might

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1. One of us (Citron) spoke to "Jane" just after the post appeared online. Telephone Interview with "Jane" (May 7, 2013) [hereinafter Interview with Jane] (notes on file with Danielle Citron); Danielle Keats Citron, *"Revenge Porn" Should Be a Crime*, CNN (Jan. 16, 2014, 3:49 PM), http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/ (discussing Jane's experience).
2. Interview with Jane, *supra* note 1.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

have faced prosecution for publishing the illegally obtained image.[8] In her state, however, it was legal to publish Jane's naked photo taken with her consent even though her consent was premised on the promise the photo would remain private.[9]

Nonconsensual pornography[10] involves the distribution of sexually graphic images of individuals without their consent. This includes images originally obtained without consent (e.g., hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent, usually within the context of a private or confidential relationship (e.g., images consensually given to an intimate partner who later distributes them without consent, popularly referred to as "revenge porn"). Because the term "revenge porn" is used so frequently as shorthand for all forms of nonconsensual pornography, we will use it interchangeably with nonconsensual porn.

Publishing Jane's nude photo without her consent was an egregious privacy violation that deserves criminal punishment. Criminalizing privacy invasions is not new. In their groundbreaking article *The Right to Privacy*, published in 1890, Samuel Warren and Louis Brandeis argued that "[i]t would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law."[11]

Over the past hundred years, state and federal legislators have taken Warren and Brandeis's advice and criminalized many privacy invasions. The Privacy Act of 1974 includes criminal penalties for the disclosure of agency records containing individually identifiable information to any person or agency not entitled to receive it.[12] Federal laws against identity theft criminalize, inter alia, the transfer or use of another person's means of identification in connection with any state felony or violation of federal law.[13] Federal laws prohibit the wrongful disclosure of individually identifiable health information.[14] The federal Video Voyeurism Prevention Act of 2004 bans intentionally recording or broadcasting an image of another person in a state of undress without that

8. *Id.*

9. *Id.*

10. Nonconsensual pornography is also sometimes referred to as "revenge porn," "cyber rape," or "involuntary porn."

11. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219 (1890). Warren and Brandeis noted that possible criminal legislation could punish as a felony the publication of "any statement concerning the private life or affairs of another, after being requested in writing . . . not to publish such statement" provided the statement does not concern someone's qualifications for public office or profession or involve a matter of public interest. *Id.* at 219 n.8.

12. *See* 5 U.S.C. § 552(a)(i)(1) (2012).

13. *See generally* 18 U.S.C. § 1028 (2012).

14. *See* 42 U.S.C. § 1320d-6 (2012).

person's consent under circumstances in which the person enjoys a reasonable expectation of privacy.[15] Many state voyeurism laws criminalize the viewing or recording of a person's intimate parts without permission.[16]

Why, then, are there so few laws banning nonconsensual pornography to date? A combination of factors is at work: lack of understanding about the gravity, scope, and dynamics of the problem; historical indifference and hostility to women's autonomy; inconsistent conceptions of contextual privacy; and misunderstandings of First Amendment doctrine.

Revenge porn victims have only recently come forward to describe the grave harms they have suffered, including stalking, loss of professional and educational opportunities, and psychological damage. As with domestic violence and sexual assault, victims of revenge porn suffer negative consequences for speaking out, including the risk of increased harm.[17] We are only now beginning to get a sense of how large the problem of revenge porn is now that brave, outspoken victims have opened a space for others to tell their stories.[18] The fact that nonconsensual porn so often involves the Internet and social media, the public, law enforcement, and the judiciary sometimes struggle to understand the mechanics of the conduct and the devastation it can cause.

Our society has a poor track record in addressing harms that take women and girls as their primary targets. Though much progress has been made towards gender equality, much social, legal, and political power remains in the hands of men. The fight to recognize domestic violence, sexual assault, and sexual harassment as serious issues has been long and difficult, and the tendency to tolerate, trivialize, or dismiss these harms persists.[19] As revenge

15. 18 U.S.C. § 1801. This statute's definition of "capture" includes "broadcasting," which suggests that it could be used to apply to the nonconsensual disclosure of such images. However, the statute's jurisdiction is very limited, confined to the "the special maritime and territorial jurisdiction of the United States." *Id.*

16. See, e.g., DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY LAW FUNDAMENTALS (2d ed. 2013); Nat'l Ctr. for Prosecution of Child Abuse, *Voyeurism Statutes 2009*, NAT'L DIST. ATTORNEYS ASS'N (Mar. 2009), http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf.

17. *See, e.g.*, Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, THEGUARDIAN (Nov. 19, 2013, 7:30 AM), http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change; Holly Jacobs, *Victims of Revenge Porn Deserve Real Change*, THEGUARDIAN (October 8, 2013, 7:30 AM), http://www.theguardian.com/commentisfree/2013/oct/08/victims-revenge-porn-deserve-protection.

18. *See, generally*, Chiarini, *supra* note 17; Jacobs, *supra* note 17.

19. Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 392–95 (2009); Mary Anne Franks, *How to Feel like a Woman, or Why Punishment Is a Drag*, 61 UCLA L. REV. 566, 569–72, 580–84 (2014).

porn affects women and girls far more frequently than men and boys, and creates far more serious consequences for them, the eagerness to minimize its harm is sadly predictable.

This disregard for harms undermining women's autonomy is closely tied to idiosyncratic, dangerous views about consent with regard to sex. Some argue that a woman's consensual sharing of sexually explicit photos with a trusted confidant should be taken as wide-ranging permission to share them with the public.[20] Said another way, a victim's consent in one context is taken as consent for other contexts. That is the same kind of dangerous mentality at work in sexual assault and sexual harassment. For years, women have had to struggle with legal and social disregard of their sexual boundaries. While most people today would rightly recoil at the suggestion that a woman's consent to sleep with one man can be taken as consent to sleep with all of his friends, this is the very logic of revenge porn apologists.

Outside of sexual practices, most people recognize that consent is context-specific. Privacy regulation and best practices make clear that permitting an entity to use information in one context does not confer consent to use it in another context without the subject's permission.[21] Individual and societal expectations of privacy are tailored to specific circumstances.[22] The nonconsensual sharing of an individual's intimate photos should be no different; consent within a trusted relationship does not equal consent outside of that relationship. We should no more blame individuals for trusting loved ones with intimate images than we blame someone for trusting a financial advisor not to share sensitive information with strangers on the street.

While some of the First Amendment concerns regarding anti–revenge porn laws are valid, many of them reflect the tendency to treat sexual autonomy, especially women's sexual autonomy, as a

20. Lara Prendergast, *Revenge Porn's Ukip Poster Girl Highlights the Dangers of Digital Media*, SPECTATOR (Apr. 28, 2014, 3:00 PM), http://blogs.spectator.co.uk/coffeehouse/2014/04/revenge-porns-new-poster-girl-highlights-the-dangers-of-digital-media/ (arguing that if individuals share nude images of themselves they are doing it "with the knowledge that it may one day end up online"); Callie Millner, *Public Humiliation over Private Photos*, SFGATE, http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php (last updated Feb. 10, 2013) (quoting revenge porn site operator as saying, "When you take a nude photograph of yourself and you send it to this other person, or when you allow someone to take a nude photograph of you, by your very actions you have reduced your expectation of privacy").

21. *See generally* sources cited *supra* note 19 (discussing privacy regulations).

22. *See generally* HELEN NISSENBAUM, PRIVACY IN CONTEXT 129 (2010); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION (2007) [hereinafter SOLOVE, FUTURE OF REPUTATION]; DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 47 (2008) [hereinafter SOLOVE, UNDERSTANDING PRIVACY]; Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 923–25 (2005).

category less deserving of respect than other social values. As scholars like Frederick Schauer[23] and Neil Richards[24] have pointed out, many regulations of speech and expression proceed without any strident First Amendment objections, including fraud, trade secrets, and product labeling.

In this Article we make the case for the direct criminalization of nonconsensual pornography. Current civil law remedies, including copyright remedies, are an ineffective deterrent to revenge porn. If they were, we would likely not be witnessing the rise in reports of victimization as well as the proliferation in revenge porn websites. According to attorney Mitchell Matorin, who has represented revenge porn victims, "In the real world, civil lawsuits are no remedy at all."[25] Among the reasons that civil litigation is ineffective is the fact that even a successful suit cannot stop the spread of an image already disclosed, and most disclosers know they are unlikely ever to be sued. Most victims do not have either the time or money to bring claims, and litigation may make little sense even for those who can afford to sue if perpetrators have few assets. While perpetrators may have little fear of civil litigation or copyright claims, the threat of criminal penalties is a different matter. Since criminal convictions in most cases stay on one's record forever, they are much less likely to be ignored. While some existing criminal laws can be mobilized against revenge porn, on the whole, existing criminal laws simply do not effectively address the issue.

Criminalizing nonconsensual pornography is also appropriate and necessary to convey the proper level of social condemnation for this behavior. Given that a response from the criminal justice system is essential, we hope to help lawmakers interested in drafting such laws. We offer our suggestions for drafting revenge porn legislation that would comport with the First Amendment and Due Process concerns.

This Article will unfold as follows. Part I responds to faulty assumptions that have obscured a full view of the damage that revenge pornography inflicts. It corrects misunderstandings about consent that have prevented us from criminalizing revenge porn. Part II explores why civil law alone cannot effectively address nonconsensual pornography. Part III assesses the criminal law

23. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767–74 (2004).

24. *See* Neil Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1171 (2005).

25. *See* Mitchell A. Matorin*, In the Real World, Revenge Porn is Far Worse Than Making It Illegal*, TPM (Oct. 18, 2013, 6:00 AM), http://talkingpointsmemo.com/cafe/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn.

landscape. It discusses the deficits of current criminal law. Then, it considers current legislative proposals to prohibit revenge porn. Part IV responds to First Amendment concerns. Part V offers our recommendations.

I. MYTHS ABOUT REVENGE PORN

This Part has two objectives. The first is to debunk the notion that the harm revenge porn inflicts is trivial. Lawmakers are unlikely to mobilize against nonconsensual pornography without a full appreciation of its harms. The second goal is to tackle society's current inability to understand the contextual nature of consent when it comes to matters of sexual privacy and autonomy. Privacy law and scholarship has recognized the importance of context in evaluating consent, and social norms reflect this insight. The same should be true for matters of intimate sexual conduct.

A. Understanding Revenge Porn's Damage

In 2007, a man allegedly made numerous copies of DVDs of his ex-girlfriend performing sex acts and distributed them on random car windshields, along with the woman's name, address, and phone number.[26] He was angry that the woman had broken off their relationship.[27] The woman, who had not known that the intimate acts had been recorded, began receiving visits and phone calls from strange men who took the video as a sexual proposition.[28]

Today, intimate photos are increasingly being distributed online, potentially reaching thousands, even millions of people, with a click of a mouse. A person's nude photo can be uploaded to a website where thousands of people can view and repost it. In short order, the image can appear prominently in a search of the victim's name. It can be e-mailed or otherwise exhibited to the victim's family, employers, coworkers, and friends. The Internet provides a staggering means of amplification, extending the reach of content in unimaginable ways.

Revenge porn's serious consequences warrant its criminalization. Nonconsensual pornography raises the risk of offline stalking and physical attack. In a study of 1,244 individuals, over 50% of victims reported that their naked photos appeared next to their full name and social network profile; over 20% of victims reported that their e-mail addresses and telephone numbers

26. *Former Boyfriend Pleads No Contest over Sex DVDs*, CHESTERFIELD OBSERVER (Apr. 25, 2007), http://www.chesterfieldobserver.com/news/2007-04-25/news/009.html.

27. *Id.*

28. *Id.*

appeared next to their naked photos.[29] Posting naked images next to a person's contact information often encourages strangers to confront the person offline. Many revenge porn victims like Jane rightly worry that anonymous callers and e-mailers would follow up on their sexual demands in person.

Victims' fear can be profound. They do not feel safe leaving their homes. Jane, for example, did not go to work for days after she discovered the postings.[30] Hollie Toups, a thirty-three-year-old teacher's aide, explained that she was afraid to leave her home after someone posted her nude photograph, home address, and Facebook profile on a porn site.[31] "I don't want to go out alone," she explained, "because I don't know what might happen."[32]

Victims struggle especially with anxiety, and some suffer panic attacks. Anorexia nervosa and depression are common ailments for individuals who are harassed online.[33] Researchers have found that cyber harassment victims' anxiety grows more severe over time.[34] Victims have difficulty thinking positive thoughts and doing their work. According to a study conducted by the Cyber Civil Rights Initiative, over 80% of revenge porn victims experience severe emotional distress and anxiety.[35]

Revenge porn is often a form of domestic violence. Frequently, the intimate images are themselves the result of an abuser's coercion of a reluctant partner.[36] In numerous cases, abusers have threatened to disclose intimate images of their partners when victims attempt to leave the relationship.[37] Abusers use the threat of disclosure to keep their partners under their control, making good on the threat once their partners find the courage to leave.

