

Redefining “Revenge Porn” Reform: A View From the Front Lines

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Redefining “Revenge Porn” Reform: A View From the Front Lines

Erratum

1251

“REVENGE PORN” REFORM: A VIEW FROM THE FRONT LINES

Mary Anne Franks*

Abstract

The legal and social landscape of “revenge porn” has changed dramatically in the last few years. Before 2013, only three states criminalized the unauthorized disclosure of sexually explicit images of adults and few people had ever heard the term “revenge porn.” As of July 2017, thirty-eight states and Washington, D.C. had criminalized the conduct; federal criminal legislation on the issue had been introduced in Congress; Google, Facebook, and Twitter had banned nonconsensual pornography from their platforms; and the term “revenge porn” had been added to the *Merriam-Webster Dictionary*. I have had the privilege of playing a role in many of these developments. In 2013, I argued that nonconsensual pornography required a federal criminal response and drafted a model statute to this effect. That statute served as the template for what eventually became the federal Intimate Privacy Protection Act of 2016, as well as for numerous state laws criminalizing nonconsensual pornography. As the Legislative and Tech Policy Director of the Cyber Civil Rights Initiative, I have worked with tech industry leaders, legislators, attorneys, victims, and advocates to develop policies and solutions to combat this abuse. This Article is an account from the front lines of the legislative, technological, and social reform regarding this evolving problem.

INTRODUCTION: LADY GODIVA’S RIDE.....	1252
I. THE “REVENGE PORN” REFORMATION	1257
A. <i>Defining the Problem</i>	1257
1. Scope and Impact	1261
2. Case Studies	1264
a. Rehtaeh Parsons	1265
b. Judge Lori Douglas	1265
c. Audrie Pott	1266
d. Dr. Holly Jacobs.....	1267
B. <i>Tech Developments</i>	1270
C. <i>Victim Support and Outreach Developments</i>	1277
D. <i>Legal Developments</i>	1278

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E.	<i>Legislative Developments</i>	1279
1.	Features of an Effective Law	1282
2.	Model State Statute	1292
3.	The Need for a Federal Criminal Law	1293
II.	OBJECTIONS.....	1298
A.	<i>Sufficiency of Existing Law</i>	1298
B.	<i>Overcriminalization and Mass Incarceration</i>	1302
C.	<i>First Amendment Concerns</i>	1308
1.	Nonconsensual Pornography as Unprotected by the First Amendment	1312
a.	As Explicit Category of Exception	1313
1.	Obscenity	1313
2.	Fighting Words	1315
b.	As Implicit Category of Exception	1315
c.	As New Category of Exception	1317
2.	Nonconsensual Pornography Laws Under Intermediate Scrutiny	1317
a.	As Content-Neutral Restriction.....	1318
b.	As Content-Based Restriction.....	1318
3.	Nonconsensual Pornography Laws Under Strict Scrutiny.....	1323
III.	MAKING SENSE OF THE OPPOSITION	1327
A.	<i>The ACLU's Arizona Challenge</i>	1328
B.	<i>Privacy vs. Harassment</i>	1330
C.	<i>Whose Privacy?</i>	1333
	THE FUTURE	1336

INTRODUCTION: LADY GODIVA'S RIDE

According to an eleventh-century legend, Leofric, the Earl of Mercia and Lord of Coventry, was a harsh ruler who imposed oppressive taxes on his townspeople.¹ The Earl's beautiful and kindhearted wife, Lady Godiva, had repeatedly beseeched Leofric to take mercy on the suffering people.² Leofric, weary of Lady Godiva's pleas, finally promised that he would lower the taxes on the condition that she ride throughout the town on horseback completely naked.³ Leofric, certain that Lady Godiva would never agree to such a humiliating act, believed that this would put

1. See Evan Andrews, *Who Was Lady Godiva?*, ASK HIST. (Oct. 22, 2014), <http://www.history.com/news/ask-history/who-was-lady-godiva>.

2. *Id.*

3. *Id.*

an end to her requests.⁴ Lady Godiva, however, was determined to help her people, no matter the cost. So she took off all of her clothes, mounted her horse, and rode through Coventry dressed only in her golden hair.⁵ Stunned by her devotion to her cause, Leofric relented and lowered the taxes.⁶

Perhaps the most fantastical aspect of this colorful legend from a modern-day perspective, however, is how the townspeople reacted to the spectacle of a beautiful woman’s body displayed naked to the public. According to some versions of the story, the people were so moved by Lady Godiva’s sacrifice on their behalf that they closed their doors, shut their windows, and turned their backs as she rode past, so that Lady Godiva was able to pass through the entire town without a single person viewing her naked body.⁷ In some versions of the story, there is one exception: a man named Tom, who could not resist attempting to look at Lady Godiva as she went by.⁸ Depending on the version of the story, Tom was either struck blind or dead as a result.⁹ This is the origin of the term “Peeping Tom.”¹⁰

In 2014, naked photos of more than a hundred female celebrities were hacked from private accounts and distributed widely on the Internet.¹¹ The victims included the actress Jennifer Lawrence, who discussed the event in a *Vanity Fair* interview.¹² “Anybody who looked at those pictures, you’re perpetuating a sexual offense. You should cower with shame,” Lawrence said, continuing that “it should be my choice” who sees her naked.¹³ Shortly after the interview was published, television host Wendy Williams addressed it on her daytime talk show, saying, “It’s

4. See Ben Johnson, *Lady Godiva*, HISTORIC UK, <http://www.historic-uk.com/CultureUK/Lady-Godiva/> (last visited May 21, 2017).

5. *Id.*

6. See Andrews, *supra* note 1.

7. See Christopher M. Cevalasco, *Lady Godiva – the Naked Truth*, CHRISTOPHERMCEVASCO.COM (Sept. 17, 2012), <http://christophermcevasco.com/2012/09/17/lady-godiva-the-naked-truth/>. In other versions, Lady Godiva ordered the townspeople to stay indoors. See Johnson, *supra* note 4.

8. See Johnson, *supra* note 4.

9. Cevalasco, *supra* note 7.

10. See Johnson, *supra* note 4.

11. See Scott Mendelson, *Jennifer Lawrence Nude Photo Leak Isn’t a ‘Scandal.’ It’s a Sex Crime*, FORBES (Sept. 1, 2014, 10:05 AM), <http://www.forbes.com/sites/scottmendelson/2014/09/01/jennifer-lawrence-nude-photo-leak-isnt-a-scandal-its-a-sex-crime/>.

12. *Cover Exclusive: Jennifer Lawrence Calls Photo Hacking a “Sex Crime,”* VANITY FAIR (Oct. 7, 2014, 8:58 AM), <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-cover>.

13. *Id.*

not your choice . . . I've looked several times" at Lawrence's photos.¹⁴ Williams asked her audience to "[c]lap if you've looked at Jennifer Lawrence's hacking pictures."¹⁵

Williams's reaction reflects the widespread contemporary view that looking at a woman's naked body without her consent is both normal and justified.¹⁶ As her comments demonstrate, we are a long way from Lady Godiva's ride. It is almost impossible to imagine, in our time, members of the public voluntarily turning away from the sight of a woman exposed against her will. It is equally impossible to imagine a society that would have praised any woman so exposed for her virtue and nobility, rather than using the exposure as an excuse to unleash a torrent of misogynist criticism, victim-blaming, and rape threats against her. We are instead a society of Peeping Toms, no longer fearing judgment for our voyeurism, but administering judgment on the objects of our gaze.

It is no longer considered merely acceptable to look at women naked without their consent; lack of consent has increasingly become the entire point of the spectacle, the factor that provides the erotic charge. Anyone interested in viewing naked bodies can easily access millions of hard-core sexually explicit images and videos of consenting individuals with a click of a mouse. The "revenge porn" consumer is not aroused by graphic sexual depictions as such, but by the fact that the people in them—usually women—did not consent to being looked at.

This was true long before the term "revenge porn" entered popular discourse. In the 1980s, hard-core porn magazine *Hustler* began running a feature called "Beaver Hunt," which published reader-submitted sexually explicit photographs.¹⁷ The women depicted in these photographs had often not consented to their submission or publication: some photographs had been stolen, some were submitted by exes with malicious purposes, and some were simply published without consent.¹⁸ The feature was controversial, resulting in numerous lawsuits against

14. Sierra Marquina, *Wendy Williams Admits to Looking at Jennifer Lawrence's Nude Leaked Photos, Mocks the Star's Defense*, US MAG. (Oct. 10, 2014, 7:00 PM), <http://www.usmagazine.com/celebrity-news/news/wendy-williams-admits-she-looked-at-jennifer-lawrences-nude-photos-20141010>.

15. *Id.* It is perhaps encouraging that the audience responded with only a smattering of applause. See Wendy Williams, *Jennifer Lawrence Speaks Out*, YOUTUBE (Oct. 8, 2014), <https://www.youtube.com/watch?v=A-rZkEnAUJY>.

16. See *infra* Section I.A.

17. Emily Poole, *Fighting Back Against Non-Consensual Pornography*, 49 U. S.F. L. REV. 181, 186 (2015).

18. *Id.*

Hustler,¹⁹ but it continues today. As video recorders and cameras became smaller and cheaper, many online communities and websites began featuring “amateur porn” of uncertain provenance.²⁰ In many cases, there is no evidence that the individuals depicted were aware that they were being filmed or that they have consented to the material being distributed.²¹ Yet the “amateur porn” industry flourishes largely without investigation or regulation, betraying a lack of social or political interest in ensuring that those featured in such intimate scenarios had consented to being seen in this way.²²

Until quite recently, there was little formal resistance to the steady normalization of viewing women naked without their consent. Before 2003, no law in the United States explicitly criminalized the unauthorized disclosure of sexually explicit images of another adult person.²³ The issue received little attention from the media or from lawmakers. That began to change in 2010, when Hunter Moore created a website featuring stolen or user-submitted sexually explicit imagery of people, mostly women, without their consent.²⁴ Moore’s site also provided detailed personal, contact, and other identifying information about the people depicted on the site.²⁵ In 2011, Christopher Chaney was arrested for hacking the email accounts of dozens of female celebrities to obtain suggestive or explicit images of the women.²⁶ Despite high-profile cases like these and a rise in “revenge porn” sites, before 2013 only three states had criminal laws applicable to the conduct.²⁷ Victims mostly suffered in silence for fear of greater exposure. Those that did attempt to seek help in law enforcement

19. Many of the lawsuits were resolved in favor of the plaintiffs. See *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1085 (5th Cir. 1984); *Gallon v. Hustler Magazine, Inc.*, 732 F. Supp. 322, 326 (N.D.N.Y. 1990).

20. Taylor Linkous, *It’s Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 RICH. J.L. & TECH. 1, 10 (2014).

21. In other cases, what is labeled “amateur” or “homemade” porn is in fact professionally produced material made with consenting and compensated individuals.

22. See Mary Anne Franks, *Who’s Afraid of Hot Girls?*, HUFFINGTON POST: BLOG (June 26, 2015, 8:46 AM), http://www.huffingtonpost.com/mary-anne-franks/whos-afraid-of-hot-girls_b_7670514.html.

23. New Jersey was the first state to enact such a law in 2003. See N.J. STAT. ANN. § 2C:14-9 (West 2016).

24. See Connor Simpson, *Revenge Porn King Hunter Moore Arrested for Hacking Email Accounts*, ATLANTIC (Jan. 23, 2014), <https://www.theatlantic.com/national/archive/2014/01/revenge-porn-king-hunter-moore-arrested-conspiracy-hack-email-accounts/357321/>.

25. *Id.*

26. See Crimesider Staff, *Christopher Chaney, So-Called Hollywood Hacker, Gets 10 Years for Posting Celebrities’ Personal Photos Online*, CBS NEWS (Dec. 18, 2012, 10:02 AM), <http://www.cbsnews.com/news/christopher-chaney-so-called-hollywood-hacker-gets-10-years-for-posting-celebrities-personal-photos-online/>.

27. See discussion *infra* Section I.E.

were often mocked. Even sympathetic police officers and lawyers told victims, not inaccurately, that what happened to them was “not against the law.”²⁸

The legal and social landscape has changed dramatically since then. In 2015, major tech companies including Google, Microsoft, Facebook, and Twitter announced that they were banning this abuse and implementing takedown procedures for victims.²⁹ On July 14, 2016, Congresswoman Jackie Speier (D-CA) introduced the Intimate Privacy Protection Act,³⁰ a bipartisan federal bill addressing nonconsensual pornography. As of July 2017, thirty-eight states and Washington, D.C. have passed laws criminalizing the nonconsensual distribution of private, sexually explicit images. The term “revenge porn,” scarcely heard of before 2012, was added to the *Merriam-Webster Dictionary* in 2016.³¹

I have had the privilege of playing a role in many of these developments. In 2013, as a guest blogger on *Concurring Opinions*,³² I proposed that the problem of nonconsensual pornography required a federal criminal response and drafted a model statute to this effect. That statute served as the template for what eventually became the 2016 federal Intimate Privacy Protection Act as well as for numerous state laws criminalizing nonconsensual pornography. As the Legislative and Tech Policy Director of the Cyber Civil Rights Initiative (CCRI), a nonprofit organization dedicated to combating online abuse, I began working with legislators, attorneys, advocates, and tech industry leaders interested in addressing the problem in 2013. In 2014, I coauthored, with Professor Danielle Keats Citron, the first law review article on the topic of criminalizing revenge porn.³³ I have also advised lawmakers and advocates outside of the United States, in countries including Australia, Canada, England, Iceland, Ireland, and Taiwan, on legal approaches to the issue. At the time of this writing, I am serving as the Reporter for the

28. See, e.g., Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013, 7:30 AM), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

29. See Jessica Roy, *How Tech Companies are Fighting Revenge Porn — and Winning*, N.Y. MAG. (June 24, 2015, 2:36 PM), <http://nymag.com/thecut/2015/06/how-tech-companies-are-fighting-revenge-porn.html>; see also *infra* Section I.B (discussing developments in the tech industry fight to combat porn).

30. H.R. 5896, 114th Cong. (2016).

31. See Katy Steinmetz, *Merriam-Webster Adds 'FOMO,' 'Mx.' and About 2,000 Other Words*, TIME (Apr. 20, 2016), <http://time.com/4299634/merriam-webster-fomo-mx-dox-update/>.

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

33. See generally Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014) (analyzing the criminalization of revenge porn).

Uniform Law Commission’s Committee on the Unauthorized Disclosure of Intimate Images.³⁴

These experiences have provided me a front-row seat to the “revenge porn” reform movement. My work on this issue has brought me into contact with victims, activists, politicians, civil liberties groups, prosecutors, and tech industry leaders. It has given me the opportunity to look inside the complex world of legislation and policymaking and to confront challenging doctrinal and scholarly issues in a real-world, high-stakes context.

In our 2014 coauthored article, *Criminalizing Revenge Porn*, Professor Citron and I set out the basic argument for why nonconsensual pornography could and should be criminalized. This Article takes up where that article left off and has two primary goals. The first is to provide an account from the front lines of the social, legislative, and technological reform on this emerging and evolving problem. The second goal is to outline and respond to various objections and criticisms of the revenge porn reform movement. As awareness of this problem and support for solutions have been growing, so too have hostility and opposition, in particular to the legal aspects of reform. Part I addresses the first goal, providing a firsthand account of the recent, rapid progress in the movement to combat nonconsensual pornography. Part II outlines and responds to several major objections to the criminalization of nonconsensual pornography, in particular the alleged sufficiency of existing law, concerns about overcriminalization, and First Amendment concerns. Part III identifies the main opponents to revenge porn reform and assesses their opposition. The Article concludes with some thoughts about where the fight for intimate privacy should go from here.

I. THE “REVENGE PORN” REFORMATION

In 2013, most people had no idea what “revenge porn” was. Victims had few options for support, and the issue was largely ignored by the general public, tech companies, and legislators. Over the next few years, the social, technological, and legislative landscape changed dramatically.

A. *Defining the Problem*

The term “revenge porn,” though commonly used, is misleading in two respects. First, “revenge” suggests that perpetrators are primarily motivated by personal vengeance. In fact, perpetrators may be motivated

34. See Nat’l Conference of Comm’rs on Unif. State Laws, *Committees: Unauthorized Disclosure of Intimate Images*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Committee.aspx?title=Unauthorized%20Disclosure%20of%20Intimate%20Images> (last visited Aug. 18, 2017).

by a desire for profit, notoriety, or entertainment, or for no particular reason at all. Their only constant is that they act without the consent of the person depicted. “Porn” can also be a misleading term, as it seems to suggest that visual depictions of nudity or sexual activity are inherently pornographic. But while the increasingly common³⁵ practice of creating explicit images within the context of a private, intimate relationship should not be considered creating pornography, distributing such images without consent should be, as it transforms a private image into public sexual entertainment. Many victim advocates accordingly use the term “nonconsensual pornography,” though I will occasionally use the term “revenge porn” interchangeably with nonconsensual pornography for ease of reference.

Nonconsensual pornography refers to sexually explicit images and video disclosed without consent and for no legitimate purpose. The term encompasses footage obtained by hidden cameras, consensually exchanged images within a confidential relationship, stolen photos, and recordings of sexual assaults. Nonconsensual pornography often plays a role in intimate partner violence, with abusers using the threat of disclosure to keep their partners from leaving or reporting their abuse to law enforcement.³⁶ Traffickers and pimps also use nonconsensual pornography to trap unwilling individuals in the sex trade.³⁷ Rapists record their attacks not only to further humiliate their victims, but also to discourage them from reporting sexual assaults.³⁸ Nursing home workers have been caught posting nude photos of elderly and disabled patients to social media.³⁹

Nonconsensual pornography can cause immediate, devastating, and in many cases, irreparable harm. A vengeful ex-partner, opportunistic hacker, or rapist can upload an explicit image of a victim to a website

35. In a recent survey of 1,100 New Yorkers, nearly half (45%) reported that they had recorded themselves having sex. *New Yorkers Reveal What Their Sex Lives Are Really Like*, N.Y. POST (Sept. 3, 2014, 6:17 PM), <http://nypost.com/2014/09/03/new-yorkers-reveal-what-their-sex-lives-are-really-like/>.

36. See Chiarini, *supra* note 28; Jack Simpson, *Revenge Porn: What Is It and How Widespread Is the Problem?*, INDEP. (July 2, 2014, 6:55 PM), <http://www.independent.co.uk/news/uk/home-news/what-is-revenge-porn-9580251.html>.

37. See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 817–18 (2008); Marion Brooks, *The World of Human Trafficking: One Woman’s Story*, NBC CHI. (Feb. 22, 2013), <http://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html>.

38. See Tara Culp-Ressler, *16-Year-Old’s Rape Goes Viral on Social Media: ‘No Human Being Deserved This,’* THINKPROGRESS (July 10, 2014), <http://thinkprogress.org/health/2014/07/10/3458564/rape-viral-social-media-jada/>.

39. See Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat*, PRO PUBLICA (Dec. 21, 2015, 8:00 AM), <https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat>.

where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of search engine results for the victim’s name, as well as being emailed or otherwise exhibited to the victim’s family, employers, coworkers, and peers.⁴⁰ Victims are frequently threatened with sexual assault, stalked, harassed,⁴¹ fired from jobs,⁴² and forced to change schools.⁴³ Some victims have committed suicide.⁴⁴ While nonconsensual pornography affects both male and female individuals, available evidence to date indicates that the majority of victims are women and girls, and that women and girls often face more serious consequences as a result of their victimization.⁴⁵

There are other costs beyond the harm to individual victims. Nonconsensual pornography imposes expressive harms⁴⁶ that impact society as a whole. The practice sends the message that sexual exploitation is an acceptable form of entertainment or punishment, or both, especially when it involves women who act in ways that men find unacceptable. It is no coincidence that many female targets of nonconsensual pornography are successful women, from Hollywood celebrities to judges to PhD students to politicians.⁴⁷ The predominantly male perpetrators and predominantly male consumers of these images can be described as attempting to put powerful women “in their place,” to punish them for acting in a way that threatens or displeases men.⁴⁸ Rape, sexual harassment, and voyeurism constantly reinforce the pernicious belief that men have the right to use women and girls sexually without their consent; “revenge porn” has the same effect. Like those forms of

40. See Chiarini, *supra* note 28.

41. See Citron & Franks, *supra* note 33, at 350, 353.

42. See Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 9 (2009).

43. See Citron & Franks, *supra* note 33, at 352.

44. See Emily Bazelon, *Another Sexting Tragedy*, SLATE (Apr. 12, 2013, 6:06 PM), http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parsons_how_should_the_legal_system_treat_nonconsensual.html.

45. See Citron & Franks, *supra* note 33, at 353–54; Jill Filipovic, ‘Revenge Porn’ Is About Degrading Women Sexually and Professionally, GUARDIAN (Jan. 28, 2013, 5:23 PM), <https://www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women>; cf. Danielle Citron, *Cyber Stalking and Cyber Harassment, a Devastating and Endemic Problem*, CONCURRING OPINIONS (Mar. 16, 2012), <http://www.concurringopinions.com/archives/2012/03/cyber-stalking-and-cyber-harassment-a-devastating-and-endemic-problem.html>.

46. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000) (“A person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her.”).

47. See Mendelson, *supra* note 11.

48. See Filipovic, *supra* note 45.

abuse, nonconsensual pornography is often celebrated, frequently trivialized, and rarely punished.

It is important to distinguish the objection to nonconsensual pornography as a violation of privacy and a form of (often gendered) sexual abuse from objections based on negative perceptions of nudity or displays of sexual conduct. Nonconsensual pornography is not wrong because nudity is shameful or because the act of recording sexual activity is inherently immoral.⁴⁹ It is wrong because exposing a person's body against her will fundamentally deprives that person of her right to privacy. Of course, there are multiple ways that a person's privacy can be violated and people value different types of private information differently. Some people would be more concerned if their private conversations, love letters, or unflattering (but not explicit) photos were made public than if nude photos of them were made public. This Article takes no position with regard to whether other forms of privacy violations should also be the subject of reform and does not attempt to present a hierarchy of privacy violations. It only asserts that the specific right not to be viewed naked or engaging in sexual activity without consent is one deserving of respect, a fact that is reflected in the long history of laws and norms against voyeurism and forced nudity both in the United States and elsewhere.

Viewing a person's nudity or sexual activity without consent is, significantly, not merely different in degree from viewing nudity or sexual activity with consent; the two are different in kind. Just as sex without consent is not just another form of sex, and taking property without consent is not just a form of borrowing, viewing a person naked or engaged in sexual activity without consent is not just a form of looking.

To all of this must be added the fact that the market for private nude photos is unlike the market for other private information. We do not live in a world where thousands of websites are devoted to revealing private medical records, credit card numbers, or even love letters. By contrast, "revenge porn" is featured in as many as 10,000 websites,⁵⁰ in addition

49. Some have claimed that nonconsensual pornography laws reinforce notions of female chastity or norms about female nudity. This is a curious critique, as no existing or pending law on nonconsensual pornography distinguishes on the basis of gender. The fundamental harm of nonconsensual pornography is, as noted throughout this Article, a violation of privacy, and men and women are equally deserving of that right. To note that women and girls often suffer more serious consequences when their nude photos are distributed is to acknowledge that a sexist double standard exists, not to endorse it.

50. This figure is based on takedown requests made available to the Cyber Civil Rights Initiative (on file with author). This number is a considerable increase from 2014, when around 3,000 websites were believed to feature nonconsensual pornography. *Misery Merchants: How Should the Online Publication of Explicit Images Without Their Subjects' Consent Be Punished?*,

to being distributed without consent through social media, blogs, emails, and texts. There is a demand for private nude photos that is unlike the demand for any other form of private information. While nonconsensual pornography is not a new phenomenon, its prevalence, reach, and impact have increased in recent years in part because technology and social media make it possible to “crowdsource” abuse, as well as make it possible for unscrupulous individuals to profit from it. Dedicated “revenge porn” sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows.⁵¹

The rise of this destructive conduct is also due in part to the fact that malicious individuals do not fear the consequences of their actions. As noted above, before 2013 there were few laws in the United States explicitly addressing this invasion of sexual privacy, even as concerns over almost every other form of privacy (financial, medical, data) have captured legal and social imagination. While some existing voyeurism, surveillance, and computer hacking laws may prohibit the nonconsensual observation and recording of individuals in states of undress or engaged in sexual activity, the nonconsensual *disclosure* of intimate images has been, until very recently, largely unregulated by the law.

1. Scope and Impact

According to a nationally representative 2017 study by the Cyber Civil Rights Initiative (CCRI), over one in eight adult social media users has been victimized or threatened with the unauthorized distribution of private, sexually explicit images or videos, and over one in twenty adult social media users have engaged in such distribution.⁵² As noted above,

ECONOMIST (July 5, 2014), <http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be>.

51. See Dylan Love, *It Will Be Hard to Stop the Rise of Revenge Porn*, BUS. INSIDER (Feb. 8, 2013, 7:00 PM), <http://www.businessinsider.com/revenge-porn-2013-2>.

52. Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report*, CYBER C.R. INITIATIVE 11 (June 12, 2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>. A previous nationwide study by the Data & Society Research Institute indicated a somewhat lower level of prevalence, finding that one in twenty-five American Internet users—around 10 million people—had been a victim of or threatened with the disclosure of intimate images. DATA & SOC’Y RESEARCH INST., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF “REVENGE PORN” 4 (2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf; *New Report Shows That 4% of U.S. Internet Users Have Been a Victim of “Revenge Porn,”* DATA & SOC’Y: BLOG (Dec. 13, 2016), <https://datasociety.net/blog/2016/12/13/nonconsensual-image-sharing/>. The discrepancy appears to be largely due to the latter study’s narrower definition of the abuse and differences in methodology. The Data & Society study was limited to nude or nearly nude depictions disclosed without consent with the intention to hurt or embarrass the victim and was conducted via telephone survey. DATA & SOC’Y: BLOG, *supra*, at 5.

thousands of websites feature “revenge porn.”⁵³ Intimate material is also disseminated without consent through social media, blogs, emails, texts, DVDs, and photographs.

There are strong indications that nonconsensual pornography is a highly gendered phenomenon. Revenge porn sites feature far more women than men,⁵⁴ and the majority of court cases and news stories to date involve female victims and male perpetrators. The 2017 CCRI study revealed that women were about 1.7 times more likely to be victimized than men, and men were by far the primary perpetrators of the abuse.⁵⁵ A 2016 Data & Society Research study found that young women were the most likely to be threatened with the conduct: one in ten women under the age of thirty had been threatened with disclosure of intimate images.⁵⁶

The CCRI study addressed all nonconsensual, sexually explicit disclosures and was conducted through Facebook polling. Eaton et al., *supra*, at 608.

53. See *supra* note 50 and accompanying text.

54. See Anastasia Powell et al., *The Picture of Who Is Affected by ‘Revenge Porn’ Is More Complex Than We First Thought*, CONVERSATION (May 7, 2017, 8:31 PM), <https://theconversation.com/the-picture-of-who-is-affected-by-revenge-porn-is-more-complex-than-we-first-thought-77155> (noting that “there are many more sites and platforms dedicated to sharing women’s nude or sexual images without their consent than men’s”); see also Abby Whitmarsh, *Analysis of 28 Days of Data Scraped from a Revenge Pornography Website*, WORDPRESS.COM (Apr. 13, 2015), <https://everlastingstudent.wordpress.com/2015/04/13/analysis-of-28-days-of-data-scraped-from-a-revenge-pornography-website/> (finding that of 396 posts to a revenge porn website, 378 depicted women versus 18 men).

55. Eaton et al., *supra* note 52, at 12.

56. See DATA & SOC’Y RESEARCH INST., *supra* note 52, at 5. The study did find that men and women were roughly equally likely to have their intimate material posted, as opposed to being threatened with posting—an intriguing finding. *Id.* However, this study does not appear to have distinguished between unsolicited and solicited images, and does not provide information about where, how, and with what information these postings were made. This may be relevant, as some studies have shown that men send more sexually explicit images than women do. See *Sext Much? If So, You’re Not Alone*, SCI. AM., <https://www.scientificamerican.com/article/sext-much-if-so-youre-not-alone/> (last visited May 21, 2017) (“[61] percent of men partake in sexting and suggestive photo taking, while 48 percent of women do.”). Many of these images are what are commonly referred to as “dick pics,” are often unsolicited, and often do not include identifying information about the sender. See Laura Thompson, *Exposing Yourself is Illegal – So Why Should the Law Tolerate Cyber-Flashing on Online Dating Apps?*, INDEP. (Feb. 4, 2016, 8:36 AM), <http://www.independent.co.uk/life-style/love-sex/exposing-yourself-is-illegal-so-why-do-online-dating-app-users-think-cyber-flashing-is-ok-a6852761.html>. Many recipients of such images consider them to be a form of harassment. See *id.* It is not uncommon for women uncomfortable with such unsolicited images to publicize these images in an effort to shame or deter the sender, often without revealing identifying details about the sender. See John Paul Titlow, *This Woman Wants Facebook To Ban Unsolicited Dick Pics*, FAST COMPANY (June 7, 2016, 6:30 PM), <https://www.fastcompany.com/3060703/this-woman-wants-facebook-to-ban-unsolicited-dick-pics>. This Article takes the position that the publication of nude or sexually explicit photos in which the sender cannot be identified should not be considered nonconsensual pornography for purposes of legal prohibition. Also, this Article considers that the sending of unsolicited nude

The CCRI, which is one of the only U.S. organizations dedicated to the issue of nonconsensual pornography, hears from an average of 100 victims every month.⁵⁷ A previous study by the CCRI in 2013 produced suggestive, though limited, findings about victim demographics and impact.⁵⁸ Ninety percent of respondents who had been victimized by nonconsensual pornography were female.⁵⁹ The majority of victims were between eighteen and thirty years old.⁶⁰ Eighty-three percent of victims said that the material that was disclosed without consent originally began as a “selfie,” that is, taken by the subject herself.⁶¹ More than half of the cases involved a former intimate partner, while around a quarter involved a former friend.⁶² In nearly sixty percent of cases, identifying information about the victim was posted along with the intimate material, including full name (59%); social network information or screenshot of social network profile (49%); email address (26%); phone number (20%); home address (16%); work address (14%); and social security number (2%).⁶³

In terms of psychological impact, nearly all victims (93%) reported suffering significant emotional distress as a consequence of victimization.⁶⁴ Eighty-two percent said they suffered significant impairment in social, occupational, or other functioning.⁶⁵ More than half experienced suicidal thoughts; forty-two percent have sought psychological help.⁶⁶ Nearly half of all victims reported being stalked or harassed online by people who have viewed their material.⁶⁷ A third of victims reported that they experienced offline stalking or harassment by people who viewed their material.⁶⁸

photos should, in many cases, be considered a form of harassment and, in some cases, a form of public exposure in which the sender does not retain an expectation of privacy.

57. See MARY ANNE FRANKS, CYBER CIVIL RIGHTS INITIATIVE, DRAFTING AN EFFECTIVE “REVENGE PORN” LAW: A GUIDE FOR LEGISLATORS 2 (2016), <https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf>.

58. The study included 1,606 total respondents, 361 of whom self-identified as victims. *2013 NCP Study Results*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/ncpstats/> (last visited May 21, 2017). All of the information provided in the rest of this Subsection comes from this study.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

Victims also reported serious effects on their romantic and family relationships.⁶⁹ A significant percentage of victims reported that the experience jeopardized their relationships with family (34%) and friends (38%); with thirteen percent reporting that being victimized resulted in the loss of a relationship with a significant other.⁷⁰ More than half of victims fear that the material will be discovered by their current or future children.⁷¹ Forty percent of victims fear the loss of a current or future partner if that partner learns of the disclosure.⁷²

With regard to professional and educational impact, forty-two percent of victims had to explain the situation to professional or academic supervisors, coworkers, or colleagues.⁷³ More than a quarter of victims left work or school for a period of time as a result of the disclosure.⁷⁴ Eight percent quit their jobs or dropped out of school; six percent were fired from their jobs or expelled from school.⁷⁵ More than half experienced difficulty concentrating at work or school due to the experience.⁷⁶ Thirty-nine percent believed that the experience affected their professional advancement.⁷⁷

Victims often limited their use of social media in the wake of their experience.⁷⁸ A quarter of victims closed down an email address due to abusive or harassing messages stemming from the disclosure of their intimate material.⁷⁹ A quarter shut down their Facebook accounts, more than ten percent closed their Twitter accounts, and eight percent closed their LinkedIn accounts.⁸⁰ Forty-two percent of victims report having thought about legally changing their name and three percent of victims have done so.⁸¹

2. Case Studies

The following are real-life cases that illustrate the destructive impact of nonconsensual pornography on victims.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

a. Rehtaeh Parsons

In 2011, fifteen-year-old Rehtaeh Parsons went to a party.⁸² She consumed several alcoholic drinks, becoming quite sick after doing so—sick enough that at one point in the evening she vomited out of an open window.⁸³ As she was doing so, an older boy sexually penetrated her from behind.⁸⁴ Another boy at the party, who Rehtaeh later said also raped her, captured this event on camera.⁸⁵ The photo eventually spread around her school and her town.⁸⁶ Rehtaeh received a barrage of messages calling her a slut and propositioning her for sex.⁸⁷ In April 2013, Rehtaeh attempted to hang herself, which left her in a comatose state.⁸⁸ She was taken off life support a few days later.⁸⁹

In an open letter to the public following her death, her father, Glen Canning, wrote:

Why is it they [the boys at the party] didn’t just think they would get away with it; they knew they would get away with it. They took photos of it. They posted it on their Facebook walls. They emailed it . . . They shared it with the world as if it was a funny animation.⁹⁰

Rehtaeh’s father closed his letter with a plea: “For the love of God do something.”⁹¹

b. Judge Lori Douglas

Lori Douglas was appointed a Judge of Canada’s Court of Queen’s Bench (Family Division) in 2005, and was appointed Associate Chief

82. John Barber, *Second Man Walks Free After Humiliation of Canadian Teen Rehtaeh Parsons*, GUARDIAN (Jan. 15, 2015, 3:38 PM), <https://www.theguardian.com/world/2015/jan/15/rehtaeh-parsons-second-man-walks-free-humiliation-canadian-teen-killed-herself>.

83. *Id.*

84. *Id.*

85. *Id.*; Lydia Warren, ‘Gang-rape Victim,’ 17, Kills Herself ‘After Her Attackers Took Picture of the Assault and Sent It to Classmates Who Branded Her a Slut,’ DAILY MAIL (Apr. 9, 2013, 4:29 PM), <http://www.dailymail.co.uk/news/article-2306494/Rehtaeh-Parsons-Gang-rape-victim-17-kills-attackers-took-picture-assault-sent-classmates-branded-slut.html>.

86. Warren, *supra* note 85.

87. Wendy Gillis, *Rehtaeh Parsons’ Friends Were Silent About Alleged Sexual Assault*, STAR (Apr. 10, 2013), https://www.thestar.com/news/canada/2013/04/10/rehtaeh_parsons_friends_were_silent_about_alleged_sexual_assault.html.

88. See Paula Newton, *Canadian Teen Commits Suicide After Alleged Rape, Bullying*, CNN (Apr. 10, 2013, 5:31 PM), <http://www.cnn.com/2013/04/10/justice/canada-teen-suicide/>.

89. *Id.*

90. Glen Canning, *Rehtaeh Parsons Was My Daughter*, GLENCANNING.COM (Apr. 10, 2013), <http://glencanning.com/2013/04/rehtaeh-parsons-was-my-daughter/>.

91. *Id.*

Justice of that Court in 2009.⁹² In 2003, Douglas's husband, Jack King (now deceased), posted nude photos he had taken of Douglas to a porn site without her knowledge or consent.⁹³ That fact emerged in 2010, when a man filed a complaint with the Canadian Judicial Council alleging that King had used these photos to lure him into a sexual relationship with his wife.⁹⁴ The Council initiated an inquiry that sought to determine, among other things, whether Douglas's "continuing presence on the bench undermines the integrity of the justice system"⁹⁵ due to the existence of the photos and the fact that Douglas had not disclosed that her husband had posted them before her appointment to the bench.⁹⁶ The inquiry included requests by the Council to view the photos in question.⁹⁷

In November 2014, Judge Douglas agreed to step down from the bench in exchange for the adjournment of the inquiry.⁹⁸ In a 2016 interview, Judge Douglas stated, "I lost my job. I lost my life. I lost my reputation. If it hadn't been for my son, there would have been little reason to keep on."⁹⁹

c. Audrie Pott

While attending a party in September 2012, fifteen-year-old Audrie Pott became extremely intoxicated.¹⁰⁰ Three boys and a girl took her to an upstairs bedroom.¹⁰¹ The girl left when the boys starting undressing Audrie and drawing on her breasts and buttocks with markers.¹⁰² The

92. *Manitoba Judge Sex Inquiry Begins Hearing Testimony*, CBC NEWS (July 16, 2012, 3:09 AM), <http://www.cbc.ca/news/canada/manitoba/manitoba-judge-sex-inquiry-begins-hearing-testimony-1.1188795>.

93. See Steve Lambert, *Husband of Manitoba Judge Investigated over Nude Photos Dies of Cancer*, STAR (Apr. 29, 2014), https://www.thestar.com/news/canada/2014/04/29/husband_of_manitoba_judge_investigated_over_nude_photos_dies_of_cancer.html.

94. See *id.*; Anna Mehler Paperny, *Should Canadian Judge Lose Job over Naked Photos Posted Online?*, GLOBAL NEWS (Oct. 9, 2014, 12:06 PM), <http://globalnews.ca/news/1606715/should-canadian-judge-lose-job-over-naked-photos-of-her-posted-online/>.

95. Dean Pritchard, *Lori Douglas to Quit Rather Than Face Inquiry*, WINNIPEG SUN (Nov. 24, 2014, 10:28 AM), <http://www.winnipegsun.com/2014/11/24/lori-douglas-to-quit-rather-than-face-inquiry>.

96. *Id.*

97. *Id.*

98. *Id.*

99. Mary Agnes Welch, *Former Judge Lori Douglas Opens up About the Hurt Caused by CJC Hearing*, WINNIPEG FREE PRESS (Jan. 5, 2016, 4:26 PM), <http://www.winnipegfreepress.com/local/Lori-Douglas-364299101.html>.

100. Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013), <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917>.

101. *Id.*

102. *Id.*

boys then took pictures of themselves sexually assaulting Audrie.¹⁰³ When Audrie woke up the next morning, she didn’t know where she was or what had happened to her.¹⁰⁴ Seeing the marks on her body led Audrie to ask her friends how they got there.¹⁰⁵ Through Facebook conversations, Audrie learned what the boys had done to her.¹⁰⁶ She also learned that there were pictures, and that those pictures were circulating around the school.¹⁰⁷

A week later, Audrie called her mother from school at midday and asked to be taken home.¹⁰⁸ She retreated to her room when the two arrived at home; her mother decided to check on her after not hearing anything for twenty minutes.¹⁰⁹ The bathroom door was locked and there was no answer from inside.¹¹⁰ Audrie’s mother forced open the door and found Audrie hanging from a belt attached to the showerhead.¹¹¹ Paramedics arrived soon after Audrie’s mother called 911, but their efforts to save Audrie were unsuccessful.¹¹²

d. Dr. Holly Jacobs

In 2011, Holly Jacobs—not the name she was born with—was completing her doctorate in Industrial/Organizational Psychology at Florida International University.¹¹³ She had moved on from what she thought had been an amicable breakup with a longtime, long-distance boyfriend.¹¹⁴ She was happy in a new relationship, so much so that she posted a picture of herself with her new boyfriend to Facebook to announce their relationship.¹¹⁵ Soon after, she received an email that would change her life:

*“It’s 8:15 where you are. You have until 8:37 to reply. Then I start the distribution.”*¹¹⁶

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Our Leadership*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/our-services/> (last visited May 21, 2017).

114. Holly Jacobs, *Being a Victim of Revenge Porn Forced Me to Change My Name*, XO JANE (Nov. 13, 2013), <http://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs>.

115. *Id.*

116. *Id.*

Jacobs quickly realized what the sender of the email was threatening to distribute, which also made the sender's identity clear.¹¹⁷ She and her ex-boyfriend had exchanged intimate photos throughout their three-year, often long-distance relationship.¹¹⁸ Three days after Jacobs received the email, her pictures had been posted to more than 200 websites and she had been inundated with unwelcome sexual propositions from men who had seen them.¹¹⁹ The pictures had also been sent to her employer and a coworker.¹²⁰ Jacobs spent the next several months trying to explain the situation to her employer, family, friends, and colleagues, and plead with porn sites and search engines to remove the material.¹²¹ After a solid month spent writing her dissertation by day and sending takedown notices at night, Jacobs managed to get the material scrubbed from the Internet.¹²² But within two weeks, her images were up again on 300 websites.¹²³ At that point, Jacobs gave up trying to change her search results, and started the process of changing her name.¹²⁴

After being told repeatedly by police that what had been done to her was not a crime in Florida, Jacobs began to try to fight back on her own.¹²⁵ In 2012, she started the End Revenge Porn campaign, which included a petition to ban the practice.¹²⁶ That same year, she came across one of my law review articles about the online harassment of women.¹²⁷ Jacobs emailed me to ask for an appointment. At our first meeting, she brought a three-ring binder filled with documentation regarding the sites on which her intimate photos and videos had appeared, along with pages of threatening emails and comments. I was horrified by her story, but I was unsure about what I could offer her except sympathy. Jacobs wanted something else: she wanted me to help her change the law.

I emphasized that I was an academic, not a lobbyist or a politician. Though I had taught criminal law for several years and had spent many class and research hours on the principles of statutory construction, I had not previously attempted to draft a law. Like many academics, I tended to think of the law as something created by other people, and that my role was to learn it, teach it, and critique it where appropriate. But Jacobs's request was compelling, and my background in criminal and

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*; See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011).

constitutional law arguably made me as qualified—in some cases more qualified—than the politicians, lobbyists, and activists who dominate the legislative process. Not only did I have the privilege of studying and teaching legal doctrine for a living, but I was also largely unencumbered by the forces that tend to influence other legislative actors—the pressure to make politically popular decisions, the institutional imperatives to take up a particular party line, or the emotional motivations of personal agendas.

So, after considerable research into relevant criminal and constitutional statutes, cases, doctrine, and legal theory, I drafted a model statute and posted it on the law blog *Concurring Opinions*, where I had been invited to guest blog during the month of February 2013.¹²⁸ In September 2013, I posted an updated draft of this statute to the End Revenge Porn website.¹²⁹ That same month, the New York Times ran an article on the subject of revenge porn that referred to my model statute. Soon after that, New York Assemblyman Ed Braunstein’s office contacted me about using the model statute as the basis for their law. The resulting collaboration led to my first state statute, A08214A.¹³⁰ Between that time and July 2017, I have advised drafters in more than thirty U.S. states, most of which successfully passed laws, as well as in Congress, which introduced a federal bill closely resembling my model statute in July 2016.¹³¹ In 2015, I became a member of California Attorney General Kamala Harris’s Working Group on Cyber Exploitation and an Observer to the Uniform Law Commission (ULC)’s Study Committee on “Revenge Porn.” In October 2016, I agreed to become the Reporter for the ULC’s Drafting Commission on the Unauthorized Disclosure of Intimate Images.

During this time, I introduced Jacobs to my friend and colleague Professor Danielle Citron, an expert in online harassment. In 2013, Jacobs founded the CCRI, serving with Professor Citron and me as members of its Executive Board. In addition to being CCRI’s Vice-

128. Franks, *supra* note 32.

129. See Erica Goode, *Victims Push Laws to End Online Revenge Porn Posts*, N.Y. TIMES (Sept. 23, 2013), http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?pagewanted=all&_r=1&.

130. For the text of the law, see *Bill A08214 Summary*, N.Y. STATE ASSEMBLY, http://assembly.state.ny.us/leg/?default_fld=&bn=A08214&term=2013&Summary=Y&Actions=Y&Text=Y&Votes=Y (last visited May 21, 2017). Unfortunately, New York has yet to pass the law, or any law on nonconsensual pornography. See Pete Brush, *1st Amendment Poses Hurdle for NY ‘Revenge Porn’ Bills*, LAW360 (Oct. 8, 2013), <http://www.law360.com/articles/479052/1st-amendment-poses-hurdle-for-ny-revenge-porn-bills>.

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

President, I now also serve as its Legislative and Tech Policy Director, working closely with both legislators and tech industry leaders.

B. *Tech Developments*

The CCRI takes the position that battling nonconsensual pornography and other forms of online abuse requires a multipronged approach: legislative, technological, and social.¹³² As CCRI's Legislative and Tech Policy Director, I oversee not only our legislative projects but also our technology-focused projects. Social media platforms and search engines are quite skilled at identifying and addressing abusive activity such as malicious software, spam, the publication of private financial information, and copyright violations. Online harassment of women, including nonconsensual pornography, causes as much—and in some cases, more—harm than these kinds of activity, and yet these same companies have not in the past devoted resources to combating it. These companies have tremendous capability for shutting down malicious activity; it is only a question of will. Fortunately, in recent years there has been an increasing commitment from these companies to addressing online abuse.

Since 2013, I have worked with tech industry leaders such as Twitter, Facebook, Microsoft, and Google regarding their policies against harassment generally and nonconsensual pornography specifically. After several presentations, meetings, and finally a cross-industry summit on the issue organized by Facebook in February 2015,¹³³ these companies, along with several others, banned nonconsensual pornography from their platforms and implemented reporting procedures to investigate complaints.

The first site to do so was Reddit. On February 24, 2015, Reddit, the Web's largest online platform, announced that it was banning images of individuals who were nude or engaged in sexual conduct posted without permission.¹³⁴ This announcement came as a surprise to many, given that Reddit had only months before served as one of the primary outlets of

132. *Our Services*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/our-services/> (last visited May 21, 2017).

133. I gave presentations at the headquarters of Google and Facebook and participated in several meetings at Twitter on nonconsensual pornography and privacy. Following my presentation about nonconsensual pornography for Facebook's Safety Series, Facebook's then-Chief of Security Joe Sullivan approached me about the possibility of a cross-industry summit on the issue. Both Holly Jacobs and I spoke at this summit. See Sara Ashley O'Brien, *Facebook Launches Tools to Combat Revenge Porn*, CNN (Apr. 5, 2017, 2:24 PM), <http://money.cnn.com/2017/04/05/technology/facebook-revenge-porn/index.html>.

134. Jessica Moreno, *Reddit: We Won't Tolerate Revenge Porn- And You Shouldn't Either*, CNN (Apr. 27, 2015), <http://money.cnn.com/2015/04/26/technology/reddit-revenge-porn/index.html>.

publication for the hacked nude photos of female celebrities.¹³⁵ The images were featured on one of the site’s 9,000 popular subreddits, crudely referred to as /r/TheFapping.¹³⁶ Soon after lawyers for the celebrities began publicly demanding that the material be removed, the subreddit was banned.¹³⁷ This was an unusual move for the site, which had, since its inception, prided itself on its “anything goes” environment, an environment whose popular subreddits included /r/beatngwomen2 and /r/rapngwomen. The CEO of Reddit at the time of the hack, Yishan Wong, issued a bizarre statement on Reddit that purported to explain not why the celebrity hack subreddit was banned, but why most subreddits with questionable content would not be banned.¹³⁸ While recognizing that incidents such as the celebrity nude photo hack were harmful, Wong wrote that Reddit was “unlikely to make changes to our existing site content policies in response to this specific event.”¹³⁹ Intriguingly, if not entirely coherently, Wong claimed that this was because Reddit is “not just a company running a website where one can post links and discuss them, but the government of a new type of community. The role and responsibility of a government differs from that of a private corporation, in that it exercises restraint in the usage of its powers.”¹⁴⁰

Two months later, in November 2014, Wong resigned as CEO. Ellen Pao, the site’s chief operating officer, stepped in as interim CEO and the site’s cofounder, Alexis Ohanian, returned to the company to serve as its chairman.¹⁴¹ Shortly after that, the site announced its ban on sharing sexually explicit images without consent.¹⁴² Ohanian referred to the celebrity hack as “a missed chance to be a leader” and tweeted, “May @reddit continue to set the #privacy standard for online platforms

135. *More than 100 Celebrities Hacked, Nude Photos Leaked*, CBS NEWS (Sept. 1, 2014), <http://www.cbsnews.com/news/jennifer-lawrence-mary-elizabeth-winstead-kate-upton-hacked-dozens-of-nude-photos-leaked/>.

136. Adario Strange, *Jennifer Lawrence and Other Celebs Hacked as Nude Photos Circulate on the Web*, MASHABLE (Aug. 31, 2014), <http://mashable.com/2014/08/31/celebrity-nude-photo-hack/>.

137. *Id.*

138. *Every Man is Responsible for His Own Soul*, REDDIT (Sept. 6, 2014), <http://www.redditblog.com/2014/09/every-man-is-responsible-for-his-own.html>.

139. *Id.*

140. *Id.* Wong’s manifesto prompted one commentator to note, “If Reddit wants to be thought of as a government, we’ll call it what it is: a failed state, unable to control what happens within its borders.” T.C. Sottek, *Reddit Is a Failed State*, VERGE (Sept. 8, 2014), <http://www.theverge.com/2014/9/8/6121363/reddit-is-a-failed-state>.

141. Tom Cherdar, *Reddit CEO Yishan Wong Resigns in Surprise Leadership Change*, VENTUREBEAT BUS. (Nov. 13, 2014), <https://venturebeat.com/2014/11/13/reddits-ceo-yishan-wong-resigns-following-50m-raise/>.

