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# The Privacy Hierarchy: A Comparative Analysis of the Intimate Privacy Protection Act vs. the Geolocational Privacy and Surveillance Act

Katherine A. Mitchell

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# The Privacy Hierarchy: A Comparative Analysis of the Intimate Privacy Protection Act vs. the Geolocational Privacy and Surveillance Act

KATHERINE A. MITCHELL\*

*The advent of the technological boom brought the world smartphones, social media, and Siri. These novel benefits, however, were accompanied by unchartered invasions of privacy. Congress has embarked on the seemingly endless path of protecting its constituents through civil and criminal legislation aimed at combatting such invasions. Two recent examples include the Intimate Privacy Protection Act (“IPPA”) and the Geolocational Privacy and Surveillance Act (“GPS Act”). Nonetheless, the IPPA, which was proposed to criminalize the dissemination of nonconsensual pornography, has garnered much less support—and much more criticism—than its geolocational counterpart.*

*This Note discusses the striking similarities of both bills, both practically and elementally. The criminality of both bills turns on the issue of contextual consent. Why then do we see such discrepancies in support? The answer may lie*

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\* J.D. Candidate 2019, University of Miami School of Law. I first and foremost wish to thank my friend and sister, Carly Hellstrom, for the inspiration behind both this Note and the numerous legislative changes she has courageously advanced. In that same spirit, I am also grateful to Professor Mary Anne Franks for her insight and guidance, which is palpable throughout this Note. Thank you to the *University of Miami Law Review* for selecting this Note for publication and to the Executive Board—especially Maya Frucht and Elizabeth Montano—for their dedication and meticulousness. We are all bettered by you. Finally, for their unwavering encouragement, support, and patience, I am especially indebted to my family and to my partner, Wesley Wallace.

*in both legal and societal justifications behind privacy protections, suggesting that some forms of privacy warrant more protections than others. Hence, the privacy hierarchy.*

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## INTRODUCTION

The right to privacy has been considered a long-held substantive right since the founding of our nation.<sup>1</sup> Which categories of privacy are considered protected by this right, however, is a debate that has existed nearly as long.<sup>2</sup> Determining what constitutes federally protected privacy has often been shaped by the surrounding geopolitical and social climates of the era of enactment.<sup>3</sup> The technological paroxysm of the past few decades has resulted in an emergence of new

<sup>1</sup> See U.S. CONST. amend. IV. See generally *Griswold v. Connecticut*, 381 U.S. 479, 484–46 (1965) (ruling for the first time that the Constitution, through the Bill of Rights, implies a fundamental right to privacy).

<sup>2</sup> See *Griswold*, 381 U.S. at 484–86.

<sup>3</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding as constitutional a Georgia anti-sodomy criminal law), *overruled by* *Lawrence v. Texas*, 539

and advanced invasions of privacy—both beneficial and unsettling—and, with that, a newly kindled need for potential privacy laws.<sup>4</sup>

Currently, there are two federal bills under congressional review that, if enacted, will each federally criminalize the intentional disclosure of an individual's private information without that individual's consent, with limited exceptions. The Intimate Privacy Protection Act ("IPPA") was introduced as a way to combat the relatively recent phenomenon of "revenge porn,"<sup>5</sup> or the dissemination of a sexually explicit image or video of a personally identifiable individual without that individual's consent.<sup>6</sup> Comparably, the Geolocational Privacy and Surveillance ("GPS") Act, aside from providing clarity regarding procedures required by law enforcement to track an individual's whereabouts, also prohibits the disclosure or dissemination of an individual's geolocation information or data without that individual's consent.<sup>7</sup> In essence, both bills were introduced in response to unsettling privacy attacks in wake of the digital age.

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U.S. 558, 576–79 (2003) (holding anti-sodomy criminal laws unconstitutional as a violation of one's right to privacy).

<sup>4</sup> See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (holding warrantless search and seizures of cell phone records revealing location information violates the Fourth Amendment); *Florida v. Jardines*, 569 U.S. 1 (2013) (drug-detecting dog sniff on front porch of a home found violative of Fourth Amendment); *United States v. Jones*, 565 U.S. 400 (2012) (installation of a GPS tracking device on defendant's vehicle constituted an unlawful search under the Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27 (2001) (warrantless use of thermal imaging device to measure heat emanating from home is unlawful).

<sup>5</sup> See *infra* Part I.

<sup>6</sup> Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016). Note that the IPPA has recently been repackaged as the "ENOUGH Act," or the "Ending Nonconsensual Online User Graphic Harassment Act of 2017." See S. 2162, 115th Cong. (2017). Nonetheless, both bills are proposed "to provide that it is unlawful to knowingly distribute a private, visual depiction of a person's intimate parts or of a person engaging in sexually explicit conduct, with reckless disregard for the person's lack of consent to the distribution, and for other purposes." H.R. 5896; S. 2162 (using "individual" in place of "person"). Despite certain differences, the crux of both versions is the same for purposes of this Note, which will refer to the IPPA.

<sup>7</sup> Geolocational Privacy and Surveillance Act, H.R. 1062, 115th Cong. (2017). Many sources cited throughout this Note discuss or analyze the 2013 version of the Geolocational Privacy and Surveillance Act, H.R. 1312, 113th Cong. (2013). Nonetheless, the proposed bills are identical and the analyses remain the same. Note, however, that the Senate version of the Act, though largely identical

Both bills garnered bipartisan support;<sup>8</sup> however, the IPPA, and many of its state counterparts, faced seemingly surprising backlash and opposition from considerable legal organizations, such as the American Civil Liberties Union (“ACLU”),<sup>9</sup> while the GPS Act gained the support of not only the ACLU, but other tech industry leaders as well.<sup>10</sup> In her article, “*Revenge Porn*” Reform: A View from the Front Lines, Professor Mary Anne Franks highlights these seeming contradictions, thus providing the genesis of the privacy disparity question.<sup>11</sup>

This Note conducts a comparative analysis of each bill and their respective critiques in an attempt to gauge how these discrepancies materialized. Part I provides a brief overview of the prevalence and effects of revenge porn, discussing the need for its criminalization.

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and introduced on the exact same day, contains slight differences. See Geolocation Privacy and Surveillance Act, S. 395, 115th Cong. (2017). For ease, this Note will only refer to the House version.

<sup>8</sup> Mary Anne Franks, *It's Time for Congress to Protect Intimate Privacy*, HUFFPOST (July 18, 2016, 1:32 PM), [https://www.huffingtonpost.com/mary-anne-franks/revenge-porn-intimate-privacy-protection-act\\_b\\_11034998.html](https://www.huffingtonpost.com/mary-anne-franks/revenge-porn-intimate-privacy-protection-act_b_11034998.html) [hereinafter Franks, *It's Time*]; Rahul Kapoor & Christopher C. Archer, *Geolocation Privacy and Surveillance Act Introduced in US Congress*, NAT'L L. REV. (Feb. 23, 2017), <https://www.natlawreview.com/article/geolocation-privacy-and-surveillance-act-introduced-us-congress>.

<sup>9</sup> Franks, *It's Time*, *supra* note 8; see also *Free Speech and Media Groups Applaud Governor's Veto of Overbroad "Revenge Porn" Bill*, ACLU (June 21, 2016), [www.aclu.org/news/free-speech-and-media-groups-applaud-governors-veto-overbroad-revenge-porn-bill](http://www.aclu.org/news/free-speech-and-media-groups-applaud-governors-veto-overbroad-revenge-porn-bill) (collecting support for the governor's veto of a similar state bill combatting nonconsensual pornography).

<sup>10</sup> See Sandra Fulton, *Congress Must Act to Stop Unwarranted Tracking by Law Enforcement*, ACLU (Mar. 22, 2013, 10:22 AM), <https://www.aclu.org/blog/national-security/privacy-and-surveillance/congress-must-act-stop-unwarranted-tracking-law>; cf. *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), [www.aclu.org/news/aclu-and-bipartisan-supporters-urge-passage-bill-check-gps-tracking-police](http://www.aclu.org/news/aclu-and-bipartisan-supporters-urge-passage-bill-check-gps-tracking-police) (urging the passage of a bill similar to the GPS Act in Maine).

<sup>11</sup> Mary Anne Franks, “*Revenge Porn*” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1333–35 (2017) [hereinafter Franks, “*Revenge Porn*” Reform]. As a pioneer of nonconsensual pornography reform, Professor Franks's numerous articles, speaking engagements, and research projects provide an expansive overview of both the major issues—and the major need—for nonconsensual pornography criminalization.

Part II of this Note discusses the IPPA, its current state law counterparts, and the legal and constitutional implications of the criminalization of revenge porn. Part III explores essentially the same analysis as the IPPA discussion in Part II; however, it focuses on the proposed GPS Act instead.<sup>12</sup> Part IV attempts to reconcile the two potential laws and the reasons behind why there appears to be discrepancies in their legitimacy, focusing on the ACLU's approach, as well as a societal analysis. Using this attempted reconciliation, Part V discusses a potential strategy to implement both bills effectively, without constitutional concern, and concludes with a brief summary and discussion of the future of these potential privacy laws.

Overall, this Note argues that the inconsistency between responses to these two bills can be explained by the concept of a privacy hierarchy. That is, certain forms of privacy are privileged above others. Privacy that relates to corporate or governmental intrusion is afforded higher protections than privacy that relates to bodily autonomy and crimes perpetrated against women. Given the inherent injustice in the trivialization of harms against women and girls, and the apparent lack of empathy such trivialization derives from, this Note argues for the dismantlement of this unjustified hierarchy.