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29. Cyber Civil Rights Statistics on Revenge Porn, at 2 (Oct. 11, 2013) (on file with authors) [hereinafter Revenge Porn Statistics].

30. Interview with Jane, *supra* note 1.

31. Caille Millner, *Public Humiliation over Private Photos*, SFGATE, http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php#photo-4161587 (last updated Feb. 10, 2013, 3:21 PM).

32. *Id.*

33. *Suicide Spurs Web to Regulation in South Korea*, NEWSWEEK (Oct. 14, 2008, 8:00 PM), http://www.thedailybeast.com/newsweek/2008/10/14/when-words-kill.html.

34. Matt R. Nobles et al., *Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyberstalking and Stalking Victimization Among a National Sample*, JUST. Q. 1, 20, 22–23 (2012).

35. Revenge Porn Statistics, *supra* note 29.

36. *See, e.g.*, Katie Smith, *What Revenge Porn Did to Me*, REFINERY29 (Nov. 18, 2013, 3:15 PM), http://www.refinery29.com/2013/11/57495/revenge-porn#page-2 ("But about two and a half years into the relationship, he started badgering me about making a video. He got fixated on it . . . he would ask me, 'Why don't you want to do it? Don't you trust me?' He just kept asking, and got more and more mean about it—'Don't you care about our sex life? Don't you care about things not being boring?'").

37. *See, e.g.*, Chiarini, *supra* note 7.

The professional costs of revenge porn are steep. Because Internet searches of victims' names prominently display their naked images or videos, many lose their jobs. Schools have terminated teachers whose naked pictures appeared online. A government agency ended a woman's employment after a coworker circulated her nude photograph to colleagues.[38]

Victims may be unable to find work at all. Most employers rely on candidates' online reputations as an employment screen. According to a 2009 study commissioned by Microsoft, nearly 80% of employers consult search engines to collect intelligence on job applicants, and, about 70% of the time, they reject applicants due to their findings.[39] Common reasons for not interviewing and hiring applicants include concerns about their "lifestyle," "inappropriate" online comments, and "unsuitable" photographs, videos, and information about them.[40]

Recruiters do not contact victims to see if they posted the nude photos of themselves or if someone else did in violation of their trust. The "simple but regrettable truth is that after consulting search results, employers don't call revenge porn victims to schedule" interviews or to extend offers.[41] Employers do not want to hire individuals whose search results might reflect poorly on the employer.[42]

To avoid further abuse, targeted individuals withdraw from online activities, which can be costly in many respects. Closing down one's blog can mean a loss of income and other career opportunities.[43] In some fields, blogging is key to getting a job.

38. Second Amended Complaint at 3, 8, Lester v. Mineta, No. C-04-3074 SI (N.D. Cal. Mar. 3, 2006), 2006 WL 104226 (noting violations of: (1) The Civil Rights Act of 1964; (2) The Rehabilitation Act; (3) 42 U.S.C. § 1983 (2012) (*BIVENS*); (4) 42 U.S.C. § 1985(3); and (5) 42 U.S.C. § 1986).

39. *Online Reputation in a Connected World*, JOB-HUNT 1, 3, 8 (Jan. 2010), http://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf.

40. MATT IVESTER, LOL . . . OMG! WHAT EVERY STUDENT NEEDS TO KNOW ABOUT ONLINE REPUTATION MANAGEMENT, DIGITAL CITIZENSHIP AND CYBERBULLYING 95 (2011).

41. Citron, *supra* note 1.

42. To be sure, employers refuse to interview or hire individuals for a variety of reasons, including, but not limited to, nonconsensual pornography. It cannot be denied, however, that revenge porn has a negative impact. Employers have no incentive to hire someone whose online reputation could jeopardize the esteem of clients and business partners. Their economic incentive is to attract more business. Avoiding hiring someone who could cast doubt on the firm's credibility is just smart business.

43. *See* Penelope Trunk, *Blog Under Your Real Name, and Ignore the Harassment*, PENELOPE TRUNK (July 19, 2007), http://blog.penelopetrunk.com/2007/07/19/blog-under-your-real-name-and-ignore-the-harassment (explaining that women who write under pseudonyms miss opportunities associated with blogging under their real names, such as networking opportunities and expertise associated with the author's name).

According to technology blogger Robert Scoble, people who do not blog are "never going to be included in the [technology] industry."[44] When victims shut down their profiles on social media platforms like Facebook, LinkedIn, and Twitter, they are saddled with low social media influence scores that can impair their ability to obtain employment.[45] Companies like Klout measure people's online influence by looking at their number of social media followers, updates, likes, retweets, and shares. Not uncommonly, employers refuse to hire individuals with low social media influence scores.[46]

Aside from these traditional harms, revenge porn can also amount to a degrading form of sexual harassment. It exposes victims' sexuality in humiliating ways. Victims' naked photos appear on slut-shaming[47] sites, such as Cheaterville.com and MyEx.com. Once their naked images are exposed, anonymous strangers can send e-mail messages that threaten rape. Some have said: "First I will rape you, then I'll kill you."[48] Victims internalize these frightening and demeaning messages.[49] Women would more likely suffer harm as a result of the posting of their naked images than their male counterparts. Gender stereotypes help explain why—women would be seen as immoral sluts for engaging in sexual activity, whereas men's sexual activity is generally a point of pride.[50]

While nonconsensual pornography can affect both men and women, empirical evidence indicates that nonconsensual pornography primarily affects women and girls. In a study conducted by the Cyber Civil Rights Initiative, 90% of those victimized by revenge porn were female.[51] Nonconsensual pornography, like rape, domestic violence, and sexual harassment, belongs to the category of violence that violates legal and social commitments to equality. It denies women and girls control over their own bodies and lives. Not only does it inflict serious and, in many cases, irremediable injury on individual victims, it constitutes a vicious form of sex discrimination.

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44. Ellen Nakashima, *Sexual Threats Stifle Some Female Bloggers*, WASH. POST, Apr. 30, 2007, at A1.

45. Seth Stevenson, *Popularity Counts*, WIRED, May 2012, at 120, 122.

46. *Id.* at 120–22.

47. "Slut-shaming" criticizes women for sexual activity. As noted journalist Emily Bazelon explains, slut-shaming is "retrograde, the opposite of feminist. Calling a girl a slut warns her that there's a line: she can be sexual but not *too* sexual." EMILY BAZELON, STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY 95 (2013).

48. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (forthcoming 2014) (manuscript at 20).

49. *Id.* at 21.

50. *Id.* There are exceptions, of course.

51. *See* Revenge Porn Statistics, *supra* note 29.

Revenge porn is a form of cyber harassment and cyber stalking whose victims are predominantly female.[52] The U.S. National Violence Against Women Survey reports that 60% of cyber stalking victims are women.[53] For over a decade, Working to Halt Online Abuse ("WHOA") has collected information from cyber harassment victims. Of the 3,787 individuals reporting cyber harassment to WHOA from 2000 to 2012, 72.5% were female, 22.5% were male, and 5% were unknown.[54] A victim's actual or perceived sexual orientation seems to play a role as well. Research suggests that sexual minorities are more vulnerable to cyber harassment than heterosexuals.[55]

B. The Consent Conundrum

Consensual sharing of intimate images is often done with the implied or express understanding that such images will remain confidential. As revenge porn victims have told us time and again, they shared their explicit images or permitted the naked photos to be taken because, and *only* because, their partners assured them that the explicit images would be kept confidential.

Nonetheless, the public tends to have difficulty recognizing the significance of such implied confidences in sexual contexts. Critics resist the criminalization of revenge porn on the grounds that consensual sharing in one context—a trusted relationship—translates into consent in other contexts—posting to the world. That understanding of consent not only runs against widely shared intuitions about other activities but also against the insights of privacy law and scholarship.

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52. Cyber harassment is often understood to involve the intentional infliction of severe emotional distress accomplished by online speech that is persistent enough to amount to a "course of conduct," rather than an isolated incident. CITRON, *supra* note 28, at 6. Cyber stalking has a more narrow meaning: it covers an online "course of conduct" designed to cause someone to fear bodily harm that would cause a reasonable person to fear for his or her safety. *Id.*

53. Molly M. Ginty, *Cyberstalking Turns Web Technologies into Weapons; Women Face Violence via Social Media*, OTTAWA CITIZEN, Apr. 7, 2012, at J1.

54. *Comparison Statistics 2000–2012*, WORKING TO HALT ONLINE ABUSE 1, 1 (2014), http://www.haltabuse.org/resources/stats/Cumulative2000-2012.pdf. WHOA's statistics are gleaned from individuals who contact their organization through their website. The organization's statistics are not as comprehensive as the Bureau of Justice Statistics, which sponsored a national survey of individuals who experienced offline and online stalking. According to the Bureau of Justice Statistics, an estimated 3.4 million people experienced real space stalking alone, while an estimated 850,000 individuals experienced stalking with both online and offline features. Katrina Baum et al., *Stalking Victimization in the United States*, U.S. DEP'T JUSTICE 1, 5 (2009), http://www.ovw.usdoj.gov/docs/stalking-victimization.pdf.

55. Jerry Finn, *A Survey of Online Harassment at a University Campus*, 19 J. INTERPERSONAL VIOLENCE 468, 477 (2004).

Consent to share information in one context does not serve as consent to share this information in another context. When a person gives her credit card to a waiter, she is not consenting to let the waiter use that card to make personal purchases. When a person entrusts a doctor with sensitive health information, he is not authorizing that doctor to share that information with the public. What lovers share with each other is not equivalent to what they share with coworkers, acquaintances, or employers. Consent is contextual; it is not an on/off switch.

Consent's contextual nature is a staple of information privacy law. A core teaching of the Fair Information Practice Principles is that sharing information for one purpose is not permission to share for other uses.[56] Policymakers have long recognized the importance of context to the sharing of sensitive information. Congress passed the Gramm-Leach-Bliley Act to ensure that the trust of financial institutions' customers would not be betrayed.[57] With few exceptions, financial institutions cannot share their customers' financial information with third parties.[58] Similarly, the Video Privacy Protection Act recognizes that individuals may be willing to share their preferences for certain kinds of films with their video providers but not with the world at large.[59] These laws recognize the contextual nature of consent—disclosing information to one entity does not signal consent to pass it on to others.[60]

In its recent report, "Protecting Consumer Privacy in an Era of Rapid Change," the Federal Trade Commission ("FTC") laid out best privacy practices principles for private entities.[61] A key recommendation was the recognition that a consumer's consent to share information in one context does not translate into consent to share that information in other contexts.[62] In instances where

56. *See generally* FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS (1998), *available at* http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf. (outlining five of the Fair Information Practice Principles).

57. *See* 15 U.S.C. § 6801(a) (2012) (addressing that "[i]t is the Policy of Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers . . . .").

58. *See id.*

59. *See* 18 U.S.C. § 2710 (2012).

60. The so-called "third-party doctrine" in Fourth Amendment jurisprudence suggests the opposite, but such an understanding is inapt here for two reasons: one, the Fourth Amendment concerns citizens' relationship to the government, not to other private citizens, and two, the doctrine has been strongly criticized even within the Fourth Amendment context, especially in the wake of the National Security Administration's spying scandals.

61. *See* FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2010), *available at* http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-preliminary-ftc-staff-report-protecting-consumer/101201privacyreport.pdf.

62. *See id.* at vi.

consumers would not expect their information to be shared with third parties, companies should ask consumers for their permission for such sharing.[63] As the FTC underscored, when data is collected for one purpose and then treated differently, the failure to respect the original expectation is a cognizable harm.[64]

The FTC's report resonates with the work of privacy scholars. In her book *Privacy in Context*, Helen Nissenbaum argues that privacy is not a binary concept.[65] Information is neither wholly private nor wholly public. Context and social norms determine the question. A person, for instance, might be willing to share personal information with her doctor but not her employer. As Joel Reidenberg has argued, using data for a purpose other than the one the subject has permitted should be considered a cognizable harm.[66]

Lior Strahilevitz's social network theory of privacy explains that information may deserve privacy protection even if it is shared with a significant number of people.[67] A group's internal norms of information disclosure play a key role in determinations about privacy expectations. For example, an HIV-positive person who told family, friends, and a support group about his HIV status did not extinguish his privacy interest in the information because the norm was that it would not be revealed with others who knew him or to the public at large.[68] Daniel Solove's pragmatic conception of privacy envisions context as central to understanding and addressing contemporary privacy problems.[69]

As privacy law and literature suggest, consent is situational. Revenge porn victims share sexually explicit photographs of themselves with others based on the understanding that the photos remain confidential. Sharing sensitive information, whether a nude photo, Social Security number, or HIV status, with a confidant does not mean one has waived all privacy expectation in the information.[70]

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63. *See, e.g.*, *id.* at vi, 55.