142. *Id.*

This is one step,” with a link to the announcement of the new policy.¹⁴³

Two weeks after Reddit’s announcement, Twitter announced that it too was banning nonconsensual pornography.¹⁴⁴ Specifically, Twitter added a clause to its existing policy against publishing “private information.” Previously, the policy only referred to “credit card numbers, street address or Social Security/National Identity numbers”; it now also states that users “may not post intimate photos or videos that were taken or distributed without the subject’s consent.”¹⁴⁵ Twitter also implemented a specific reporting process for such material.¹⁴⁶ Facebook announced an explicit ban against nonconsensual pornography in March 2015.¹⁴⁷

But the biggest bombshell came from Google. On June 2, 2015, as part of the “Talks-at-Google” series at Google Headquarters, I gave a presentation on how the tech industry, in particular Google, could and should combat nonconsensual pornography as a violation of user privacy.¹⁴⁸ On June 19, 2015, the Senior Vice President of Google Search announced that the search engine would “honor requests from people to remove nude or sexually explicit images shared without their consent from Google Search results.”¹⁴⁹ The policy change seemed to acknowledge that Google search results are the calling card of the digital age and that “revenge porn” results can wreak havoc on a victim’s employment, educational, and personal potential. The company, well-known for its reluctance to openly regulate search results on the basis of

143. @alexisohanian, TWITTER (Feb. 24, 2015), <https://twitter.com/amlanweb/status/570299350456401921>.

144. Hayley Tsukayama, *Twitter Updates Its Rules to Specifically Ban ‘Revenge Porn,’* WASH. POST (Mar. 11, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/03/11/twitter-updates-its-rules-to-specifically-ban-revenge-porn/?utm_term=.82606f62a083.

145. *The Twitter Rules*, TWITTER, <https://support.twitter.com/articles/18311-the-twitter-rules> (last visited May 21, 2017).

146. Kashmir Hill, *Twitter Bans Nonconsensual Intimate Photos, A.k.a. ‘Revenge Porn,’* FUSION (Mar. 11, 2015), <http://fusion.net/story/102264/twitter-bans-revenge-porn/>.

147. Rob Price, *Facebook Has Banned Revenge Porn*, BUS. INSIDER (Mar. 16, 2015, 8:58 AM), <http://www.businessinsider.com/facebook-bans-revenge-porn-community-guidelines-2015-3>.

148. One of the arguments I made involved pointing out that Google had altered its search algorithm to reduce the impact of “mugshot sites,” which aggregate public arrest records and photographs and often demand a fee for removal. Though these sites were publishing truthful, public information arguably in the public interest, the grave reputational and other harms they caused to the individuals featured compelled Google to make them less accessible in search queries. My argument was that revenge porn sites inflicted even graver harms using information that was neither a matter of public record or in the public interest. See David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), <http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html>.

149. Amit Singhal, *‘Revenge Porn’ and Search*, GOOGLE: PUB. POL’Y BLOG (June 19, 2015), <http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html>.

content, recognized the role that search engines play in maximizing the destructive impact of nonconsensual pornography.¹⁵⁰

While it is important to applaud these changes, it is also important to note their shortcomings. The nature of “revenge porn” is such that an image only needs to be available for a few minutes before it goes viral. By the time a victim discovers that her material has been posted and requests its removal, it may have already been downloaded, forwarded, and posted by hundreds or even thousands of users. Accordingly, companies committed to combating this abuse should prioritize preventative measures to keep the disclosure from occurring in the first place. In its ongoing collaboration with companies such as Facebook and Twitter to revise and improve policies on nonconsensual pornography and other forms of online abuse,¹⁵¹ the CCRI has strongly urged the adoption of preventative measures.¹⁵²

Major tech companies including Google, Yahoo, and Twitter have long used preventative technology to deal with certain forms of harmful content. This technology, called PhotoDNA, was developed by Microsoft to screen for and remove child pornography.¹⁵³ PhotoDNA uses “‘robust hashing,’ which calculates the particular characteristics of a given digital image—its digital fingerprint or ‘hash value’—to match it to other copies of that same image.”¹⁵⁴ After the National Center for Missing and Exploited Children assigns PhotoDNA “signatures” to known images of abuse, “those signatures can be shared with online service providers, who can match them against the hashes of photos on their own services, find copies of the same photos and remove them.”¹⁵⁵ Companies such as Google, Facebook, and Yahoo use PhotoDNA to scan images and videos uploaded to or transmitted through their platforms.¹⁵⁶ The developer of

150. *See id.*

151. *See* Mia Mercado, *Facebook Is Fighting Revenge Porn with These Important New Tools*, BUSTLE (Apr. 6, 2017), <https://www.bustle.com/p/facebook-is-fighting-revenge-porn-with-these-important-new-tools-49513>; James Vincent, *Twitter Continues Its Fight Against Harassment with New Blog Post*, VERGE (Feb. 9, 2016, 6:22 AM), <https://www.theverge.com/2016/2/9/10948780/twitter-harassment-trust-safety-council>.

152. Colin Daileida, *One Woman Is Trying to Pressure Google to Bury Revenge Porn*, MASHABLE (Feb. 27, 2015), <http://mashable.com/2015/02/27/google-algorithm-revenge-porn/#dvHBfP0YImqp>; Heather Kelly, *Reddit’s Stand Against Revenge Porn*, CNN (Feb. 25, 2015, 12:34 PM), <http://money.cnn.com/2015/02/25/technology/reddit-revenge-porn-policy/index.html>.

153. *New Technology Fights Child Porn by Tracking Its “PhotoDNA,”* MICROSOFT, <https://news.microsoft.com/2009/12/15/new-technology-fights-child-porn-by-tracking-its-photodna/#sm.0001mpmupctevct7pjn11vtwrw6xj> (last visited May 21, 2017).

154. *Id.*

155. *Id.*

156. Stephanie Mlot, *‘Hash List’ to Help Google, Facebook, More Remove Child Porn*, PC MAG. (Aug. 11, 2015, 1:12 PM), <http://www.pcmag.com/article2/0,2817,2489399,00.asp>.

PhotoDNA, Hany Farid, is heading up a project to apply this technology to extremist content, “proposing a system that proactively flags extremist photos, videos, and audio clips as they’re being posted online.”¹⁵⁷

The CCRI has long recommended that companies apply preventative hashing technology to nonconsensual pornography.¹⁵⁸ Though the harms of nonconsensual pornography are different from child pornography and jihadist videos, these forms of content are similar in that they cause immediate, devastating, and, in many cases, irreversible damage. Though there are theoretical and practical objections to treating nonconsensual pornography in a similar fashion as child pornography or extremist propaganda, none is fatal to this proposition.¹⁵⁹ In April 2017, Facebook announced that it would begin using photo hashing technology in nonconsensual pornography cases, making it the first major company to publicly adopt this strategy.¹⁶⁰

Other companies have yet to follow suit. Their inaction may rest on the objection that nonconsensual pornography is different from these other forms of harmful content because it is difficult to “know it when we see it.” The fact that an image or video contains nudity or is otherwise sexually explicit does not mean that the material is harmful or unlawful and such a determination requires investigation into context. While this is true with regard to nonconsensual pornography, it is also true, though arguably to a lesser extent, with regard to child pornography and extremist propaganda.

Many people, especially in the tech industry, believe that child pornography is self-evident and therefore easy to categorize and condemn. But not all visual depictions of nude minors constitute child pornography. Consider, as just one example, the “baby’s first bath” photos commonly taken and shared by so many parents. The federal definition of child pornography is “any visual depiction . . . of sexually explicit conduct,” the production of which “involves the use of a minor engaging in sexually explicit conduct,” where “sexually explicit conduct” is defined as “graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same

157. Kaveh Waddell, *A Tool to Delete Beheading Videos Before They Even Appear Online*, ATLANTIC (June 22, 2016), <http://www.theatlantic.com/technology/archive/2016/06/a-tool-to-delete-beheading-videos-before-they-even-appear-online/488105/>.

158. O’Brien, *supra* note 133.

159. This Article does not address First Amendment objections here, as the policies of private companies do not implicate the First Amendment as such (though non-legal concepts of free speech and censorship can and do inform both how private companies determine their policies and how users feel about them).

160. Deepa Seetharaman, *Facebook Takes Aim at ‘Revenge Porn,’* WALL ST. J. (Apr. 5, 2017, 5:49 PM), <https://www.wsj.com/articles/facebook-takes-aim-at-revenge-porn-1491428994>.

or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited” or “graphic or lascivious simulated . . . bestiality; masturbation; or sadistic or masochistic abuse; or . . . graphic or simulated lascivious exhibition of the genitals or pubic area of any person.”¹⁶¹ It would not in fact be self-evident whether a photograph of a naked child or teenager not engaged in either actual or stimulated sexual activity is child pornography. Such a determination would require some investigation into context.

Extremist propaganda is even less clear. Even the threshold determination of whether a beheading video is meant to encourage or condemn violence requires investigation into context. And even if that determination can be made, the question whether such the dissemination of material should be regarded as harmful or helpful is subject to serious debate.

In other words, if the qualification for using preemptive screening technology is that the content’s alleged harm is self-evident, then neither child pornography nor extremist propaganda would pass the test. So why might major tech companies that have been using PhotoDNA for child pornography for years and are considering similar technology for extremist propaganda balk at the idea of using it for nonconsensual pornography?

The most likely answer has to do with scale and public perception. Given the enormous amount of content uploaded to and transmitted by contemporary telecommunications companies, content screening and removal policies have to be “scalable.” Companies must be able to sort through massive amounts of context and make rapid decisions about them. It is not feasible for companies to sort through each case individually; they need to be able to take “bulk actions,” as it were. When it comes to child pornography, the reality is that most flagged content will be removed even if it might not actually be child pornography. The loss of that material is unlikely to be publicly bemoaned; few consumers are likely to complain about the lack of content featuring naked children on social media or search engine results. There are many people, however, who will and do complain about any reduction in the amount of adult pornography available on the Internet. That is, tech companies are willing to err on the side of removing more content than strictly necessary with regard to ambiguous cases of child porn or extremist propaganda in part because there is little downside to doing so,¹⁶² especially compared to sexually explicit adult material. There is, presumably, a much higher—or at least more highly defensible—interest in sexually explicit material involving adults than there is in child porn or extremist propaganda.

161. 18 U.S.C. § 2256 (2012).

162. Extremist propaganda is more controversial, which helps explain why some Internet companies are balking at the prospect of screening it out.

Commercial pornography is big business, and many people want to use the Internet and social media to distribute and consume pornography even when there is no financial incentive.

But nonconsensual pornography is also unique in that its ambiguity can be more easily and readily resolved than other forms of potentially harmful content. What makes the disclosure of a sexually explicit image or video harmful turns on something very simple: consent. And determinations of consent, unlike determinations of whether nudity is “lascivious” or a beheading is newsworthy, are quite simple. Here is an example of how a consent regime could work in the context of adult sexually explicit images: once an image is flagged as sexually explicit, a simple verification procedure could be required prior to disclosure. When the platform detects an explicit image, it could launch a popup message or similar mechanism to ask for verification that the user is authorized to disclose it.¹⁶³ This should be no burden to users wishing to distribute sexually explicit material of themselves or to distribute commercial pornography. It would, however, serve as a possible deterrent—or at least a kind of psychological “speed bump”—for users who know they are not authorized to distribute the material. Given that “revenge porn” and other forms of online abuse are often committed impulsively and in the heat of bitterness or jealousy, even minimal measures that force users to pause before taking action may be enough to get them to desist.

It would of course be possible for users to lie or, in some cases, to simply be mistaken about whether the disclosure was authorized. But this is not an issue unique to the question of nonconsensual pornography; it is also an issue, for example, with copyright infringement. Providers could treat disputes over nonconsensual pornography in a similar way to disputes over copyright violations. Once providers are notified that there is nonconsensual pornography on the platform, they could remove the material until the disclosing party provides evidence that it was an authorized disclosure.¹⁶⁴ If the discloser does not or cannot produce such evidence, the image could be permanently removed and the discloser subjected to penalties, such as the suspension of their account.

In my conversations with tech company representatives, the consent-first approach to sexually explicit images is often met with alarm or dismissal. This resembles the way that “affirmative consent” approaches have generated considerable controversy in the context of sexual

163. See Jessica Roy, *Could Affirmative Consent Help Stop Revenge Porn?*, N.Y. MAG. (July 6, 2015, 3:06 PM), <http://nymag.com/thecut/2015/06/could-affirmative-consent-stop-revenge-porn.html>.

164. Of course, notice-and-takedown practices in copyright disputes are themselves controversial. The point here is to simply note that these practices are now common and apparently not so burdensome as to halt the Internet as we know it.

assault.¹⁶⁵ A discussion of that controversy is beyond the scope of this Article, but suffice it to say here that the concept of affirmative consent, though not always so termed, is in fact quite common and uncontroversial in numerous other contexts. There is little controversy over the fact that consent must be given affirmatively, and often in writing, before certain actions can be performed or certain information can be disclosed. Patients sign consent forms before receiving medical treatment; models sign releases before their images can be used; many credit card transactions require the signature of the card holder. Beyond situations involving formal written consent, most people would not take someone else’s wallet, drive someone else’s car, or enter another person’s house without explicitly being invited to do so. The common practice of obtaining permission prior to engaging in activities such as providing medical treatment, borrowing cars, or entering homes should apply equally to sexual activity, including sexual activity involving the disclosure of intimate material.

The emphasis on affirmative consent presumes, of course, that the only form of legitimate sexual activity is consensual sexual activity. Quite obviously, perpetrators and consumers of nonconsensual pornography have a different view. But one hopes that tech companies—and most people—have higher standards than revenge pornographers. If they do, and they do not wish to facilitate nonconsensual sexual activity, then it follows that they should design their systems to require affirmative consent for the disclosure of sexual imagery.

C. *Victim Support and Outreach Developments*

The CCRI developed new victim support resources beginning in 2014. CCRI began a collaborative project with the law firm K&L Gates to provide pro bono legal services to victims of nonconsensual pornography.¹⁶⁶ The project, called the Cyber Civil Rights Legal Project and headed up by attorneys Elisa D’Amico and David Bateman, assisted 100 clients in the first few months of its existence.¹⁶⁷

CCRI also launched a twenty-four-hour helpline for victims and continues to offer do-it-yourself strategies for getting private material removed from the Internet and referrals to private attorneys and takedown

165. See Sherry F. Colb, *Making Sense of “Yes Means Yes,”* JUSTIA (Oct. 29, 2014), <https://verdict.justia.com/2014/10/29/making-sense-yes-means-yes>.

166. As of 2015. Matthew Goldstein, *Law Firm Finds Project to Fight ‘Revenge Porn,’* N.Y. TIMES (Jan. 29, 2015, 7:47 PM), <http://dealbook.nytimes.com/2015/01/29/law-firm-finds-project-to-fight-revenge-porn/>.

167. *Id.*

services.¹⁶⁸ One such attorney, Erica Johnstone, is a cofounder of Without My Consent, a nonprofit organization that provides resources and develops educational materials for victims of technology-facilitated abuse with which CCRI frequently collaborates.¹⁶⁹ Another prominent attorney is Carrie Goldberg, a member of the CCRI board whose New York firm specializes in Internet abuse and sexual consent matters.¹⁷⁰ CCRI is also currently developing training material for educational institutions and for law enforcement.

D. Legal Developments

In January 2015, the Federal Trade Commission (FTC) issued a complaint¹⁷¹ and a proposed consent order¹⁷² against Craig Brittain, the owner of the (now defunct) revenge porn site Is Anybody Down. The complaint alleged that Brittain engaged in unlawful business practices by obtaining sexually explicit material of women through misrepresentation and deceit and disseminating this material for profit.¹⁷³ According to the terms of the settlement, Brittain must destroy all such material and is barred from distributing such material in the future without the “affirmative express consent in writing” of the individuals depicted.¹⁷⁴ In doing so, the FTC effectively declared the business model of revenge porn sites to be unlawful—a tremendous vindication for the victims of nonconsensual pornography.¹⁷⁵

In February 2015, revenge porn proprietor Hunter Moore, owner of the notorious site Is Anyone Up, pleaded guilty to a single count of federal hacking and a single count of federal aggravated identity theft.¹⁷⁶ Moore had been facing more than fifteen federal felony charges,¹⁷⁷ the

168. See *Our Services*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/our-services/> (last visited May 21, 2017); see also *Online Removal Guide*, CYBER C.R. INITIATIVE, <http://www.cybercivilrights.org/online-removal/> (last visited May 21, 2017).

169. *Erica Johnstone*, RIDDER, COSTA & JOHNSTONE LLP (last visited May 21, 2017), <http://rcjlawgroup.com/attorneys/erica/>.

170. *Carrie Goldberg, Esq.*, C. A. GOLDBERG, PLLC, <http://www.cagoldberglaw.com/team/carrie-goldberg/> (last visited May 21, 2017); Margaret Talbot, *The Attorney Fighting Revenge Porn*, NEW YORKER (Dec. 5, 2016), <http://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn>.

171. Complaint at 1, *In re Craig Brittain*, (Docket No. C-4564) No. 132 3120 (F.T.C. 2015).

172. Consent Order at 1, *In re Craig Brittain*, No. 132 3120 (F.T.C. 2015).

173. Complaint, *supra* note 171, at 2.

174. Consent Order, *supra* note 172, at 3.

175. Klint Finley, *Feds Bar Man from Posting Revenge Porn*, WIRED (Jan. 29, 2015), <http://www.wired.com/2015/01/ftc-revenge-porn/>.

176. Phil Helsel, *Revenge Porn Kingpin Hunter Moore Pleads Guilty, Faces Jail*, NBC NEWS (Feb. 25, 2015, 11:03 PM), <http://www.nbcnews.com/news/crime-courts/revenge-porn-kingpin-hunter-moore-pleads-guilty-faces-jail-n313061>.

177. *Id.*

plea meant that Moore would serve between two and seven years in federal prison.¹⁷⁸ On December 2, 2015, Moore was sentenced to thirty months in prison.¹⁷⁹ It is important to note, however, that Moore was not actually punished for “revenge porn,” as the nonconsensual disclosure of private sexual imagery was not at the time, and is still not yet, a federal crime.¹⁸⁰

Also in February 2015, Kevin Bollaert, the owner of yet another notorious revenge porn site, U Got Posted, was convicted of twenty-seven counts of extortion and identity theft for posting more than 10,000 private, sexually explicit images of people without consent.¹⁸¹ Like Moore, Bollaert was not charged with nonconsensual pornography per se. California passed its first law against nonconsensual pornography in late 2013, after Bollaert committed the acts for which he was charged.¹⁸² In April 2015, he was sentenced to eighteen years in prison; in September 2015, the sentence was reduced to eight years, followed by ten years of mandatory supervision.¹⁸³

In April 2015, Senator Al Franken, who serves on the Senate Judiciary Committee’s Subcommittee on Privacy, Technology and the Law, wrote a letter to then-FBI Director James Comey urging the Bureau to take the issue of nonconsensual pornography seriously.¹⁸⁴

E. Legislative Developments

In 2009, the Philippines became the first country to criminalize nonconsensual pornography, with a penalty of up to seven years’

178. *Id.*

179. See Tracy Clark-Flory, *Revenge Porn King Going to Prison for Something Besides Revenge Porn*, VOCATIV (Dec. 3, 2015, 6:32 PM), <http://www.vocativ.com/news/257638/revenge-porn-king-going-to-prison-for-something-besides-revenge-porn/>.

180. *Id.*

181. Ken Stone, *Revenge Porn Case Goes to Jury; 26 Named as Photo-Site Victims*, TIMES SAN DIEGO (Jan. 29, 2015), <http://timesofsandiego.com/crime/2015/01/29/revenge-porn-case-goes-jury-26-named-photo-site-victims/>.

182. California’s first law would not have been of much use against Bollaert in any case, as it did not apply to images or video created by the victim and required the perpetrator to act with the intent to cause distress. Bollaert’s motive was explicitly financial, not personal. Fortunately, after collaboration with CCRI, California revised its law.

183. See Dana Littlefield & Lyndsay Winkley, *Sentence Revised for Revenge Porn Operator*, SAN DIEGO UNION-TRIBUNE (Sept. 21, 2015, 5:09 PM), <http://www.sandiegouniontribune.com/news/2015/sep/21/kevin-bollaert-revenge-porn-case-resentencing/>.

184. See Mario Trujillo, *Franken Wants ‘Revenge Porn’ Crackdown*, HILL (Apr. 3, 2015, 2:36 PM), <http://thehill.com/policy/technology/237861-franken-wants-fbi-crackdown-on-revenge-porn>.

imprisonment.¹⁸⁵ The Australian state of Victoria outlawed nonconsensual pornography in 2013.¹⁸⁶ In 2014, Israel became the first country to classify nonconsensual pornography as a form of sexual assault, punishable by up to five years' imprisonment;¹⁸⁷ Canada and Japan criminalized the conduct the same year.¹⁸⁸ England and Wales criminalized the conduct in February 2015.¹⁸⁹ New Zealand outlawed the practice in July 2015.¹⁹⁰ Northern Ireland and Scotland followed suit in February¹⁹¹ and March 2016, respectively.¹⁹² In 2015, Germany's highest court ruled that an ex-partner must destroy intimate images of his former partner upon request.¹⁹³ Brazil is currently considering legislation on the issue.¹⁹⁴

In the United States, only three U.S. states—New Jersey, Alaska, and Texas¹⁹⁵—had criminal laws that could be directly applied to nonconsensual pornography before 2013.¹⁹⁶ Between 2013 and July 2017, thirty-six states and Washington, D.C. passed criminal legislation

185. An Act Defining and Penalizing the Crime of Photo and Video Voyeurism, Prescribing Penalties Therefor, and for Other Purposes, Rep. Act No. 9995 (2009) (Phil.), <http://www.wipo.int/edocs/lexdocs/laws/en/ph/ph137en.pdf>.

186. 'Revenge Porn' Outlawed: Israel and Australia Ban Spurned Lovers from Posting Compromising Photos of Their Exes, DAILY MAIL (Jan. 8, 2014, 12:31 PM), <http://www.dailymail.co.uk/femail/article-2535968/Revenge-porn-outlawed-Israel-state-Australia-ban-spurned-lovers-posting-compromising-photos-exes.html>.

187. Yifa Yaakov, *Israeli Law Makes Revenge Porn a Sex Crime*, TIMES ISRAEL (Jan. 6, 2014), <http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/>.

188. Protecting Canadians from Online Crime Act, S.C. 2014, c 31 (Can.); Shigenori Matsui, *The Criminalization of Revenge Porn in Japan*, 24 PAC. RIM. L. & POL'Y J. 289, 290 (2015).

189. I advised one of the Members of Parliament who originally pushed for a law prohibiting nonconsensual pornography, Maria Miller.

190. *Act Closes 'Revenge Porn' Loophole*, SCOOP (July 6, 2015, 3:48 PM), <http://www.scoop.co.nz/stories/PO1507/S00047/act-closes-revenge-porn-loophole.htm>.

191. Lucy Clarke-Billings, *Revenge Porn Laws in Europe, U.S. And Beyond*, NEWSWEEK (Sept. 16, 2016), <http://www.newsweek.com/revenge-porn-laws-europe-us-and-beyond-499303>.

192. See Mark McLaughlin & Katrine Bussey, *'Revenge Porn' Becomes an Offence as MSPs Vote on Sex Crime Law Shake-up*, DAILY RECORD (Mar. 22, 2016, 10:08 PM), <http://www.dailyrecord.co.uk/news/scottish-news/revenge-porn-becomes-offence-msps-7610604#B3sUIs54qHlvDF1C.97>.

193. *Sex Tape Row: German Court Orders Man to Destroy Naked Images*, BBC NEWS (Dec. 22, 2015), <http://www.bbc.com/news/world-europe-35159187>.

194. Alex Cochrane, *Legislating on Revenge Porn: An International Perspective*, SOC'Y FOR COMPUTERS & L. (July 24, 2014), <http://www.scl.org/site.aspx?i=ed38027>.

195. A portion of Texas's law was declared unconstitutional in 2014. See *Ex parte Thompson*, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014).

196. In 2011, a provision was added to the Uniform Code of Military Justice prohibiting the viewing, photographing, recording, and broadcast of "the private area of another person without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy." 10 U.S.C. § 920c (2012).

to address this conduct: Alabama, Arizona,¹⁹⁷ Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas (to supplement previous law), Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin, bringing the total number of states with “revenge porn” laws as of July 2017, to thirty-eight.¹⁹⁸ The conduct is a felony in six of these states (Arizona, Hawaii, Idaho, Illinois, New Jersey, Texas, as well as Washington, D.C.), is a felony under some circumstances in several states, can be upgraded to a felony under certain circumstances in others, and is a misdemeanor offense in the rest.¹⁹⁹ State legislation has been introduced or is pending in more than a dozen additional states, as well as Puerto Rico. As of July 2017, I have advised or am continuing to advise legislative efforts in Kentucky, Massachusetts, Missouri, New York, and Virginia.²⁰⁰

In response to the 2017 Marines United scandal, in which a Facebook group restricted to male Marines distributed hundreds of nude and sexually explicit photos of female Marines without their consent,²⁰¹ the U.S. House of Representatives unanimously passed H.R. 2052, Protecting the Rights of Individuals Against Technological Exploitation Act (PRIVATE Act).²⁰² This bill would amend the Uniform Code of Military Justice (UCMJ) to prohibit the disclosure of sexually explicit visual material without consent.²⁰³ The federal Intimate Privacy Protection Act (IPPA)²⁰⁴ was introduced in Congress on July 14, 2016.