#### I. "REVENGE PORN": THE NEED FOR CRIMINALIZATION

Somewhat of a misnomer, "revenge porn" is the colloquialism used for the dissemination—typically online—of a sexually explicit,

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<sup>12</sup> In an attempt at efficiency, this Note does not purport to analyze, or even acknowledge, each and every critique of the respective bills and their underlying constitutional issues. Entire law review articles can and have been dedicated to the subjects individually. Instead, this Note will attempt to broadly describe some of the concerns and policies highlighted in academic and legal literature regarding each subject, and how these bills can be reconciled. *See, e.g.*, Alix Iris Cohen, Comment, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300 (2015) (conducting a purely First Amendment unprotected category of speech analysis for potential nonconsensual pornography laws); Stephen Wagner, *Stopping Police in Their Tracks: Protecting Cellular Location Information Privacy in the Twenty-First Century*, 12 DUKE L. & TECH. REV. 201 (2014) (addressing Fourth Amendment implications of federal geolocational legislation).

or intimate, photograph, video, or other multimedia apparatus, without the consent of the depicted individual.<sup>13</sup> “Revenge porn” has recently been added to the *Merriam-Webster Dictionary* as “sexually explicit images of a person posted online without that person’s consent especially as a form of revenge or harassment.”<sup>14</sup> Hence, the misnomer. As discussed below, many current state revenge porn laws require an “intent to harm” element for criminal liability.<sup>15</sup> However, this nonconsensual dissemination need not derive from vengeful purposes or personal animus, as many perpetrators participate simply with entertainment or economic motivations in mind.<sup>16</sup>

Considered a “kingpin” of revenge porn,<sup>17</sup> Craig Brittain defended his business model, claiming, “[w]e don’t want anyone shamed or hurt[;] we just want the pictures there for entertainment purposes and business.”<sup>18</sup> In 2015, members of the Penn State chapter of the Kappa Delta Rho fraternity were investigated upon discovery that photographs of unconscious naked women were posted

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<sup>13</sup> *Frequently Asked Questions*, CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/faqs/> (last visited Jan. 20, 2019).

<sup>14</sup> *Revenge Porn*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2017).

<sup>15</sup> *See, e.g.*, UTAH CODE ANN. § 76-5b-203(2) (2018), [https://le.utah.gov/xcode/Title76/Chapter5b/C76-5b-S203\\_2014040320140513.pdf](https://le.utah.gov/xcode/Title76/Chapter5b/C76-5b-S203_2014040320140513.pdf) (“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 . . . .” (emphasis added)); *see also infra* Part II.

<sup>16</sup> Brian Maass, *‘Revenge Porn’ Website Has Colorado Women Outraged*, CBS DENVER (Feb. 3, 2013, 10:13 PM), <https://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/>; Rob Price, *Bitcoin Beggars Try to Profit Off #CelebGate*, DAILY DOT (Sept. 1, 2014, 1:46 PM), [www.dailydot.com/crime/celebgate-jennifer-lawrence-nude-leakers-bitcoin/](http://www.dailydot.com/crime/celebgate-jennifer-lawrence-nude-leakers-bitcoin/).

<sup>17</sup> Jessica Contrera, *‘Revenge Porn’ Distributors Are Finally Seeing Legal Ramifications. This Web Site Owner Will Go to Prison for 18 Years.*, WASH. POST (Apr. 5, 2015), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/04/05/revenge-porn-distributors-are-finally-seeing-legal-ramifications-this-web-site-owner-will-go-to-prison-for-18-years/>.

<sup>18</sup> Franks, *“Revenge Porn” Reform*, *supra* note 11, at 1288 n.233 (quoting Maass, *supra* note 16). Brittain further stated, “we’re not doing anything, not trying to hurt them, we’re not out for revenge or being malicious, we just want entertainment, we want the money, we’re after making the buck.” Maass, *supra* note 16.

to their brothers-only Facebook page.<sup>19</sup> Members defended the Facebook page, claiming it was purely “satirical” and “wasn’t intended to hurt anyone.”<sup>20</sup> In 2014, in what became known as #CelebGate, hackers leaked hundreds of intimate photos of celebrities in exchange for the now-popularized cryptocurrency known as Bitcoin, previously a common currency exchanged on the dark web.<sup>21</sup>

Until the occurrence of numerous high-profile cases, such as the #CelebGate scandal, the topic of revenge porn was essentially non-existent in both the social, legal, and public discourse.<sup>22</sup> Jennifer Lawrence, award-winning actress and #CelebGate victim, knows firsthand the harm suffered at the hands of revenge porn perpetrators: “It is not a scandal. It is a sex crime.”<sup>23</sup>

Public interest has peaked due to this influx of celebrity notoriety and the ever-increasing prevalence of social media; however, until recently, even these nonconsensual occurrences were normalized as a cost of fame and/or the risk assumed by exposing oneself to intimate images in the first place.<sup>24</sup> Often overlooked, however, are the thousands of everyday laywomen (and men) who are victimized by these predatory and humiliating invasions of privacy.

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<sup>19</sup> Tyler Kingkade, *Police Say Penn State Fraternity Circulated Nude Photos of ‘Unsuspecting Victims,’* HUFFPOST (Mar. 17, 2015, 1:55 PM), [https://www.huffingtonpost.com/2015/03/17/penpenn-state-fraternity-nude-photos\\_n\\_6886476.html](https://www.huffingtonpost.com/2015/03/17/penpenn-state-fraternity-nude-photos_n_6886476.html); see also Lindsey Bever, *Penn State Suspends Kappa Delta Rho Fraternity for 3 Years Following Findings of Hazing and Sexual Harassment*, WASH. POST (May 27, 2015), [www.washingtonpost.com/news/morning-mix/wp/2015/05/27/penn-state-suspends-kappa-delta-rho-fraternity-for-3-years-following-findings-of-hazing-and-sexual-harassment/](http://www.washingtonpost.com/news/morning-mix/wp/2015/05/27/penn-state-suspends-kappa-delta-rho-fraternity-for-3-years-following-findings-of-hazing-and-sexual-harassment/).

<sup>20</sup> Holly Otterbein, *Member of Penn State’s Kappa Delta Rho Defends Fraternity*, PHILA. MAG. (Mar. 18, 2015, 4:36 PM), [www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/](http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/).

<sup>21</sup> See Price, *supra* note 16.

<sup>22</sup> Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1255.

<sup>23</sup> Sam Kashner, *Both Huntress and Prey*, VANITY FAIR (Nov. 2014), <https://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy>.

<sup>24</sup> See Becky Peterson, *Revenge Porn Is Illegal in California – Here’s What Could Happen to Rob Kardashian for Tweeting Explicit Photos of His Ex*, BUS. INSIDER (July 5, 2017, 8:50 PM), [www.businessinsider.com/rob-kardashian-legal-risk-for-chyna-blac-revenge-porn-2017-7](http://www.businessinsider.com/rob-kardashian-legal-risk-for-chyna-blac-revenge-porn-2017-7); Dave Quinn, *Mischa Barton Testifies in Revenge-Porn Case as Lawyer Declares ‘Another Court Victory,’* PEOPLE (July 1, 2017, 2:59 PM), [www.people.com/tv/mischa-barton-revenge-porn-testify-july](http://www.people.com/tv/mischa-barton-revenge-porn-testify-july).



In the first national study to examine self-reporting of nonconsensual pornography victimization and perpetration, it was reported that one in every eight social media users has been the target of nonconsensual pornography.<sup>25</sup> In a similar study developed in 2013, ninety percent (90%) of respondents who self-identified as victims of nonconsensual pornography were female.<sup>26</sup> The popular social media site Facebook received more than 51,000 reports of revenge porn in January 2017 alone.<sup>27</sup> However, the potential pool of victims is vastly expanding, as the practice of sending intimate images within the context of an intimate relationship has gained prevalence in this new age of social media and technological dating.<sup>28</sup> A 2014 survey of 1,100 New Yorkers revealed that approximately forty-five percent (45%) of respondents have recorded themselves having sex.<sup>29</sup> According to a 2014 study by software security company McAfee, fifty-four percent (54%) of adults in the United States send or receive intimate text messages, nude photos, and/or explicit videos.<sup>30</sup> The technological advances of the most recent years, as well as the ever-increasing usage of social media platforms,<sup>31</sup> have the

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<sup>25</sup> ASIA A. EATON ET AL., CYBER CIVIL RIGHTS INITIATIVE, 2017 NATION-WIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION: A SUMMARY REPORT 6, 11 (2017), <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

<sup>26</sup> CYBER CIVIL RIGHTS INITIATIVE, CCRI'S 2013 NONCONSENSUAL PORNOGRAPHY (NCP) RESEARCH RESULTS 1 (2013), [www.cybercivilrights.org/wp-content/uploads/2016/11/NCP-2013-Study-Research-Results-1.pdf](http://www.cybercivilrights.org/wp-content/uploads/2016/11/NCP-2013-Study-Research-Results-1.pdf).

<sup>27</sup> Nick Hopkins & Olivia Solon, *Facebook Flooded with 'Sextortion' and 'Revenge Porn', Files Reveal*, GUARDIAN (May 22, 2017, 9:52 AM), [www.theguardian.com/news/2017/may/22/facebook-flooded-with-sextortion-and-revenge-porn-files-reveal](http://www.theguardian.com/news/2017/may/22/facebook-flooded-with-sextortion-and-revenge-porn-files-reveal). "The company relies on users to report most abusive content, meaning the real scale of the problem could be much greater." *Id.*

<sup>28</sup> See Franks, "Revenge Porn" Reform, *supra* note 11, at 1257–58.

<sup>29</sup> *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/>.

<sup>30</sup> *Consumer Online Behavior and Attitudes Toward PC Health*, MCAFEE, [http://sawebdev.ca/mcafee/global\\_stats/US/2.html](http://sawebdev.ca/mcafee/global_stats/US/2.html) (last visited Dec. 23, 2018).

<sup>31</sup> AARON SMITH & MONICA ANDERSON, PEW RESEARCH CTR., SOCIAL MEDIA USE IN 2018, at 2 (2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> (follow "Complete Report PDF" under "Report Materials") (showing that social media use across all measured platforms—YouTube, Facebook, Instagram, Pinterest, Snapchat, LinkedIn, Twitter, and WhatsApp—all increased between 2012 and 2018); *Social Media Fact Sheet*, PEW RES. CTR. (Feb.

potential to raise these statistics exponentially. Thus, the harm created by perpetrators of revenge porn amounts not just to individual harms of victims, but to an overall social harm: suppressing a practice of sexual expression that is more common than society and lawmakers would like to believe.<sup>32</sup>

As highlighted in depth by Professors Franks and Citron, these individual harms, however, can be both irreparable and decimating to their victims' livelihoods and mental health.<sup>33</sup> Intimate photos distributed online can reach millions of viewers with the click of a mouse, and many victims report that their images were likewise distributed to friends, family members, employers, and coworkers, producing an irremediable stain on their personal and professional relationships.<sup>34</sup> Furthermore, victims often report subsequent online and in-person harassment, including reports of cyberbullying, stalking, and threats of physical harm or sexual assault.<sup>35</sup> This is especially true when personal information, such as the victim's phone number, address, email, or social media accounts, is posted contemporaneously, as they often are.<sup>36</sup> Sadly, numerous victims resorted to suicide to escape the continuous and incessant castigation deriving from the images' distribution and resulting invasion of privacy.<sup>37</sup>

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5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/> ("When Pew Research Center began tracking social media adoption in 2005, just 5% of American adults used at least one of these platforms. By 2011 that share had risen to half of all Americans, and today 69% of the public uses some type of social media.").