64. *Id.* at 20 n.49 (quoting Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877, 881 (2003)).

65. NISSENBAUM, *supra* note 22, at 144.

66. Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877, 881 (2003).

67. *See generally* Strahilevitz, *supra* note 13.

68. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994); Strahilevitz, *supra* note 22.

69. SOLOVE, UNDERSTANDING PRIVACY, *supra* note 13; Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1112 (2010) (reviewing SOLOVE, UNDERSTANDING PRIVACY, *supra* note 22).

70. *See, e.g.*, *Kubach*, 443 S.E.2d at 494. The refusal to recognize the contextual nature of consent may stem from a moral disapproval of intimate photographs. Some might argue that contextual integrity, as Nissenbaum calls it, is not extended to certain "morally questionable" content. NISSENBAUM,

II. THE INADEQUACY OF CIVIL ACTIONS

Some commentators oppose regulatory proposals based on the argument that existing civil remedies can ably address revenge porn.[71] Unfortunately, that is not the case. Civil law can offer modest deterrence and remedy, but practical concerns often render them more theoretical than real. As this Part concludes, more effective disincentives for nonconsensual pornography are needed than what civil actions can provide.

A. Tort Law

In theory, tort law reaches some of the harm suffered by revenge porn victims. Victims could sue for intentional infliction of emotional distress, recovering for severe emotional suffering intentionally or recklessly caused. Individuals are not expected to tolerate cruel invasions of their privacy that are extreme and outrageous.[72] The privacy tort of public disclosure of private fact could provide relief. Key to this tort is the public's lack of a legitimate interest in the disclosed information. Publishing a private person's nude photos online is not a matter that legitimately concerns the public.[73] Courts have recognized public disclosure claims where the plaintiff shared private information with one other trusted person.[74]

Revenge porn victims have brought tort claims and won. A woman sued her ex-boyfriend after he posted her nude photographs on twenty-three adult websites next to her contact information and alleged interest in a "visit or phone call."[75] Her ex created an online advertisement that said she wanted "no strings attached" masochistic sex.[76] Strange men left her frightening voice mails.[77]

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supra note 22. But determinations of what is morally questionable vary widely and are generally not a suitable basis for law.

71. *See, e.g.*, 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/.

72. Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 65 (2012).

73. *See* Daily Times Democrat v. Graham, 162 So. 2d 474, 477–78 (Ala. 1964) (upholding disclosure claims where a newspaper published picture of a woman whose body was exposed after her dress was blown up by air jets because there was "nothing of legitimate news value in the photograph" and because, not only was the photograph embarrassing, it could be properly classified as obscenity given its offensiveness to modesty and the involuntary nature of the exposure to the public).

74. *See generally* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW (4th ed. 2011) (discussing court decisions involving public disclosure of private information).

75. Taylor v. Franko, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *3 (D. Haw. June 12, 2011).

76. *Id.* at *4.

77. *Id.*

The woman suffered anxiety and a bout of shingles.[78] She worried the abuse would impact her security clearance at work.[79] A judge awarded the woman $425,000 for intentional infliction of emotional distress, defamation, and public disclosure of private fact.[80]

One major problem, however, is that most victims lack resources to bring civil suits. As we have heard from countless victims, many cannot afford to sue their perpetrators. Having lost their jobs due to the online posts, they cannot pay their rent, let alone cover lawyer's fees. It may also be hard to find lawyers willing to take their cases. Most lawyers do not know this area of law and are not prepared to handle the trickiness of online harassment evidence. This reduces the deterrent effect of civil litigation, as would-be perpetrators are unlikely to fear a course of action that is unlikely to materialize.

What is more, since plaintiffs in civil court generally have to proceed under their real names, victims may be reluctant to sue for fear of unleashing more unwanted publicity. Generally, courts disfavor pseudonymous litigation because it is assumed to interfere with the transparency of the judicial process, to deny a defendant's constitutional right to confront his or her accuser, and to encourage frivolous claims from being asserted by those whose names and reputations would not be on the line. Arguments in favor of Jane Doe lawsuits are considered against the presumption of public openness—a heavy presumption that often works against plaintiffs asserting privacy invasions.[81]

Even in ideal circumstances, where pseudonymous litigation is permitted and where a lawyer is willing to take the case, it may be hard to recover much in the way of damages. Defendants often do not have deep pockets. Victims may be hard pressed to expend their time and money on lawsuits if defendants are effectively judgment proof. Then too, an award of damages is no assurance that websites will comply with requests to take down the images. The removal of

78. *See id.* at *3.

79. *Id.* at *2.

80. *Id.* at *5. Not only did the court find that the plaintiff sufficiently stated a claim for intentional infliction of emotional distress, it upheld the plaintiff's claim for negligent infliction of emotional distress despite the general requirement of physical injury. The unique circumstances of the case made clear that the plaintiff's distress was trustworthy and genuine. *Id.*; *see also* Doe v. Hofstetter, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, at *8 (D. Colo. June 13, 2012) (awarding plaintiff damages for intentional infliction of emotional distress where the defendant posted the plaintiff's intimate photographs online, e-mailed them to her husband, and created fake Twitter accounts displaying them).

81. Doe v. Smith, 429 F.3d 706, 710 (7th Cir. 2005) ("The public has an interest in knowing what the judicial system is doing, an interest frustrated when any part of litigation is conducted in secret.").

images is the outcome that most victims desire above all else, and civil litigation may be unable to make that happen.[82]

Some argue that in cases where individual perpetrators are judgment proof, victims can bring claims against the websites that publish revenge porn and in turn drive the demand for it. Generally speaking, site operators are immunized from tort liability related to a third party's content. Section 230 of the Communications Decency Act provides, "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 provider."[83] Courts have interpreted § 230 to largely immunize from liability website owners and operators for tortious material submitted by third-party users.[84] According to § 230, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," which indicates that the statute trumps civil and criminal state laws.[85] If a user hacks into a person's computer to obtain sexually explicit photographs and submits the photos, unsolicited, to a revenge porn website, the site owner would not be liable for displaying it.[86]

B. Copyright Law

Copyright law can seem like a promising avenue for redress because § 230 does not immunize websites from federal intellectual property claims.[87] If a victim took the image herself then she would

82. *See generally* Matorin, *supra* note 25, (explaining that civil litigation may provide compensation to revenge porn victims but it "won't remove the photos from the Internet or Google").

83. 47 U.S.C. § 230(c)(1) (2012).

84. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (3rd Cir. 1997).

85. 47 U.S.C. § 230(e)(3). A recent letter from the National Association of Attorneys General urged Congress to revise § 230 so that it cannot preempt state criminal law. The current wording and interpretation of § 230, these Attorneys General maintain, impairs criminal prosecutions of child trafficking. *See* Letter From the Nat'l Ass'n of Attorneys Gen. to Congress (July 23, 2013), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1465&context=historical.

86. We are leaving for other work the question of whether § 230's immunity should be narrowed or if the statute in its current form should be understood as failing to immunize site operators who actively facilitate the posting of revenge porn. One of us, Citron, supports a narrow amendment to § 230 for sites whose principal purpose is to host revenge porn. *See* CITRON, *supra* note 48, at 176–77. The other, Franks, believes that a Ninth Circuit decision, *Roommates.Com*, supports the notion that sites that purposely solicit the posting of revenge porn are effectively cocreators of such content and thus enjoy no immunity. Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1164–65 (9th Cir. 2008). Because we agree on so much, we thought it wise to note our disagreement on this issue and leave exploration of them for separate endeavors.

87. 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

be considered the copyright owner. In that case, the victim could file a § 512 notice after registering the copyright.[88] The site operator would have to take down the allegedly infringing content promptly or lose their immunity under the Digital Millennium Copyright Act.[89]

Even if the victim took the photo herself, however, her right to sue for a copyright violation may be illusory. Revenge porn sites often ignore requests for removal because they are not worried about being sued. They know that most victims cannot afford to hire a lawyer.

If a victim did not take the sexually explicit photo herself, she does not own the copyright—it belongs to the photographer. Some lawyers and scholars have suggested that an expansive conception of joint authorship might cover these victims,[90] but this theory is untested and may prove to have little traction.[91]

In any event, even successful copyright actions cannot put the genie back in the bottle. Once an image is released, getting it removed from one site does not mean that it will be removed from every other site to which it has migrated. Even more importantly, the suggestion that copyright law is an adequate response to nonconsensual porn mischaracterizes the harm as one of property rights. While copyright remedies can certainly exist alongside and supplement other avenues of redress for victims, the harm involved in nonconsensual pornography cannot be reduced to a property claim.[92]

C. Sexual Harassment Law

Does revenge porn constitute actionable sexual harassment? As defined by the Equal Employment Opportunity Commission, sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[93] Under current law, protections against sexual harassment have little force outside of employment and educational settings.[94] Accordingly, while nonconsensual pornography that is

88. *See* 17 U.S.C. § 512(c)(1)(C) (2012)

89. Site operators are not liable for infringement if they take down the allegedly infringing content. *See* 17 U.S.C. § 512(a).

90. *See* Derek Bambauer, *Beating Revenge Porn with Copyright* (Jan. 25, 2013), https://blogs.law.harvard.edu/infolaw/2013/01/25/beating-revenge-porn-with-copyright/.

91. *See generally* Derek Bambauer, *Exposed*, 98 MINN. L. REV. (forthcoming 2014).

92. *See* Matorin, *supra* note 25 (arguing that attempts to cast revenge porn as a copyright issue "are absurd").

93. 29 C.F.R. § 1604.11(a) (2013).

94. In different ways, we have argued that the protection against sexual harassment, as a form of sex discrimination, should not be so limited. *Compare* Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657 (2012)

produced, distributed, or accessed by a victim's coworkers, employers, school officials, or fellow students raises the possibility of a hostile environment sexual harassment claim under Title VII of the Civil Rights Act of 1964[95] or Title IX of the Education Amendments of 1972,[96] such claims would not be available to address nonconsensual pornography falling outside of this narrow category.

As this discussion shows, civil law cannot meaningfully deter and redress revenge porn. We now turn to the potential for a criminal law response.

III. CRIMINAL LAW'S POTENTIAL TO COMBAT REVENGE PORN

A criminal law solution is essential to deter judgment-proof perpetrators. As attorney and revenge porn expert Erica Johnstone puts it, "Even if people aren't afraid of being sued because they have nothing to lose, they are afraid of being convicted of a crime because that shows up on their record forever."[97] Nonconsensual pornography's rise is surely related to the fact that malicious actors have little incentive to refrain from such behavior. While some critics believe that existing criminal law adequately addresses nonconsensual pornography, this Part highlights how existing criminal law fails to address most cases of revenge porn.

A. The Importance of Criminal Law

Criminal law has long prohibited privacy invasions and certain violations of autonomy. Criminal law is essential to send the clear message to potential perpetrators that nonconsensual pornography

(contending that site operators should be liable for sexual harassment hosted on their sites), *with* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 91–95 (2009) (arguing that cyber harassment ought to be addressed as civil rights violations and thus harassers should face liability under anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and Section 1981 of Title 42, among other claims); *see also* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1436–53 (2011) (arguing that cyber harassment interferes with victims' ability to interact as digital citizens); Citron, *supra* note 10, at 375–77 (arguing that a cyber civil rights legal agenda has a crucial role in educating the public, law enforcement, courts, and victims about cyber harassment's interference with victims' equality). Citron's forthcoming book on cyber harassment proposes an amendment to Title VII that would permit suits against perpetrators of discriminatory cyber harassment for interfering with victims' important economic and educational opportunities. CITRON, *supra* note 48.

95. tit. VII, 42 U.S.C. §§ 2000e–2000e-15 (2012).

96. tit. IX, 20 U.S.C. §§ 1681–1688 (2012).