197. The ACLU brought suit against Arizona’s original 2015 law; the parties ultimately agreed not to enforce the law. The Arizona legislature passed a revised version of the law in 2016. See Associated Press, *Arizona Gov. Ducey Signs Bill Criminalizing ‘Revenge Porn,’* AZ CENTRAL (Mar. 11, 2016, 4:04 PM), <http://www.azcentral.com/story/news/politics/legislature/2016/03/11/arizona-gov-ducey-signs-bill-criminalizing-revenge-porn/81666052/>.

198. 35 States + DC Have Revenge Porn Laws, CYBER C.R. INITIATIVE, <http://www.cybercivilrights.org/revenge-porn-laws/> (last visited May 21, 2017). The total is thirty-four instead of thirty-five because Texas’s new law supplemented its previous one.

199. In some states, the offense is a felony if certain aggravating factors are present, e.g., when the perpetrator publishes the images for profit or with the intent to harass the victim. See, e.g., DEL. CODE ANN. tit. 11, § 1335 (West 2014).

200. Virginia has a law, but is seeking to revise it.

201. Katie Van Syckle, *How Two Marines Helped Bring Down Revenge Porn on Facebook*, ROLLING STONE (May 5, 2017), <http://www.rollingstone.com/culture/features/facebook-revenge-porn-how-two-marines-helped-stop-it-w478930>.

202. H.R. 2052, 115th Cong. (2017).

203. Brendan McGarry, *House Votes to Criminalize Revenge Porn in the Military*, MILITARY.COM (May 24, 2017), <http://www.military.com/daily-news/2017/05/24/house-votes-criminalize-revenge-porn-military.html>.

204. H.R. 5896, 114th Cong. (2016).

In a press release, Congresswoman Speier spoke of the harm caused by nonconsensual pornography: “The damage caused by these attacks can crush careers, tear apart families, and, in the worst cases, has led to suicide [W]hat makes these acts even more despicable is that many predators have gleefully acknowledged that the vast majority of their victims have no way to fight back My bill will fix that appalling legal failure.”²⁰⁵ IPPA is the product of extensive, years-long collaboration with civil liberties groups, criminal law practitioners, constitutional scholars, tech industry leaders, and victim advocates.²⁰⁶ It has been widely praised by members of these groups for being narrowly drawn enough to comport with the First Amendment and broadly drawn enough to provide comprehensive protection to victims²⁰⁷ and was introduced with broad bipartisan support.²⁰⁸ The bill is supported by Facebook, Twitter, the National Organization for Women, the National Democratic Institute, the Information Technology and Innovation Foundation, Feminist Majority, Girls, Inc., and the CCRI.²⁰⁹ Leading constitutional scholar Professor Erwin Chemerinsky also gave a statement in support of the bill.²¹⁰

1. Features of an Effective Law

While the Intimate Privacy Protection Act is a strong, clear, and constitutionally sound legislative effort, the same cannot necessarily be said of the various state laws passed recently on the issue of nonconsensual pornography. The fact that the number of states with “revenge porn” laws jumped from three to thirty-eight in the space of only a few years is a testament to how this issue has evolved in the public consciousness. However, many of the state laws regarding nonconsensual pornography that have been passed or are pending suffer from overly burdensome requirements, narrow applicability, or constitutional infirmities. In drafting model statutes and developing guidelines for legislators, I drew on my experience consulting with legal scholars, practitioners, judges, law enforcement, victims, and advocates for domestic violence and trafficking victims. Laws should be clear, specific,

205. Press Release, Congresswoman Jackie Speier, Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn (July 14, 2016), <https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual>.

206. See Mary Anne Franks, *It's Time for Congress to Protect Intimate Privacy*, HUFFINGTON POST (July 18, 2016, 1:32 PM), http://www.huffingtonpost.com/mary-anne-franks/revenge-porn-intimate-privacy-protection-act_b_11034998.html?.

207. Though the bill does have its critics, as will be discussed below.

208. Franks, *supra* note 206.

209. *Id.*

210. *Id.*

and narrowly drawn to protect both the right to privacy and the right to freedom of expression. The following summarizes the specific features an effective law should include, as well as features that should be avoided.²¹¹

The law should first clearly identify the fundamental social harm of the conduct, namely, the violation of privacy. Nonconsensual pornography can involve harassment, extortion, or identity theft; the harm it inflicts can be psychological, physical, financial, reputational, professional, educational, or discriminatory. What nonconsensual pornography *always* involves is an invasion of privacy, and the harm it *always* inflicts is a loss of privacy. Accordingly, the basic elements of the crime should be (1) the disclosure of private, sexually explicit photos or videos of an identifiable²¹² person, (2) without the consent of the person depicted.²¹³

The law should also clearly state the requisite *mens rea* for each element of the crime. It is an axiom of criminal law that a person cannot be guilty “unless the mind be guilty; that is unless the intention be

211. The following is based on a document I prepared for legislators, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators*, CYBER C.R. INITIATIVE, <http://www.cybercivilrights.org/guide-to-legislation/> (last visited May 21, 2017). Ideally, laws would also include a severability clause, so that in the event that some provision might be declared invalid, the rest of the provision would remain effective.

212. The designation of an “identifiable” person makes clear that the statute will not apply to photos or videos that merely depict body parts or sexual activity and provide no indication of who the subjects might be.

213. For example, see Illinois’s statute addressing the nonconsensual dissemination of private sexual images:

A person commits non-consensual dissemination of private sexual images when he or she:

(1) intentionally disseminates an image of another person:

. . . .

(B) who is identifiable from the image itself or from information displayed in connection with the image; and

(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination.

720 ILL. COMP. STAT. 5/11-23.5(b)(1)–(3) (2015).

criminal.”²¹⁴ *Mens rea*, or “guilty mind,” refers to the mental state the defendant must have had with regard to the “social harm” elements set out in the definition of the offense.²¹⁵ At common law, the terms for *mens rea* were numerous and often ill-defined. The Model Penal Code (MPC), by contrast, uses just four terms for *mens rea*: purpose, knowledge, recklessness, and negligence.²¹⁶ Many states have adopted the MPC approach to *mens rea*.²¹⁷

The *mens rea* for the first element, disclosure, should be purpose or knowledge. The distinction between the two is not bright in most circumstances, and in the context of disclosures amount effectively to the same thing. The primary point is to ensure that purely accidental disclosures would not be punishable.

The *mens rea* for the second element, without the consent of the person depicted, should be no higher than recklessness. While the term “recklessness” can be defined in various ways, the MPC offers a clear definition: recklessness requires the conscious disregard of a “substantial and unjustifiable risk.”²¹⁸ This definition takes a sophisticated approach to the question of risk. First, it requires the actor to be subjectively aware of the risk, as opposed to negligence, which is based on what the actor should have known.²¹⁹ Second, it provides a principled way to analyze the culpability of risky acts. All acts, to some extent, involve risk. That does not mean that all acts that could result in social harm should be prohibited or punished. Under a recklessness analysis, only “substantial and unjustifiable” risks are at issue. The “substantial” prong suggests that the risk must be weighty in both a quantitative and qualitative sense: risks that are extremely unlikely to result in harm, or risks that are likely only to result in trivial harms, are not “substantial.” The first prong is moreover informed by the second, “unjustifiable” prong. The analysis of justification requires a calculation of the social utility of the risk. Speeding on a busy highway involves substantial risk both in terms of the probability and severity of the harm; car accidents are common and pose a grave risk of serious injury or death. But the analysis of the risk is affected by the reason for speeding. If a person speeds to get home in time to watch a favorite TV show, there is little social utility and thus little to justify in the taking of that risk; if a person speeds to get a seriously ill child to the hospital, there is much greater social utility and thus justification in the taking of that risk. It is appropriate to criminally punish

214. *Mens Rea*, BLACK’S LAW DICTIONARY (4th ed. 1951).

215. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 489 (E.D.N.Y. 1993).

216. MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 2016).

217. See JOSHUA DRESSLER & STEPHEN GARVEY, CRIMINAL LAW: CASES AND MATERIALS 168–69 (7th ed. 2016).

218. MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2016).

219. *Id.*

actors who act recklessly, in addition to those who act purposely or knowingly, when they know that the social utility of the risk they take is far outweighed by the social harm that is likely to result.

With regard to nonconsensual pornography, the potential social harm is both highly likely and highly destructive. The likelihood of negative consequences resulting from the public disclosure of personal photos and videos depicting nudity or sexual conduct, especially for women and girls, is extremely high. As discussed above, these consequences include psychological trauma severe enough to lead many to contemplate, and some to commit, suicide; threats of sexual assault; harassment; stalking; loss of employment; loss of educational opportunities; loss of intimate and family relationships; and many other harms. The social utility of the risky activity—disclosing a sexually explicit photo or video of a person without verifying consent—is extremely low. Refraining from such disclosures absent clear consent cannot be a burden in the way that refraining from other risky but socially useful activities, such as driving, would. This is not only because the social utility of disclosing sexually explicit images is so much lower, but also because the elimination of the risk is so minimally burdensome. All one has to do to avoid the risk of nonconsensual disclosure is to confirm consent when there is doubt. Contemporary communication technology makes it possible for such confirmation to be both easy and quick. Moreover, the decision to disclose sexually explicit images will rarely, if ever, require the kind of split-second decision-making that would make verification impossible or impractical.

Since the recklessness standard restricts liability to those who consciously disregard the risk at issue, there would be no liability in situations in which the actor was genuinely not aware of the risk. To illustrate, if an actor sincerely believes that the person depicted in the image he wishes to disclose consented to the disclosure—for example, because it is an image taken from a commercial porn site that presumably features models who have signed releases—that actor would not be liable under the statute. By contrast, if it can be shown that an actor was aware of the risk—perhaps because the image was taken from a site advertised as a “revenge porn” site—that actor could be prosecuted under the statute.²²⁰

220. Some have argued that the law should distinguish between “original” and “secondary” (sometimes also referred to as “downstream”) distributors. The underlying assumption of this is that people who forward or redistribute nonconsensual pornography are less culpable than the original discloser. But regardless of whether one’s act of disclosure is the first, the second, or the hundredth disclosure, the question of culpability should still turn on the individual’s state of mind. If secondary disclosers are less culpable in the sense that the fact of previous disclosures could lead them to conclude that such disclosures are consensual, then they are not acting recklessly and

The law should include exceptions for sexually explicit images voluntarily exposed in public or commercial settings.²²¹ These exceptions are important to ensure that recording and reporting unlawful activity in public places (such as indecent exposure), reporting on newsworthy public events (such as topless protests), or forwarding or linking to commercial pornography are not criminalized.

The law should also include narrow exceptions for disclosures made in the public interest, including the lawful and common practices of law enforcement or medical treatment. As attorney Samuel Warren and future Supreme Court Justice Louis Brandeis stated in their influential 1890 article on the right to privacy, “The right to privacy does not prohibit any publication of matter which is of public or general interest.”²²²

Law enforcement officers and medical professionals often have to deal with intimate materials, such as visual records of injuries from domestic violence or rape. While it is vital that such materials be kept out of the public eye, the law should not burden the necessary flow of evidence or medical records that takes place in professional settings. Outside of law enforcement and medical practices, the public interest exception might apply, for example, to situations in which a concerned partner or parent of a victim of nonconsensual pornography contacts an advocacy organization or social media platform and includes links to or copies of the content in the hopes of having it removed or otherwise obtaining assistance, without getting express permission from the victim to do so. While the term “public interest” is not without ambiguity, the dictionary definition of the term—“the welfare or well-being of the general public”²²³—provides considerable guidance, as does the case law illustrating its boundaries, discussed in more detail below.

thus would not be accountable under the statute. Put another way, the distinction between primary and secondary disclosers only matters insofar as it communicates something meaningful with regard to the discloser’s state of mind. But given that it is possible for an “original” discloser to actually have less knowledge regarding the absence of consent than a “secondary” discloser, the distinction is not particularly illuminating. It is preferable to focus on mens rea and not the chronology of disclosures, though the chronology of disclosures may well inform the determination of one’s mens rea. Secondary distributors who are “information content providers” as defined by Section 230 present a different sort of problem, addressed below.

221. See, e.g., Illinois’s law, which exempts the intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed “when the dissemination is made for the purpose of a criminal investigation that is otherwise lawful”; “for the purpose of, or in connection with, the reporting of unlawful conduct”; “when the images involve voluntary exposure in public or commercial settings”; or “when the dissemination serves a lawful public purpose.” 720 ILL. COMP. STAT. 5/11-23.5 (2015).

222. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

223. *Public Interest*, DICTIONARY.COM, <http://www.dictionary.com/browse/public-interest> (last visited May 21, 2017).

Most importantly, the law should not be limited to offenders who intend to cause their victims harm or distress. Nonconsensual pornography, while sometimes a form of harassment, is always an invasion of privacy. According to the CCRI’s 2017 national study of victimization and perpetration of nonconsensual pornography, the vast majority of perpetrators do not intend to harm their victims. Of the roughly one in twenty respondents who admitted having engaged in nonconsensual pornography, 79% stated that they “did not intend to hurt” their victims.²²⁴ The numerous cases involving perpetrators who actively attempt to hide their actions from their victims, including the 2017 “Marines United” Facebook page scandal mentioned above, further underscore the unsuitability of intent to harass requirements.²²⁵

As discussed in more detail below, the insistence that nonconsensual pornography laws must include a motive requirement originated with the American Civil Liberties Union (ACLU)²²⁶ and was later echoed by the Media Coalition and the Motion Picture Association of America.²²⁷ These groups have unfortunately been successful in convincing some legislators that such requirements are necessary for laws to comport with the First Amendment.²²⁸ This is despite the fact that there is no constitutional basis for characterizing nonconsensual pornography as harassment rather than privacy, and no basis for claiming that privacy laws must include motive requirements in order to survive constitutional scrutiny. In fact, as will be discussed in more detail below, motive requirements create constitutional vulnerabilities.²²⁹ Cyberbullying laws in North Carolina and New York have recently been declared unconstitutional²³⁰ on the grounds that phrases such as harass, torment,

224. Eaton et al., *supra* note 52, at 19.

225. See discussion *supra* 201.

226. The ACLU Foundation of Arizona made this claim in a lawsuit against Arizona’s first nonconsensual pornography law. Complaint for Declaratory and Injunctive Relief, *Antigone Books L.L.C. v. Horne*, No. 2:14-cv-02100-SRB, 2014 WL 4784248, at 1, 4, 29 (D. Ariz. 2014). The ACLU of Maryland made this claim. See *Criminal Law – Harassment – Revenge Porn: Hearing on H.B. 43 Before H. Judiciary Comm.*, 2014 Leg., 434th Sess. 1–2 (Md. 2014) (statement of American Civil Liberties Union of Md.).

227. *Revenge Porn: Movie Studios Attack Draft Law*, BBC NEWS (Apr. 4, 2016), <http://www.bbc.com/news/technology-35959594>.

228. Though this is not in fact required by the First Amendment and actually potentially creates First Amendment vulnerabilities, I have recommended, as a possible compromise for legislators who feel pressured to include some reference to distress or harm, to use an objective standard, e.g., “when a reasonable person would know that such disclosure would cause harm or distress to a reasonable person.”

229. See *infra* Part III.

230. See David L. Hudson Jr., *NY High Court Says Anti-Cyberbullying Law Won’t Pass First Amendment Muster*, A.B.A. J. (Nov. 1, 2014, 5:20 AM), http://www.abajournal.com/magazine/article/bully_fighting_new_yorks_high_court_says_anti_cyberbullying_law_wont_pa

and embarrass are unconstitutionally vague.²³¹ The sole nonconsensual pornography law to date that has been declared unconstitutional includes a motive requirement,²³² while none of the nonconsensual pornography laws without a motive requirement (including the oldest such law, New Jersey's, on the books since 2003) have been found unconstitutional.

The term "revenge porn" is likely partly to blame for misguided intent requirements, as it implies that this conduct is motivated by personal animus. Nonconsensual pornography often is, of course, a form of harassment. "Classic" revenge porn cases involve bitter exes determined to destroy their victims' lives. However, a significant portion of nonconsensual pornography cases involves people who do not even know each other. The proprietors of revenge porn websites, for example, do not have personal grievances against the thousands of victims depicted without consent on their platforms.²³³ Neither did the distributors of over a hundred female celebrities' private, intimate photos in the notorious 2014 "celebrity hack."²³⁴ Nor do the many perpetrators who distribute or publish photos and videos on the presumption that their victims will never discover what they have done, including the California Highway Patrol officers who accessed and forwarded female DUI suspects' intimate cellphone pictures as a "game,"²³⁵ the fraternity brothers who uploaded photos of unconscious, naked women to a members-only Facebook page,²³⁶ or the caretakers who posted explicit images of their

ss_f; Eugene Volokh, *N.C. Court Strikes Down Ban on Posting 'Personal or Sexual Information' About Minors 'With the Intent to Torment,'* WASH. POST (June 11, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/11/n-c-court-strikes-down-ban-on-posting-personal-or-sexual-information-about-minors-with-the-intent-to-torment/>.

231. See Hudson, *supra* note 230; Volokh, *supra* note 230.

232. See *infra* note 398.

233. As Craig Brittain, a revenge porn site owner, claimed in defense of his actions, "I call it entertainment We don't want anyone shamed or hurt[;] we just want the pictures there for entertainment purposes and business." *'Revenge Porn' Website Has Colorado Women Outraged*, CBS DENVER (Feb. 3, 2014, 10:13 PM), <http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/>.

234. See Rob Price, *Bitcoin Beggars Try to Profit Off #CelebGate*, DAILY DOT (Sept. 1, 2014, 1:46 PM), <http://www.dailydot.com/crime/celebgate-jennifer-lawrence-nude-leakers-bitcoin/>. The disclosers in that case were hoping for Bitcoin (online currency) donations, and likely had no personal relationship to their victims at all.

235. See Matthias Gafni, *Warrant: CHP Officer Says Stealing Nude Photos from Female Arrestees 'Game' for Cops*, EAST BAY TIMES (Oct. 24, 2014, 3:00 PM), http://www.contracostatimes.com/my-town/ci_26793090/warrant-chp-officer-says-stealing-nude-photos-from.

236. Holly Otterbein, *Member of Penn State's Kappa Delta Rho Defends Fraternity*, PHILA. MAG. (Mar. 18, 2015, 3:46 PM), <http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/>. In March 2014, after it was discovered that members of the Penn State chapter of the Kappa Delta Rho fraternity had uploaded photos of unconscious, naked women to a members-only Facebook page, a fellow fraternity brother defended the group

unsuspecting patients to Snapchat.²³⁷

Those who insist that nonconsensual pornography laws must include intent to harass or humiliate requirements sometimes do so because they confuse the word “intent” used in such requirements with “intent” in the sense of mens rea. The ambiguity of the word “intent” in the criminal law context is unfortunate, as it apparently leads some to conclude that the word “intent” must literally be included in all criminal statutes or that phrases beginning with the word “intent” are expressions of mens rea. But mens rea does not mean “intent” in the narrow sense of purposefulness, but rather can be any one of several culpable mental states, including knowledge, recklessness, or negligence with regard to social harm.²³⁸ It is even possible, though controversial, to punish people for harms with no “guilty mind” at all in so-called “strict liability” crimes.²³⁹

“Intent to harass” requirements, despite the phrasing, are not intent requirements at all, in the sense of mens rea, but are in fact motive requirements. While, as explained above, the requisite mens rea for each element of a criminal law should be clearly stated, criminal laws are not required to include—and indeed the majority do not include—motive requirements.²⁴⁰ “Intent to harass” requirements²⁴¹ result in arbitrary distinctions between perpetrators motivated by personal desire to harm and those motivated by other reasons.²⁴² Imposing such motive

by explaining that the conduct “wasn’t malicious whatsoever. It wasn’t intended to hurt anyone. It wasn’t intended to demean anyone. It was an entirely satirical group . . .” *Id.*

237. Ornstein, *supra* note 39.

238. MODEL PENAL CODE § 2.02(2)(a)–(d) (AM. LAW INST. 2016).

239. *See, e.g.,* State Cent. Collection Unit v. Jordan, 952 A.2d 266, 269 (Md. 2008).

240. The Supreme Court’s decision in *Elonis v. United States* added to the confusion. A common misreading of the decision was that it required the level of mens rea in federal criminal statutes to be no lower than recklessness. But what the Court actually held was that in situations where the mens rea of a crime was not clearly stated, the Court would not presume that the mens rea is any lower than recklessness. 135 S. Ct. 2001, 2012–13 (2015). In other words, the Court decided *Elonis* purely on narrow statutory construction grounds, and its holding would not apply to statutes that expressly articulated the mens rea for each element of a crime. *See id.*

241. *See, e.g.,* UTAH CODE ANN. § 76-5b-203 (LexisNexis 2016). “An actor commits the offense of distribution of intimate images if the actor, with the intent to cause emotional distress or harm, knowingly or intentionally distributes to any third party any intimate image of an individual who is 18 years of age or older . . .” *Id.*

242. Professor Eugene Volokh reached the same conclusion in a recent article. Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1405–06 (2016) (“Revenge porn is bad because it’s nonconsensual—at least one of the participants didn’t agree to the distribution of the material—and not because its purpose is revenge. The label ‘revenge porn’ stuck because it’s vivid, and because most nonconsensual porn probably is motivated by revenge. But for purposes of legal analysis, there’s no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person.”); *see also* Warren & Brandeis, *supra* note 222, at 218 (“The invasion of the privacy that is to be protected is equally

requirements ignores the reality that many perpetrators act not with an intent to distress but out of a desire to entertain, to make money, or to achieve notoriety.

Other pitfalls to avoid in drafting such a law may include expansive definitions of nudity (e.g., buttocks or female nipples visible through gauzy or wet fabric, covered male genitals in a “discernibly turgid state”).²⁴³ Too-broad definitions could also lead to “baby in the bath” problems, criminalizing parents who share innocent pictures of their infants.²⁴⁴ On the other hand, the law should not be so narrowly drafted as to apply only to images featuring nudity, as an image can be sexually explicit without containing nudity.²⁴⁵ The law should not be so narrowly drafted as to only apply to disclosures made online or through social media,²⁴⁶ as nonconsensual pornography can also take “low-tech” forms

complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not . . .”).

243. See, e.g., GA. CODE ANN. § 16-11-90(a) (2016) (defining “nudity” as “(A) The showing of the human male or female genitals, pubic area, or buttocks without any covering or with less than a full opaque covering; (B) The showing of the female breasts without any covering or with less than a full opaque covering; or (C) The depiction of covered male genitals in a discernibly turgid state”).

244. See Riya Bhattacharjee, *Florida Pushes Bill to Criminalize ‘Revenge Porn,’* MSN NEWS (Apr. 9, 2013), <http://news.msn.com/us/florida-pushes-bill-to-criminalize-revenge-porn> (“University of Miami law professor Mary Anne Franks said it was ‘a very good sign’ that legislators were working toward criminalizing revenge porn, but the proposed bill was too broad in some aspects and too narrow in others. ‘It’s criminalizing the creation of an image that depicts nudity, but it doesn’t define nudity,’ Franks said. ‘It needs to make clear what it means by nudity and that nudity isn’t the only thing we care about. So it is unclear whether it refers to genitalia, buttocks, breasts, etc. or all of the above. That vagueness might mean that a mother who uploads a photo of her baby in the bath to Facebook could face criminal prosecution.’”).

245. See Carrie Goldberg, *Seven Reasons Illinois Is Leading the Fight Against Revenge Porn*, CYBER C.R. INITIATIVE (Dec. 31, 2014), <http://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn>.

246. For example, Georgia’s law limits its application to a person who:

- (1) Electronically transmits or posts, in one or more transmissions or posts, a photograph or video . . . when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person; or
- (2) [c]auses the electronic transmission or posting, in one or more transmissions or posts, of a photograph or video . . . when the transmission or post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person.

GA. CODE ANN. § 16-11-90(b)(1)–(2).

such as printed photographs and DVDs.²⁴⁷

The law should not, despite the ACLU’s urgings,²⁴⁸ be limited to conduct perpetrated by a current or former intimate partner.²⁴⁹ While such laws highlight the fact that nonconsensual pornography is often a form of intimate partner violence, they allow friends, coworkers, and strangers to engage in this destructive conduct with no consequence.

State laws must also reflect an understanding of Section 230 of the Communications Decency Act.²⁵⁰ Section 230 protects online entities from liability when they merely provide platforms for third-party content.²⁵¹ Given that Section 230 trumps any state law that conflicts with it,²⁵² state laws should not be drafted in a way that creates unnecessary confusion about this fact.²⁵³ However, state legislators should also take care not to broaden immunity for online entities beyond what is provided by Section 230, which only applies to the extent that these entities serve as intermediaries for third-party content. To the extent that online entities act as codevelopers or cocreators of content, Section 230 is not a bar to state intervention.²⁵⁴

247. See, e.g., the case of David Feltmeyer, who allegedly distributed sexually explicit DVDs of his ex-girlfriend on the windshields of cars in her neighborhood after she declined to continue a relationship with him. Associated Press, *Police: Man Left DVDs of Ex-Girlfriend Performing Sex Acts on Car Windshields*, FOX NEWS (Mar. 3, 2007), <http://www.foxnews.com/story/2007/03/03/police-man-left-dvds-ex-girlfriend-performing-sex-acts-on-car-windshields/>. The case of Jovica Petrovic is also illuminating here. Petrovic sent 8.5 x 11 glossy photos of his ex-wife performing sex acts in FedEx envelopes to her boss as well as to her home address, where they were opened by her seven-year-old son. Nicholas Phillips, *Sext Fiend: Jovica Petrovic Tried to Embarrass His Ex-Wife to Death, and Revenge Porn Was the Name of the Game*, RIVERFRONT TIMES (Apr. 18, 2013), <http://www.riverfronttimes.com/2013-04-18/news/sext-fiend/full/>.