<sup>32</sup> See Franks, "Revenge Porn" Reform, *supra* note 11, at 1285.

<sup>33</sup> See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–53 (2014); see also EATON ET AL., *supra* note 25, at 23–24.

<sup>34</sup> See Citron & Franks, *supra* note 33, at 350–53 (2014); Franks, "Revenge Porn" Reform, *supra* note 11, at 1263–64.

<sup>35</sup> Franks, "Revenge Porn" Reform, *supra* note 11, at 1259, 1263; see also, e.g., Anmarie Chiarini, Opinion, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013, 7:30 AM), [www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change](http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change).

<sup>36</sup> See Citron & Franks, *supra* note 33, at 350–51.

<sup>37</sup> Nina Burleigh, *Sexting, Shame and Suicide*, ROLLING STONE (Sept. 17, 2013, 6:20 PM), <https://www.rollingstone.com/culture/culture-news/sexting-shame-and-suicide-72148/>. Fifty-one percent (51%) of victims of revenge porn reported contemplating suicide after the distribution of their intimate images.

In September 2012, Audrie Pott, a fifteen-year-old high school student, attended a party where once she became extremely inebriated, a group of teenagers brought her upstairs, undressed her, drew on her naked body with markers, and proceeded to take pictures of themselves sexually assaulting Ms. Pott.<sup>38</sup> A week later, Ms. Pott committed suicide in her bathroom.<sup>39</sup> In the spring of 2015, Tiziana Cantone sent an explicit video of herself to her ex-boyfriend, who subsequently posted the video on various social media platforms.<sup>40</sup> After her video reached millions of viewers, she became the butt of what is commonly referred to as a “meme,” or in other words, the butt of a viral Internet joke, with portions of her sex tape printed on t-shirts in her native country of Italy.<sup>41</sup> Humiliating Ms. Cantone became “a national pastime.”<sup>42</sup> In a desperate attempt to “regain her privacy,” Ms. Cantone ended her own life.<sup>43</sup> These are just a few of the tragic outcomes of victims suffering at the mercy of nonconsensual pornography.

Further, as Professor Franks discussed, nonconsensual pornography can often play a larger role in other underlying or overarching crimes, as perpetrators use the threat of nonconsensual porn as leverage to blackmail their victims into nondisclosure of the crimes.<sup>44</sup> Human traffickers often coerce unwilling victims into the sex trade or prostitution by threatening to divulge their private images.<sup>45</sup> Rapists and other sexually violent predators document their attacks to

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Sameer Hinduja, *Revenge Porn Research, Laws, and Help for Victims*, CYBERBULLYING RES. CTR., <https://cyberbullying.org/revenge-porn-research-laws-help-victims> (last visited Jan. 2, 2018).

<sup>38</sup> Burleigh, *supra* note 37.

<sup>39</sup> *Id.*

<sup>40</sup> Emily Fairbairn, *Revenge Porn Suicide Shame: Tiziana Cantone Killed Herself over Leaked Sex Tape Because in Italy Sex for Fun Is Still a Sin*, SUN (Sept. 16, 2016, 11:55 PM), <https://www.thesun.co.uk/living/1799725/tiziana-cantone-killed-herself-over-leaked-sex-tape-because-in-italy-sex-for-fun-is-still-a-sin/>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Franks, “Revenge Porn” Reform, *supra* note 11, at 1258; *see, e.g.*, Chiarini, *supra* note 35.

<sup>45</sup> *See, e.g.*, Marion Brooks, *The World of Human Trafficking: One Woman’s Story*, NBC CHI. (Feb. 21, 2013, 1:52 PM), <http://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html>.

embarrass their victims, dissuading them from going to the police.<sup>46</sup> Victims of domestic violence, sexual assault, and human trafficking often face the insufferable choice of either reporting their attackers and having to relive the indignity, humiliation, and further suffering resulting from the dissemination of their explicit images or videos, or not reporting their attackers and suffering in silence.<sup>47</sup>

Some scholars and legislators alike argue that existing criminal laws are sufficient to combat the practice of nonconsensual pornography and that rather than drafting targeted revenge porn litigation, offenders should be punished utilizing existing harassment, extortion, and cyber-stalking laws.<sup>48</sup> However, the failure to criminalize the practice of nonconsensual pornography perpetuates the practice of gendered sexual abuse and the “pernicious belief that men have the right to use women and girls sexually without their consent.”<sup>49</sup> Furthermore, failing to define nonconsensual pornography as a crime in and of itself likewise perpetuates a victim-blaming culture, where the victim is punished—and his or her harms trivialized—for engaging in the normal human behavior of sexual expression.<sup>50</sup> Moreover, as described below, the definition of nonconsensual pornography and the many forms that it may take may not conform to the traditional and statutory notions of “harassment,” and thus, may be independently insufficient to combat the perpetration of revenge porn.<sup>51</sup>

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<sup>46</sup> See, e.g., Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (Dec. 16, 2012), <https://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html>; Tara Culp-Ressler, *16-Year-Old's Rape Goes Viral on Social Media: 'No Human Being Deserved This,'* THINKPROGRESS (July 10, 2014, 1:07 PM), <http://thinkprogress.org/health/2014/07/10/3458564/rape-viral-social-media-jada/>.

<sup>47</sup> See Franks, “Revenge Porn” Reform, *supra* note 11, at 1258–59.

<sup>48</sup> Rachel Budde Patton, Note, *Taking the Sting out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, 16 GEO. J. GENDER & L. 407, 436–42 (2015).

<sup>49</sup> Franks, “Revenge Porn” Reform, *supra* note 11, at 1259.

<sup>50</sup> *Id.* at 1321.

<sup>51</sup> 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/>.

For example, in what was referred to as New York's first revenge porn case, Ian Barber was charged with aggravated harassment (among other things) when he posted nude photos of his then-girlfriend to Twitter and also sent the images to her employer and family.<sup>52</sup> In dismissing all charges against Barber, the judge noted that New York's definition of aggravated harassment requires that "the defendant undertake some communication with the complainant," and because Barber did not actually send these photographs to his girlfriend, the aggravated harassment charge could not stand.<sup>53</sup> Moreover, many state and federal harassment and stalking laws require that the defendant be involved in a "course of conduct" intended to harm or harass,<sup>54</sup> meaning that a "single act of uploading a private image would generally not constitute harassment."<sup>55</sup>

Furthermore, damage suits against websites that refuse to comply with notice-and-takedown procedures have generally been unsuccessful.<sup>56</sup> This is due to the ever-present obstacle of section 230 of the Communications Decency Act of 1996, which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>57</sup> Section 230 effectively grants these websites immunity from liability so long as the site does not alter or revise the posted material.<sup>58</sup>

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<sup>52</sup> *People v. Barber*, No. 2013NY059761, 2014 WL 641316, at \*1 (N.Y. Crim. Ct. Feb. 18, 2014).

<sup>53</sup> *Id.* at \*5–6.

<sup>54</sup> Franks, "Revenge Porn" Reform, *supra* note 11, at 1301 (citing N.Y. PENAL LAW §§ 120.50, 240.25 (McKinney 2018)); *see also* 18 U.S.C. § 2261A(2) (2012) (defining that stalking occurs when a person who, "with the intent to . . . harass . . . engage[s] in a course of conduct that . . . causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress"); 18 PA. CONS. STAT. § 2709 (2018).

<sup>55</sup> Franks, "Revenge Porn" Reform, *supra* note 11, at 1301.

<sup>56</sup> Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, FORBES (Jan. 28, 2013, 1:13 PM), <https://www.forbes.com/sites/eric-goldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/#1016c9a17eff>.

<sup>57</sup> 47 U.S.C. § 230(c)(1) (2012).

<sup>58</sup> Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 67, 67 n.35 (2014); *see, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099–1106 (9th Cir. 2009) ("[I]t appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker

Civil remedies likewise found their place in the fight against nonconsensual pornography, as victims may resort to the tort remedy of breach of confidentiality,<sup>59</sup> intentional or reckless infliction of emotional distress,<sup>60</sup> the privacy tort of public disclosure of private facts,<sup>61</sup> and copyright law<sup>62</sup> as avenues of redress for the wrongs committed against them. In the high-profile case of *Bollea v. Gawker Media, LLC*, a Florida judge upheld the \$140 million verdict against Gawker Media for publishing an explicit sex tape of former professional wrestler, Hulk Hogan.<sup>63</sup> Hogan's causes of action

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(3) of information provided by another information content provider.”); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669–72 (7th Cir. 2008) (“[G]iven § 230(c)(1) [the plaintiff] cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.”); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–19 (1st Cir. 2007) (agreeing with other courts to “interpret[] Section 230 immunity broadly, so as to effectuate Congress’s ‘policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997))); *Gavra v. Google Inc.*, No. 5:12–CV–06547–PSG, 2013 WL 3788241, at \*2 (N.D. Cal. July 17, 2013) (“A website is liable for the unlawful content of online material only if the website contributes materially . . . to its alleged unlawfulness. Merely providing third parties with neutral tools to create web content, even if the website knows those parties are using the tools to create illegal content, does not create liability, nor does refraining from removing objectionable content, despite receiving notice.” (internal quotations omitted)).

<sup>59</sup> See, e.g., Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 722–32 (2017); cf. Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 908–37 (2006) (discussing a contractual theory of confidentiality rather than a tort theory).

<sup>60</sup> See, e.g., Citron & Franks, *supra* note 33, at 357–58; Caroline Drinnon, Note, *When Fame Takes Away the Right to Privacy in One’s Body: Revenge Porn and Tort Remedies for Public Figures*, 24 WM. & MARY J. WOMEN & L. 209, 221–22 (2017).

<sup>61</sup> See, e.g., Drinnon, *supra* note 60, at 222–23.

<sup>62</sup> See, e.g., Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 439–46 (2014); 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=.759fa63a0c9a](https://www.washingtonpost.com/news/the-intersect/wp/2014/09/08/how-copyright-became-the-best-defense-against-revenge-porn/?utm_term=.759fa63a0c9a).