97. Tracy Clark-Flory, *Criminalizing "Revenge Porn,"* SALON (Apr. 6, 2013, 9:00 PM), http://www.salon.com/2013/04/07/criminalizing_revenge_porn/.

inflicts grave privacy and autonomy harms that have real consequences and penalties.[98]

While we share general concerns about overcriminalization and overincarceration, rejecting the criminalization of serious harms is not the way to address those concerns. To argue that our society should not criminalize certain behavior because too many other kinds of behavior are already criminalized is at best a non sequitur. Only the shallowest of thinkers would suggest that the question whether nonconsensual pornography should be criminalized—indeed, whether any conduct should be criminalized—should turn on something as contingent and arbitrary as the number of existing laws. Rather, the question of criminalization should be a question about the seriousness of the harm caused and whether such harm is adequately conceptualized as a harm only to individuals, for which tort remedies are sufficient, or should be conceptualized as a harm to both individuals and society as a whole for which civil penalties are not adequate, thus warranting criminal penalties.[99]

We are also sensitive to objections that criminalizing revenge porn might reinforce the harmful and erroneous perception that women should be ashamed of their bodies or their sexual activities, but maintain that recognizing and protecting sexual autonomy does exactly the opposite.[100] A criminal law solution would send the message that individuals' bodies are their own and that society recognizes the grave harms that flow from turning individuals into objects of pornography without their consent.

In this way, a criminal law approach will help us conceptualize the nonconsensual publication of someone's sexually explicit images as a form of sexual abuse. When sexual abuse is inflicted on an individual's physical body, it is considered rape or sexual assault. The fact that nonconsensual pornography does not involve physical contact does not change the fact that it is a form of sexual abuse. As

98. *See* Mary Anne Franks, *Why Revenge Porn Must Be a Crime*, NYDAILYNEWS.COM (Mar. 17, 2014), http://www.nydailynews.com/opinion/revenge-porn-crime-article-1.1702725.

99. *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 221–22 (1991) (noting, though criticizing, the "standard 'black letter' law distinction . . . that crimes represent injuries to society generally, while torts involve only private interests," but also conceding that "there are public values that would be injured if criminal behavior were treated only as tortious conduct for which the victim must be made whole through compensation").

100. A comparison can be made here to rape laws. While it is possible to interpret the criminal punishment for rape as reinforcing the view that women who are raped are "damaged," we do not think this is a necessary or correct interpretation. In fact, the real danger lies in failing to seriously punish violations of sexual autonomy.

Supreme Court Justice Horace Gray wrote in 1891, "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one . . . to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass . . . ."[101] Federal and state criminal laws regarding voyeurism demonstrate that physical contact is not necessary to cause great harm and suffering.[102]

Video voyeurism laws punish the nonconsensual recording of a person in a state of undress in places where individuals enjoy a reasonable expectation of privacy.[103] Criminal laws prohibiting voyeurism rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person's consent not only inflicts dignitary harms upon the individual observed, but also inflicts a social harm serious enough to warrant criminal prohibition and punishment.

International criminal law provides precedent and perspective on this issue. Both the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have employed a definition of sexual violence that does not require physical contact. In both tribunals, forced nudity was found to be a form of sexual violence.[104] In the *Akayesu* case, the ICTR found that "[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[105] In the *Furundzija* case, the ICTY similarly found that international criminal law punishes not only rape, but also "all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity."[106]

The legal and social condemnation of child pornography exemplifies our collective understanding that the viewing and distribution—not just production—of certain kinds of sexual images

101. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 252 (1891).

102. *See, e.g.*, 18 U.S.C. § 1801 (2012); *see also* Nat'l Ctr. for Prosecution of Child Abuse, *supra* note 16 (providing an inventory of state voyeurism statutes).

103. 18 U.S.C. § 1801.

104. *See* ANN-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE 135–37 (2005); LISTENING TO THE SILENCES: WOMEN AND WAR 146–47 (Helen Durham & Tracey Gurd eds., 2005).

105. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

106. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

are harmful. In *New York v. Ferber*,[107] the United States Supreme Court recognized that the distribution of child pornography is distinct from the underlying crime of the sexual abuse of children.[108] The Court observed that "[t]he distribution of photographs and films depicting sexual activity by juveniles . . . [is] a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[109] When images and videos of sexual assaults and surreptitious observation are distributed and consumed, they inflict further harms on the victims and on society connected to, but distinct from, the criminal acts to which the victims were originally subjected.[110] The trafficking of this material increases the demand for images and videos that exploit the individuals portrayed. This is why the Court in *Ferber* held that it is necessary to shut down the "distribution network" of child pornography to reduce the sexual exploitation of children: "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."[111]

Nonconsensual pornography raises similar concerns. Disclosing sexually explicit images without permission can have lasting and destructive consequences. Victims often internalize socially imposed shame and humiliation every time they see them and every time they think that others are viewing them.

Consider the experience of sports reporter Erin Andrews. After a stalker secretly taped her while she undressed in her hotel room, he posted as many as ten videos of her online.[112] Google Trends data suggested that just after the release of the videos, much of the nation began looking for some variation of "Erin Andrews peephole video."[113] Nearly nine months later, Andrews explained, "I haven't stopped being victimized—I'm going to have to live with this forever . . . . When I have kids and they have kids, I'll have to

107. 458 U.S. 747 (1982).

108. *Id.* at 764.

109. *Id.* at 759.

110. *See* Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES MAG. (Jan. 24, 2013), http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?pagewanted=all&_r=0.

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

112. Lynn Lamanivong, *Erin Andrews' Video Voyeur Gets 2½ Years*, CNN (Mar. 16, 2010, 9:49 AM), http://www.cnn.com/2010/CRIME/03/15/espn.erin.andrews.sentence/; *see* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1813–14 (2010) (discussing privacy harms experienced by Erin Andrews).

113. Steve Johnson, *Erin Andrews' Nude Video Coverage Full of Hypocrisy*, CHI. TRIB. (July 23, 2009), http://articles.chicagotribune.com/2009-07-23/entertainment/0907220636_1_erin-andrews-video-web.

explain to them why this is on the Internet."[114] She further lamented that when she walks into football stadiums to report on a game, she faces the taunts of fans who have seen her naked online.[115] She explained that she "felt like [she] was continuing to be victimized" each time she talked about it.[116]

Andrews's experience is echoed by that of Lena Chen, who allowed her ex-boyfriend to take pictures of them having sex.[117] After he betrayed her trust and posted the pictures online, the pictures went viral.[118] As Chen explained, feeling ashamed of her sexuality was not something that came naturally to her, but it is now something she knows inside and out.[119] Victims of nonconsensual pornography are harmed each time a person views or shares their intimate images.

B. Current Criminal Law's Limits

Existing federal and state criminal laws have limited application to the initial posters of nonconsensual pornography and the laws have even less force with regard to site operators. This Subpart first explores the potential of criminal harassment statutes in pursuing the original discloser. Then, it turns to the possibility of extortion and child pornography charges against revenge porn site operators.

1. Punishing Original Disclosers Under Criminal Law

Many scholars believe that existing criminal law adequately addresses revenge porn. Professor Eric Goldman, for instance, argues that criminal harassment laws punish the distribution of sexually explicit images when there is intent to harm, but that is not always true.[120] Two potential hurdles stand in the way.

The first hurdle is that criminal harassment and stalking laws only apply to defendants who engage in repeated harassing acts. The federal cyber stalking statute, 18 U.S.C. § 2261A, bans as a felony the use of any "interactive computer service" to engage in a

114. Leslie Casimir, *The ESPN Girl Takes a Stand*, GLAMOUR (Mar. 5, 2010), http://www.glamour.com/inspired/magazine/2010/03/the-espn-girl-takes-a-stand.

115. *Id.*

116. Michael Y. Park, *Erin Andrews Calls Peeping-Tom Video a "Nightmare,"* PEOPLE (Sept. 1, 2009, 11:50 AM), http://www.people.com/people/article/0,,20301731,00.html.

117. Lena Chen, *I Was the Harvard Harlot*, SALON (May 23, 2011, 9:01 PM), http://www.salon.com/2011/05/24/harvard_harlot_sexual_shame/.

118. *Id.*

119. *Id.*

120. *See* 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/.

"course of conduct" intended to harass or intimidate someone in another state that *either* places that person in reasonable fear of serious bodily injury or death *or* that would reasonably be expected to cause the person to suffer "substantial emotional distress."[121]

A single posting of someone's name, address, and sexually explicit image can cause serious damage but would not amount to a harassing "course of conduct." A revenge porn post can go viral, but the poster who started the cascade could evade harassment charges. As Jane's experience attests, a single post, e-mail, or other disclosure of nonconsensual pornography can cause grave harm.[122]

The second problem is that some state harassment laws only apply to persistent abuse communicated directly to victims. A New York state court recently dismissed charges against a man who posted his ex-girlfriend's nude photos on Twitter and sent the photos to the woman's employer and sister.[123] The court justified its dismissal of the aggravated harassment charge on the grounds that the man had not sent the nude photos to the woman herself, but rather to others.[124] Revenge porn posted on third-party sites would not be banned under harassment statutes that require direct contact with victims.[125]

Even when revenge porn does fit the definition of criminal harassment, police may decline to get involved. Victims are often told that the behavior is not serious enough for an in-depth

121. 18 U.S.C. § 2261A(2) (2012). Under the federal cyber-stalking statute, defendants can be punished for up to five years in jail and fined $250,000. Many states similarly define criminal cyber harassment but treat it as a misdemeanor with modest sentences and fines. *See, e.g.*, MASS. ANN. LAWS ch. 265, § 43A (LexisNexis 2010) (covering a willful and malicious engagement in a pattern of acts or series of acts via e-mail or "internet communications" that is directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress); SUSAN PRICE, CONN. GEN. ASSEMB. OFFICE LEGIS. RESEARCH, 2012-R-0293, OLR BACKGROUNDER: CYBERSTAKING (2012) (describing variations in the thirty-four state cyber-stalking laws surveyed by the National Conference of State Legislatures).

122. Unfortunately, even if revenge porn is part of a broader course of harassing conduct, law enforcement routinely refuses to take it seriously because they lack technical understanding of the problem and believe that conduct regarding sexually intimate images is innocuous. Citron, *supra* note 19, at 402. That problem extends to revenge porn as well.

123. *See* Mary Anne Franks, *We Need New Laws to Put a Stop to Revenge Porn*, INDEP. (Feb. 23, 2014), http://www.independent.co.uk/voices/comment/we-need-new-laws-to-put-a-stop-to-revenge-porn-9147620.html.

124. People v. Barber, 2014 N.Y. Slip. Op. 50193(U) (N.Y. Sup. Ct. Feb. 18, 2014); Erin Donaghue, *Judge Throws Out New York Revenge Porn Case*, CBS (Feb. 25, 2014, 4:42 PM), http://www.cbsnews.com/news/judge-throws-out-new-york-revenge-porn-case/.

125. *Id.*

investigation.[126] "They are shooed away because, officers say, they are to blame for the whole mess, since they chose to share their intimate pictures."[127]

Consider Holly Jacobs's case. Hundreds of porn and revenge porn sites featured her nude images next to her work biography and e-mail address.[128] Some posts falsely claimed that she would have sex for money and that she had slept with her students.[129] Law enforcement officers told her that because she voluntarily gave the photos to her ex-boyfriend, he owned them and could freely share them.[130]

Jacobs refused to give up on the potential for criminal law. After contacting U.S. Senator Marco Rubio's office, the Florida State Attorney's office took up her case and charged her ex with a misdemeanor count of cyber stalking.[131] Investigators traced one of the porn posts to her ex's IP address.[132] They told Jacobs that they needed a warrant to search his computer for further evidence because her ex had claimed that he had been hacked and denied releasing Jacobs's pictures.[133]

The charges against her ex were dismissed when prosecutors decided they could not justify seeking a warrant for a misdemeanor case.[134] Their hands were tied, they said, even though "I've been hacked" is a standard defense in cyber stalking cases.[135] Jacobs's case apparently was not serious enough for the police to obtain a warrant to search a defendant's computer or home.[136]

2. Prosecuting Site Operators for Extortion and Child Pornography

What about website operators' criminal liability under current state or federal criminal law? Although § 230 immunity is broad, it is not absolute. It exempts from its reach federal criminal law, intellectual property law, and the Electronic Communications

126. *See* Citron, *supra* note 19, at 375–76 (highlighting the tendency of law enforcement to dismiss harassment complaints).

127. Danielle Citron, *How to Make Revenge Porn a Crime: Worried About Trampling on Free Speech? Don't Be.*, SLATE (Nov. 7, 2013, 1:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/making_revenge_porn_a_crime_without_trampling_free_speech.html.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. CITRON, *supra* note 48 (discussing in detail Holly Jacobs's revenge porn experience); Citron, *supra* note 19.