248. See Mary Anne Franks, *The ACLU’s Frat House Take on ‘Revenge Porn,’* HUFFINGTON POST (Apr. 1, 2015), http://www.huffingtonpost.com/mary-anne-franks/the-aclus-frat-house-take_b_6980146.html.

249. For example, Pennsylvania’s law states:

[A] person commits the offense of unlawful dissemination of intimate image[s] if, with intent to harass, annoy or alarm a current or former sexual or intimate partner, the person disseminates a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.

18 PA. CONS. STAT. § 3131 (2014).

250. Pub L. No. 104-104, 110 Stat. 137 (1996) (codified as amended at 47 U.S.C. § 230 (2012)).

251. 47 U.S.C. § 230(c)(1).

252. *Id.* § 230(e)(3) (“No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”).

253. By the same token, criticisms to the effect that a state “revenge porn” law can deprive Internet entities of their Section 230 immunity are unfounded.

254. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008). See also Mary Anne Franks, *The Lawless Internet? Myths and*

2. Model State Statute

In accordance with the requirements outlined above, the model state statute I drafted for the CCRI reads:

An actor may not knowingly disclose an image of another person who is identifiable from the image itself or information displayed in connection with the image and whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or recklessly disregards the risk that the depicted person did not consent to the disclosure [and under circumstances in which the actor knew or should have known that the depicted person had a reasonable expectation of privacy. A person who has consented to the disclosure of an image within the context of a confidential relationship retains a reasonable expectation of privacy with regard to disclosures beyond such a relationship, as does a person whose intimate parts are exposed or who is engaging in a sexual act involuntarily, whether in public or private.]

a. Definitions. For the purposes of this section,

1. “Disclose” includes transferring, publishing, distributing, or reproducing;
2. “Image” includes a photograph, film, videotape, recording, digital, or other reproduction;
3. “Intimate parts” means the naked genitals, pubic area, anus, or female adult nipple of the person;
4. “Sexual act” includes but is not limited to masturbation; genital, anal, or oral sex; sexual penetration with objects; or the transfer or transmission of semen upon any part of the depicted person’s body.

b. Exceptions. This section does not apply to

1. Images involving voluntary exposure in public or commercial settings; or
2. Disclosures made in the public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings,

Misconceptions About CDA Section 230, HUFFINGTON POST (Dec. 18, 2013, 5:35 PM), http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html.

or medical treatment.

c. Severability.

1. The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.²⁵⁵

Examples of enacted state legislation that are substantially similar to this model statute are Illinois,²⁵⁶ Minnesota,²⁵⁷ and Washington.²⁵⁸

3. The Need for a Federal Criminal Law

As discussed above, the thirty-eight state laws that have been passed as of July 2017 vary significantly in their definitions, exceptions, and penalties. This, combined with the fact that twelve states do not yet have laws on the books, creates confusion and undermines legislative effectiveness. Ideally, all states will soon have strong, clear, consistent laws against nonconsensual pornography. But even if and when they do, a federal criminal law would still be necessary to provide a single, clear articulation of the relevant elements of the crime for several reasons.²⁵⁹

First, federal criminal prohibition is one of the most powerful ways for society to acknowledge and condemn serious wrongdoing. Nonconsensual pornography causes not only severe privacy harm to individual victims but also wide-ranging social harm. It inflicts particular burdens on women and girls, who are disproportionately targeted by nonconsensual pornography and who tend to suffer more negative consequences than men and boys. The conduct—and even the threat of this conduct—chills women’s speech, expression, and ambition in

255. MARY ANNE FRANKS, DRAFTING AN EFFECTIVE “REVENGE PORN” LAW: A GUIDE FOR LEGISLATORS, CYBER CIVIL RIGHTS INITIATIVE 10 (2016), <https://www.cybercivilrights.org/guide-to-legislation/>.

The “reasonable expectation of privacy” language is bracketed because of the benefits and drawbacks of including it. The benefit of including such language is to emphasize that the statute only protects private images. This point is already addressed in B(1) of the exceptions, but including it in the elements might helpfully underscore this aspect. The drawback of this approach is that the term “reasonable expectation of privacy” might create more ambiguity than it resolves, especially considering the doctrinal baggage of the term in Fourth Amendment jurisprudence.

Id. at 10 n.61.

256. 720 ILL. COMP. STAT. 5/11-23.5 (2015).

257. MINN. STAT. § 617.261 (2016).

258. WASH. REV. CODE § 9A.86.010 (2015).

259. See Franks, *supra* note 32.

particular. Women withdraw from every sphere of meaningful activity when they fall victim to this crime: work, school, social media, and personal relationships. Federal criminal laws are appropriate against conduct that causes severe and irreversible harm to both individuals and society, and nonconsensual pornography assuredly falls into that category.

Additionally, federal law enforcement authorities often have superior resources and capabilities to investigate and prosecute these crimes. Nonconsensual pornography is, moreover, a borderless crime that is most effectively addressed by federal legislation.

Finally, a federal law is necessary to tackle one of the greatest obstacles to shutting down the revenge porn industry: the immunity provided to many website operators through Section 230 of the Communications Decency Act. As noted above, Section 230 provides that no tort law and no state criminal law can be used against “interactive computer services”—that is, search engines, social media platforms, websites, message boards, etc.—for content provided by third parties.²⁶⁰ That means revenge porn sites, in theory, cannot be prosecuted so long as they only provide a platform for angry exes and other revenge porn perpetrators. It also means that such interactive computer services have no legal obligation to respond to nonconsensual pornography. This is in stark contrast to these services’ obligations regarding violations of federal criminal law, such as child pornography,²⁶¹ or to copyright violations.²⁶² The difference can be explained by the fact that Section 230 does not apply to either federal criminal law or intellectual property law.²⁶³

If a federal criminal law prohibiting nonconsensual pornography were passed, however, interactive computer services would no longer be able to raise a Section 230 defense against liability. A federal law could impose liability and removal requirements on interactive computer services for nonconsensual pornography without violating Section 230. This is a possibility that inspires both enthusiasm and alarm. There are those who are enthusiastic about the possibility of imposing liability on the widest possible range of search engines, websites, social media platforms, and message boards for nonconsensual pornography regardless of whether these entities are aware of the content. The reasoning is that if these providers faced potential liability, they would be forced to actively screen their platforms for this content and incentivized to remove it. This would certainly go a long way towards reducing the proliferation and transmission of nonconsensual pornography. On the other hand, many worry that this outcome would threaten the freedom of

260. 47 U.S.C. § 230(c) (2012).

261. 18 U.S.C. § 2258A(a)(1)(A)–(B) (2012).

262. 17 U.S.C. § 512(a)(1)–(5) (2012).

263. 47 U.S.C. § 230(e)(1)–(2).

Internet expression. Screening places a heavy burden on providers, especially those dealing with large amounts of third-party content. Some companies with limited resources might not be able to bear this burden and would be forced to exit the field. In addition, providers generally would be incentivized to always err on the side of removal. The concern is that providers would become timid about content for fear of liability, resulting in a net loss to freedom of expression on the Internet.

The fear of chilling effects on Internet expression drives much of the criticism about legislative reform on nonconsensual pornography, especially federal legislative reform. Concern about the chilling effects that may result from imposing liability on electronic communication providers for third-party content has led some, especially those within the tech industry, to be hostile to any attempt to regulate nonconsensual pornography through federal criminal law. Any attempt to gain the support—or at least to avoid the ire—of major tech industry leaders must address this concern. The most sensible way to address it is for the law to distinguish between individuals and electronic communication providers. While an individual could justifiably be held accountable for recklessly disclosing private, sexually explicit material without consent, that standard is a poor fit for entities such as Facebook or Google, which deal with vast amounts of content provided by other people. Accordingly, the requisite *mens rea* for an individual should be different from the requisite *mens rea* for an interactive computer service provider.

Here, existing federal criminal law is instructive. Federal criminal law has acknowledged the practical challenges of imposing broad liability on intermediaries for third-party content with regard to both child pornography and copyright-infringing material. Existing law only requires electronic communication service providers to report suspected violations of child pornography and exploitation laws to the National Center for Missing and Exploited Children when the provider has “actual knowledge” that the content is unlawful.²⁶⁴ Federal intellectual property law limits liability to providers who have “actual knowledge” of infringing content and who do not respond to notice of infringing content in a timely and effective manner.²⁶⁵

The IPPA draft took cues from these provisions, suggesting different standards of liability for individuals and for telecommunication providers. Individuals should be liable when they knowingly disclose private, sexually explicit material with reckless disregard as to whether the disclosure was consensual, but telecommunication providers should only be liable when they actively and knowingly engage in the distribution of nonconsensual pornography. This solution, developed

264. 18 U.S.C. § 2258A(a)(1).

265. 17 U.S.C. § 512 (c)(1)(A)(i)–(iii).

through intensive consultation with members of the tech industry, effectively reinstates Section 230 immunity for intermediaries that act in good faith. That is, so long as intermediaries do not intentionally promote or solicit content that they know to be in violation of the statute, they do not risk liability. Intermediaries that do intentionally solicit or promote content they know to be in violation of the statute, such as revenge porn sites, can be prosecuted.

The elements of the model federal statute are, accordingly, very similar to those of the model state statute. The differences are, first, that the federal statute follows the phrasing conventions of the federal criminal code and makes internal references to other relevant parts of the code. The second difference is that the federal statute includes a section specifically addressing telecommunications and Internet service providers.

The model federal statute I have drafted for the CCRI reads as follows:

Whoever knowingly uses the mail, any interactive computer service, electronic communication service, electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or whose naked genitals or post-pubescent female nipple are exposed, with knowledge of or reckless disregard for the fact that the depicted person did not consent to the distribution, shall be fined under this title or imprisoned not more than ____ years, or both.

A. Exceptions.

- 1) This section does not apply to a visual depiction of a voluntary exposure of an individual's own naked genitals or post-pubescent female nipple or an individual's voluntary engagement in sexually explicit conduct, if such exposure takes place in public or in a lawful commercial setting.
- 2) This section shall not apply to disclosures made in the public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.

B. Telecommunications and Internet Service Providers.

This section shall not apply to any provider of an interactive computer service as defined in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. 230 (f)(2)) with

regard to content provided by another information content provider, as defined in section 230(f)(3) of the Communications Act of 1934 (47 U.S.C. 230(f)(3)) unless such provider intentionally promotes or solicits content that it knows to be in violation of this section.

C. Definitions

- 1) Except as otherwise provided, any term used in this section has the meaning given that term in section 1801.
- 2) The term “visual depiction” has the meaning given that term in section 2256.
- 3) The term “sexually explicit conduct” has the meaning given that term in section 2256(2)(A).

D. Severability.

- 1) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.²⁶⁶

The Intimate Privacy Protection Act, introduced in Congress in July 2016, is substantially similar to this statute.²⁶⁷

266. CYBER C.R. INITIATIVE, CCRI Model Federal Law, <http://www.cybercivilrights.org/ccri-model-federal-law/> (last visited May 22, 2017).

267. The Intimate Privacy Protection Act of 2016 states, in relevant part:

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

(b) EXCEPTIONS.—

(1) LAW ENFORCEMENT AND OTHER LEGAL PROCEEDINGS.—This section—

(A) does not prohibit any lawful law enforcement, correctional, or intelligence activity;

(B) shall not apply in the case of an individual reporting unlawful activity; and

II. OBJECTIONS

Criticisms of legislative reform generally fall into three categories: belief in the sufficiency of existing laws, concerns about overcriminalization, and First Amendment objections. Each will be addressed in turn.

A. *Sufficiency of Existing Law*

Those who insist that existing laws, whether civil or criminal, are sufficient to address this conduct are either ignorant of or indifferent to the reality victims face. If existing laws provided an adequate remedy, thousands of victims would not contact the CCRI in despair with all-too-similar stories of being told that what happened to them was not a crime or that they have no legal recourse. Professor Citron and I detailed the insufficiency of existing laws to combat nonconsensual pornography in our coauthored article.²⁶⁸ This Section will briefly revisit the main points.

(C) shall not apply to a subpoena or court order for use in a legal proceeding.

(2) VOLUNTARY PUBLIC OR COMMERCIAL EXPOSURE.—This section does not apply to a visual depiction of a voluntary exposure of an individual's own naked genitals or post-pubescent female nipple or an individual's voluntary engagement in sexually explicit conduct if such exposure takes place in public or in a lawful commercial setting.

(3) CERTAIN CATEGORIES OF VISUAL DEPICTIONS EXCEPTED.—This section shall not apply in the case of a visual depiction, the disclosure of which is in the bona fide public interest.

(4) TELECOMMUNICATIONS AND INTERNET SERVICE PROVIDERS.—This section shall not apply to any provider of an interactive computer service as defined in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. 230 (f)(2)) with regard to content provided by another information content provider, as defined in section 230(f)(3) of the Communications Act of 1934 (47 U.S.C. 230(f)(3)) unless such provider of an interactive computer service intentionally promotes or solicits content that it knows to be in violation of this section.

(c) DEFINITIONS.—In this section:

(1) Except as otherwise provided, any term used in this section has the meaning given that term in section 1801.

(2) The term “visual depiction” means any photograph, film, or video, whether produced by electronic, mechanical, or other means.

(3) The term “sexually explicit conduct” has the meaning given that term in section 2256(2)(A).

The Intimate Privacy Protection Act, H.R. 5896, 114th Cong. (2016).

268. See Citron & Franks, *supra* note 33, at 360–61 (depicting the inabilities of copyright law and sexual harassment law, specifically).

It should be emphasized, however, that this critique is neither a claim that existing laws can never be useful nor a rejection of solutions other than criminalization. The CCRI encourages victims to consider all plausible existing legal remedies and strategies. Our board includes attorneys who use existing laws, both civil and criminal, to great effect in nonconsensual pornography cases. The CCRI is constantly exploring multiple legal approaches to the problem, including civil restraining orders, Title VII and Title IX claims, and the creation of a new tort. But current legal remedies, while they sometimes lead to satisfactory results in individual cases, are not in themselves sufficient to address the problem.

As a general rule, civil actions place a heavy burden on the victim and in many cases will be an implausible or impossible approach. Civil litigation of any kind generally requires money, time, and access to legal resources. It also often requires further dissemination of the very material that harms the victim.²⁶⁹ The irony of privacy actions is that they generally require further breaches of privacy to be effective. Additionally, in many cases the party responsible will not have enough financial resources to make a damages claim worthwhile (i.e., the defendant will be judgment-proof).

This is connected to the other difficulty in bringing civil claims for nonconsensual pornography: it can be very difficult to find a party to sue. Given the ease with which individual purveyors of nonconsensual pornography can access or distribute images anonymously, it is difficult to identify and prove (especially for the purposes of a lawsuit) who they are.²⁷⁰ Victims are barred from making most civil claims against the websites that distribute this material because of Section 230 of the Communications Decency Act (CDA). As discussed above, CDA § 230 has been interpreted to grant website owners and operators far-ranging immunity for tortious material submitted by third-party users.²⁷¹

Copyright law is more promising for some victims of nonconsensual pornography because, as mentioned above, CDA § 230 does not

269. See, e.g., Rebecca Adams, *For Victims of Sexual Assault, There's Little Incentive to Come Forward – Besides 'Justice,'* HUFFINGTON POST (Dec. 15, 2014), http://www.huffingtonpost.com/2014/12/15/victims-sexual-assault-come-forward-justice_n_6294152.html.

270. See, e.g., Kate McKenna, *Non-Consensual Distribution of Nude Images 'a Real Issue for Canadians,'* CBC News (Jan. 26, 2017), <http://www.cbc.ca/news/canada/montreal/porn-site-reax-montreal-1.3953167>.

271. “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.” 47 U.S.C. § 230(c)(1) (2012). One can hope that more courts rule along the lines of the U.S. Court of Appeals for the Ninth Circuit in *Fair Housing Council v. Roommates.com*, where the website in question was found to have helped create the harmful content as opposed to merely distributing it, but such rulings have been rare so far. See 521 F.3d 1157, 1172, 1175 (9th Cir. 2008).

immunize websites from copyright claims. If a victim took the image or video herself, she is the copyright owner and could in theory take action against unauthorized use. This strategy has proven successful in some cases.²⁷² However, this option will not be of use to the many victims who do not take the images or videos themselves. Moreover, similar problems of publicity, time, and resources that accompany tort claims hinder copyright claims. Even in cases where the victim does hold the copyright and submits a proper DMCA notice and takedown request, many site owners will ignore it.²⁷³ Even when a site owner does honor a takedown request, the image will often pop up on another site or even the same site after a short time.²⁷⁴

Civil actions require money, time, and resources that many victims simply do not have, and the chances of success are low. Even successful civil actions cannot truly address the harm created by revenge porn: even if a victim wins damages or obtains an injunction forcing the poster to take down the image, there is literally nothing to stop the hundreds or thousands of other users that have already downloaded or reposted her image.²⁷⁵ Of course, criminal penalties also cannot guarantee that images will be removed, but they offer greater potential for deterrence than the vague and unlikely threat of civil action. Again, none of this is to suggest that civil remedies cannot or should not be pursued, but merely to underscore the point that they are not, by themselves, sufficient as a response to nonconsensual pornography.

Some existing criminal laws could in theory be brought to bear on nonconsensual pornography, including laws prohibiting voyeurism, stalking, and harassment. With regard to existing criminal laws on stalking and harassment, a 2014 New York case is instructive. In what was referred to as New York's first "revenge porn case," a man named Ian Barber posted naked pictures of his girlfriend to his Twitter account without her consent and sent them to her employer and to her sister.²⁷⁶ After his actions were reported to police, Barber was charged with

272. See, e.g., Caitlin Dewey, *How Copyright Became the Best Defense Against Revenge Porn*, WASH. POST (Sept. 8, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/09/08/how-copyright-became-the-best-defense-against-revenge-porn/?utm_term=.68fd101e3aff.

273. Mitchell J. 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/>; Jeff Roberts, *No, Copyright Is Not the Answer to Revenge Porn*, GIGAOM (Feb. 6, 2014, 7:24 AM), <https://gigaom.com/2014/02/06/no-copyright-is-not-the-answer-to-revenge-porn/>.

274. See Roberts, *supra* note 273.

275. *Id.*

276. Erin Donaghue, *Judge Throws Out New York "Revenge Porn" Case*, CBS NEWS (Feb. 25, 2014), <http://www.cbsnews.com/news/judge-throws-out-new-york-revenge-porn-case/>.

dissemination of an unlawful surveillance image, harassment, and public display of offensive sexual material.²⁷⁷ In February 2014, Judge Steven M. Statsinger ruled that while Barber’s conduct was “reprehensible,” it did not violate any of these laws.²⁷⁸ The case offered a compelling illustration of how state laws fail to protect sexual privacy.

Judge Statsinger ran down the list of charges against Barber: given that unlawful surveillance laws only apply to images that are obtained through surreptitious means, and no information was provided about how Barber obtained the images, the unlawful surveillance charge was not supported.²⁷⁹ With regard to harassment, Judge Statsinger noted that New York’s definition, like the definition of many other jurisdictions, requires actual communication with a person.²⁸⁰ Given that Barber did not send the images to his girlfriend, this charge also could not stand.²⁸¹ Finally, with regard to the public display of offensive sexual material, Judge Statsinger expressed skepticism with regard to whether either tweeting or emailing a photo could be considered a “public” display, and observed that the complaint did not indicate whether the images, in addition to featuring nudity, appealed to a “prurient interest in sex,” as required by the statute.²⁸² The Barber case suggested that “revenge porn” was perfectly legal in New York.²⁸³

The Barber case demonstrates some of the limitations of existing criminal laws against harassment. Harassment and stalking laws often can only be brought to bear in cases where the perpetrator is engaged in a “course of conduct” that is intended to harm or harass—a single act of uploading a private image would generally not constitute harassment, no matter how devastating the result.²⁸⁴

Federal and state laws prohibiting both harassment and stalking are notoriously underenforced, even in straightforward situations involving physical violence.²⁸⁵ The idea that they can and will be applied successfully in cases that often involve no physical contact, complex computer forensics, and moral judgments about women’s sexual behavior is wishful thinking.

277. *Id.*

278. *People v. Barber*, No. 2013NY049761, 2014 WL 641316, at *1 (N.Y. Crim. Ct. Feb. 18, 2014).

279. *Id.* at *4–5.

280. *Id.* at *5–6.

281. *Id.* at *6.

282. *Id.* at *7–8.

283. See Emily Shire, *New York Can’t Kick Its Revenge Porn Habit*, DAILY BEAST (Feb. 25, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/02/25/i-heart-revenge-porn-new-york-fails-its-first-revenge-porn-case.html>.

284. N.Y. PENAL LAW § 120.50 (McKinney 2017); *id.* § 240.25.

285. See DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 85 (2014).

Finally, the law can and does accommodate multiple approaches to social harms. The existence of wrongful death civil remedies, for example, does not demonstrate that there is no need for criminal homicide laws. The existence of multiple legal options for addressing certain conduct is neither impermissible nor regrettable. There is no reason that nonconsensual pornography should be treated differently in this respect.

B. *Overcriminalization and Mass Incarceration*

This objection is often related to the misplaced belief in the sufficiency of existing laws, but also often invokes general skepticism about the criminal justice system. According to conventional wisdom, the United States has an overcriminalization problem.²⁸⁶ As Professor Douglas Husak describes it, “The two most distinctive characteristics . . . of criminal justice in the United States during the past several years are the dramatic expansion in the substantive criminal law and the extraordinary rise in the use of punishment.”²⁸⁷ Thus the overcriminalization concern is closely tied to the phenomenon of mass incarceration. The tacit assumption here, of course, is that it is unjust for so many people to be convicted and incarcerated, which evokes a third concern over due process. The basic idea is that too many harmless acts are being treated as harmful; too many people are being convicted too easily; and too many people who are not dangers to society are being locked up.

This critique of our current criminal justice system is valid in many respects. Far too many people are jailed for nonviolent, or at least non-antisocial, conduct. The criminalization of drug possession, minimal roles in criminal conspiracies, petty theft, failure to pay child support, “risky” conduct while pregnant, and defensive use of force in domestic violence cases are but a few examples of wrongheaded criminal policy. There is also no denying that institutionalized bias regarding race and class infects our criminal justice system at every level.

None of this, however, is directly responsive to the question of whether nonconsensual pornography should be a crime. Criminalization is not synonymous with incarceration, and incarceration is not synonymous with mandatory minimums or lengthy sentences. Objections about bias in the application of criminal penalties should be separated from the objections to what kinds of conduct should receive such penalties. Finally, there is no empirical evidence to suggest that the criminalization of nonconsensual pornography, unlike many other types of conduct, would be likely to result in either disproportionate

286. See George Will, *America Desperately Needs to Fix Its Overcriminalization Problem*, NAT’L REV. (Apr. 8, 2015), <http://www.nationalreview.com/article/416674/>.

287. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3 (2008).

convictions or increased scrutiny of racial minority and lower class populations. If anything, the limited available information on perpetrator demographics suggests that nonconsensual pornography is largely committed by white, middle-class men.

As Professor Citron and I wrote in our 2014 article:

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.²⁸⁸

Warren and Brandeis took it as a given that privacy violations should be addressed by criminal as well as civil law: “It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law [T]hat the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted.”²⁸⁹ Like many privacy violations, such as trespass and voyeurism, nonconsensual pornography inflicts severe harm, and in many cases irreparable harm, on individuals as well as damaging society as a whole.

Given the nature and severity of the harm, the primary focus of legal intervention against nonconsensual pornography should be on deterrence. Unlike, for example, victims of property crimes, victims of nonconsensual pornography cannot truly be compensated or made whole. There is no undoing a violation of privacy; there is only damage control. Accordingly, legal intervention must focus on deterrence above all. Critics of criminalization often claim that what victims of nonconsensual pornography “really want” is for the material to be removed, which can be better accomplished by civil remedies.²⁹⁰ But if one were to actually

288. Citron & Franks, *supra* note 33, at 362.

289. *Id.*

290. See Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013), <https://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/>.

consider what victims “really want,” the real answer is that they want the material never to have been disclosed at all. Even in the relatively rare cases when victims succeed in getting injunctive relief that commands the removal or destruction of their private material, the effectiveness of the remedy is limited by the nature of technological reproduction. A judge can order a victim’s ex-boyfriend to destroy any copies of nude photos he has in his possession and to stop posting such material to the Internet, but if the ex-boyfriend has already uploaded those photos to dozens of revenge porn sites, which in turn have allowed thousands of users to view, download, and forward those photos, this order can hardly make a dent in the damage. By the time most cases ever make it to court, the material will already have been sent to the victim’s family members, employers, and peers, and may well have already been viewed, downloaded, and redistributed thousands of times.