<sup>63</sup> *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012); Eriq Gardner, *Judge Upholds Hulk Hogan’s \$140 Million Trial Victory*

included invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, publication of private matter, and violation of the right to publicity.<sup>64</sup> Though considered a civil victory against a perpetrator of nonconsensual pornography, this case does little to address the underlying problems in relying on civil remedies to address the issue of nonconsensual pornography.

First and foremost, the vast majority of victims of nonconsensual pornography do not have the requisite resources available to a person of high notoriety like Mr. Hogan<sup>65</sup>—who’s litigation was financially supported by Silicon Valley billionaire Peter Thiel.<sup>66</sup> The issue is further exacerbated by the fact that many victims are forced out of their employment positions because of the embarrassment and tarnished reputation that accompanies having one’s private images posted online (and sometimes sent directly to said employer).<sup>67</sup> Furthermore, civil actions also require that the very material harming the victim—i.e., his or her intimate images or videos—be further displayed to attorneys, judges, or other members of the judicial proceedings.<sup>68</sup> “The irony of privacy actions is that they generally require further breaches of privacy to be effective.”<sup>69</sup>

Civil remedies have their limitations both in addressing the harms of certain individuals and in combatting the pervasive underlying problem of nonconsensual pornography—a lack of deterrence.<sup>70</sup> Copyright law, for example, will only apply if the victim actually owns the material disseminated online, which requires that the victim took the image or video him or herself.<sup>71</sup> While eighty percent (80%) of revenge porn images are selfies,<sup>72</sup> many victims report that their images were either taken by their significant other

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*Against Gawker*, HOLLYWOOD REP. (May 25, 2016, 6:56 AM), <https://www.hollywoodreporter.com/thr-esq/judge-upholds-hulk-hogans-140-897301>.

<sup>64</sup> Complaint at 9–18, *Bollea*, 913 F. Supp. 2d 1325 (No. 8:12-cv-02348).

<sup>65</sup> Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1299–1300.

<sup>66</sup> Nicole K. Chipi, Note, *Eat Your Vitamins and Say Your Prayers: Bollea v. Gawker, Revenge Litigation Funding, and the Fate of the Fourth Estate*, 72 U. MIAMI L. REV. 269, 281–83 (2017).

<sup>67</sup> Citron & Franks, *supra* note 33, at 352–53, 358.

<sup>68</sup> See Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1299.

<sup>69</sup> *Id.*

<sup>70</sup> See *id.* at 1299–300.

<sup>71</sup> Levendowski, *supra* note 62, at 440.

<sup>72</sup> *Id.* at 426.

with their consent, taken without their knowledge, or in some cases, such as the #CelebGate scandal, hacked and obtained without the victim's knowledge or consent.<sup>73</sup> Moreover, a successful claim for the intentional infliction of emotional distress is rare, as courts have found that “[w]here the gravamen of a plaintiff’s complaint is really another tort, intentional infliction of emotional distress should not be available.”<sup>74</sup>

Existing laws—both criminal and civil—are insufficient to fully address the issues presented by the exacerbation of nonconsensual pornography.<sup>75</sup> Thus, nonconsensual pornography must be criminalized in and of itself as a separate offense.<sup>76</sup>

## II. THE INTIMATE PRIVACY PROTECTION ACT: AN ATTEMPT AT THE FEDERAL CRIMINALIZATION OF REVENGE PORN

Before 2003, no state explicitly criminalized nonconsensual adult pornography and victims were left with little to no remedial courses of action.<sup>77</sup> Prior to 2013, only three states—New Jersey, Alaska, and Texas—criminalized the unauthorized disclosure of nonconsensual pornography.<sup>78</sup> Currently, forty-one states and the District of

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<sup>73</sup> *Id.* at 424, 424–25 nn.9–12. Levendowski mentions that about ten percent (10%) of victims reported that the pictures were taken without their knowledge, twelve percent (12%) were photoshopped photos, forty percent (40%) were hacked, and thirty-six percent (36%) were uploaded by ex-lovers. *Id.*

<sup>74</sup> *Patel v. Hussain*, 485 S.W.3d 153, 176 (Tex. App. 2016) (quoting *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004)).

<sup>75</sup> See generally Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT. L. REV. 247 (2015) (arguing revenge porn victims currently have no effective legal remedy).

<sup>76</sup> See generally Citron & Franks, *supra* note 33 (arguing for direct criminalization of nonconsensual pornography).

<sup>77</sup> Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1255. In 2003, New Jersey became the first state to officially enact a criminal revenge porn law. *Id.* at 1255 n.23; see N.J. STAT. ANN. § 2C:14-9 (West 2018).

<sup>78</sup> Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1280.



Columbia have enacted criminal legislation to address the harms associated with nonconsensual pornography.<sup>79</sup> In most of the remaining states, legislation is pending.<sup>80</sup> Technological developments have likewise emerged, with industry leaders, such as Twitter,<sup>81</sup> Facebook,<sup>82</sup> Microsoft,<sup>83</sup> Google,<sup>84</sup> and Reddit,<sup>85</sup> banning nonconsensual pornography on their sites, and taking strides to implement effective reporting and removal procedures on their platforms. The

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<sup>79</sup> The states with current revenge porn laws are as follows: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *41 States + DC Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, [www.cybercivilrights.org/revenge-porn-laws](http://www.cybercivilrights.org/revenge-porn-laws) (last visited Dec. 30, 2018). Additionally, Ohio's Governor signed a law criminalizing revenge porn in December 2018, which will go into effect in March 2019. Javonte Anderson, *Kasich Signs Law to Stop 'Revenge Porn,'* TOLEDO BLADE (Jan. 2, 2019, 6:00 AM), <https://www.toledoblade.com/local/education/2019/01/02/governor-kasich-signs-law-to-stop-revenge-porn/stories/20181228126>.

<sup>80</sup> See, e.g., Sandra Chapman, *Indiana Senator Proposes Bill to Make Revenge Porn Illegal*, WTHR (Jan. 10, 2018, 5:42 PM), <https://www.wthr.com/article/indiana-senator-proposes-bill-to-make-revenge-porn-illegal>; *Senate Passes Bill to Prevent Revenge Porn*, N.Y. ST. SENATE (Mar. 19, 2018), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-bill-prevent-revenge-porn>; see also Franks, "Revenge Porn" Reform, *supra* note 11, at 1281.

<sup>81</sup> 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/>.

<sup>82</sup> Sara Ashley O'Brien, *Facebook Launches Tools to Combat Revenge Porn*, CNN (Apr. 5, 2017, 10:46 AM), <http://money.cnn.com/2017/04/05/technology/facebook-revenge-porn/index.html>.

<sup>83</sup> Brian Fung, *Microsoft Is Stepping up the War on Revenge Porn – and Validating the Right to Be Forgotten*, WASH. POST (July 22, 2015), [https://www.washingtonpost.com/news/the-switch/wp/2015/07/22/how-silicon-valleys-war-on-revenge-porn-is-validating-the-right-to-be-forgotten/?utm\\_term=.722d5e2e5068](https://www.washingtonpost.com/news/the-switch/wp/2015/07/22/how-silicon-valleys-war-on-revenge-porn-is-validating-the-right-to-be-forgotten/?utm_term=.722d5e2e5068).

<sup>84</sup> 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>.

<sup>85</sup> Andrea Peterson, *Reddit Is Finally Cracking Down on Revenge Porn*, WASH. POST (Feb. 24, 2015), [https://www.washingtonpost.com/news/the-switch/wp/2015/02/24/reddit-is-finally-cracking-down-on-revenge-porn/?utm\\_term=.fd340912c999](https://www.washingtonpost.com/news/the-switch/wp/2015/02/24/reddit-is-finally-cracking-down-on-revenge-porn/?utm_term=.fd340912c999).

fight against nonconsensual pornography has vastly expanded; however, the array of arsenal combatting this crime still lacks a federally mandated criminal law prohibiting the nonconsensual dissemination or distribution of an individual's intimate images or videos.<sup>86</sup>

On July 14, 2016, California Congresswoman Jackie Speier first introduced the IPPA in Congress,<sup>87</sup> which was the culmination of an “extensive, years-long collaboration with civil liberties groups, criminal law practitioners, constitutional scholars, tech industry leaders, and victim advocates.”<sup>88</sup> The IPPA mandates

(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

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<sup>86</sup> Following a military scandal involving the distribution of hundreds of sexually explicit images of female Marines to an all-male Marine Facebook group, the House of Representatives unanimously passed the PRIVATE Act, which would amend the Uniform Code of Military Justice (“UCMJ”) to proscribe disclosure of such material without consent. *See* H.R. 2052, 115th Cong. (2017); Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1281.

<sup>87</sup> *See* Press Release, Jackie Speier, Rep., Congresswoman Speier, Fellow Members of Cong. 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>.

<sup>88</sup> Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1282.

enforcement, correctional, or intelligence activity;

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

(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).<sup>89</sup>

In summation, the bill amends the federal criminal code, making it unlawful to knowingly distribute a photograph, film, or video of a nude individual or an individual engaging in sexually explicit acts. The bill requires “reckless disregard for the [depicted] person’s lack of consent” if and when the person is “identifiable from the image itself or information displayed in connection with the image.”<sup>90</sup> The bill drew widespread bipartisan support, the approval of Facebook, Twitter, and other public interest groups, and also received the endorsement of various constitutional law scholars, including Erwin Chemerinsky.<sup>91</sup>

Notably missing from the proposed law, however, is any intent to harm or harass,<sup>92</sup> an element required for criminal liability, which is commonly featured in various state law counterparts to the

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<sup>89</sup> Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

<sup>90</sup> *Id.*

<sup>91</sup> Franks, *It’s Time*, *supra* note 8.

<sup>92</sup> This “intent to harm, humiliate, distress, harass, etc.” requirement will be interchangeable with a “motive” requirement in this Note. Professor Franks explains how and why the two similar terms may be confused in an analysis of legislative creation and implementation of criminal laws:

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 . . . .

“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.

Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1289.