Privacy Act.[137] As § 230(e) provides, the statute has "[n]o effect" on "any [f]ederal criminal statute" and does not "limit or expand any law pertaining to intellectual property."[138]

The recent federal prosecution against revenge porn site operator Hunter Moore has been invoked as support for the notion that no new laws are needed to take on revenge porn. In December 2013, federal prosecutors indicted Moore for conspiring to hack into people's computers to steal their nude images.[139] According to the indictment, Moore paid a computer hacker to access women's password-protected computers and e-mail accounts to steal their nude photos for financial gain—profits from his revenge porn site Is Anyone Up.[140]

While the prosecution of Moore is cause for celebration, it is a mistake to draw from it the conclusion that existing laws are sufficient to address revenge porn. The fact that one revenge porn site owner allegedly broke numerous federal laws in running a revenge porn website does not change the fact that he is facing no charges for publishing the content itself,[141] and that the next revenge porn entrepreneur will no doubt learn not to make the same mistakes as Hunter Moore.

State prosecutors are currently pursuing extortion charges against site operators who call for posters to upload their exes' naked images and then charge a hefty fee for the removal of those photos.[142] There is a strong argument that § 230's immunity does not apply to those who extort victims whose predicament they have helped orchestrate. California Attorney General Kamala Harris has brought the first cases to press the question.[143]

In December 2013, the operator of revenge porn site UGotPosted, Kevin Bollaert, was indicted for extortion, conspiracy, and identity theft in violation of California state laws.[144] The site featured the nude photos, Facebook screen shots, and contact information of more than 10,000 individuals.[145] According to the

137. *See* 47 U.S.C. § 230(e) (2012).

138. *Id.*

139. Jessica Roy, *Revenge-Porn King Hunter Moore Indicted on Federal Charges*, TIME (Jan. 23, 2014), http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/.

140. *Id.*

141. Justin Mitchell, *Law Takes Revenge on "Revenge Porn King,"* VOICE RUSS. (Jan. 24, 2009, 11:49 AM), http://voiceofrussia.com/us/2014_01_24/Law-takes-revenge-on-revenge-porn-king-2424/.

142. *See, e.g.*, Lee Munson, *Revenge Porn Operator Facing Charges of Conspiracy, Extortion and Identity Theft*, NAKED SECURITY (Dec. 11, 2013), http://nakedsecurity.sophos.com/2013/12/11/revenge-porn-operator-facing-charges-of-conspiracy-extortion-and-identity-theft/.

143. *See id.*

144. *Id.*

145. *Id.*

indictment, Bollaert ran the revenge porn site with a companion takedown site, Change My Reputation.[146] When Bollaert received complaints from individuals who appeared in nude photos, he allegedly sent them e-mails directing them to the takedown site, which charged up to $350 for the removal of photos.[147] Attorney General Harris explained that Bollaert "published intimate photos of unsuspecting victims and turned their public humiliation and betrayal into a commodity with the potential to devastate lives."[148]

Bollaert will likely challenge the State's identity theft charges on § 230 grounds.[149] Because California's identity theft laws are somewhat unusual,[150] it is unclear how successful Bollaert's defense will be. He may also try to argue that charging for the removal of user-generated photos is not tantamount to authoring or codeveloping them, that is, charging for the removal of content is not the same as paying for or helping develop it.[151] Nonetheless, the State has a strong argument that the extortion charges fall outside § 230's immunity because the charges hinge on what Bollaert himself did and said, not on what his users posted.

Even if the California Attorney General's charges are dismissed on § 230 grounds, federal prosecutors could charge Bollaert with federal criminal extortion charges. Sites that encourage cyber harassment and charge for its removal (or have a financial arrangement with removal services) are engaging in extortion.

But of course revenge porn operators who charge for the removal of images are not the only ones hosting revenge porn. There are countless other sites and blogs that host revenge porn that do not engage in extortion. If these criminal prosecutions are successful, site operators will stop charging for the removal of photos and the phenomenon will still continue.

Prosecuting site operators for violating federal cyber-stalking law is even less promising than prosecuting original disclosers. Most site operators cannot be said to have engaged in a pattern of harassing conduct vis-à-vis any given victim. They lack the requisite intent to "kill, injure, harass, or place under surveillance

146. *Id.*
147. *Id.*
148. *Id.*
149. *See* Eric Goldman, *Should We Cheer the California Attorney General's Revenge Porn Arrest—or Find It Alarming?*, FORBES (Dec. 11, 2013, 1:55 PM), http://www.forbes.com/sites/ericgoldman/2013/12/11/should-we-cheer-the-california-attorney-generals-revenge-porn-arrest-or-find-it-alarming/.
150. *See* Ryan Calo, *Creative Revenge Porn Charges Filed in California*, FORBES (Dec. 10, 2013, 6:01 PM), http://www.forbes.com/sites/ryancalo/2013/12/10/creative-revenge-porn-charges-filed-in-california/.
151. Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Dec. 18, 2013, 5:36 PM), http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html.

with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress" a particular person.[152] Many admitted purveyors of nonconsensual pornography maintain, with some plausibility, that their sole intention is to obtain notoriety, fulfill some sexual desire, or increase traffic for their websites.

What about child pornography laws? While "pornography" is to some degree regulated by federal criminal law, federal law focuses almost exclusively on the age of the material's subjects.[153] Little attention is paid to individuals' consent (or lack thereof) to be portrayed in such a manner. With regard to original perpetrators of nonconsensual pornography, both state and federal child pornography laws can be used to deter and prosecute the production of sexually explicit material featuring underage individuals. Section 2256 of Title 18 defines child pornography as any visual depiction of sexually explicit conduct involving a minor (someone under eighteen years of age).[154] "Visual depictions include photographs, videos, digital or computer generated images indistinguishable from an actual minor, and images created, adapted, or modified, but appear to depict an identifiable, actual minor."[155] These provisions do not apply, of course, to victims over the age of eighteen, seriously limiting the usefulness of these prohibitions in revenge porn cases.

One commentator contends that criminal penalties applicable to general pornographers could apply to revenge porn site operators.[156] That is not the case. Section 2257 of Title 18 sets out recordkeeping requirements for those engaged in "producing" pornography.[157] The statute's definition of "produces" or "producing" pornography tracks the definition of § 230 of the Communications Decency Act, which means it does not cover websites that facilitate or distribute material submitted by third-party users.[158] The statute also focuses almost exclusively on age-verifying identification.[159] It sets out no requirements to verify that the individuals portrayed have consented to the use of their images. While this law may provide some disincentives for distributing nonconsensual pornography of underage individuals, it will not have any effect on the distribution of material featuring adult victims.

152. 18 U.S.C. § 2261A (2012).
153. *See generally id.* § 2256.
154. *Id.* § 2256.
155. *Citizen's Guide to U.S. Federal Law on Child Pornography*, U.S. DEP'T JUST., http://www.justice.gov/criminal/ceos/citizensguide/citizensguide_porn.html (last visited Feb. 9, 2014).
156. Jeong, *supra* note 60.
157. *See* 18 U.S.C. § 2257(b) (providing record-keeping requirements for those who produce "sexually explicit conduct").
158. *See id.* § 2257(h)(2) (defining the term "produces").
159. *See id.* § 2257(b).

C. Current Efforts to Criminalize Nonconsensual Pornography

To date, New Jersey, Alaska, Texas, California, Idaho, and Utah are the only states that criminalize the nonconsensual disclosure of someone's sexually intimate images.[160] During the writing of this Article, legislators in seventeen states have proposed revenge porn bills.[161] We provide our thoughts on these developments, noting the strengths and weaknesses of the various approaches and offering suggestions of our own. We reserve our views on the constitutionality of these proposals for the next Part.

New Jersey, the first state to criminalize revenge porn, has the broadest statute, prohibiting the nonconsensual observation, recording, or disclosure of sexually explicit images. Under New Jersey law, it is a third-degree crime[162] to post or share a person's nude or partially nude images without that person's consent.[163] The New Jersey law provides the following:

> An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer.[164]

The crime carries a prison sentence ranging from three to five years.[165]

Although the law has been around for almost a decade, it has been invoked in only a few cases.[166] In a recent case, the defendant

160. N.J. STAT. ANN. § 2C:14-9 (West 2005) (taking effect on Jan. 8, 2004); S.B. 255, 2013-2014 Reg. Sess. (Cal. 2013). Idaho and Utah passed laws in 2014. *See* 2014 Idaho Sess. Laws 173 (H.B. 563); 2014 Utah Laws 124 (H.B. 71).

161. Franks has been advising legislators all across the country, from New York and Wisconsin to Florida and Illinois to name just a few. Franks is also working with Congresswoman Jackie Speier in drafting a federal revenge porn bill. Franks and Citron worked with Maryland delegate Jon Cardin in crafting his revenge porn bill. Legislators in Florida attempted to pass a much less clear and much less comprehensive bill in their most recent term, but the measure died in committee. The bill's original sponsors have declared that they will attempt to introduce the bill again in their next session and have been working with Franks on revisions. Rick Stone, *In Florida, "Revenge Porn" Is a Moving Target*, WLRN (Dec. 4, 2013, 7:56 AM), http://wlrn.org/post/florida-revenge-porn-moving-target.

162. New Jersey does not use the classifications of "felony" and "misdemeanor." *See* N.J. STAT. ANN. § 2C:52-2 (West 2005).

163. *Id.* § 2C:14-9.

164. *Id.* § 2C:14-9(c).

165. *Id.* § 2C:43-6.

and victim exchanged "unclothed" photos of each other while dating.[167] After their break up, the defendant threatened to send the victim's nude pictures to her employer, a public school.[168] The defendant followed up on his threat, forwarding the pictures to the school stating "you have an educator there that is . . . not proper."[169] The defendant admitted to sending the pictures.[170] The defendant was convicted for disclosing naked images given with the understanding that they would not be shared with others.[171]

In 2010, Rutgers University student Dahrun Ravi was charged under the New Jersey statute after he secretly filmed his roommate Tyler Clementi having sex with a man and watched the live feed with six friends.[172] Clementi committed suicide after discovering what had happened.[173] The jury convicted Ravi of various counts of invasion of privacy, including the nonconsensual "observation" of Clementi having sex and the nonconsensual "disclosure" of the sex video.[174]

On January 8, 2014, Maryland legislator Jon Cardin proposed a revenge porn bill that resembled the New Jersey approach.[175] The proposed bill bars the disclosure of a person's sexually explicit or nude images "knowing that the other person has not consented to the disclosure."[176] The proposed bill included various exemptions,

166. In 2012, Brandon Carangelo was charged under the New Jersey statute for uploading pictures of his ex-girlfriend without her consent. Michaelangelo Conte, *Bayonne Man Charged with Posting Nude Photos of Ex-Girlfriend on Internet*, NJ.COM (Oct. 23, 2012, 5:59 PM), http://www.nj.com/hudson/index.ssf/2012/10/bayonne_man_charged_with_posti.html.

167. State v. Parsons, No. 10-06-01372, 2011 WL 6089210, at *1 (N.J. Super. Ct. App. Div. Dec. 8, 2011).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at *1–3.

172. Star-Ledger Staff, *Dharun Ravi Sentenced to Jail in Tyler Clementi Webcam Spying Case*, NJ.COM (May 21, 2012, 9:57 PM), http://www.nj.com/news/index.ssf/2012/05/dharun_ravi_sentenced_to_jail.html.

173. *Id.*

174. *Id.*

175. *See* H.B. 43, 2014 Leg., 435th Sess. (Md. 2014).

> For the purpose of prohibiting a person from intentionally disclosing a certain sexually explicit image of a certain other person, knowing that the other person has not consented to the disclosure; providing penalties for a violation of this Act; providing for the scope of this Act; providing that this Act does not affect any legal or equitable right or remedy otherwise provided by law; defining certain terms; and generally relating to the intentional disclosure of sexually explicit images.

Id.