Criminal law does not necessarily provide better results with regard to limiting dissemination after the fact. But that is not the particular value of criminal law in addressing this conduct. The value of criminalization is that the fear of jail time is far more salient to the average would-be perpetrator than the remote possibility of being sued.²⁹¹ The ideal effect of a criminal law is to discourage perpetrators from becoming perpetrators in the first place.

Of course, solid empirical evidence of the deterrent effect of criminalization is hard to come by—it is always hard to discern why people do not engage in crime. But we do know that certainty, more so than severity, of punishment does factor into deterrence, and it is generally acknowledged that most people fear jail more than lawsuits. The CCRI’s 2017 national study on victimization and perpetration of nonconsensual pornography also provides useful insight here. The survey asked respondents who admitted to having engaged in nonconsensual pornography what might have stopped them from doing so. Out of more than a dozen possible factors, the majority of respondents (60%) indicated that harsh criminal penalties would have been the most effective deterrent.²⁹²

A detail from the 2014 celebrity hack is also illuminating on this point. As thousands of users gleefully and openly consumed and distributed the private, intimate photos of dozens of female celebrities, an announcement by one of the victims, gymnast McKayla Maroney, caused a sudden panic. Maroney made the claim, confirmed by her lawyers, that she was

291. VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 1 (2010), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

292. Eaton et al., *supra* note 52, at 22.

underage in the hacked photos.²⁹³ Users and moderators scrambled to delete the photos, and sites like Reddit, which posted many of the photos, went into a tailspin: “The Reddit community r/TheFappening has become the main hub for the leaked photos, due to the fact that Reddit is one of the few mainstream websites that isn’t proactively deleting all links to them. In an urgent post, the subreddit’s moderators warn the community that the site’s admins have informed them that Maroney was underage in the photos ‘and that we quickly need to remove them.’”²⁹⁴

Reddit users had not suddenly developed a conscience about their voyeuristic consumption of hacked photos. The only removals that took place in the wake of this revelation were ones that depicted girls who were reportedly underage. Users clearly feared that viewing and forwarding those photos might constitute a violation of criminal laws against child pornography. The response to the Maroney photos underscores the fact that fear of criminal punishment—especially fear of federal criminal law—is a powerful motivator.

What is more, as Professor Husak himself notes, we must consider the possibility that a society can simultaneously suffer from both over- and under-criminalization.²⁹⁵ This is a point made to dramatic effect by reporter Jill Leovy in her recent book *Ghettoside: A True Story of Murder in America*. Leovy details how minority communities are both over- and under-policed: over-policed as perpetrators of minor crimes and under-policed as victims of major crimes, such as murder.²⁹⁶ Similarly, our society has also tended to under-criminalize and under-police harms primarily suffered by women. Consider that until the mid-1800s, wife-beating was considered a natural exercise of a husband’s privilege by most legal systems.²⁹⁷ In the United States, the recognition of domestic violence as a crime did not take hold until the 1970s.²⁹⁸ For decades after

293. Cindy Boren, *McKayla Maroney Takes Legal Action over Hacked Photos, Claiming She Was Underage*, WASH. POST (Sept. 3, 2014, 2:40 PM), https://www.washingtonpost.com/news/early-lead/wp/2014/09/03/mckayla-maroney-takes-legal-action-over-hacked-photos-claiming-she-was-underage/?utm_term=.7fa606879c6f.

294. Rob Price, *There’s Child Porn in the Massive Celebrity Nudes Hack*, DAILY DOT (Sept. 2, 2014, 12:06 PM), <http://www.dailydot.com/news/reddit-fappening-celebgate-mckayla-liz-lee-child-porn/>.

295. HUSAK, *supra* note 287, at 18 (“[S]ome of the recent expansions in the size and scope of the criminal sanction are welcome. . . . I am sure there are additional areas in which we still are guilty of *undercriminalization*.”).

296. See generally JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015).

297. Reva B. Siegel, *‘The Rule of Love’: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–24 (1996); THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 479 (Wilbur R. Miller ed., 2012).

298. Edna Erez, *Domestic Violence and the Criminal Justice System: An Overview*, 7 ONLINE J. ISSUES NURSING (Jan. 31, 2002), www.nursingworld.org/ojin/MainMenuCategories/ANA

this recognition, police officers were trained to treat domestic violence as a “private” matter that should be dealt with outside the legal system if at all possible.²⁹⁹ This “arrest avoidance”³⁰⁰ stemmed not from concerns for the welfare of the victims and their children, but rather from the belief that male violence against intimate partners was an inevitable and not particularly unfortunate reality. Even today, the actions of the victims of violence all too often receive more scrutiny and more opprobrium than the actions of the perpetrators.³⁰¹

Rape, another form of violence disproportionately targeted at women, was similarly treated as a husband’s privilege for most of Western history.³⁰² To the extent rape was criminalized before the twentieth century, it was most often treated as a property crime against male relatives.³⁰³ The last U.S. state to abolish the “marital rape” exemption did not do so until 1993, and many vestiges of the exemption remain.³⁰⁴ Modern definitions of rape tend to focus on “force” instead of lack of consent, meaning that acquaintance rapes (which make up the vast majority of rapes) are the least likely to be prosecuted.³⁰⁵ Constricted definitions of rape, along with belittling, abusive treatment by law enforcement, help explain why more than eighty percent of sexual assaults go unreported.³⁰⁶

Marketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.aspx.

299. *See id.*

300. *See id.*

301. *See, e.g.,* the Ray Rice domestic violence incident, where video footage clearly shows the American football player knocking his then-fiancée unconscious. Much of the media commentary that followed in the wake of this video focused on what the victim, Janay Rice, had done to provoke Rice’s actions and criticism of her decision to marry Rice after the incident. Olivia Marshall & Lis Power, *Right-Wing Media Blames Ray Rice’s Victim*, MEDIA MATTERS (Sept. 8, 2014), <http://mediamatters.org/research/2014/09/08/right-wing-media-blames-ray-rices-victim/200684>.

302. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (1847).

303. Ethan Bronner, *A Candidate’s Stumble on a Distressing Crime*, N.Y. TIMES (Aug. 23, 2012), <http://www.nytimes.com/2012/08/24/us/definition-of-rape-is-shifting-rapidly.html>.

304. THE NAT’L CTR. FOR VICTIMS OF CRIME, *SPOUSAL RAPE LAWS: 20 YEARS LATER* 2 (2004), <http://www.njep-ipsacourse.org/PDFs/NCVCspousalrapelaws.pdf>.

305. Nora Caplan-Bricker, *There’s a Legal War over the Definition of Rape*, NEW REPUBLIC (May 6, 2014), <https://newrepublic.com/article/117630/jed-rubinfeld-rape-law-feminists-debate-force-versus-non-consent>.

306. *See* CANDACE KRUTTSCHNITT ET AL., NAT’L RESEARCH COUNCIL, *ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT* 36 (2014) (“Conducted in 1989–1991, the National Women’s Study collected information on rape and sexual assault. It estimated that 84 percent of rape victims did not report their victimization to police. Tjaden and Thoennes (2006) reported a similar percentage (81 percent) of nonreporting from the National Violence Against Women Survey.” (citation omitted)).

The sexual harassment of women in the workplace—including assaults, sexual propositions, and unequal treatment—is yet another form of abuse that the law was slow to recognize.³⁰⁷ Subjecting female employees to unwelcome sexual advances or blatantly sexist hostility was viewed as the natural and/or deserved consequence of women entering the workplace. It has only been in recent years that sexual harassment has been formally recognized as gender discrimination, and even now many female workers put up with sexist treatment rather than complain, for fear of risking their positions or of not receiving support.³⁰⁸

The consequences of under-criminalizing these forms of abuse, on both individual victims and on women as a group, are severe. The experience of physical violence, sexual violence, and discrimination leaves physical, psychological, and financial scars.³⁰⁹ Sexual harassment inspires fear, anger, and discomfort in women, leading them to curtail their personal and professional choices and undermine their right to gainful employment. The trauma of sexual assault can last a lifetime, undermining victims’ ability to work, receive an education, and form and maintain intimate relationships. Domestic violence can cost victims their jobs, their financial stability, their children, their family and social support systems, and their lives.

All of these costs also sustain and exacerbate gender inequality. The experience or anticipation of abuse traps women in destructive relationships, restricts their freedom of movement, inhibits their performance in workplaces and schools, and drives many women away from certain careers, opportunities, and spaces altogether. Gendered abuse validates and promotes views of male superiority, male sexual entitlement, and female subordination.

The under-criminalization of male abuse of women reinforces pernicious perceptions about who should take responsibility for harmful behavior. More so than perpetrators of almost any other type of crime, men who abuse women—whether in domestic violence, sexual assault, or nonconsensual pornography—are given the benefit of the doubt. Social and legal norms implore us to constantly consider how fragile and impulsive men are, enslaved by their physical desires, struggling with

307. Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 3–18 (2004), https://law.yale.edu/system/files/documents/pdf/Faculty/Siegel_IntroductionAShortHistoryOfSexualHarassmentLaw.pdf.

308. See Gwen Moran, *Why Sexual Harassment Is Still an Issue and Why So Many Get Away With It*, FAST CO. (June 25, 2014), <http://www.fastcompany.com/3032291/strong-female-lead/why-sexual-harassment-is-still-an-issue-and-why-so-many-get-away-with-it>.

309. NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, CTRS. FOR DISEASE CONTROL AND PREVENTION, DEPT. OF HEALTH AND HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 2–3 (Mar. 2003), <http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf>.

conflicting messages about masculinity, and prone to jealousy-fueled rages. These normative pleas center the perpetrator's experience while erasing the victim. More so than victims of any other type of crime, women who are abused by men—whether through domestic violence, sexual assault, or nonconsensual pornography—are treated with skepticism and in many cases outright hostility.³¹⁰ Women are regarded as liars and manipulators, and prone to overreaction, unwise choices, and general confusion about their own desires. The impact of these negative stereotypes is particularly acute for women of color and those from lower socioeconomic backgrounds.³¹¹

Considering the uniquely harmful nature of privacy violations, the special power of criminal law to deter abusive behavior, and the fact that men's abuse of women is generally *under*-, not *over*-, criminalized, the benefits of criminalizing nonconsensual pornography outweigh the costs.

C. First Amendment Concerns

As previously mentioned, the various state laws criminalizing nonconsensual pornography vary considerably in scope, definitions, and clarity. Some of these laws suffer from constitutional infirmities, in particular First Amendment problems. Nonetheless, there is no reason that a criminal nonconsensual pornography law must conflict with the First Amendment. The IPPA was met with praise from many quarters, including First Amendment scholars. These included Professor Erwin Chemerinsky, Dean of Berkeley School of Law and one of the most influential legal scholars in the country. According to Professor Chemerinsky, "There is no First Amendment problem with this bill. The First Amendment does not protect a right to invade a person's privacy by publicizing, without consent, nude photographs or videos of sexual activity."³¹² Professor Eugene Volokh, a First Amendment expert well known for his skepticism of "most privacy-based speech restrictions," stated that the Intimate Privacy Protection Act is "quite narrow, and pretty clearly defined."³¹³ Professor Neil Richards, a First Amendment and

310. See, e.g., Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 95 (2008); see also Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 79 (2000).

311. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252–82 (1991); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1 (1998).

312. See Press Release, Office of Congresswoman Jackie Speier, *supra* note 205.

313. Tracy Clark-Flory, *Bill That Would Make Revenge Porn Federal Crime to Be Introduced*, VOCATIV (July 14, 2016, 10:25 AM), <http://www.vocativ.com/339362/federal-revenge-porn-bill/>.

privacy scholar, called IPPA “a very well-drafted law.”³¹⁴

However, there are those who claim that not only IPPA, but all attempts to legislate against nonconsensual pornography, are unconstitutional. Stated in the broadest terms, the objection to legislative reform regarding nonconsensual pornography is that such reform violates the First Amendment.³¹⁵ It is evident, however, that such a claim cannot be meant literally. It is difficult to find any critic who argues that there are *no* constitutionally permissible legal remedies for victims; indeed, as outlined above, much of the criticism of the legislative reform movement is based on the claim that adequate legal remedies already exist. The usual suspects include copyright law, privacy torts, intentional infliction of emotional distress claims, and/or criminal laws addressing conduct that often accompanies nonconsensual pornography, including law prohibiting hacking, identity theft, extortion, stalking, or harassment.

Putting aside for the moment the “other criminal laws” category, there is a clear conflict between the claim that regulating nonconsensual pornography violates the First Amendment and the assertion that the conduct is sufficiently addressed by existing law. In order to support the use of tort, copyright, or privacy law to address nonconsensual pornography, one must concede that *some* legal regulation of nonconsensual pornography must be compatible with the First Amendment. In other words, to praise the capacity of existing civil laws to address the harms of nonconsensual pornography is to approve the regulation of nonconsensual pornography, which is to acknowledge that these existing regulations do not violate the First Amendment.

In other words, no reasonable person seems to believe that “revenge porn” is categorically protected by the First Amendment. More nuanced critics instead assert that criminal laws against nonconsensual pornography are a very different matter from civil laws.³¹⁶ While civil laws indeed have different consequences than criminal laws, an issue that will be discussed below, the distinction between criminal and civil law is largely irrelevant for First Amendment purposes. We do not have two

314. *Id.*

315. See, e.g., Erin Fuchs, *Here’s What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013), <http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9>.

316. See, e.g., Steven Brill, *The Growing Trend of ‘Revenge Porn’ and the Criminal Laws That May Follow*, HUFFINGTON POST (Apr. 27, 2014, 5:33 PM), http://www.huffingtonpost.com/steven-brill/the-growing-trend-of-revenge-porn_b_4849990.html (“[T]he First Amendment presents support for the argument that one should not be arrested, let alone imprisoned, for publicizing its speech—in the form of these photographs or images. In fact, some suggest that the criminal law is the inappropriate venue in which to deal with this conduct. After all, the conduct is non-violent and a mere example of a somewhat harsh freedom of expression. Instead, perhaps the better course of action is to file a civil suit for the damages this conduct may cause.”).

First Amendments, one for civil law and one for criminal law; and it is certainly not the case that the Supreme Court has decided that civil laws categorically raise fewer or less serious First Amendment issues than the latter. “What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel,” noted the Court in *New York Times v. Sullivan*.³¹⁷ If anything, the Court has pointed in the opposite direction, observing that criminal statutes afford more safeguards to defendants than tort actions, suggesting that criminal regulation of conduct raises fewer First Amendment issues than tort actions.³¹⁸

Consequently, the revised claim that “using *criminal* law to regulate revenge porn violates the First Amendment,” turns out to be no more intelligible than the broad claim that “regulating revenge porn violates the First Amendment.” More specificity is required, along the lines of concerns about overinclusiveness, underinclusiveness, vagueness, and overbreadth. But these concerns are not, of course, limited to criminal laws. Whatever analysis one applies to criminal statutes regulating nonconsensual pornography, one must also apply to civil or other statutes regulating nonconsensual pornography, which critics often fail to do.

If vagueness and overbreadth is a concern and narrowness is a virtue, then it should be relevant that criminal statutes regulating nonconsensual pornography based on this model statute are considerably narrower than many tort actions or other noncriminal approaches. Intentional infliction of emotional distress cases often come into the crosshairs of First Amendment challenges; copyright law is notoriously ambiguous and believed by many to exact heavy costs to freedom of expression;³¹⁹ and the standards of “unfair business practices” as promulgated by the Federal Trade Commission (FTC) are considerably vague.

The FTC decree against revenge porn site operator Craig Brittain is particularly interesting on this point. The decree prohibits Brittain from disseminating intimate images or video of individuals without their “affirmative express consent in writing” and permanently restrains and enjoins him from directly or indirectly making use of any personal information—including image and videos—obtained in connection with his revenge porn site. The order further requires Brittain to destroy all such information “in all forms” in his possession within thirty days. This is a broad order that effectively restricts a considerable amount of

317. 376 U.S. 254, 277 (1964).

318. *Id.* (“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.”).

319. Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 320–22 (2013).

expressive conduct, yet no critic has claimed that the FTC’s actions violate Britain’s First Amendment rights.

There is a fundamental oddity to be noted here about the debate over the constitutionality of “revenge porn” laws. Nonconsensual pornography laws based on this model statute are, in essence, privacy laws, and privacy laws are commonly presumed to be constitutional and commonsensical, both by the general public and by scholars.³²⁰ That is, while such laws can be controversial in some cases, there appears to be general agreement that protecting sensitive information like medical records or Social Security numbers is something the law can and should do. When it comes to sensitive information in the form of naked pictures, however, the presumption flips: many people presume that laws that protect this information are inherently problematic. This is another way of saying that there appears to be a kind of sex exceptionalism in both lay and expert opinion about privacy and the First Amendment. Few people argue that there is a First Amendment right either to view or distribute drivers’ license records, but many seem convinced that there is a First Amendment right to view or distribute naked pictures.

Another point is worth underscoring here. Like other privacy violations, nonconsensual pornography is not amenable to the strategy of “counter-speech” so cherished by First Amendment absolutists. Whatever the merits of the belief that the best answer to bad speech is more speech in other contexts, the approach is unintelligible in the face of privacy-destroying expression. One cannot “speak back” to the exposure of one’s private information, whether it be medical records, private home addresses, or naked photos.

The constitutional analysis of nonconsensual pornography laws depends, of course, on the specific law. As detailed above, the model statute focuses on the knowing disclosure of private, sexually explicit photos or videos without the consent of those depicted and for no lawful public purpose. This is the soundest definition for both public policy and constitutional purposes. Other laws, especially those that add elements such as intent to harass, are more vulnerable to both policy and constitutional challenges. The defense of nonconsensual pornography laws against First Amendment objections offered here refers only to laws that are substantially similar to the model statute.

It is important to bear in mind that extreme assertions regarding the constitutionality of new laws rely on the fiction that First Amendment

320. See Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1505 (2015) (noting that “[d]espite calls from industry groups and a few isolated academics that these laws somehow menace free public debate, the vast majority of information privacy law is constitutional under ordinary settled understandings of the First Amendment”).

doctrine is either coherent or predictable. As Professor Robert Post writes, “contemporary First Amendment doctrine is . . . striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech.”³²¹ It is difficult to say with confidence what any court will do if and when it is faced with a question about the constitutionality of a given nonconsensual pornography statute. Courts might consider revenge porn to receive no First Amendment protection at all, in which case nonconsensual pornography laws would raise no First Amendment issues. Alternatively, courts might determine that nonconsensual pornography laws trigger minimal First Amendment scrutiny. Another possibility is that courts might decide that such laws trigger but survive strict scrutiny. Finally, it is possible, though unlikely, that courts will decide that such laws trigger and do not survive strict scrutiny. The following Subsections will consider each of the first three possibilities as applied to the model law.

1. Nonconsensual Pornography as Unprotected by the First Amendment

The First Amendment is one of the most frequently invoked and most misunderstood constitutional rights. One of the most common misperceptions, aside from the belief that the First Amendment applies to non-state actors, is that the First Amendment protects all forms of expression. A slightly more sophisticated, but still inaccurate, belief is that the First Amendment protects all forms of expression except for a few discrete categories, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.³²² As Professor Frederick Schauer writes, the few categories that the Court has explicitly determined not to receive First Amendment protection do not “represent the universe of speech lying outside the First Amendment.”³²³ For an accurate determination of what forms of speech the First Amendment does not protect, “we must consider not only the speech that the First Amendment noticeably ignores, but also the speech that it ignores more quietly.”³²⁴

It is not implausible that a court could treat nonconsensual pornography as belonging to an existing and explicit category of exception to full First Amendment protection. Even if it does not,

321. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249–50 (1995).

322. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–69, 1774–77 (2004).

323. *Id.* at 1777–78.

324. *Id.* at 1778.

however, nonconsensual pornography could still be considered a category of speech that is an implicit exception to the First Amendment, or as a new category of exception.

a. As Explicit Category of Exception

In *United States v. Stevens*,³²⁵ the Supreme Court reiterated that some forms of speech have historically been unprotected by the First Amendment.³²⁶ The categories the *Stevens* court listed were obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.³²⁷ A court could consider nonconsensual pornography to belong to one of these categories. The most likely candidates from this list would be obscenity and fighting words, though both have fallen out of fashion and are far from perfect fits. This Subsection will explore these possibilities.

1. Obscenity

In *Miller v. California*,³²⁸ the Court set out the following guidelines for determining whether material is obscene:

(a) 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.”³²⁹

The Supreme Court provided two “plain examples” of “sexual conduct” that could be regulated: “(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”³³⁰

The primary challenge of classifying nonconsensual pornography as obscenity is the fact that much of the content in question—e.g., topless photos, videos of consensual adult sexual activity—is not “patently offensive” as such. Volokh has suggested that, nonetheless, “[h]istorically and traditionally, such depictions would likely have been seen as unprotected obscenity (likely alongside many consensual

325. 559 U.S. 460 (2010), *superseded by statute*, 48 U.S.C. § 48 (2012).

326. *Id.* at 470.

327. *Id.* at 468.

328. 413 U.S. 15 (1973).

329. *Id.* at 24.

330. *Id.* at 25.

depictions of nudity).”³³¹ A stronger argument might be that 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 be considered a “patently offensive representation” of sexual conduct that offers no “serious literary, artistic, political, or scientific value.”³³² Cynthia Barmore has argued that there is a common intuition that nonconsensual pornography is offensive, “rooted in the context in which revenge porn arises and the resulting violation of the core principle in intimate relationships that all aspects of sexual activity should be founded on consent. That violation occurs whenever a sexually explicit image is disseminated against the will of one party.”³³³

Treating nonconsensual pornography as obscenity may be a poor fit for several reasons, however. First, it may produce unintended consequences if the classification is based on the content of the material rather than the manner in which it is disclosed. As Professor John Humbach has argued, “[t]he obscenity exception may permit bans on *legally obscene* revenge porn, but only perhaps at the risk of also subjecting the obscenity’s producer to a risk of criminal prosecution.”³³⁴ That is, if the type of sexually explicit content in private images is considered obscene, the person creating it—who is often the person depicted—may well bear criminal responsibility along with (or instead of) the person who distributes it.³³⁵ More fundamentally, the obscenity approach may be in tension with the goals of anti-subordination and gender equality—the association of naked bodies, especially women’s bodies, with obscenity could potentially do more to reinforce sexual shame than to respect sexual autonomy.³³⁶ Finally, there is the practical reality that while obscenity remains a formal category of expression not protected by the First Amendment, criminal prosecutions of obscenity are exceedingly rare.

331. Eugene Volokh, *Florida ‘Revenge Porn’ Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013), <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/>.

332. Professor Volokh may also be making this argument when he writes that courts could uphold a “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” on the correct basis that, “as a categorical matter[,] such nude pictures indeed lack First Amendment value.” *Id.*

333. Cynthia Barmore, Note, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 STAN. L. REV. 447, 463 (2015).

334. See John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 235–36 (2014).

335. Something similar has in fact materialized in the prosecution of minors who engage in consensual “sexting” activity for child pornography.

336. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 146–62 (1987).

2. Fighting Words

In *Chaplinsky v. New Hampshire*,³³⁷ the Court found that among the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem” was a category of “‘fighting’ words,” words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”³³⁸ The Court explained that fighting words “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”³³⁹

The “tendency to incite an immediate breach of the peace” branch of this analysis is not likely to prove useful in the nonconsensual pornography context, given that it is, as Professor Cynthia Bowman has observed, “male-biased in its central concept—the assumption that the harm of personally abusive language either consists in, or can be gauged by, its tendency to provoke a violent response.”³⁴⁰ However, the first branch, which focuses on words that “by which their very utterance inflict injury,” has some potential.³⁴¹ Bowman suggests that fighting words may be a potential avenue for regulating street harassment, and the argument might work for nonconsensual pornography as well. Bowman posits that “[i]f women plaintiffs can establish that street harassment falls within this branch by explaining the injuries that the words inflict, as well as the reasons why they—unlike men—are unlikely to fight back, the fighting words doctrine may hold more promise than any other legal standard.”³⁴² Similarly, if victims of nonconsensual pornography can demonstrate the immediate harm caused by nonconsensual pornography, which include humiliation, anxiety, fear, and trauma, the conduct might be considered a form of—to use Justice Antonin Scalia’s words in reference to workplace sexual harassment—“sexually derogatory ‘fighting words.’”³⁴³ Like obscenity, however, the “fighting words” exception does not offer much hope of frequent and effective usage.

b. As Implicit Category of Exception

Even if nonconsensual pornography does not belong to an explicit category of exception to the First Amendment, nonconsensual

337. 315 U.S. 568 (1942).

338. *Id.* at 571–72 (1942) (footnote omitted).

339. *Id.*

340. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 563 (1993).

341. *Id.* at 547.