IPPA.<sup>93</sup> This drew some admonition from critics, claiming that the law would create a multitude of constitutional and social issues, including First Amendment and over-criminalization problems.<sup>94</sup> However, in analyzing the current state revenge porn laws below, this “intent to harm” element arguably may not be necessary to avoid running afoul of the Constitution and may itself create constitutional quandaries.<sup>95</sup>

#### A. *Current Revenge Porn Laws, Intent, and Why It Matters*

As mentioned previously, there has been an enormous increase in state awareness and proactive legislation against nonconsensual pornography over the past five years. However, many of these state laws are riddled with issues, making them difficult to enforce—and even harder to prosecute—by state law enforcement. These legislative vulnerabilities include over-burdensome elemental requirements that lead to narrow applicability for what has become an extremely pervasive criminal matter.<sup>96</sup> These similar state laws may also face constitutional susceptibilities, including First Amendment issues.<sup>97</sup>

One over-burdensome prerequisite for a current state law criminalizing nonconsensual pornography is the requirement that the crime be perpetrated by a current or former sexual or intimate partner. For example, Pennsylvania’s current law asserts

[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

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<sup>93</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-1425(A)(3) (2018); 18 PA. CONS. STAT. § 3131(a) (2018); UTAH CODE ANN. § 76-5b-203(2) (2018), [https://le.utah.gov/xcode/Title76/Chapter5b/C76-5b-S203\\_2014040320140513.pdf](https://le.utah.gov/xcode/Title76/Chapter5b/C76-5b-S203_2014040320140513.pdf) (“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 . . .” (emphasis added)).

<sup>94</sup> See Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1302–27.

<sup>95</sup> See *id.* at 1289.

<sup>96</sup> *Id.* at 1282.

<sup>97</sup> *Id.*

state of nudity or engaged in sexual conduct.<sup>98</sup>

This narrow requirement overlooks the reality that, though the term “revenge porn” indicates that this kind of conduct is often perpetrated by a current or former intimate partner, many of these crimes are carried out by individuals who have no intimate or sexual affiliation with the victim, such as friends, acquaintances, or, as previously discussed, strangers.<sup>99</sup>

A similar issue arises when a state law criminalizing nonconsensual pornography requires an “intent to harass” element, or, in other words, requires the perpetrator to have a nefarious motive in distributing these images.<sup>100</sup> Prosecutors will be unable to prove this requisite motive for many offenders, because many perpetrators will commit this reprehensible conduct without any vengeful or vindictive motive.<sup>101</sup> For example, perpetrators who distribute photos or videos presuming that the victims depicted will never unearth the perpetrator’s conduct will not be held criminally liable for their conduct in states with this intent to harm requirement.<sup>102</sup> As previously discussed, Pennsylvania’s current law, notwithstanding the “former sexual or intimate partner” requirement, also maintains an “intent to harass, annoy, or alarm” requirement;<sup>103</sup> thus, the members of the Penn State chapter of Kappa Delta Rho who shared photos of naked, unconscious women on their Facebook group were able to act with impunity.<sup>104</sup>

These intent to harm and motive requirements may also be constitutionally problematic, which is exactly what they are purportedly intended to amend.

### B. *Legal Implications of Revenge Porn Laws*

Generally, there are four recognized theories of criminal punishment that attempt to describe policy rationale for the societal use of

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<sup>98</sup> 18 PA. CONS. STAT. § 3131(a) (2018).

<sup>99</sup> See Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1288 (“[A] significant portion of nonconsensual pornography cases involves people who do not even know each other.”); see, e.g., Price, *supra* note 16.

<sup>100</sup> See Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1287–90.

<sup>101</sup> See *supra* Part I.

<sup>102</sup> See Otterbein, *supra* note 20.

<sup>103</sup> § 3131(a).

<sup>104</sup> See Otterbein, *supra* note 20.

criminal regulations—deterrence, rehabilitation, retribution, and incapacitation.<sup>105</sup> The strongest of these justifications underlying the necessity for the criminalization of nonconsensual pornography lies within the concept of deterrence.<sup>106</sup> Deterrence is “[t]he act or process of discouraging certain behavior, particularly by fear; [especially] as a goal of criminal law, the prevention of criminal behavior by fear of punishment.”<sup>107</sup>

In a 2017 national study on nonconsensual pornography, the Cyber Civil Rights Initiative (“CCRI”) discerned that of respondents who admitted to having engaged in nonconsensual pornography, the majority indicated that criminal penalties would have been the most likely deterrent to stop them from having engaged in such conduct.<sup>108</sup> Because of the insufficiency of civil laws, it is often difficult for victims of nonconsensual pornography to be fully made whole;<sup>109</sup> therefore, critics against the criminalization of nonconsensual pornography often overlook the fact that the real harm created by this conduct is an unqualified invasion of privacy—of which the only remedial measure competent enough to “make the victim whole” would be for the conduct to never have occurred in the first place.<sup>110</sup>

Because of the technological nature of the crime, once a picture is disseminated, it is nearly impossible to determine how many individuals have viewed, saved, or redistributed the intimate images or videos, making it just as impossible for the victim’s harm to actually be remedied.<sup>111</sup> Accordingly, the legislators supporting the

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<sup>105</sup> See generally Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRITISH J. AM. LEGAL STUD. 263, 266–99 (2013).

<sup>106</sup> Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1303–04.

<sup>107</sup> *Deterrence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>108</sup> EATON ET AL., *supra* note 25, at 22.

<sup>109</sup> See *supra* Part I.

<sup>110</sup> See Sarah Jeong, Opinion, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), [www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/](http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/).

<sup>111</sup> Charlotte Alter, ‘*It’s Like Having an Incurable Disease*’: Inside the Fight Against Revenge Porn, TIME (June 13, 2017), [www.time.com/4811561/revenge-porn/](http://www.time.com/4811561/revenge-porn/) (discussing how “there’s no way to guarantee [an image] hasn’t been copied, screenshotted, or stored on a cache somewhere”). According to Reg Harnish, CEO of cyber-risk assessment firm GreyCastle Security, “[o]nce the images and videos have been exposed or published, the internet is permanent . . . . There are literally

criminalization of nonconsensual pornography should—and do—focus on the deterrent effects of these laws. However, these deterrent effects have also been categorized and labeled as unwarranted chilling effects, running afoul of many policy justifications underlying the United States Constitution’s conceptualization of fairness.

## 1. CONSTITUTIONAL CHALLENGES

Though there have been differing bases for challenges to the criminalization of nonconsensual pornography, constitutional challenges based on the First Amendment and over-breadth “void for vagueness” challenges remain the most persistent.<sup>112</sup>

### a. First Amendment Free Speech Challenges

With the advent of widespread internet use for various forms of expression, including blogging, social media use, and a new age of journalism to name a few, came a whirlwind of free speech advocacy pushing for increased protections of online expression. Much of the criticism regarding legislative reform on nonconsensual pornography, particularly that from major tech industry leaders, derives from the apprehension of the chilling effects on Internet expression that may accompany the imposition of a federally mandated criminal law.<sup>113</sup> In other words, opponents worry about the First Amendment free speech ramifications of limiting the freedom to distribute content online without the fear of punishment by the government.<sup>114</sup> In order for a law to pass strict constitutional scrutiny under the First Amendment Free Speech Clause, the law must be narrowly tailored and enacted in order to achieve a compelling governmental interest.<sup>115</sup> Generally, adult pornography is considered protected speech under a free speech analysis; however, the nonconsensual aspect of revenge porn may tip the scales in favor of criminalization when

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hundreds of things working against an individual working to remove a specific piece of content from the internet . . . It’s almost impossible.” *Id.*

<sup>112</sup> See Larkin, *supra* note 58, at 97, 97 n.151.

<sup>113</sup> Franks, “Revenge Porn” Reform, *supra* note 11, at 1294–95; see Erin Fuchs, *Here’s What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013, 1:08 PM), <http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9>.

<sup>114</sup> The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

<sup>115</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).



weighing the speech's harms against its societal free speech value.<sup>116</sup>

Many proponents of the criminalization of nonconsensual pornography argue for various strategies to ensure that revenge porn laws are not stamped out by First Amendment concerns, including as an already-established category of unprotected speech, such as defamation or obscenity,<sup>117</sup> or, alternatively, as a new category of unprotected speech warranting regulation.<sup>118</sup> Most opponents who are wary that the criminalization of nonconsensual pornography triggers First Amendment concerns argue that laws prohibiting this conduct are effectively content- or viewpoint-based speech laws, and thus, should not be constitutionally upheld.<sup>119</sup> Content- or viewpoint-based restrictions prohibiting certain forms of speech—"including speech intended to annoy, harass, or cause emotional distress"—will typically be deemed unconstitutional.<sup>120</sup> However, advocates rebut this claim by emphasizing that revenge porn laws are not attempting to restrict the *content* of expression—i.e., intimate images or videos—but rather, are merely attempting to place reasonable restrictions on the "time, place, or manner" of the speech—i.e., that it be consensually distributed.<sup>121</sup> This highlights the important absence of any "intent to harm" requirement in the proposed IPPA bill.

Statutes that criminalize nonconsensual pornography, which focus on harassment, annoyance, or emotional distress, arguably raise First Amendment free speech concerns, as the Supreme Court has persistently held that the offensiveness of speech does not constitute a sufficiently compelling government interest to justify government intrusion into individual expression.<sup>122</sup> Other critics highlight that

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<sup>116</sup> Cohen, *supra* note 12, at 331–32.

<sup>117</sup> See Kitchen, *supra* note 75, at 255–56, 276–80.

<sup>118</sup> See Cohen, *supra* note 12, at 331–46; Franks, "Revenge Porn" Reform, *supra* note 11, at 1317.

<sup>119</sup> See Kitchen, *supra* note 75, at 274.

<sup>120</sup> *Id.*

<sup>121</sup> See Franks, "Revenge Porn" Reform, *supra* note 11, at 1317–18.

<sup>122</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988) (highlighting the "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience"); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it

these harms do not serve compelling government interests for the same reasons.<sup>123</sup> Furthermore, these intent to harm requirements arguably transform otherwise constitutional, content-neutral, “time, place, and manner restrictions” into viewpoint-based restrictions, hence, causing more constitutional infirmity than assistance.<sup>124</sup> Therefore, requiring intent to harm elements into laws prohibiting nonconsensual pornography may ironically pose the very problems they are purportedly intended to attenuate.

Other critics of the IPPA point to the potential chilling effects on internet intermediaries as defined in section 230 of the Communications Decency Act and express concern that these internet intermediaries, such as Facebook and Google—which already handle an extraordinary amount of content provided by others—would find themselves ensnared in an over-burdensome regulatory system and potentially facing liability for these images.<sup>125</sup> However, in an effort to assuage these concerns, the IPPA bill proposes differing standards of liability for individuals and for these telecommunication intermediaries.<sup>126</sup> The differing standards derive from the mens rea necessary for criminal liability under the IPPA: “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

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constitutional protection.”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”).