176. *Id.* "'Intimate parts' means the naked genitals, pubic area, or buttocks of a person or the naked nipple of a female adult person." *Id.* "'Sexual act' has the meaning stated in § 3-301 of this title." *Id.* "'Sexual conduct' has the

such as the exclusion of images related to matters of public interest. It reads:

> This section does not apply to:
>
> (1) a law enforcement official in connection with a criminal prosecution;
>
> (2) a person acting in compliance with a subpoena or court order for use in a legal proceeding;
>
> (3) a person acting with a bona fide and lawful scientific, educational, governmental, news, or other similar public purpose; or
>
> (4) a voluntary exposure in a public or commercial setting.[177]

The proposed Maryland bill treats nonconsensual pornography as a felony with up to five years of jail time and a significant fine. Wisconsin has proposed a similar bill.[178]

A revenge porn bill proposed by New York lawmakers is narrower than New Jersey's or Maryland's approach. It covers sexually explicit photographs captured consensually as part of an intimate relationship, with the expectation of privacy, and later disclosed to the public without the consent of the individual depicted.[179] Much like the Maryland proposal, the New York proposal includes exceptions for law enforcement, legal proceedings, and voluntary exposures made in public.[180]

California's newly adopted revenge porn bill has the narrowest coverage of all. Adopted in October 1, 2013, the California law provides that a party is guilty of disorderly conduct if

> [a]ny person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.[181]

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meaning stated in § 3-301 of this title." *Id.* "'Image' includes a photograph, a film, a videotape, a recording, or a digital or other reproduction." *Id.*

177. *Id.*

178. A.B. 462, 2013–2014 Leg. (Wis. 2013).

179. Several different bills on this issue have been proposed in New York. One of the authors, Franks, worked on the version sponsored by Assemblyman Braunstein and Senator Griffo, which is the bill discussed here. A.O. 8214, 2013–2014 Reg. Sess. (N.Y. 2013).

180. *Id.*

181. CAL. PENAL CODE § 647 (West 2013).

The California bill requires that the defendant intend to cause the victim serious emotional distress, a requirement that is absent from the New Jersey's bill and other proposals.[182] It also demands that the state prove that victims have suffered serious emotional distress.[183] Its penalty is the weakest, comparatively speaking. Unlike the New Jersey bill and other proposed bills that classify nonconsensual pornography as a felony, it is a misdemeanour in California punishable by up to six months in prison and a $1,000 fine (up to one year in prison and a $2,000 fine for a second offense).[184]

IV. THE FIRST AMENDMENT CHALLENGES

What of First Amendment objections to revenge porn legislation? Would its criminalization transgress First Amendment doctrine and free speech values? Is nonconsensual pornography "offensive" speech that must be tolerated or is it instead within the narrow band of private communications that can be proscribed within the boundaries of the First Amendment? As we argue in this Part, it is the latter.

A "bedrock principle underlying the First Amendment . . . is that the government may not [censor] the expression of an idea simply because society finds the idea itself offensive" or distasteful.[185] Ordinarily, government regulation of the content of speech—what speech is about—is permissible only in a narrow set of circumstances. Content regulations have to serve a compelling interest that cannot be promoted through less restrictive means. Strict scrutiny review, as it is called, is difficult to satisfy because we distrust the government to pick winners and losers in the realm of ideas. Courts err on the side of caution before regulating speech because free expression is crucial to our ability to govern ourselves, to discover the truth, and to express ourselves, among other values.[186] As the Supreme Court famously declared in *New York*

182. *Id.*

183. *Id.*

184. CAL. PENAL CODE §§ 19, 19.2 (West 2008). Franks worked with legislative drafters in California to amend the law to provide more protection for victims and to include explicit exceptions for conduct protected by the First Amendment. *See Sen. Cannella Introduces New Legislation to Combat Revenge Porn,* ANTHONY CANNELLA (Feb. 20, 2014) http://district12.cssrc.us/content/sen-cannella-introduces-new-legislation-combat-revenge-porn.

185. Texas v. Johnson, 491 U.S. 397, 414 (1989).

186. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." (internal quotation marks omitted) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

Times Co. v. Sullivan, our society has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[187] Hateful and deeply offensive words thus enjoy presumptive constitutional protection.[188]

Nonetheless, First Amendment doctrine holds that not all forms of speech regulation are subject to strict scrutiny. Certain categories of speech can be regulated due to their propensity to bring about serious harms and only slight contributions to First Amendment values. They include true threats, speech integral to criminal conduct, defamation, obscenity, and imminent and likely incitement of violence.[189] Courts also have employed "less rigorous" scrutiny in upholding the constitutionality of penalties for nonconsensual disclosures of private communications, such as sex tapes, on the ground that such communications are not matters of public concern.[190]

187. *Id.* at 270.

188. In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court concluded that the defendant engaged in constitutionally protected speech when he wore a jacket into a courtroom with "Fuck the Draft" written on its back. *Id.* at 16. The Court explained that a governmental interest in regulating offensive speech could not outweigh the defendant's First Amendment right to freedom of speech. *Id.* at 26.

189. *See N.Y. Times Co.*, 376 U.S. at 269. The Court has articulated complex constitutional standards for some of these categories like defamation, erecting a matrix of fault and damage rules based on whether a plaintiff is a public or private figure. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346–49 (1974). As free speech scholar Rodney Smolla puts it, the well-defined categories of speech falling outside the First Amendment's coverage entail elaborate standards of review, and some constitutional protection is indeed afforded to certain types of libelous and obscene speech. Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of* United States v. Alvarez, 76 ALB. L. REV. 499, 501–02 (2013).

190. *See, e.g.*, Michaels v. Internet Entm't Grp., 5 F. Supp. 2d 823 (C.D. Cal. 1998). In assessing the constitutionality of certain categories of speech, the Supreme Court has distinguished speech involvjng matters of public interest and speech involving purely private matters. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011) (finding that the constitutionality of intentional infliction of emotional distress claims depended on whether the emotionally distressing speech involved matters "of interest to society at large" as determined by its content, form, and context); City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (finding that sexually explicit images were not of legitimate news interest in that they did not inform the public about any aspect of his employer's functioning and thus the government could fire an employee without running afoul of the First Amendment); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (upholding a defamation claim because it involved a purely private matter of a business's credit report that was not subject to the actual malice standard required for "debate on public issues"); Time v. Hill, 385 U.S. 374 (1967) (on matters of "legitimate public concern," defamation claims require proof of actual malice); *N.Y. Times Co.*, 376 U.S. at 277 (explaining that in a defamation suit involving a public official, free speech on "matters of public concern should be uninhibited, robust, and wide open").

A narrowly crafted revenge porn criminal statute that protects the privacy of sexually explicit images can be reconciled with the First Amendment. For support, we can look to the Court's decisions assessing the constitutionality of civil penalties under the federal Wiretap Act and lower court decisions on the public disclosure of private fact tort. We can rely on those decisions because the Court has generally held that the First Amendment rules applicable to criminal law are the same as those applicable to tort law.[191]

Here it is necessary to take note of the erroneous yet oft-repeated claim by opponents of criminalization that, while civil penalties for revenge porn do not violate the First Amendment, criminal penalties do. This is simply not an accurate statement of First Amendment jurisprudence. The Supreme Court has never held that speech protected by the First Amendment can be restricted by civil but not criminal law. In fact, its rulings support the opposite conclusion:

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law . . . . The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Presumably, a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action.[192]

The Court was explicitly asked to categorically exclude criminal penalties for truthful reporting about public officials in *Landmark*, and it explicitly declined to do so.[193]

191. *N.Y. Times Co.*, 376 U.S. at 277. Indeed, as the Court noted in *New York Times*, criminal actions provide even greater protection to defendants than do civil cases because they require proof beyond reasonable doubt and other protections afforded to criminal defendants. *Id.*

192. *Id.*

193. Landmark Commc'ns Inc. v. Virginia, 435 U.S. 829, 838 (1978) ("Landmark urges as the dispositive answer to the question presented that truthful reporting about public officials in connection with their public duties is always insulated from the imposition of criminal sanctions by the First Amendment. . . . We find it unnecessary to adopt this categorical approach to resolve the issue before us."); *see generally* Danielle Citron, *Debunking the First Amendment Myths Surrounding Revenge Porn Laws*, FORBES (Apr. 18, 2014, 11:19 AM), http://www.forbes.com/sites/daniellecitron/2014/04/18/debunking-the-first-amendment-myths-surrounding-revenge-porn-laws/ (debunking the myth that the First Amendment has different rules for civil and criminal penalties and quoting Eugene Volokh for the proposition that the Court has "refused invitations to treat civil liability differently from criminal liability for First Amendment purposes").

In other words, to argue that civil restrictions of nonconsensual pornography are constitutionally acceptable while criminal restrictions are not is logically inconsistent. While one may take the position that criminalization is unwise or unnecessary for policy reasons (a position we do not find convincing, as demonstrated above), such a position finds no support in established First Amendment doctrine.[194]

A. Wiretap Decisions

Let us first explore judicial decisions assessing the constitutionality of penalties for the nonconsensual disclosure of truthful, lawfully obtained information initially acquired illegally.[195] The Court has held that "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[196] In assessing a newspaper's criminal conviction for publishing a juvenile defendant's name in a murder case, the Court, in the 1979 decision in *Smith v. Daily Mail*,[197] laid down the now well-established rule that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[198] Since then, the Court has consistently refused to adopt a bright-line rule that truthful publications can never be subjected to civil or criminal liability for "invading 'an area of privacy' defined by the State."[199] To the contrary, the Court has repeatedly noted that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of the society."[200]

In *Bartnicki v. Vopper*,[201] for instance, an unidentified person intercepted and recorded a cell phone call between the president of a local teacher's union and the union's chief negotiator.[202] The conversation concerned the negotiations between the union and the

194. *See* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994 (2012) ("[T]he severity of the penalty imposed—though of central importance to the speaker who bears it—does not normally affect the merits of his free speech claim. . . . Speech is either protected, in which case it may not be punished, or unprotected, in which case it may be punished to a very great degree.").

195. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 517 (2001); Smith v. Daily Mail Pub. Co., 443 U.S. 97, 98 (1979).

196. *Smith*, 443 U.S. at 102; *see also* Fla. Star v. B.J.F., 491 U.S. 524, 540–41 (1989) (discussing the high requirements such state action would have to meet).

197. *Smith*, 443 U.S. at 98.

198. *Id.* at 103.

199. *Fla. Star*, 491 U.S. at 533.

200. *Id.*

201. Bartnicki v. Vopper, 532 U.S. 514, 514 (2001).

202. *Id.* at 518.

school board.[203] During the call, one of the parties mentioned, "go[ing] to . . . [the] homes" of school board members to "blow off their front porches."[204] A radio commentator, who received a copy of the intercepted call in his mailbox, broadcasted it on his talk show.[205] The question was whether the radio commentator could be penalized under the Wiretap Act for publishing the recorded cell phone conversation.[206]

As the Court explained, the case presented a "conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."[207] The Court underscored that the "fear of public disclosure of private conversations might well have a chilling effect on private speech."[208] For the Court, there were free speech interests "on *both* sides of the constitutional calculus."[209] The Court distinguished the free speech interests in certain types of communications. According to the Court, "some intrusions on privacy are more offensive than others, and . . . the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself."[210]

The Court struck down the penalties assessed against the radio commentator as unconstitutional because the private communications concerned negotiations over the proper level of compensation for teachers that were "unquestionably a matter of public concern."[211] As the Court underscored, *Bartnicki* did not involve the nonconsensual publication of "trade secrets or domestic gossip or other information of purely private concern."[212] Citing *Florida Star v. B.J.F.*,[213] the Court noted that "[w]e continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."[214] The Court ruled that the privacy concerns vindicated by the Wiretap Act had to "give way" to "the interest in publishing matters of public importance."[215] The Court held that even though the journalist

203. *Id.*
204. *Id.* at 518–19.
205. *Id.* at 519.
206. *See id.* at 520–21.
207. *Id.* at 518.
208. *Id.* at 533.
209. *Id.*
210. *Id.*
211. *Id.* at 535.
212. *Id.* at 533.
213. 491 U.S. 524, 533 (1989).
214. *Bartnicki*, 532 U.S. at 514.
215. *Id.* at 534.

knew the conversation had been illegally obtained in violation of the federal Wiretap Act, the First Amendment protected its broadcast.[216]

As the Court suggested in *Bartnicki*, the state interest in protecting the privacy of communications may be "strong enough to justify the application of" the federal Wiretap Act if they involve matters "of purely private concern."[217] Free speech scholar Neil Richards has argued, and we agree, that the *Bartnicki* rule thus has a built-in exception: regulations regarding the nonconsensual disclosure of private communications that are not of legitimate concern to the public deserve a lower level of First Amendment scrutiny.[218] Following that reasoning, courts have upheld civil penalties under the federal Wiretap Act where the unwanted disclosures of private communications involved "purely private matters."[219]

B. Public Disclosure of Private Fact Tort

Along similar lines, lower courts have upheld the constitutionality of the public disclosure of private fact tort claims where the private facts disclosed did not concern newsworthy matters, that is, matters of legitimate public interest.[220] The constitutionality of the privacy tort in cases involving the nonconsensual disclosure of sex videos is well established.[221] In *Michaels v. Internet Entertainment Group, Inc.*,[222] an adult entertainment company obtained a copy of a sex video made by the

216. *Id.* at 518.