342. *Id.*

343. *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992).

pornography might nonetheless not receive First Amendment protection. While the majority in *Stevens* implied that its list of categories was virtually exhaustive, many scholars have criticized this assertion. These five categories come nowhere close to capturing all the categories of exceptions that the Court has recognized in the context of First Amendment protections—forty-eight by the count of one constitutional scholar.³⁴⁴ Even that longer list of exceptions does not capture the vast amount of expression that the Court has quietly never subjected to First Amendment scrutiny. As Professor Schauer writes,

no First Amendment-generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional, whether corporate executives may be imprisoned under the Sherman Act for exchanging accurate information about proposed prices with their competitors, whether an organized crime leader may be prosecuted for urging that his subordinates murder a mob rival, or whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool.³⁴⁵

In all of these examples, Schauer observes, some punishment is imposed for speech on the basis of both the content and the impact of the speech.³⁴⁶ Regardless, “no First Amendment degree of scrutiny appears. In these and countless other instances, the permissibility of regulation—unlike the control of incitement, libel, and commercial advertising—is not measured against First Amendment-generated standards.”³⁴⁷ In other words, the view that all speech is presumptively protected by the First Amendment, as well as the view that all speech is protected subject only to a few narrow, historically recognized exceptions, is simply wrong. So even if nonconsensual pornography laws are considered to be content-based, it does not necessarily follow that such laws raise *any* First Amendment concerns, much less compelling ones. Nonconsensual pornography may well belong to the implicit category of expression that receives no First Amendment attention at all.

344. Ronald K.L. Collins, *Exceptional Freedom – The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–18 (2013).

345. Schauer, *supra* note 322, at 1770.

346. *Id.* at 1770–71.

347. *Id.* at 1771.

c. As New Category of Exception

The Court could also, in theory, decide to treat nonconsensual pornography as a new category of particularly harmful speech. While the Court asserted in *Stevens* that there is no “freewheeling authority to declare new categories of speech outside the scope of the First Amendment,”³⁴⁸ it did not reject the possibility that new categories may nonetheless be added in the future: “Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”³⁴⁹ The holding in *Stevens* makes it clear that “depictions of animal cruelty” is not one of those categories,³⁵⁰ but that does not mean that First Amendment jurisprudence is completely frozen in time. Child pornography, for example, was not a category historically recognized as unprotected by the First Amendment, and yet the Court determined in 1982 that child pornography did not receive First Amendment protection.³⁵¹ The *Stevens* court was at pains to explain that the determination in *New York v. Ferber* was grounded in a historically unprotected exception; that is, child pornography was “intrinsically related” to the criminal activity of child abuse.³⁵² Given that nonconsensual adult pornography is also strongly related to criminal activity, including extortion, stalking, harassment, and rape, as well as strongly related to unlawful sex discrimination,³⁵³ a court might well decide that it too deserves to be added to the list of explicit categories unprotected by the First Amendment.

2. Nonconsensual Pornography Laws Under Intermediate Scrutiny

Assuming for the sake of argument that nonconsensual pornography does receive some form of First Amendment protection, and therefore that restrictions on it trigger some sort of First Amendment scrutiny, there is a strong case to be made that this scrutiny should not be particularly searching. First, it can be argued that nonconsensual pornography laws based on the model statute are not content-based restrictions, but rather time, place, and manner restrictions that should receive minimal or intermediate scrutiny. If, arguendo, the laws are considered to be content-based restrictions, they should still receive less rigorous scrutiny, as the expression they seek to regulate is not the kind of core political speech that receives the highest level of First Amendment protection.

348. *United States v. Stevens*, 559 U.S. 460, 472 (2010).

349. *Id.*

350. *Id.*

351. *Id.* at 471 (noting that the Court’s decision in *New York v. Ferber* identified child pornography as a category of “speech as fully outside the protection of the First Amendment”).

352. *Id.*

353. See discussion *infra* Subsection II.C.2.

a. As Content-Neutral Restriction

Laws based on my model nonconsensual pornography statute do not prohibit the publication of material based on its content or its message. Under the model law, private, sexually explicit photos and videos can be freely distributed, so long as the disclosure is made with the consent of those depicted or for a lawful public purpose. The images may be flattering or degrading, refined or crude. Consensually distributed images do not differ in content or message from images distributed without consent. The model law does not favor some types of sexually explicit content over others or require that sexually explicit material promote a certain message. Nonconsensual pornography laws based on my model statute restrict no message, only the manner of distribution. The governmental purpose is to protect privacy, not to express disapproval or suppress unfavorable viewpoints. Therefore, such laws can be characterized as a content-neutral “time, place, and manner” restriction. A law that regulates expressive activity “is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’”³⁵⁴

Because time, place, and manner restrictions are content-neutral, not content-based, they receive a lower form of scrutiny than content-based restrictions.³⁵⁵ While such restrictions “must be narrowly tailored to serve the government’s legitimate, content-neutral interests,” they are not required to be “the least restrictive or least intrusive means of doing so.”³⁵⁶ Rather, narrow tailoring requires only that the regulation “promotes a substantial government interest that would be achieved less effectively absent the regulation.”³⁵⁷ The model statute protects the government’s interest in preserving the intimate privacy of its citizens, an interest that would be very difficult to achieve without regulation.

b. As Content-Based Restriction

If nonconsensual pornography laws are nonetheless considered to be content-based restrictions, this does not mean that they should be reviewed under strict scrutiny. While the Court has held that “content-based regulations of speech are presumptively invalid,”³⁵⁸ it has also recognized that the rationale of the general prohibition against content-

354. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

355. *Id.* at 791.

356. *Id.* at 798.

357. *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

358. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

based regulations “is that content discrimination ‘raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.’”³⁵⁹ The Court has noted that there are “numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted.”³⁶⁰

The Supreme Court has “long recognized that not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection,’” whereas “speech on matters of purely private concern is of less First Amendment concern.”³⁶¹ Sexually graphic images intended either for no one’s viewing or only for viewing by an intimate partner is a matter of purely private concern. While the disclosure of some matters of private concern may qualify for First Amendment protection, there must be some legitimate interest in these matters for this to be the case.³⁶² There is no such legitimate interest in disclosing or consuming sexually explicit images without the subjects’ consent, with the exception of disclosures that serve the public interest.³⁶³ Prohibiting the nonconsensual disclosure of sexually graphic images of individuals poses “no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas.”³⁶⁴ The Court has recognized that distribution of homemade sexually explicit material “does not qualify as a matter of public concern under any view.”³⁶⁵

The Supreme Court has moreover used a reduced level of scrutiny for the regulation of sexually explicit material, even when that material does not rise to the level of obscenity.³⁶⁶ Such speech is afforded First Amendment protection “of a wholly different, and lesser, magnitude.”³⁶⁷ Courts have routinely applied intermediate scrutiny to and upheld laws that address the secondary effects of sexually explicit material, as long as the restrictions are intended to serve a substantial government interest,

359. *Davenport*, 551 U.S. at 188 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)).

360. *Id.*

361. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

362. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

363. An exception accounted for in the model statutes.

364. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Dun & Bradstreet*, 472 U.S. at 760). In *Snyder*, the Court suggested that a matter is “purely private” if it does not contribute to “the free and robust debate of public issues” or the “meaningful dialogue of ideas.” *Id.*

365. *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam).

366. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

367. *Id.*

are narrowly tailored to serve that interest, and do not unreasonably limit alternative avenues of communication.³⁶⁸

In addition, nonconsensual pornography undermines historically protected rights, including the rights not to speak and to maintain one's privacy against unwarranted intrusions.³⁶⁹ Numerous state and federal laws prohibiting the unauthorized distribution of private information—from trade secrets to medical records to drivers' licenses to Social Security numbers to video rentals—have never been deemed unconstitutional or even challenged on constitutional grounds.³⁷⁰ The “publication of private facts” tort is widely accepted by the majority of courts to comply with the First Amendment, although the Supreme Court has yet to rule explicitly on the constitutionality of this tort with regard to matters not of public record. According to the *Restatement (Second) of Torts*:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.³⁷¹

Laws restricting disclosure of private information serve important speech-enhancing functions. In his concurrence in *Bartnicki v. Vopper*,³⁷² Justice Stephen 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,”³⁷³ that is, the interest in “fostering private speech.”³⁷⁴ He continued, “the 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

368. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–50, 54 (1986) (upholding a zoning ordinance restricting the location of adult theaters); *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (upholding a measure requiring male performers in adult films to wear condoms); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999) (upholding ordinance limiting the hours of operation for adult bookstores).

369. Cf. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (describing sexual conduct as “the most private human conduct”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”).

370. See generally Daniel J. Solove, *A Brief History of Information Privacy Law*, in PROSKAUER ON PRIVACY LAW (2006) (discussing various acts and case laws regarding the restricted distribution of medical records, drivers' licenses, Social Security numbers, etc.).

371. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

372. 532 U.S. 514 (2001).

373. *Id.* at 537–38 (Breyer, J., concurring).

374. *Id.* at 536.

rigid constitutional rules, which would unnecessarily restrict legislative flexibility.”³⁷⁵

Justice Breyer’s concurrence highlights how “chilling effects” can be produced not only when laws over-deter people from engaging in protected expression, but also when laws fail to protect privacy. Consider the typical advice meted out to those who fear falling prey to nonconsensual pornography: “Just don’t take pictures!” In addition to blaming the victim, such a response literally instructs those most likely to be victimized by this practice—that is, women—to refrain from certain forms of expressive conduct, namely, the use of image-capturing technology in their sexual expression. Such an approach is openly hostile to freedom of expression.³⁷⁶ The fear that private, intimate information might be exposed to the public not only discourages women from engaging in erotic expression, but also from other kinds of expressive conduct. Many women report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed. When nonconsensual pornography targets women in politics, as it often does,³⁷⁷ it imposes additional harms: it discourages women from becoming active in politics, creates a significant hurdle for women’s political engagement, and undermines the quality and integrity of democratic participation. Thus, the failure to prohibit nonconsensual pornography has a uniquely chilling effect on political speech—the very form of speech that is supposed to receive the greatest protection by the First Amendment.

The “don’t take pictures” response also ignores the fact that many victims did not voluntarily produce the material in question. As cameras have gotten smaller and more portable, women have increasingly been subjected to surreptitious photography and recording in both public and private spaces. Many nonconsensual pornography victims were not aware that their sexual encounter was being filmed. “Upskirt” and “downblouse” photography usually takes place without the woman’s knowledge and certainly without her consent. The horrifying modern trend of recording sexual assaults is yet another category of involuntary

375. *Id.* at 541.

376. See Scott Gant, *Sex, Privacy, and Videotape: Lessons of Gawker’s Downfall*, WIRED (Aug. 16, 2016, 5:30 AM), <http://www.wired.com/2016/08/gawker-hulk-hogan-auction/> (“[T]he notion that Hogan should be penalized for previously discussing his sex life in public was itself problematic for a defendant cloaking itself in the First Amendment. If Gawker’s view were adopted by courts, then speakers would have to censor themselves or risk having their personal information displayed before the world on the grounds that their own prior statements turned the subjects of their speech into ‘matters of public concern.’”).

377. See, e.g., John Bresnahan & Alex Isenstadt, *‘Private’ Video of Virgin Islands Democratic Delegate Posted Online*, POLITICO (July 21, 2016, 1:27 PM), <http://www.politico.com/story/2016/07/stacey-plaskett-sex-tape-225951>.

exposure. If it is women's responsibility to avoid the devastating and irremediable effects of nonconsensual pornography, they must not only refrain from using photography and video for their own voluntary erotic expression, but also constantly guard against involuntary recording by others. Women would need to adjust their daily clothing choices—no skirts, certainly, or any tops with gaps or buttons—as well as avoid situations in which they could possibly be sexually assaulted, which is to say, any situation, especially in which they might come into contact with men. These are chilling effects in the extreme.

Because nonconsensual pornography is a practice disproportionately targeted at women and girls, it could be considered a form of discrimination that produces harmful secondary effects. Protections against discriminatory conduct are valid under the First Amendment,³⁷⁸ and content-based regulations that are predominantly concerned with harmful secondary effects rather than the expressive content of particular conduct do not violate the First Amendment.³⁷⁹ Prohibitions against discrimination on the basis of race, sex, national origin, and other categories, even when such discrimination takes the form of “expression,” have been upheld by the Supreme Court.³⁸⁰ Title II and Title VII of the Civil Rights Act of 1964,³⁸¹ along with Title IX of the Education Amendments of 1972, all allow for the regulation of certain forms of speech and expression when they violate fundamental principles of equality and nondiscrimination.³⁸² Apart from the harm that nonconsensual pornography inflicts on individual victims, it inflicts discriminatory harms on society as a whole. Like other abuses directed primarily at women and girls, such as rape, intimate partner violence, and sexual harassment, nonconsensual pornography reinforces the message

378. *Wisconsin v. Mitchell*, 508 U.S. 476, 482 (1993) (noting that “antidiscrimination laws . . . have long been held constitutional”).

379. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–90 (1992) (“Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the . . . speech,’ . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” (emphasis omitted)).

380. *Id.* at 389 (“[S]ince words can in some circumstances violate laws directed not against speech, but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech . . . Thus, for example, sexually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.”).

381. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2012)).

382. *Id.*

that women’s bodies belong to men, and that the terms of women’s participation in any sphere of life are to be determined by their willingness to endure sexual subordination and humiliation. Nonconsensual pornography causes women to lose jobs, leave school, change their names, and fear for their physical safety, driving women out of public spaces and out of public discourse.³⁸³ Combating this form of sex discrimination is not only consistent with longstanding First Amendment principles, but comports with equally important Fourteenth Amendment equal protection principles.

Assuming, then, that some degree of constitutional scrutiny of nonconsensual pornography laws is appropriate, the proper standard is intermediate review. Prohibiting the distribution of sexually explicit images of individuals without their consent does not raise the specter of the government attempting to inhibit debate on issues of public concern or to drive certain viewpoints from the marketplace. Such laws are aimed at the protection of highly personal private information and the prevention of harmful secondary effects (including financial, reputational, psychological, and discriminatory injuries) that invariably flow from the disclosure of sexually explicit depictions of individuals without their consent.³⁸⁴ The intermediate scrutiny standard provides sufficient protection for any First Amendment interests at stake.

3. Nonconsensual Pornography Laws Under Strict Scrutiny

Some scholars have asserted that nonconsensual pornography laws are not only content-based, but also viewpoint-based, and thus necessarily trigger more than just First Amendment scrutiny.³⁸⁵ It bears emphasizing here that the model statute focuses on the harm caused by the disclosure

383. Nina Bahadur, *Victims of ‘Revenge Porn’ Open Up on Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014, 8:50 AM), http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html.

384. See *Dahlstrom v. Sun-Times Media, L.L.C.*, 777 F.3d 937, 949–52 (7th Cir. 2015) (applying intermediate scrutiny to restrictions on the disclosure of personal information); *Vivid Entm’t, L.L.C. v. Fielding*, 774 F.3d 566, 580–81 (9th Cir. 2014) (applying intermediate scrutiny to restrictions directed at the secondary effects of sexually explicit depictions).

385. See *Humbach*, *supra* note 334, at 217. *Humbach* claims that revenge porn laws “constitute unconstitutional content discrimination, viewpoint discrimination and speaker discrimination, not to mention prior restraint.” *Id.* *Humbach*’s alternative proposed solution is to “draft a law that defines its prohibition in such a way that its burden on speech is merely ‘incidental’ to a valid non-speech-related purpose, thus qualifying the law for review under *O’Brien*’s less exacting intermediate-scrutiny standard.” *Id.* at 249–50. *Humbach* suggests the following language: “It is a criminal offense for any person, in the absence of a purpose to convey or disseminate truthful information or ideas, to do any act intended to cause or otherwise attempt to cause extreme emotional distress to another person.” *Id.* at 251. This statute is both overbroad and vague, similar to the cyberbullying statutes that have been found unconstitutional in state courts. See discussion *infra* Section III.B.

of private information and not on other harms that may also follow, such as reinforcing negative views about women or sexuality. Laws that focus on those negative views are indeed open to the charge that the regulation is an attempt by the government to suppress a disfavored viewpoint and will likely not survive First Amendment scrutiny.³⁸⁶ The model statute, by contrast, is uninterested in viewpoint. While nonconsensual pornography certainly does often stigmatize its victims—particularly women—as promiscuous or sexually immoral, that is not what permits the government to regulate the manner in which certain types of private material is distributed. Rather, it reflects the government’s compelling interest in preventing physical and psychological harms and protecting privacy. Like laws that regulate the public disclosure of other forms of private information, from medical records to Social Security numbers, nonconsensual pornography laws based on my model statute are not aimed at suppressing the negative messages that such information might convey. Rather, they are aimed at protecting the right of citizens to maintain control over who has access to their private information and preventing the harms that flow from exposure of private information.

Accordingly, even if nonconsensual pornography laws based on the model statute were reviewed under strict scrutiny, they should survive, as they are narrowly tailored to address compelling government interests.

386. In an intriguing article, Professor Andrew Koppelman argues that nonconsensual pornography laws do constitute viewpoint discrimination but are nonetheless justifiable because First Amendment doctrine should allow for the regulation of speech that is “antithetical to liberalism”: “Sexism is antithetical to liberalism, but liberalism generally addresses it by means other than the restriction of speech. Here, however, there is no other way to do it. The general principles that appropriately govern free speech law should not govern here.” Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 690 (2016). Koppelman’s reasoning here resembles the approach of the Minneapolis anti-pornography ordinance struck down by the U.S. Court of Appeals for the Seventh Circuit in *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). As the court observed, the ordinance’s definition of pornography meant that “[s]peech that ‘subordinates’ women . . . is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content.” *Id.* at 328. The court firmly held that such a position violates the First Amendment:

The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters “premised on equality”—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

Id. at 325 (citation omitted).

The model statute protects the government’s interest in preventing the real-life harms of nonconsensual pornography. As the Court observed more than century ago, “[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow,” and to “compel any one . . . to lay bare the body . . . without lawful authority, is an indignity, an assault, and a trespass.”³⁸⁷ Laws regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of one’s body. Criminal laws prohibiting surveillance and 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 inflicts a social harm serious enough to warrant criminal prohibition and punishment.³⁸⁸ As previously discussed, victims of nonconsensual pornography suffer a wide range of harms, from the trauma and humiliation of having the most intimate and private details of their lives placed on display to job loss, severe harassment and threats, and serious reputational harm. There should be little question that preventing these harms is a compelling governmental interest.

Even in the absence of concrete harm, the protection of privacy is essential for fostering the relationships and values crucial to an open society. People rely on the confidentiality of transactions in other contexts all the time: they trust doctors with sensitive health information; salespeople with credit card numbers; and lawyers with their closely guarded secrets. They are able to rely on the confidentiality of these transactions because society takes it as a given that consent to share information is limited by context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished.³⁸⁹ Laws protecting victims from unauthorized disclosures of their financial, legal, or medical information have a long and mostly uncontroversial history. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information.³⁹⁰ The protection of a private individual’s sexual

387. *Union Pac. R.R. v. Botsford*, 141 U.S. 250, 251–52 (1891).

388. *See generally* NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE & NAT’L DIST. ATTORNEYS ASS’N, VOYEURISM STATUTES 2009 (2009) [hereinafter VOYEURISM STATUTES 2009], http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf (cataloguing the voyeurism legislation across U.S. jurisdictions).

389. *See, e.g.*, 18 U.S.C. § 1832(a)(2) (2012) (criminalizing the unauthorized disclosure of trade secrets); 42 U.S.C. § 1320d-6(a)(3) (2012) (criminalizing the unauthorized disclosure of individually identifiable health information).

390. *See, e.g.*, 18 U.S.C. § 1832(a)(2) (criminalizing the unauthorized disclosure of trade secrets); 42 U.S.C. § 1320d-6(a)(3) (criminalizing the unauthorized disclosure of individually identifiable health information).

information against unauthorized disclosure is entitled to at least the same respect.

Furthermore, by protecting people against the disclosure of intimately private images without their consent, the model statute advances the government's interest in safeguarding important aspects of speech and expression. Although privacy laws do, in some sense, restrict speech, they also "directly enhance private speech" because their "assurance of privacy helps to overcome our natural reluctance" to communicate freely on private matters out of fear that those communications "may become public."³⁹¹ This is particularly true when the potential dissemination is extremely wide-ranging, as it is with images distributed online. The fear that private, intimate information might be exposed to the public discourages individuals from engaging not only in erotic expression, but also from other kinds of expressive conduct. Many victims report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed.³⁹²

To suggest that none of these is a compelling governmental interest would cast into doubt widely accepted legal restrictions for the protection of privacy, from restrictions on the disclosure of records with personally identifying information, to criminal prohibitions on voyeurism and unlawful surveillance, to common-law protections against publicizing the private life of another.

The model statute is moreover narrowly drawn to protect the fundamental right to privacy without infringing upon freedom of speech. It prohibits only the knowing and unauthorized disclosure of images of identifiable persons who are nude or engaging in sexual conduct. The law specifically exempts disclosures that are made in the public interest. The provision also does not apply to disclosures of images of voluntary nudity or sexual conduct in public or commercial settings. Nonconsensual pornography laws based on my model statute do not amount to a complete ban on expression.³⁹³ People remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images. Moreover, they remain free to criticize or complain about fellow citizens in ways that do not violate the privacy rights of others. The narrowly tailored prohibition in the model statute does not come close to shutting down the vast number of ways in which people may vent their anger and aggression. The Internet has provided innumerable opportunities for aggressive and offensive interactions, and the First Amendment largely

391. *Bartnicki v. Vopper*, 532 U.S. 514, 537 (2001) (Breyer, J., concurring).

392. See Natalie Gil, *Victims of Revenge Porn Turn to Students for Legal Advice*, GUARDIAN (July 25, 2016, 9:38 AM), <https://www.theguardian.com/law/2016/jul/25/victims-of-revenge-porn-turn-to-students-for-legal-advice>.

393. See *Vivid Entm't, L.L.C. v. Fielding*, 774 F.3d 566, 578–79 (9th Cir. 2014).

protects those opportunities. The First Amendment does not, however, protect the unauthorized distribution of personal, private, and intimate images unrelated to any public interest.

III. MAKING SENSE OF THE OPPOSITION

When the issue of nonconsensual pornography first began receiving extensive public attention, representatives of the American Civil Liberties Union (ACLU) reacted by declaring that *no* criminal law prohibiting the nonconsensual distribution of sexually explicit images was permissible within the bounds of the First Amendment.³⁹⁴ The organization soon backed away from this approach³⁹⁵ and took a different tack, insisting on an arbitrarily narrow definition of the crime. This definition required, in essence, that the perpetrators be current or former intimate partners and be motivated by the intent to harass their victims. Despite having no basis for claiming that either of these limitations is necessary to survive First Amendment challenge and, indeed, ignoring the fact that both limitations *create* First Amendment vulnerabilities, the ACLU has succeeded in intimidating several state legislatures into watering down their laws according to the ACLU’s specifications.

The ACLU was apparently emboldened by the outcome of its lawsuit over Arizona’s “revenge porn” law in 2014. The ACLU pressured Arizona to replace its original law, which characterized the crime as a privacy violation, with ACLU’s preferred version, which transformed the law into a weak and duplicative anti-harassment provision. Though no determination of the constitutionality of Arizona’s original law was ever made (the state of Arizona merely agreed to not enforce the original law), the ACLU and its surrogates—the Media Coalition and later the Motion Pictures Association of America—repeatedly insinuated and at times outright falsely claimed that Arizona’s law had been declared unconstitutional.³⁹⁶ In fact, the only nonconsensual pornography law that

394. See Eric Schulzke, *California Lawmakers Target ‘Revenge Porn’ but Miss, Critics Say*, DESERET NEWS (Sept. 8, 2013, 5:25 PM), <http://www.deseretnews.com/article/865586019/California-lawmakers-target-revenge-porn-but-miss-critics-say.html> (noting that the Northern California ACLU had written a confused letter opposing the state’s new “revenge porn” bill without making any coherent First Amendment arguments or citing to any relevant cases); see also Liz Halloran, *Race to Stop ‘Revenge Porn’ Raises Free Speech Worries*, NPR (Mar. 6, 2014, 11:16 AM), <http://www.npr.org/blogs/itsallpolitics/2014/03/06/286388840/race-to-stop-revenge-porn-raises-free-speech-worries>.

395. “Will Matthews, a spokesman for the ACLU of Northern California, said that the ACLU had no objections to the bill, but he could not offer any explanation for why the initial objection letter was sent, nor what changes in the bill altered their viewpoint.” Schulzke, *supra* note 394.