<sup>123</sup> See John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 30–38 (2012) [hereinafter Humbach, *Privacy*].

<sup>124</sup> See Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1318 (“Consensually distributed images do not differ in content or message from images distributed without consent. The [IPPA] 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 [such as the IPPA] restrict no message, only the manner of distribution. The governmental purpose is to protect privacy, not to express disapproval or suppress unfavorable viewpoints.”); *see also Cox v. New Hampshire*, 312 U.S. 569 (1941) (holding that although the government may not regulate the content of speech, it may place reasonable time, place, and manner restrictions on speech).

<sup>125</sup> See Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1294–95.

<sup>126</sup> See Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

they *actively and knowingly* engage in the distribution of nonconsensual pornography.”<sup>127</sup> Therefore, intermediaries who act in “good faith,” and do not “intentionally promote or solicit content that they know to be in violation of the statute” are shielded from liability.<sup>128</sup>

Despite these criticisms, civil liberties groups, criminal law practitioners, and constitutional scholars praised the IPPA as being narrow enough to constitutionally satisfy First Amendment requirements while allowing enough breadth to provide ample protection to victims of nonconsensual pornography.<sup>129</sup> However, there are certain civil liberties groups—most notably, the ACLU—that still actively oppose the IPPA’s, and other similar state laws’, regulations criminalizing the distribution of nonconsensual pornography as enacted.<sup>130</sup>

#### b. Over-Breadth & Overcriminalization

Similar to the apprehension that telecommunication intermediaries would be too easily ensnared by liability, another oft-cited ground critics of the criminalization of nonconsensual pornography rely upon is the notion that laws of this nature would only perpetuate the criminal justice system’s overcriminalization and mass incarceration epidemic.<sup>131</sup> Opponents likewise express concern regarding revenge porn prohibitions appearing overbroad and/or creating unconstitutional void-for-vagueness issues.<sup>132</sup>

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<sup>127</sup> Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1295 (emphasis added).

<sup>128</sup> *Id.* at 1295–96 (“This solution, developed through intensive consultation with members of the tech industry, effectively reinstates Section 230 immunity for intermediaries that act in good faith.”).

<sup>129</sup> Franks, *It’s Time*, *supra* note 8. Professor Erwin Chemerinsky, one of the nation’s most influential constitutional scholars, stated, “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.” Press Release, Jackie Speier, *supra* note 87.

<sup>130</sup> See Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1327–35.

<sup>131</sup> See *id.* at 1302–08; see also George Will, *America Desperately Needs to Fix Its Overcriminalization Problem*, NAT’L REV. (Apr. 9, 2015, 12:00 AM), <https://www.nationalreview.com/2015/04/america-desperately-needs-fix-its-overcriminalization-problem-george-will/>.

<sup>132</sup> See Larkin, *supra* note 58, at 97 n.151.

The void-for-vagueness doctrine turns on the concept of “unconstitutional uncertainty”<sup>133</sup> and derives from the Due Process Clauses of the Fifth and Fourteenth Amendments, requiring criminal laws to be drafted with sufficient clarity to put a reasonable person of ordinary intelligence on notice that his or her conduct would be considered criminal.<sup>134</sup> To avoid void-for-vagueness issues, laws prohibiting nonconsensual pornography must be drafted narrowly enough to avoid the pitfalls of unconstitutional uncertainty and overcriminalization.<sup>135</sup> One legal scholar suggested that “a suitably clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there’s good reason to think that the subject did not consent to publication” would be constitutional.<sup>136</sup>

For example, laws that do not require the subject or victim to be identified or, at the very least, identifiable,<sup>137</sup> may be considered impermissibly broad and/or void-for-vagueness.<sup>138</sup> Critics may argue that by not requiring the subject to be identified or identifiable, the law may be unconstitutionally “criminalizing a victimless act,” especially as most of the harms associated with nonconsensual pornography stem predominantly from the fact that others are aware of the subject’s identity.<sup>139</sup> Another example of a law that may fall

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<sup>133</sup> See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67–69 (1960). It is also important to note that the doctrines of overbreadth or overcriminalization and void-for-vagueness are not to be conflated. Nonetheless, overly vague statutes may have the added effect of over-criminalization.

<sup>134</sup> See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 760–61 (2012). For a discussion on the development of the void-for-vagueness doctrine in the United States Supreme Court precedent, see Note, *supra* note 133.

<sup>135</sup> Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1290–91.

<sup>136</sup> Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, SLATE (Sept. 25, 2013, 6:21 PM), [www.slate.com/articles/double\\_x/doublex/2013/09/revenge\\_porn\\_legislation\\_a\\_new\\_bill\\_in\\_california\\_doesn\\_t\\_go\\_far\\_enough.html](http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html) (quoting Eugene Volokh).

<sup>137</sup> See, e.g., GA. CODE ANN. § 16-11-90(b) (2018); IDAHO CODE § 18-6609 (2018); UTAH CODE ANN. § 76-5b-203(2) (2018), [https://le.utah.gov/xcode/Title76/Chapter5b/C76-5b-S203\\_2014040320140513.pdf](https://le.utah.gov/xcode/Title76/Chapter5b/C76-5b-S203_2014040320140513.pdf). For examples of state laws that explicitly require identification, see, for example, ARIZ. REV. STAT. ANN. § 13-1425(A) (2018); CAL. PENAL CODE § 647(j)(4)(A) (West 2018); COLO. REV. STAT. § 18-7-107(1) (2018); HAW. REV. STAT. § 711-1110.9(1)(b) (2018).

<sup>138</sup> See Kitchen, *supra* note 75, at 268.

<sup>139</sup> See *id.*

within the unconstitutional purview of being deemed overbroad is one that “include[s] expansive definitions of nudity,” or one that just simply does not clearly define what would constitute nudity under the statute.<sup>140</sup> Over-expansive definitions may unintentionally criminalize innocuous behavior, justifying concerns of overcriminalization and void-for-vagueness.<sup>141</sup>

However, the IPPA seems to avoid these pitfalls by requiring that the subject be identified or identifiable, by clearly defining its elements, such as nudity and consent, and by providing for numerous exceptions, including distribution for law enforcement purposes, voluntary exposure, and depictions that are in the bona fide public interest.<sup>142</sup>

Despite the IPPA’s victories in terms of effective legislative drafting, staunch critics still steadfastly oppose the IPPA’s, and similar state laws’, enactment without the addition of even narrower guidelines.<sup>143</sup> For example, in May 2014, Arizona enacted its first criminal nonconsensual pornography law;<sup>144</sup> however, in September of that same year, the ACLU filed suit against the state, challenging the law as unconstitutionally overbroad.<sup>145</sup> Representing “[a] broad coalition of bookstores, newspapers, photographers, publishers, and librarians,”<sup>146</sup> the ACLU insisted the statute be redefined as follows:

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<sup>140</sup> Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1290. Georgia, for example, defines “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.

§ 16-11-90(a)(2).

<sup>141</sup> See Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1290.

<sup>142</sup> See Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).

<sup>143</sup> See Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1327–30.

<sup>144</sup> 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>.

<sup>145</sup> Press Release, ACLU, First Amendment Lawsuit Challenges Ariz. Criminal Law Banning Nude Images (Sept. 23, 2014), <https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images>.

<sup>146</sup> *Id.*

(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.<sup>147</sup>

Though the court never decided the constitutionality of the proposed bill, Arizona lawmakers ultimately buckled and agreed to include an “intent to harm, harass, intimidate, threaten or coerce the depicted person” requirement.<sup>148</sup> Heartened by this seeming “victory,”<sup>149</sup> the ACLU continued to insist upon an “intent to harm” requirement and succeeded in assisting numerous state legislatures in adjusting their proposed revenge porn bills to the ACLU’s proposed specifications above.<sup>150</sup>

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<sup>147</sup> Letter from ACLU Found. of Ariz., ACLU Found., and Dentons US LLP, to Hon. Andy Briggs, Senate President, Ariz. State Senate, Hon. Andy Tobin, Speaker of the House, Ariz. House of Rep., and Hon. Mark Brnovich, Att’y Gen. of the State of Ariz., at 2 (Jan. 7, 2015), <https://drive.google.com/file/d/0B2LoKN1jK5BNX0NsZUdOUng5ZlE/view?usp=sharing>.

<sup>148</sup> ARIZ. REV. STAT. ANN. § 13-1425(A)(3) (2018).

<sup>149</sup> Lee Rowland, *VICTORY! Federal Judge Deep-Sixes Arizona’s Ridiculously Overbroad ‘Nude Photo’ Law*, ACLU (July 10, 2015), <https://www.aclu.org/blog/victory-federal-judge-deep-sixes-arizona-s-ridiculously-overbroad-nude-photo-law>.

<sup>150</sup> Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1327. For example, the ACLU voiced concern over Rhode Island’s revenge porn law in 2016 because it did not contain an “intent to harm” requirement, which the ACLU argued made the law overly broad. James O’Leary, *ACLU Expresses Concerns over ‘Revenge Porn’ Bill*, WPRI (June 1, 2016, 8:12 AM), <https://www.wpri.com/news/local-news/aclu-concerned-with-revenge-porn-bill/1044409146>. After much urging from the ACLU, Rhode Island’s governor agreed and vetoed the bill. Ted Nesi, *Raimondo Issues First Veto, over ‘Revenge Porn,’* WPRI (June 21, 2016, 10:43 AM), <https://www.wpri.com/news/local-news/raimondo-issues-first-veto-over-revenge-porn/1044414356>. In 2018, the ACLU succeeded again when Rhode Island passed its revenge porn law containing an “intent to harm” requirement. *See* 11 R.I. GEN. LAWS § 11-64-3(a)(4) (2018).

The ACLU's endeavor of narrowing the provisions of laws prohibiting nonconsensual pornography in an attempt to limit overbreadth—and ultimately overcriminalization—may have some merit, as some commentators note that “[i]nsofar as a criminal statute requires the government to prove that a person posted images with the intent to harass, injure, or extort the subject, the [challenged law] should be able to withstand [constitutional scrutiny.]”<sup>151</sup> These proponents of the “intent to harm” requirement cite to the fact that the Supreme Court has consistently highlighted that unconstitutional void-for-vagueness problems can be circumvented by including mens rea elements in challenged criminal legislation.<sup>152</sup>

However, this reasoning is arguably misapplied. “Intent to harm” requirements are not mens rea requirements, but rather motive requirements.<sup>153</sup> As a constitutional matter, motive prerequisites are not required in criminal laws.<sup>154</sup> Moreover, aside from the problems posed by “intent to harm” requirements, and with regard to overbreadth and void-for-vagueness problems, these “intent to harm” requirements may again create the very infirmities they are purportedly established to amend.