217. *Id.* at 533.

218. Neil M. Richards, *The Limits of Tort Privacy*, 9 J. ON TELECOMM. & HIGH TECH. L. 357, 378 (2011).

219. *See, e.g.*, Quigley v. Rosenthal, 327 F.3d 1044, 1067–68 (10th Cir. 2003) (upholding civil penalties under the federal Wiretap Act for the disclosure of the contents of intercepted phone calls concerning a woman's private discussion with friends and family regarding an ongoing dispute with a neighbor because the intercepted call involved purely private matters).

220. SOLOVE & SCHWARTZ, *supra* note 74. The public disclosure of private fact tort builds First Amendment protections into the claim itself by excluding from the tort private facts that are newsworthy. To state a claim for public disclosure of private fact, the plaintiff has to prove that the defendant published a private fact about the plaintiff that does not involve newsworthy matters and whose publication would highly offend the reasonable person. Citron, *supra* note 112, at 1828–29; William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 394–96 (1960).

221. *See, e.g.*, Michaels v. Internet Entm't Grp., 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998); *see also* SOLOVE, FUTURE OF REPUTATION, *supra* note 22, at 129, 160; Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 987–89 (2003) (arguing that the disclosure tort can be balanced with the First Amendment where the speech addresses private concerns).

222. *Michaels*, 5 F. Supp. 2d at 828.

celebrity couple, Bret Michaels and Pamela Anderson Lee.[223] The couple sought to enjoin the defendant from publishing the tape on the grounds that its publication would mean the commission of the tort of public disclosure of private fact.[224] The court found for the plaintiffs, reasoning that the public has no legitimate interest in graphic depictions of the "most intimate aspects of" a celebrity couple's relationship.[225] As the court explained, "sexual relations are among the most private of private affairs, and that a video recording of two individuals engaged in such relations represents the deepest possible intrusion into such affairs."[226]

These cases support the constitutionality of narrowly crafted revenge porn laws criminalizing the publication of someone's sexual images in violation of their understanding that the images would be kept private. The proposed New York bill and California statute, for instance, protect the interest in individual privacy and, in particular, the interest in fostering private sexual expression.[227] Sexually themed images constitute psychologically and financially harmful breaches of social norms that satisfy the "purely private matters" exception in the *Smith* line of authority.[228] As Neil Richards puts it, "[u]nwanted publication of a sex video would seem to cause much greater injury, and to be far less necessary to public debate."[229]

The Court's recent decision in *Snyder v. Phelps*[230] supports the notion that the nonconsensual disclosure of sexual images constitutes purely private matters deserving less First Amendment protection.[231] *Snyder* concerned the Westboro Baptist Church's picketing of a soldier's funeral with signs suggesting that the soldiers' deaths are God's way of punishing the United States for its tolerance of homosexuality.[232] In 2006, the church's pastor, Fred Phelps, obtained police approval to protest on public land 1,000 feet from the church where the funeral of a Marine killed in Iraq, Matthew Snyder, would be held.[233] The protestors' signs read, "God Hates the USA," "America is Doomed," "God Hates You," "You're Going to Hell," and "Thank God for Dead Soldiers."[234] Albert Snyder

223. *Id.* at 827.
224. *Id.* at 828, 839–40.
225. *Id.* at 840.
226. *Id.* at 841.
227. *Cf. supra* notes 175–80 and accompanying text.
228. *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 98 (1979).
229. *See* NEIL M. RICHARDS, INTELLECTUAL PRIVACY: CIVIL LIBERTIES AND INFORMATION IN A DIGITAL AGE (forthcoming 2014) (on file with author).
230. Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).
231. *Id.* at 1220.
232. *Id.* at 1216.
233. *Id.* at 1213.
234. *Id.*

sued Phelps and members of his church for intentional infliction of emotional distress.[235] The jury award was in the millions.[236]

The Supreme Court overruled the decision in favor of the Westboro Baptist Church.[237] As the Chief Justice held, Snyder's emotional distress claim transgressed the First Amendment because the protest constituted speech of the highest importance—views on public matters like "the political and moral conduct of the United States . . . homosexuality in the military, and scandals involving the Catholic" Church.[238] Chief Justice Roberts, writing for the majority, explained that speech on public matters deserves rigorous protection in order to prevent the stifling of debate essential to democratic self-governance.[239] In contrast, the Chief Judge explained, speech about purely private matters receives less vigorous protection because the threat of liability would not risk chilling the "meaningful dialogue of ideas."[240] The majority pointed to a government employer's regulation of videos showing an employee engaged in sexual activity.[241] Such regulation was constitutionally permissible because sex videos shed no light on the employer's operation or functionality, but rather involved purely private matters in which the public lacked a legitimate interest.[242] As the Court noted in revealing dicta, sexually explicit images exemplify the sort of "purely private matters" that deserve less heightened protection.[243]

Some have suggested that *United States v. Stevens*[244] ended the question of whether speech can ever be regulated if it falls outside the categories of unprotected speech such as defamation, obscenity, incitement, or true threats.[245] This is a misreading of *Stevens*. In *Stevens*, the Court considered the constitutionality of a statute

235. *Id.*
236. *Id.* at 1214.
237. *See generally id.*
238. *Id.* at 1217. The protest's location further convinced the majority that the picketers wanted to engage in a public debate as they protested next to a public street, which is traditionally used and specially protected as a forum of public assembly and debate. *Id.* at 1218–20.
239. *Id.* at 1215–17.
240. *Id.* at 1215.
241. *Id.* at 1215–17.
242. *Id.*
243. *See id.*
244. 599 U.S. 460 (2010).
245. Oddly, in discussing recognized categories of unprotected speech, the Court in *Stevens* included defamation, citing the group libel case *Beauharnais v. Illinois*, 343 U.S. 250 (1952) for support rather than *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) or later individual defamation cases. *Stevens*, 559 U.S. at 468. Since the *N.Y. Times Co.* decision, scholars have long claimed, and we tend to agree, that group libel claims would not survive "actual malice" scrutiny. Generally, hateful ideas about groups concern matters of public concern, as the Court in *Snyder* suggested. *See generally Snyder*, 131 S. Ct. 1207.

criminalizing the creation, sale, or depiction of animal cruelty for commercial gain.[246] The Court rejected the government's argument that animal cruelty depictions amounted to a new category of unprotected speech.[247] As the Court explained, First Amendment doctrine does not permit the government to prohibit speech just because it lacks value or because the "ad hoc calculus of costs and benefits tilts in a statute's favor."[248] The Court does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[249] The Court in *Stevens*, however, recognized that some forms of speech may be historically unprotected or entitled to less rigorous protection, even though the Court has not recognized it as such explicitly.[250] But, as the Court explained, depictions of animal cruelty are not among them.[251] Not so for the public disclosure of private fact tort and other long-standing privacy regulations. As the Court held in *Bartnicki* and *Florida Star*, laws protecting privacy are "plainly rooted in the traditions and significant concerns of our society."[252]

Moreover, the Court in *Snyder v. Phelps*, decided after *Stevens*, makes clear that the Court has not eliminated long-standing torts like intentional infliction of emotional distress even though the Court has not explicitly included it as a category of speech deserving of less rigorous protection.[253] Although the Court has never explicitly held that intentional infliction of emotional distress claims amount to a category of protected speech, the decision assumed that such claims could be upheld as constitutional if certain conditions were met—if the expression giving rise to the claims involved purely private matters.[254] In *Snyder*, the Court refused to strike down the tort as unconstitutional, much as the Court refused to do so in *Hustler Magazine, Inc. v. Falwell*.[255]

With this construct in mind, when might revenge porn concern speech on public matters deserving rigorous protection? What about the application of revenge porn statutes to individuals publishing the sexually explicit images of a public official without the official's consent?

Consider the infamous images of former Congressman Anthony Weiner. Several women revealed to the press that Congressman

246. *See generally Stevens*, 599 U.S. 460.
247. *Id.* at 472.
248. *Id.* at 471.
249. *Id.* at 472.
250. *See id.* at 478–80.
251. *Id.*
252. Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989) (internal quotation marks omitted) (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975)); *see also generally* Bartnicki v. Vopper, 532 U.S. 514 (2001).
253. *See supra* note 230–43 and accompanying text (discussing *Snyder*).
254. *See supra* notes 240–43 and accompanying text.
255. 485 U.S. 46 (1988).

Weiner had sent them sexually explicit photographs of himself via text and Twitter messages on different occasions.[256] Under the reasoning in *Snyder*, the public arguably has a legitimate interest in learning about the sexual indiscretions of governmental representatives. On one occasion, Weiner sent unsolicited images of his penis to a college student whom he did not personally know.[257] His decision to send such messages sheds light on the soundness of his judgment. Unlike the typical revenge porn scenario involving private individuals who shared their naked photos or permitted trusted others to take them on the understanding that the photos would remain confidential, this scenario raises important questions about whether explicit material disclosed without consent can be considered a matter of public import or otherwise constitutionally protected.

The second set of naked images that Congressman Weiner shared might have different First Amendment implications. In 2013, Congressman Weiner announced that he would be running in the New York City mayoral race.[258] A woman, Sydney Leathers, released sexually explicit images of Weiner that he had sent to her while they were having an online affair.[259] To be sure, the *fact* that Weiner sent such pictures involves a matter that the public has a legitimate interest in learning about, given that Weiner is a public figure who had promised that he was no longer engaging in these types of extramarital sexual activities.[260] But does the public have a legitimate interest *in the pictures themselves*, beyond the question of proof that the pictures were authentic?

In the first scandal, the pictures were proof of a congressman's nonconsensual, potentially harassing conduct vis-à-vis a stranger. In the second scandal, Weiner shared naked photographs with a trusted intimate. The public interest lies in the fact that he was having an extramarital, online sexual relationship while running for public office, a fact that could have been easily demonstrated with the numerous text messages exchanged between Weiner and Leathers or with censored versions of the pictures in question. We raise this issue not to come down definitely on the matter but to flag

256. Kevin Liptak, *Weiner Estimates He Sexted Three Women After Resigning*, CNN POLITICS (July 25, 2013, 1:09 PM), http://politicalticker.blogs.cnn.com/2013/07/25/weiner-estimates-he-sexted-three-women-after-resigning/?iref=allsearch.

257. *See Weiner Apologizes for Lying, "Terrible Mistakes," Refuses to Resign*, CNN POLITICS (June 7, 2011, 6:54 AM), http://www.cnn.com/2011/POLITICS/06/06/new.york.weiner/ [hereinafter *Weiner Apology*].

258. Cyril Josh Barker, *Weiner—Staying in Race*, N.Y. AMSTERDAM NEWS, July 31, 2013, at 16.

259. *Id.*

260. *See Weiner Apology supra,* note 257.

the distinction between the public's legitimate interest in knowing about the naked pictures and in actually seeing them.[261]

Another way to understand the constitutionality of revenge porn statutes is through the lens of confidentiality law. Confidentiality regulations are less troubling from a First Amendment perspective because they penalize the breach of an assumed duty, not the emotional injury of published words. Instead of prohibiting a certain kind of speech, confidentiality law enforces express or implied promises and shared expectations.[262]

C. Obscenity

Might the Supreme Court find that nonconsensual pornography amounts to unprotected obscenity? Noted First Amendment scholar Eugene Volokh argues that sexually intimate images of individuals disclosed without consent belong to the category of "obscenity," which the Supreme Court has determined does not receive First Amendment protection.[263] In his view, nonconsensual pornography lacks First Amendment value as a historical matter and should be understood as categorically unprotected because it is obscenity.[264] Although the Court's obscenity doctrine has developed along different lines with distinct justifications, nonconsensual pornography can be seen as part of obscenity's long tradition of proscription.

In *Miller v. California*,[265] the Court set out the following guidelines for determining whether material is obscene:

> whether '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.[266]

261. In his forthcoming book, Neil Richards makes a similar argument. *See* RICHARDS, *supra* note 229, at 38. In discussing the case of celebrities who did not consent to sex tapes being made public, Richards argues that naming celebrities as adulterers may be one thing but publishing high-resolution videos of their sex acts is another. *Id.* As he explains, we do not need to see celebrities naked to discuss their infidelity. *Id.*

262. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1670 (2009).