396. See, e.g., Memorandum from Media Coalition, Inc., to Minn. Legislature, <https://drive.google.com/file/d/0B2LoKN1jK5BNVHRZdW9valMwZms/view?usp=sharing> (falsely claiming that “[t]he state of Arizona agreed to a permanent bar on enforcing the law

has been declared unconstitutional as of January 2017 is Vermont's—which had amended its law to include an intent to harass requirement, in accordance with the ACLU's demands.³⁹⁷

A. *The ACLU's Arizona Challenge*

In May 2014, Arizona passed a law criminalizing nonconsensual pornography.³⁹⁸ In September 2014, the ACLU initiated a lawsuit challenging the law on behalf of itself and a group of booksellers.³⁹⁹ In a letter to Arizona lawmakers, the ACLU demanded that the state redefine the crime, asserting that any law criminalizing “revenge porn” must be limited to circumstances where

(1) a person who was or is in an intimate relationship with another person and who, (2) during and as a result of that relationship, obtained a recognizable image of such other person in a state of nudity, (3) where such other person had a reasonable expectation of privacy and an understanding that such image would remain private, (4) to display such image (5) without the consent of such other person, (6) with the intent to harass, humiliate, embarrass, or otherwise harm such other person, and (7) where there is no public or newsworthy purpose for the display.⁴⁰⁰

According to the ACLU, any law against nonconsensual pornography should only apply to perpetrators who were in intimate relationships with their victims and who disclosed the material with the intent to harm them.

acknowledging that the law was unconstitutional”); MOTION PICTURE ASS'N OF AMERICA (2016), <https://drive.google.com/file/d/0B2LoKN1jK5BNQXAxbzIzTndtc1E/view?usp=sharing> (“The state declined to defend the law, law, [sic] acknowledging the law’s constitutional infirmities.”); *Hearing on HB 129 Before the H. Comm. on Judiciary*, 2017 Leg., 65th Sess. 2 (Mont. 2017) (statement of Motion Picture Ass’n of America representative Jessie Luther), http://montanalegislature.granicus.com/MediaPlayer.php?clip_id=20329&meta_id=166445 (falsely claiming that the final decree in the Arizona case “found the law unconstitutional” around minute 48:30).

397. See Elizabeth Hewitt, *Judge Finds ‘Revenge Porn’ Law Unconstitutional*, VT DIGGER (Aug. 1, 2016, 6:38 PM), <https://vtdigger.org/2016/08/01/judge-finds-revenge-porn-law-unconstitutional/>. That decision is now under review by the Supreme Court of Vermont; CCRI has filed an amicus brief in support of the state. Brief for Cyber Civil Rights Initiative et al. as Amici Curiae Supporting Appellant, *State v. VanBuren*, No. 2016-253 (Vt. Jan. 16, 2017), 2017 WL 872499.

398. Michelle Dean, *Arizona Adds Revenge Porn Law to Its Books*, GAWKER (May 2, 2014, 9:17 AM), <http://gawker.com/arizona-adds-revenge-porn-law-to-its-books-1570757305>.

399. *Antigone Books LLC v. Brnovich*, No. 2:14-cv-02100-PHX-SRB (D. Ariz. July 10, 2015).

400. E-mail from American Civil Liberties Union, to Ariz. Lawmakers & Ariz. House of Representatives Standing Comm. on the Judiciary (Feb. 10, 2015), <https://drive.google.com/file/d/0B2LoKN1jK5BNX0NsZUdOUng5ZIE/view?usp=sharing>.

How exactly the ACLU arrived at this definition and what made the ACLU qualified to define this conduct has never been made clear. But the ACLU has reiterated this definition in statements to the media and in testimony in opposition to legislation against nonconsensual pornography in other states.⁴⁰¹

Concerned about the effect the lawsuit could have on cases already initiated under the law, the sponsor of Arizona’s legislation, Representative J.D. Mesnard, offered to amend the law to respond to some of the objections raised by the suit.⁴⁰² The parties agreed to stay enforcement of the law during the amendment process.⁴⁰³ While the ACLU’s concern regarding newsworthiness had merit—Arizona’s law, unlike the model statute, did not include a public interest exception—the ACLU did not make a convincing case for its other demands.⁴⁰⁴ Nonetheless, the ACLU threatened to continue to oppose⁴⁰⁵ Arizona’s law as long as it failed to include an “intent to harass” requirement, regardless of whether the law was amended to include an exception for public interest.⁴⁰⁶

To support its claim that the Arizona statute was overbroad, the ACLU listed a handful of scenarios it alleged were potentially prosecutable under Arizona’s statute, including bookstores selling volumes that contained photographs from Abu Ghraib or parents sharing pictures of their babies taking baths.⁴⁰⁷ Leaving aside for the moment the merits of

401. See *Criminal Law – Harassment – Revenge Porn: Hearing on H.B. 43 Before H. Judiciary Comm.*, 2014 Leg., 434th Sess. 1–2 (Md. 2014) (statement of American Civil liberties union of Md.).

402. See Franks, *supra* note 248.

403. Jamie Ross, *AZ Revenge Porn Law Put on Hold by Judge*, COURTHOUSE NEWS (Dec. 1, 2014), <https://www.courthousenews.com/az-revenge-porn-law-put-on-hold-by-judge/>.

404. See H.R. 2515, 51st Leg., 2nd Sess. (Az. 2014).

405. See Bob Christie, *Arizona House Approves Revisions to ‘Revenge Porn’ Law*, WASH. TIMES (Mar. 3, 2015), <http://www.washingtontimes.com/news/2015/mar/3/arizona-house-sets-vote-on-revisions-to-revenge-po/>.

406. See Bill Slane, *‘Revenge Porn’ Bill Stalled by Lawsuit; Lawmaker Proposes Revisions*, CRONKITE NEWS (Feb. 13, 2015), <http://cronkitenewsonline.com/2015/02/with-revenge-porn-stalled-by-lawsuit-lawmaker-proposes-revisions/>.

407. See Press Release, American Civil Liberties Union, Bookstores, Publishers, News Media, Librarians, and Photographers Charge Law Violates Freedom of Speech (Sept. 23, 2014), <https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images>. This Article does not share the ACLU’s certainty that circulating unedited photos of Abu Ghraib prisoners being sexually humiliated, with their genitalia and identifying features completely exposed (photos that did expose them in this way would not be subject to nonconsensual pornography statutes), should be absolutely protected by the First Amendment. Indeed, given the sensitivity of the imagery, mainstream news outlets blurred or otherwise edited the faces or the genitalia of the men depicted. Every disclosure that reveals the victims’ identity potentially not only magnifies their humiliation but also creates the risk of further harm when they return to their communities.

any of these particular examples, it is important to note that constitutional overbreadth concerns “must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”⁴⁰⁸ That is, mere conjecture that a statute could be applied very broadly is not in itself sufficient grounds to invalidate it.⁴⁰⁹ A parade of horrors will not negate the otherwise legitimate sweep of a statute. And despite the fact that New Jersey’s nonconsensual pornography law—which contains no “intent to harass” requirement and is in some ways broader than the model statute—was passed in 2003,⁴¹⁰ and Alaska’s very broad law was passed in 2006,⁴¹¹ the ACLU has not been able to cite a single actual instance of this type of overapplication.

In 2016, Arizona ultimately passed a new version of its law that restricted the statute to offenders who act with “the intent to harm, harass, intimidate, threaten or coerce the depicted person.”⁴¹² This left many Arizona “revenge porn” victims without a legal remedy and others in a state of confusion about where their case stood. On the ACLU’s website, an ACLU staff attorney celebrated the outcome, asserting that “Arizona is a little bit freer today.”⁴¹³

B. *Privacy vs. Harassment*

The most disturbing aspect of the ACLU’s position, evidenced in its challenge to Arizona’s law and in other challenges, is its continued insistence on intent to cause harm or distress language. Intent-to-harass requirements effectively convert what should be a privacy law into a harassment law. In addition to mischaracterizing the nature of the harm caused, as discussed above, this insistence ignores the fact that harassment laws already exist at both the state and federal level. If they

408. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

409. As the Supreme Court noted in 1973, “there are limitations in the English language with respect to being both specific and manageably brief.” *Id.* at 608 (quoting *United States Civil Service Comm. v. Letter Carriers*, 413 U.S. 548, 578–79 (1973)). No statute will “satisfy those intent on finding fault at any cost,” but the Constitution does not require the satisfaction of impossible standards. *Id.* What is required, rather, is that laws be “set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.” *Id.* To strike down a law on the grounds of constitutional overbreadth is “strong medicine . . . employed by the Court sparingly, and only as a last resort.” *Id.* at 601.

410. N.J. STAT. ANN. § 2C:14-9 (West 2017).

411. ALASKA STAT. § 11.61.120 (2017).

412. ARIZ. REV. STAT. ANN. § 13-1425 (2017).

413. Lee Rowland, *VICTORY! Federal Judge Deep-Sixes Arizona’s Ridiculously Overbroad ‘Nude Photo’ Law*, ACLU (July 10, 2015, 6:45 PM), <https://www.aclu.org/blog/speak-freely/victory-federal-judge-deep-sixes-arizonas-ridiculously-overbroad-nude-photo-law#comments-top>.

were effective deterrents or responses to this conduct, thousands of victims would not be reporting that law enforcement has told them that what happened to them was not a crime. Treating nonconsensual pornography as harassment would merely duplicate existing, ineffective law.

The ACLU’s argument that intent-to-harass requirements are required by the Constitution is particularly odd in light of the organization’s own history of arguing that concepts such as harassment and emotional distress are unconstitutionally overbroad. The ACLU has repeatedly attacked harassment and stalking provisions precisely on this basis. In objecting to federal stalking provisions of the Violence Against Women Act,⁴¹⁴ the ACLU characterized intent to cause “substantial emotional distress” elements, as well as intent to “harass” or “intimidate” elements, as “unconstitutionally overbroad.”⁴¹⁵ Thus, the ACLU paradoxically insists that in order for nonconsensual pornography laws to be constitutional, they must include the very element that, according to the ACLU, makes stalking laws unconstitutional.

Beyond vagueness and overbreadth issues, prohibiting only disclosures of sexually explicit images when they are intended to cause distress, while allowing disclosures that are not, also renders a law vulnerable to objections of underinclusiveness⁴¹⁶ and viewpoint discrimination.⁴¹⁷ As noted above, the only nonconsensual pornography law to date to be declared unconstitutional is Vermont’s, which was amended to include an “intent to harass” requirement under pressure from the ACLU and its surrogates.⁴¹⁸ By contrast, none of the nonconsensual pornography laws that do not include “intent to harass” requirements (including the oldest such law on the books, New Jersey’s, which was passed in 2003) has been found unconstitutional.

The ACLU’s favored statutes also allow any person who disclosed private, sexually explicit material for profit, reputation enhancement,

414. Pub. L. No. 103-322, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13981 (2012)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

415. Gabe Rottman, *New Expansion of Stalking Law Poses First Amendment Concerns*, ACLU (Mar. 12, 2013, 1:55 PM), <https://www.aclu.org/blog/free-speech/new-expansion-stalking-law-poses-first-amendment-concerns>.

416. See *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

417. For example, a Texas court recently held that the state’s improper photography statute could not be rescued from constitutional overbreadth because it only criminalized photographs taken with the intent to arouse or gratify a person’s sexual desires. In fact, the court found that such an intent requirement was “the regulation of protected thought.” *Ex parte Thompson*, 442 S.W.3d 325, 339, 350–51 (Tex. Crim. App. 2014). See also *Snyder*, 562 U.S. at 458.

418. See Hewitt, *supra* note 397. I have firsthand knowledge of the development of Vermont’s law, as I was asked to testify regarding the bill before the Vermont House Judiciary in 2015.

entertainment, or “satire” to act with impunity.⁴¹⁹ A 2015 case involving the Penn State chapter of the Kappa Delta Rho (KDR) fraternity illustrates the consequences of such a position. After it came to light that fraternity brothers were posting photos of naked, unconscious women to a members-only Facebook page, a KDR member defended the group’s actions by claiming that “[i]t was a satirical group. It wasn’t malicious whatsoever. It wasn’t intended to hurt anyone. It wasn’t intended to demean anyone.”⁴²⁰ Fortunately for these fraternity members—and unfortunately for the women they victimized—Pennsylvania’s nonconsensual pornography law was precisely the kind of narrow law⁴²¹ that the ACLU endorses.⁴²² Enacted in 2014, that law is restricted to those who, “with intent to harass, annoy or alarm a current or former sexual or intimate partner . . . disseminate[] a visual depiction of the current or former sexual or intimate partner in a state of nudity or engaged in sexual conduct.”⁴²³ The sponsor of the legislation recently stated that she intends to close the “relationship loophole” in light of the KDR case;⁴²⁴ there is no word yet on whether she intends to address the “intent to harass” requirement as well.

The ACLU’s position on nonconsensual pornography laws is in tension with its own reputation as a champion of privacy rights. The ACLU supports laws that protect many forms of private information, such as Social Security numbers, genetic information, and even geolocation data. Both state and federal criminal laws prohibit the unauthorized disclosure of material such as medical records,⁴²⁵ financial data,⁴²⁶ and cell phone usage information.⁴²⁷ None of these statutes require that perpetrators act with the intent to harass their victims, and certainly none require that the perpetrator and victim be intimate partners. These laws reflect the century-old understanding that, in the words of Warren and Brandeis, “the absence of ‘malice’ in the publisher does not afford a defence” to privacy violations; “[p]ersonal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property.”⁴²⁸ The ACLU clearly recognizes in most contexts that protecting privacy does not demand the addition of “intent

419. Franks, *supra* note 248.

420. *Id.*

421. 18 PA. CONS. STAT. § 3131 (2017).

422. I repeatedly advised the legislative sponsor against such requirements.

423. 18 PA. CONS. STAT. § 3131.

424. Christian Alexandersen, *Senator Wants to Close ‘Revenge Porn’ Relationship Exemption Amid Penn State Frat Scandal*, PENN LIVE (Mar. 19, 2015, 4:31 PM), http://www.pennlive.com/midstate/index.ssf/2015/03/senator_wants_to_close_revenge.html.

425. 42 U.S.C. § 1320d-6 (2012).

426. TEX. PENAL CODE ANN. § 31.17 (2015).

427. 47 U.S.C. § 222 (2012).

428. Warren & Brandeis, *supra* note 222, at 218.

to harass” requirements and does not violate the First Amendment.

Treating nonconsensual pornography as a harassment issue instead of a privacy issue demotes the harm it causes from an invasion of privacy to something more akin to hurt feelings. Not only is this a misguided and patronizing approach to nonconsensual pornography, but it also renders nonconsensual pornography laws more vulnerable to constitutional attack. The ACLU has been instrumental in attacking the constitutional legitimacy of anti-harassment laws, even as it has helped cement the constitutional legitimacy of pro-privacy laws.

C. *Whose Privacy?*

If the ACLU acknowledged that nonconsensual pornography is a privacy issue, not a harassment issue, it would have to confront some serious inconsistencies in its positions on sexual privacy versus other forms of privacy. On its Technology and Privacy Project webpage, the ACLU proclaims, “The ACLU works to expand the right to privacy, increase the control individuals have over their personal information, and ensure civil liberties are enhanced rather than compromised by technological innovation.”⁴²⁹ In many cases, the ACLU seems to make good on this promise: The ACLU has urged the FTC to pursue data brokers who buy and sell information about consumers;⁴³⁰ written a letter of support⁴³¹ for the Genetic Information Nondiscrimination Act as a means of protecting “extremely personal sensitive information”; and encouraged Congress to pass legislation that would require patient consent for the use of medical records for “secondary purposes.”⁴³² All of these measures emphasize the right of individuals not to have their private information disclosed without consent, without any reference to motive.

Lest one think that the difference here rests on a distinction between civil and criminal regulation, the ACLU has recently advocated in support of a bill that would make negligent disclosures of geolocation

429. *Privacy and Technology*, ACLU, <https://www.aclu.org/technology-and-liberty> (last visited Aug. 18, 2017).

430. Chris Calabrese, *Federal Trade Commission Needs to Move Beyond Reports When It Comes to Data Brokers*, ACLU (May 28, 2014, 3:10 PM), <https://www.aclu.org/blog/technology-and-liberty/federal-trade-commission-needs-move-beyond-reports-when-it-comes-data>.

431. Letter from ACLU, to Senator (2014), <https://www.aclu.org/technology-and-liberty/aclu-letter-senate-urging-support-s-358-%E2%80%9Cgenetic-information-nondiscriminatio> (last visited Apr. 5, 2017).

432. *ACLU Urges Congress to Define Medical Privacy as Patient Control of Electronic Health Records*, ACLU (July 23, 2008), <https://www.aclu.org/technology-and-liberty/aclu-urges-congress-define-medical-privacy-patient-control-electronic-health->.

data a federal crime⁴³³ and authored laws forbidding merchants from asking customers for Social Security numbers on pain of criminal penalty.⁴³⁴ These reforms use the criminal law to suppress speech in order to protect privacy. And yet the ACLU fights measures that attempt to protect the privacy of information arguably far more intimate than geolocation data or Social Security numbers.

The peculiar refusal to recognize nonconsensual pornography as a privacy violation is shared by the ACLU's fellow critics of revenge porn reform: the Media Coalition and the Motion Pictures Association of America (MPAA). The Media Coalition, whose membership is composed of booksellers, publishers, librarians, film, and recording and video game producers, was a party to the action brought by the ACLU against the original Arizona bill and has opposed, alongside the ACLU, other state legislation on the issue.⁴³⁵ The MPAA, the trade association representing major Hollywood studios, has joined the ACLU and the Media Coalition in opposing nonconsensual pornography laws. Both the Media Coalition and the MPAA recycle ACLU talking points in their opposition. The two groups made their first high-profile stand against revenge porn reform in April 2016, when Minnesota's nonconsensual pornography bills, House File 2741 and Senate File 2713, were making their way through the legislature.⁴³⁶ The bills' sponsor, Rep. John Lesch, had organized a diverse Working Group on the subject in 2015 that included CCRI as well as the ACLU. Both the Media Coalition and the MPAA published letters of opposition to the bill, attempting to characterize nonconsensual pornography as "offensive" or "embarrassing" "free speech."⁴³⁷

But the two groups were unable to offer a single example of protected speech that would be prohibited by the statute.⁴³⁸ This is unsurprising, given that the bills in question were narrowly drafted to prohibit only intentional disclosures of only sexually explicit images and videos

433. *ACLU and Bipartisan Supporters Urge Passage of Bill to Check GPS Tracking by Police: It's Time to Bring Privacy Laws Up to Speed with New Technology*, ACLU (Mar. 20, 2013), <https://www.aclu.org/news/aclu-and-bipartisan-supporters-urge-passage-bill-check-gps-tracking-police>.

434. Robert Ellis Smith, *Statement on Social Security Number Privacy Act Bill H-5202*, PRIVACY J. (Feb. 8, 2011), <http://riaclu.org/legislation/bill/social-security-numbers-h-5202-s-179/>.

435. *About*, MEDIA COALITION, <http://mediacoalition.org/about/> (last visited May 22, 2017).

436. Teri Robinson, *MPAA Says Minn. Revenge Porn Bill Would Compromise Free Speech*, SC MEDIA (Apr. 4, 2016), <https://www.scmagazine.com/mpaa-says-minn-revenge-porn-bill-would-compromise-free-speech/printarticle/528733/>.

437. Memorandum from the Media Coalition and Motion Picture Association (MPAA) to Minn. HF2741 and SF2713 (Mar. 28, 2016), <http://www.cybercivilrights.org/mpaa/>.

438. *Id.*

without the depicted individuals’ consent and only when a reasonable person would have known the images were to remain private, in addition to including an exception for disclosures that “relate[] to a matter of public concern,” when “dissemination serves a lawful public purpose.”⁴³⁹

Both the Media Coalition and the MPAA, following the ACLU’s lead, “urge[d] the addition of an ‘intent to harass’ provision, claiming that such a requirement would dissolve their constitutional objections.”⁴⁴⁰ But, as noted above, if the statute raised any genuine First Amendment issues, they could not be answered by a requirement that singles out certain viewpoints for punishment. Such a provision would, in fact, potentially create First Amendment objections on the grounds of underinclusiveness and viewpoint discrimination, in addition to rendering the law incoherent and duplicative of existing law. Adding an “intent to harass” requirement would moreover, as noted above, mean that the people who distributed the private, intimate photos of celebrities, including Hollywood star Jennifer Lawrence, would be free to do so with impunity because they were merely providing “entertainment.”

The ACLU did not prevail in Minnesota. But it did succeed in convincing Arizona legislators in 2015 and in lobbying Rhode Island Governor Gina Raimondo to veto a strong bill that had been passed almost unanimously by the state legislature in 2016.⁴⁴¹ The ACLU’s opposition to Rhode Island’s bill was particularly strange in light of the fact that the Rhode Island ACLU had previously authored a law forbidding merchants to ask customers for their Social Security numbers on pain of criminal penalty—a suppression of speech that the ACLU clearly considered to be a justified and necessary measure to protect privacy.⁴⁴²

The approach taken by the ACLU and special interest groups like the Media Coalition and the MPAA allows revenge porn site operators to destroy the lives, careers, reputations, and personal relationships of thousands of people, mostly women, so long as their motives are greed or voyeurism: rapists may continue to distribute footage of their sexual assaults on social media; nursing home workers may continue to share nude photos of vulnerable patients for entertainment;⁴⁴³ and police officers may continue to trade naked photos stolen from women they have detained as a “game.”⁴⁴⁴ It is difficult to reconcile such a position with the protection of privacy or other civil liberties.

439. *Id.*

440. *Id.*

441. Ted Nesi, *Raimondo Issues First Veto, Over ‘Revenge Porn,’* WPRI (June 21, 2016, 10:43 AM), <http://wpri.com/2016/06/21/raimondo-issues-first-veto-over-revenge-porn/>.

442. Smith, *supra* note 434.

443. See Ornstein, *supra* note 39.

444. See Gafni, *supra* note 235.

THE FUTURE

There is no silver bullet—legal or otherwise—to ending the practice of nonconsensual pornography. Eradicating this abuse requires a transformation of not only legal, but also social and technological, norms. It requires, for example, an outright rejection of the entrenched cultural belief that women's bodies are public property, and an unequivocal condemnation of using sex as a means of discipline. This will not be achieved by criminalization alone, and criminalization necessarily creates its own problems. It is undeniable that there is a crisis of over-incarceration in this country and that our criminal justice system is deeply flawed in many respects. But it is also undeniable that crimes against women and girls have historically been under-criminalized, and that our legal system's failure to adequately recognize and condemn sexual abuse in particular is one reason we continue to be plagued by it.

With these qualifications, the move towards criminalization has given victims of this destructive practice some reason for hope. Not only does it provide an avenue towards justice that does not require the time-consuming and costly services of private attorneys (time and money being two luxuries few victims can afford), it also sends the powerful message that nonconsensual pornography is a form of sexual abuse for which victims are not to blame. The criminalization approach is also the only approach with any serious potential for deterrence. Given the immediate, devastating, and often irremediable harm that nonconsensual pornography inflicts, deterrence must be the first priority.

It is past time for the law, as well as the tech industry and society as a whole, to recognize that sexual privacy—women's as well as men's—is at least as deserving of respect as other forms of privacy. People rely on the confidentiality of transactions in other contexts all the time: we trust doctors with sensitive health information; we trust salespeople with credit card numbers; and we trust search engines with our most private questions and interests. We are able to rely on the confidentiality of these transactions because our society takes it as a given—most of the time—that consent to share information is limited by context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished. Laws protecting victims from unauthorized disclosures of their financial, legal, or medical information have a long and mostly uncontroversial history; it is remarkable that disclosures of sexual information have for so long been treated differently. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information. The circulation of credit card numbers, health records, or trade secrets without proper authorization all carry serious criminal penalties. Laws regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of

one’s body. Criminal laws prohibiting surveillance and 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 inflicts a social harm serious enough to warrant criminal prohibition and punishment.⁴⁴⁵

Privacy is not, as revenge porn reform critics would have it, inherently at odds with freedom of speech; privacy is in fact essential to free speech.⁴⁴⁶ As Justice William O. Douglas wrote in 1971, free discourse is impossible under surveillance: the individual’s right to be “the sole judge of as to what must be said and what must remain unspoken” is the “essence of the idea of privacy implicit” in the First Amendment.⁴⁴⁷ If the right to free speech—for everyone, women and men—is to be more than a hollow right, then the right to privacy must also be defended.

In a 2000 article for Harvard Magazine titled *Code is Law: On Liberty in Cyberspace*, Professor Lawrence Lessig wrote,

Our choice is not between ‘regulation’ and ‘no regulation.’ The code regulates. It implements values, or not. It enables freedoms, or disables them. It protects privacy, or promotes monitoring. People choose how the code does these things. People write the code. Thus the choice is not whether people will decide how cyberspace regulates. People—coders—will. The only choice is whether we collectively will have a role in their choice—and thus in determining how these values regulate—or whether collectively we will allow the coders to select our values for us.⁴⁴⁸

Code, of course, has multiple meanings. It can mean the code written by software engineers who design social media platforms and Internet infrastructure, the code of our social norms, or the code of laws. To fight against the harm of nonconsensual pornography and to protect the values of intimate expression and privacy, we must take responsibility for all of these codes, and rewrite them when necessary.

445. See VOYEURISM STATUTES 2009, *supra* note 388.

446. See Mary Anne Franks, *Why Hulk vs. Gawker Is Not About Privacy vs. Free Speech*, HUFFINGTON POST (Mar. 23, 2016, 12:17 PM), http://www.huffingtonpost.com/mary-anne-franks/why-hulk-versus-gawk-is-n_b_9527786.html.

447. *Id.*

448. Lawrence Lessig, *Code Is Law: On Liberty in Cyberspace*, HARV. MAG. (Jan. 1, 2000), <http://harvardmagazine.com/2000/01/code-is-law.html>.