Laws introduced in both New York and North Carolina, with similar preventative measures combatting the endemic of cyberbullying plaguing the Internet, were both declared unconstitutional on the basis that the phrases used, such as harass, torment, and humiliate, are unconstitutionally ambiguous, and thus, fall within the purview of the void-for-vagueness doctrine.<sup>155</sup> Vermont is the lone state

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<sup>151</sup> Larkin, *supra* note 58, at 97 n.151.

<sup>152</sup> *Id.* (citing *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 526 (1994); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99, 499 n.14 (1982)).

<sup>153</sup> *See supra* note 92. For example, the Model Penal Code uses only four terms to define mens rea: purpose, knowledge, recklessness, and negligence. MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 2016).

<sup>154</sup> Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1289.

<sup>155</sup> *See* David L. Hudson, Jr., *Bully Fighting: New York’s High Court Says Anti-Cyberbullying Law Won’t Pass First Amendment Muster*, A.B.A. J., Nov. 2014, at 15, 16; Eugene Volokh, Opinion, *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/>.

to have had a nonconsensual pornography law found unconstitutional, though that decision was recently overturned by the Vermont Supreme Court in 2018.<sup>156</sup> In fact, Vermont's law includes such an "intent to harm" or motive requirement.<sup>157</sup> In contrast, similar laws criminalizing nonconsensual pornography in a much more broad<sup>158</sup> sense, such as New Jersey's,<sup>159</sup> which does not contain a motive requirement, have never been declared unconstitutional. Both New Jersey and Alaska's<sup>160</sup> criminal nonconsensual pornography laws are considered relatively broad, especially compared to what the ACLU would deem their quintessential revenge porn laws, and yet, they have withstood constitutional scrutiny for over a decade.<sup>161</sup>

On the same note, though the ACLU has insisted that these "intent to harass" or motive requirements are constitutionally necessary to withstand scrutiny, the civil liberties group has itself advocated against proposed federal harassment and stalking laws that include intent to cause "substantial emotional distress," intent to "harass," or intent to "intimidate" requirements as "unconstitutionally overbroad."<sup>162</sup> This, however, may stem from the group's lesser views of the privacy protected by nonconsensual pornography regulations as opposed to similar privacy laws. Alternatively, this may stem from an understanding that nonconsensual pornography is a form of harassment as opposed to a gross invasion of privacy.

## 2. FORMULATING THE RIGHT: PRIVACY VS. HARASSMENT

Revenge porn legislation must clearly define what kind of right the legislation aims to protect. The question worth posing is whether nonconsensual pornography should be deemed a form of harassment

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<sup>156</sup> Elizabeth Hewitt, *Judge Finds 'Revenge Porn' Law Unconstitutional*, VTDIGGER (Aug. 1, 2016), <https://vtdigger.org/2016/08/01/judge-finds-revenge-porn-law-unconstitutional/>; Alan J. Keays, *Top Court Says 'Revenge Porn' Law Constitutional; Defense Calls Ruling Bizarre*, VTDIGGER (Aug. 31, 2018), <https://vtdigger.org/2018/08/31/top-court-says-revenge-porn-law-constitutional-defense-calls-ruling-bizarre/>.

<sup>157</sup> V.T. STAT. ANN. tit. 13 § 2605 (2018).

<sup>158</sup> Franks, "Revenge Porn" Reform, *supra* note 11, at 1330.

<sup>159</sup> N.J. STAT. ANN. § 2C:14-9 (West 2018).

<sup>160</sup> ALASKA STAT. § 11.61.120 (2018).

<sup>161</sup> See Franks, "Revenge Porn" Reform, *supra* note 11, at 1330.

<sup>162</sup> See, e.g., 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>.



or an invasion of privacy.<sup>163</sup> Though precedent establishes that both types of social harms are worthy of legislative protection, numerous reasons exist as to why nonconsensual pornography may not—and should not—fit into the category of anti-harassment regulations.<sup>164</sup>

Several advocates express the belief that New Jersey’s comprehensive revenge porn law—though not initially intended as such—rightfully conveys “the idea that the exposure of [the victim’s] ‘intimate parts’ or ‘sexual contacts’ is inherently intrusive.”<sup>165</sup> Thus, advocates view it as a “prime example” of how to characterize and criminalize the harms created by nonconsensual pornography, primarily as a privacy right rather than a protection against harassment.<sup>166</sup>

Requiring “intent to harm,” “intent to harass,” or other similar motive elements in the IPPA, or similar state laws, effectively transforms a privacy protection regulation into an anti-harassment regulation.<sup>167</sup> This may be considered a gross mischaracterization of what the pertinent social harms arising from nonconsensual pornography actually are—nonconsensual pornography may sometimes involve harassment, but “[w]hat nonconsensual pornography always involves is an invasion of privacy, and the harm it always inflicts is a loss of privacy.”<sup>168</sup> By demoting the focused harm from a gross invasion of privacy to a form of harassment, the legislation will fail to capture the actual harms nonconsensual pornography poses.<sup>169</sup> This is likely the result of a privacy hierarchy.

It has been widely established that the Constitution encompasses a right to privacy that extends beyond the reach of both governmental intrusion and unreasonable private intrusion.<sup>170</sup> In fact, the Su-

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<sup>163</sup> See Franks, “Revenge Porn” Reform, *supra* note 11, at 1330–33.

<sup>164</sup> See *supra* Part I.

<sup>165</sup> Kitchen, *supra* note 75, at 267 (quoting Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357, 383–84 (2013)).

<sup>166</sup> *Id.*

<sup>167</sup> Franks, “Revenge Porn” Reform, *supra* note 11, at 1330–31 (arguing that “[t]reating nonconsensual pornography as harassment would merely duplicate existing, ineffective law”).

<sup>168</sup> *Id.* at 1283 (emphasis omitted).

<sup>169</sup> *Id.* at 1330–31, 1333.

<sup>170</sup> See *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of [constitutional] protection. But what he seeks to preserve as private, even in an

preme Court has upheld a right to sexual privacy under the substantive component of the Due Process Clauses on numerous occasions.<sup>171</sup> Furthermore, the IPPA would not be the first federal regulation criminalizing the dissemination of private information, and the criminalization of gross invasions of privacy—such as the Privacy Act of 1974<sup>172</sup>—has been consistently upheld by our state and federal legislative and judicial systems.<sup>173</sup> Other similar criminal laws upheld—and also endorsed by the ACLU as protections against privacy invasions—include the prohibition against uncon-

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area accessible to the public, may be constitutionally protected.”) (internal citations omitted).

<sup>171</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (holding that forbidding the use of contraceptives violated the constitutional guarantee of the right of marital privacy that is “older than the Bill of Rights—older than our political parties, older than our school system”); *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (finding that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike,” thus “dissimilar treatment for married and unmarried persons who are similarly situated violate[s] the Equal Protection Clause”); *Lawrence v. Texas*, 539 U.S. 558, 576–79 (2003) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.”).

<sup>172</sup> Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a (2012)) (making it unlawful for federal agencies to disclose personal identifiers, such as name or social security number, without consent unless certain exceptions apply).

<sup>173</sup> See, e.g., *Social Security Numbers (H 5202, S 179)*, ACLU R.I. (Feb. 8, 2011), <http://riaclu.org/legislation/bill/social-security-numbers-h-5202-s-179/> (last visited Jan. 5, 2019).

sented disclosure of personal information such as medical records,<sup>174</sup> cell phone information,<sup>175</sup> and other financial information,<sup>176</sup> none of which have an “intent to harm” element as a requisite for criminal liability.<sup>177</sup>

Many of these scenarios include a similar notion of contextual consent present in a situation involving nonconsensual pornography. For example, an individual may consent to giving his or her social security number or health information under the premise that the information will not be distributed for any purpose other than that intended in that transactional or intimate relationship.<sup>178</sup> This protection against invasions of privacy, even paired with contextual consent, has been clearly upheld as warranted by the legislature and judicial system. Deciding exactly what kind of privacy warrants this protection, however, creates some push back.

### III. THE GEOLOCATIONAL PRIVACY AND SURVEILLANCE ACT

A similar example of a proposed law prohibiting the nonconsensual disclosure of personal information is the GPS Act, which, if enacted, would make it a criminal offense to intentionally sell or distribute an individual’s geolocation records without his or her consent.<sup>179</sup> The GPS Act defines “geolocation information” as

any information that is not the content of a communication, concerning the location of a wireless communication device or tracking device . . . that, in whole or in part, is generated by or derived from the

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<sup>174</sup> 42 U.S.C. § 1320d-6 (2012).

<sup>175</sup> 47 U.S.C. § 222 (2012).

<sup>176</sup> 12 U.S.C. § 3403 (2012).

<sup>177</sup> Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1332–33.

<sup>178</sup> See Cohen, *supra* note 12, at 332–34 (describing how initial consent does not insulate an individual from liability when he or she knowingly distributes or publishes images or information, for consent is “context-specific”).

<sup>179</sup> See Geolocation Privacy and Surveillance Act, H.R. 1062, 115th Cong. (2017). Though the statute provides for additional exceptions where consent is not a factor, such as a warrant exception, these exceptions do not pertain to the discussion in this Note.

operation of that device and that could be used to determine or infer information regarding the location of the person.<sup>180</sup>

Introduced in February 2017 by a bipartisan group of Congressional members, the GPS Act was “[d]esigned to enact comprehensive rules for both government agencies and commercial service providers” and “would require law enforcement to obtain a warrant before using GPS data to track an individual’s location.”<sup>181</sup> Though the main aspect of the proposed bill is to create guidelines for law enforcement in obtaining personal geolocation information, the bill likewise prohibits, with risk of criminal liability, “commercial service providers from sharing customers’ geolocation information with outside entities without customer consent.”<sup>182</sup> The bulk of this comparative analysis will derive from this non-law enforcement aspect of the GPS Act.