263. 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/.

264. *Id.*

265. 413 U.S. 15 (1973).

266. *Id.* at 24 (citations omitted).

The Supreme Court provided two "plain examples" of "sexual conduct" that could be regulated: "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[267]

Disclosing pictures and videos that expose an individual's genitals or reveal an individual engaging in a sexual act without that individual's consent could qualify as a "patently offensive representation" of sexual conduct. Such material offers no "serious literary, artistic, political, or scientific value."[268]

D. Free Speech Values

Free expression allows individuals to express truths about themselves and the world as they see it.[269] It enables citizens to make intelligent, informed decisions about self-government.[270] As Justice Brandeis underscored, free speech is "important not just as an *individual* right, but as a safeguard for the *social* processes of democracy."[271] Being able to express ideas and to listen to the ideas of others is instrumental to our ability to engage as citizens.

The nonconsensual disclosure of someone's sexually explicit images does little to advance expressive autonomy and self-governance and does much to undermine private self-expression. Maintaining the confidentiality of someone's sexually explicit images, shared under the assumption that they would be kept private, has little impact on a poster's expression of ideas. It contributes little to public conversation essential for self-government. The publication of revenge porn does not produce better democratic citizens. It does not promote civic character or educate us about cultural, religious, or political issues.

Instead, the nonconsensual disclosure of a person's sexually explicit images chills private expression based on the fear that the images would be shared with the public at large. Without any expectation of privacy and confidentiality, victims would not share their naked images. Such sharing may in fact enhance intimacy

267. *Id.* at 25.

268. *Id.* at 24. Volokh has written that:

> [A] suitably clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there's good reason to think that the subject did not consent to publication of such pictures, would likely be upheld by the courts . . . . [C]ourts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value.

Volokh, *supra* note 263.

269. Citron, *supra* note 94, at 101 & n.286 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785–89 (2d ed. 1988)).

270. RICHARDS, *supra* note 229, at 8–9.

271. *Id.*

among couples and their willingness to be forthright in other aspects of their relationship. Laws restricting disclosure of private information serve important speech-enhancing functions. In his concurrence in *Bartnicki*, Justice Breyer noted that while nondisclosure laws place "direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives,"[272] that is, the interest in "fostering private speech."[273] He continued, [T]he Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy . . . . [W]e should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility."[274] We agree.

V. RECOMMENDATIONS

In this Part, we offer our recommendations to lawmakers working to criminalize revenge porn. Our advice is informed by First Amendment doctrine, due process concerns, and the goal of encouraging the passage of laws that will deter revenge porn and its grave harms. In the course of advising lawmakers working on this issue, we have worked closely with civil liberties groups, including the ACLU. We take their recommendations and concerns seriously. Our recommendations are offered in that spirit.

Civil liberties groups rightly worry that if revenge porn laws "aren't narrowly focused enough, they can be interpreted too broadly."[275] Digital Media Law Project's Jeff Hermes has expressed concern that revenge porn laws might criminalize speech in which the public has a legitimate interest.

Careful and precise drafting can avoid these concerns. These drafting techniques are essential to any effort to criminalize revenge porn.[276] Criminal laws are vulnerable to constitutional challenges if they are vague or overbroad. Defendants must have clear notice about the precise activity that is prohibited. Not only does legislation have to give fair warning to potential perpetrators, it must not be so broad as to criminalize innocuous behavior. Let us explore key features of revenge porn bills that can help avoid these problems.

272. Bartnicki v. Vopper, 532 U.S. 514, 537–38 (2001) (Breyer, J., concurring).

273. *Id.* at 536.

274. *Id.* at 541.

275. Anne Flaherty, *"Revenge Porn" Victims Press for New Laws*, ASSOCIATED PRESS (Nov. 15, 2013, 12:34 PM), http://bigstory.ap.org/article/revenge-porn-victims-press-new-laws.

276. This necessary care is not limited to revenge porn; any law that regulates expression faces similar challenges.

A. Clarifying the Mens Rea

Revenge porn laws should clarify the defendant's mental state. They could require that the defendant knowingly betrayed the privacy expectation of the person in the sexually explicit image.[277] If that were required, a law could require proof that the defendant knew that the other person did not consent to the disclosure *and* that the other person shared the image (or permitted the image to be taken) on the understanding it would be kept private.[278]

The California law seemingly incorporates this notion. The law only punishes intentional privacy invaders.[279] It does not apply to individuals who foolishly share someone's naked photos with others without knowing they are breaching someone's confidence. The current California statute only applies "under circumstances where the parties agree or understand the image shall remain private."[280] It would not reach people who repost nude images without knowledge or agreement that the image be kept private.

B. Malicious Motive

The California bill goes too far, in our view, in requiring proof of a malicious motive, specifically that the defendants intended to inflict serious emotional distress. Other statutes have imposed similar "intent to harass" or "intent to harm" requirements.[281] Such requirements misunderstand the gravamen of the wrong—the disclosure of someone's naked photographs without the person's consent and in violation of their expectation that the image be kept private. Whether the person making the disclosure is motivated by a desire to harm a particular person, as opposed to a desire to entertain or generate profit, should be irrelevant. Malicious motive requirements are not demanded by the First Amendment and, in fact, create an unprincipled and indefensible hierarchy of perpetrators. What is essential is a statute's goal of protecting privacy, autonomy, and the fostering of private expression, which the Court has recognized as legitimate grounds for regulation.[282]

277. Smith v. California, 361 U.S. 147, 152–55 (1959) (ruling in an obscenity case that the mens rea of the crime must be "knowing" rather than mere negligence to protect against overbreadth concerns).

278. That is the view of one of us (Citron). Franks would frame the mens rea requirement for the lack of consent element to use a "knowing or should have known" standard.

279. We borrow this phrase from Lee Rowland, who generously spent time talking to one of us (Citron) about the constitutionality of revenge porn legislation.

280. CAL. PENAL CODE § 247 (West 2013).

281. *See, e.g.*, *id.* § 647.

282. *See supra* notes 272–74 and accompanying text.

C. Proof of Harm

Revenge porn statutes might have a better chance of withstanding overbreadth challenges if they require the state to prove that the victims suffered harm. For instance, the California bill requires the State to prove that the victim suffered emotional harm. Lawmakers could extend coverage to other types of serious harms described in Part I, such as economic injuries, physical harm, or stalking. Free speech advocates contend that revenge porn statutes should not criminalize postings that have no impact on victims. That argument certainly should be considered as lawmakers work on revenge porn bills.[283]

D. Clear Exemptions

Revenge porn bills should include exemptions that guard against the criminalization of disclosures concerning matters of public interest, such as the Maryland, New York, and Wisconsin bills do.[284] They should make clear that it is a crime to distribute someone's sexually explicit images *if and only if* those images do not concern matters of public importance. Worded that way, a law would not apply, for example, to Syndey Leathers, the woman who published former Congressman and mayoral candidate Anthony Weiner's intimate pictures. Such an exception would help reflect the state of First Amendment doctrine; it would not alleviate overbreadth problems.

E. Specific Definitions

Revenge porn statutes must provide clear and specific definitions of certain key terms. For instance, legislators have provided specific and narrow definitions of "sexually explicit" and "nude" images so that defendants have a clear understanding of the images covered by the statutes. Maryland, New Jersey, and California include narrow definitions of "sexually explicit" and "nude" images.

Revenge porn bills should also clarify what lawmakers mean by "disclosure." Disclosure could mean showing a single other person, such as sharing a cell phone photograph with another person or sending a person's nude photograph to her employer. It could, however, have a more narrow meaning: publicity to a wide audience. We believe that a broader definition is in order, since nonconsensual pornography can have a devastating impact if shown to one other

283. On this point we may be at odds. Franks disagrees that proof of harm should be an essential component of a revenge porn bill, as no such similar component seems to be required by other forms of sexual surveillance or abuse. Citron believes that such proof may be required to overcome overbreadth concerns.

284. *See supra* notes 175–80 and accompanying text.

person. Victims have lost their jobs after perpetrators e-mailed their nude photos to their employers. They experience great shame knowing that an employer or client has seen their nude photo without their consent. The harms of revenge porn can be as powerful if seen by one person as by hundreds.

F. Penalty

The ideal penalty for nonconsensual pornography is another contested issue. If the conduct is categorized as a mere misdemeanor, it risks sending the message that the harm caused to victims is not that severe. Such categorization also decreases incentives for law enforcement to dedicate the resources necessary to adequately investigate such conduct. At the same time, criminal laws that are more punitive will face stricter examination and possible public resistance. Although California's categorization of revenge porn as a misdemeanor sends a weak message to would-be perpetrators and will be a less effective deterrent than a law like New Jersey's,[285] it may have aided the law's passage.

On March 26, 2014, Congresswoman Jackie Speier (D-CA) announced that she would be sponsoring criminal legislation against nonconsensual pornography.[286] We support the federal criminal prohibition of nonconsensual pornography because it would reach online acts that are not covered by state law.[287] Congress could amend the federal cyber-stalking statute, § 2261A, with the features we suggested above in mind.[288]

Such a law would not weaken § 230 protections by exposing search engines, Internet service providers ("ISPs"), and most content hosts to potential liability. A law drafted as we suggest would not involve any alteration of § 230, nor would it target most online platforms. It would only prohibit the disclosure of someone's sexually explicit images if the defendant had the requisite mens rea. The law is, in this and other respects, in harmony with the goals of § 230, which distinguishes between interactive computer services and information content providers. It is true that Internet

285. The ACLU initially objected to the California bill and then withdrew its opposition on the grounds that the statute was sufficiently narrow to comport with the First Amendment.

286. One of us (Franks) is assisting Rep. Speier's office in drafting the federal legislation. Steven Nelson, *Federal "Revenge Porn" Bill Will Seek to Shrivel Booming Internet Fad*, U.S. NEWS & WORLD REP., (Mar. 26, 2014), http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shrivel-booming-internet-fad.

287. The U.S. Constitution permits federal lawmakers to regulate the instrumentalities of interstate commerce, including the Internet.

288. *See* 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.

intermediaries would not be able to raise a § 230 defense in the unlikely event of prosecution, but this would not mean that they could not raise any other, more relevant defenses.

If nonconsensual pornography were to become a federal crime, it would be one of thousands of existing federal crimes for which no Internet entity can raise a § 230 defense. Search engines and ISPs have had to work around federal criminal law for many years now, and this fact has not resulted in anything approaching the "death" of the Internet or of the free exchange of ideas.

Federal criminalization of certain forms of online content, far from becoming a burden for search engines, ISPs, and other entities providing interactive computer services, can actually lead to important and voluntary innovations by signaling the seriousness of the damage caused to victims. Google and Microsoft's recent efforts with regard to child pornography are an admirable case in point.[289]

CONCLUSION

We write this Article at a time of great possibility for the criminalization of nonconsensual pornography. On October 12, 2013, the *New York Times* editorial board endorsed our efforts as Board Members of the Cyber Civil Rights Initiative in helping legislators craft criminal prohibitions of revenge porn.[290] As the editorial board urged, "Although lawmakers can't do much to help their constituents with these difficulties, they can work to provide recourse for when exes seek revenge through un-consensual pornography."[291] States, along with the federal government, should craft narrow statutes that prohibit the publication of nonconsensual pornography. Such efforts are indispensable for victims whose lives are upended by images they shared or permitted to be taken on the understanding that they would remain confidential. No one should be able to turn others into objects of pornography without their consent. Doing so ought to be a criminal act. In this Article, we have laid out why this is the case, offered our assessment of recent legislative proposals, and addressed First Amendment concerns. We

289. Alanna Petroff, *Google, Microsoft Move to Block Child Porn*, CNNMONEY (Nov. 18, 2013, 9:10 AM), http://money.cnn.com/2013/11/18/technology/google-microsoft-child-porn/.

290. Editorial, *Fighting Back Against Revenge Porn*, N.Y. TIMES, Oct. 13, 2013, at SR10. The Chicago Tribune editorial board expressed a similar view: "The First Amendment can coexist fine with laws against revenge porn—as it does with laws against child porn, incitements to violence and sexual harassment." *Sordid Revenge: Using Explicit Photos to Embarrass Should Be a Crime*, CHI. TRIB., (Feb. 2, 2014), http://articles.chicagotribune.com/2014-02-02/opinion/ct-revenge-porn-edit-0202-20140202_1_mary-anne-franks-explicit-photos-sexual-images.

291. *Id.*

hope, in time, to see lawmakers follow our advice and ensure the protection of victims.