The proposed impact of the GPS Act on private companies will be to provide a “strong legal framework” governing access to customers’ geolocation information and to create guidelines to ensure these providers are able to comply with the “unclear and potentially conflicting obligations” between government and private entity requests and customer privacy protection.<sup>183</sup> The GPS Act likewise applies to private entities and persons who illegally and intentionally obtain or disseminate an individual’s geolocation information.<sup>184</sup> The GPS Act protects “both real-time tracking and access to records of individuals’ past movements.”<sup>185</sup> However, “[t]he GPS Act permits service providers to collect geolocation information in the normal course of business,” such as through smartphone applications,

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<sup>180</sup> *Id.* § 2.

<sup>181</sup> Kapoor & Archer, *supra* note 8.

<sup>182</sup> Press Release, Ron Wyden, Sen., Wyden, Chaffetz, Conyers Bill to Crack Down on Warrantless Tracking by the Gov’t, Use of Cell-Site Tech. (Feb. 5, 2017), <https://www.wyden.senate.gov/news/press-releases/wyden-chaffetz-conyers-bill-to-crack-down-on-warrantless-tracking-by-the-government-use-of-cell-site-technology>.

<sup>183</sup> *GPS Act*, RON WYDEN U.S. SEN. FOR OR., <https://www.wyden.senate.gov/priorities/gps-act> (last visited Jan. 5, 2019).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

given that the customer has consented to such use.<sup>186</sup> The bill, however, clarifies that “these companies are only allowed to share or sell customers’ data with the consent of individual customers.”<sup>187</sup>

In a recent press release addressing the bill, Representative Jason Chaffetz explained, “Congress has an obligation to act quickly to protect Americans from violations of their privacy made possible by emerging technologies.”<sup>188</sup> Representative John Conyers, Jr., another proponent of the bill, stated that geolocation information “strikes at the heart of personal privacy interests,” and thus, calls for immediate protective action by the legislature.<sup>189</sup> Neema Singh Guliana, legislative counsel for the ACLU, stated, “Congress should swiftly pass the GPS Act to protect this sensitive information.”<sup>190</sup>

#### A. *Current Geolocation Protection Laws*

Similar to legislation proposed and enacted to combat nonconsensual pornography, most of the current legislation regarding geolocation protection did not exist until the recent technological boom, and yet still was considerably delayed in its proliferation until the widespread use of smartphones.<sup>191</sup> The legal jurisprudence of geolocation protection differs throughout the country, with some states depending on judicial rulings to create precedent, while others have enacted express legislation addressing the issue.<sup>192</sup> However, though state legislatures and lower state courts have expanded location privacy protections as of late, these protections differ based on what state an individual is located in, and can even differ based on what jurisdiction of law enforcement—federal versus local or state

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Press Release, Ron Wyden, *supra* note 182.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See Kapoor & Archer, *supra* note 8 (“Existing law applicable to the access and use of geolocation data has not kept pace with developments in technology . . . .”); see also Peter Cihon, *Status of Location Privacy Legislation in the States: 2015*, ACLU (Aug. 26, 2015, 1:15 PM), <https://www.aclu.org/blog/privacy-technology/location-tracking/status-location-privacy-legislation-states-2015>.

<sup>192</sup> See *Cell Phone Location Tracking Laws by State*, ACLU, <https://www.aclu.org/issues/privacy-technology/location-tracking/cell-phone-location-tracking-laws-state> (last visited Jan. 24, 2018) [hereinafter *Tracking Laws*].

law enforcement—is seeking the information.<sup>193</sup> Thus, the GPS Act was introduced to address these inconsistencies.<sup>194</sup>

For example, Montana’s legislation requires a warrant for all cell phone location information, but does not restrict federal law enforcement.<sup>195</sup> The Florida Supreme Court held that a warrant is required for real-time location tracking.<sup>196</sup> However, the Eleventh Circuit Court of Appeals held that no warrant was required for historical location information.<sup>197</sup> In Colorado, state law requires a warrant for access to location information directly from devices, but not from service providers.<sup>198</sup> Contrastingly—and not uncommonly—New York does not have any binding authority regarding geolocation information protection; thus, this information remains “unprotected.”<sup>199</sup> In sum, “courts have created differing standards on what procedures must be followed for government agencies to obtain geolocation data from commercial service providers, thereby creating conflicting obligations across jurisdictions.”<sup>200</sup>

As a result, the GPS Act was introduced in an endeavor to reconcile these discrepancies, and to create federally endorsed guidelines for the proper use and disclosure of individuals’ private location information.<sup>201</sup> What most, if not all, of this jurisprudence—both legislative and judicial—lacks, however, is a criminal prohibition against the distribution of an individual’s geolocation information;<sup>202</sup> therefore, the GPS Act would effectively be the first geolocation protection law of its kind to enact criminal sanctions against private entities.<sup>203</sup>

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<sup>193</sup> *See id.*

<sup>194</sup> *See Kapoor & Archer, supra* note 8.

<sup>195</sup> MONT. CODE ANN. § 46-5-110 (2017).

<sup>196</sup> *See Tracey v. State*, 152 So. 3d 504, 525–26 (Fla. 2014).

<sup>197</sup> *United States v. Davis*, 785 F.3d 498, 511–13 (11th Cir. 2015).

<sup>198</sup> COLO. REV. STAT. § 16-3-303.5 (2018).

<sup>199</sup> *Tracking Laws, supra* note 192.

<sup>200</sup> Kapoor & Archer, *supra* note 8.

<sup>201</sup> *See* Press Release, Ron Wyden, *supra* note 182.

<sup>202</sup> *Cf. Tracking Laws, supra* note 192 (noting the cell phone location tracking laws by state).

<sup>203</sup> *See* Press Release, Ron Wyden, *supra* note 182.

### B. *Legal Implications of Geolocation Protection Laws*

Geolocation protection laws have been introduced and enacted as a means of ensuring individuals' rights to their constitutional protection against unlawful searches and seizures.<sup>204</sup> The ultimate goal of the Fourth Amendment is to protect the people's right to privacy and unreasonable invasions by the government;<sup>205</sup> therefore, a warrant is typically required in order to access an individual's property, person, or effects.<sup>206</sup> According to advocates of the GPS Act, privacy laws have not kept pace with the ever-advancing technologies of the digital age, which is reason for the widespread support for the bill's enactment.<sup>207</sup> However, some noted that the GPS Act may pose similar legal implications to those of the IPPA, such as overbreadth and vagueness issues.<sup>208</sup>

For example, one commentator noted that though "[t]he bill's warrant requirement has been well-received by privacy advocates," it may contain some definitional ambiguities that could render the law unconstitutionally void-for-vagueness.<sup>209</sup> Though the definition of "geolocation information" is defined in the bill as information that is not the content of a communication, and could be used to determine or infer an individual's location, "[t]his definition is arguably broad enough to include IP addresses."<sup>210</sup> This could similarly lead to overcriminalization concerns as well as the criminalization of innocuous behavior, as geolocation information may be

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<sup>204</sup> See Cihon, *supra* note 191.

<sup>205</sup> *Camara v. Mun. Court of the City and Cty. of S.F.*, 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

<sup>206</sup> See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

<sup>207</sup> See Press Release, Ron Wyden, *supra* note 182; Kapoor & Archer, *supra* note 8.

<sup>208</sup> See *The Next Privacy Frontier: Geolocation*, INT'L ASS'N PRIVACY PROFESSIONALS (June 3, 2013), <https://iapp.org/news/a/the-next-privacy-frontier-geolocation>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*; see Geolocational Privacy and Surveillance Act, H.R. 1062, 115th Cong. (2017).

obtained through many differing means, such as GPS-based location, Wi-Fi signal strength, and IP addresses.<sup>211</sup>

Furthermore, though the criminal sanction pertaining to the distribution of an individual's geolocation information turns entirely on consent, the proposed bill does not clearly identify what form of "prior consent" suffices to fall within the bill's exception.<sup>212</sup> Failing to specify what would constitute adequate consent for a criminal sanction that requires a primary element of the crime to be "nonconsensual" arguably fails to put an individual of ordinary knowledge on notice regarding his or her conduct, and thus, would be deemed unconstitutionally void-for-vagueness as a violation of due process.<sup>213</sup>

#### IV. RECONCILING THE TWO POTENTIAL FEDERAL LAWS

Though both proposed laws are not analytically identical, both bills, if enacted, would guarantee federal criminal protections against gross invasions of individual privacy. Both bills would criminally prohibit the distribution or dissemination of an individual's private information. Both bills are proposed to combat a multitude of violations made possible by the digital age. The criminality of both bills turns on the element of consent. Contextual consent. Why then has one bill seemed to garner more support and far less criticism than the other? The answer may lie in both legal and societal justifications behind privacy protections, suggesting that some forms of privacy warrant more protection than others—a privacy hierarchy.<sup>214</sup>

Each of the proposed bills consists considerably of the same criminal elements and mens rea requirements: (1) the intentional disclosure of (2) a person's private information (3) without consent.<sup>215</sup> However, the mens rea required by the IPPA regarding consent involves "reckless disregard for the person's lack of consent to

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*; see H.R. 1062.

<sup>213</sup> See *supra* Section II.B.1.b.

<sup>214</sup> However, the notion that certain forms of privacy are deserving of more protection than others is not a new concept by any means. See *supra* note 171.

<sup>215</sup> See H.R. 1062; Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (2016).



the distribution.”<sup>216</sup> On the other hand, the GPS Act requires “knowing or having reason to know that the information was obtained” without consent or in violation of the Act.<sup>217</sup> Despite these similarities, neither bill contains a motive or intent to harm requirement, such as those suggested by critics of the IPPA.<sup>218</sup> In fact, there seems to be a lack of opposition calling for such a requirement for the GPS Act.<sup>219</sup>

While there are similarities in the criminal elements and mens rea requirements of both bills, the kinds of privacy involved in each bill differ entirely. The GPS Act involves location information, while the IPPA involves intimate and sexual information about an individual. Nevertheless, both scenarios involve the concept of contextual consent. With regard to geolocation information, a customer may consensually give this information to a service provider by using, for example, their iPhone’s GPS function, or by turning on their WiFi publicly, or simply by allowing their smartphone applications to track their whereabouts for better quality service. This consent is usually given with the implicit understanding that this information will not be distributed or sold to third parties or government entities for tracking purposes. The intimate pictures or videos protected by the IPPA are likewise typically given with an implicit understanding that this consent is bound by the context of an intimate or personal relationship, and not for the further dissemination of said information.<sup>220</sup> These differing forms of privacy, however, pose varying legal and societal implications.

#### A. *A Legal Analysis*

From a purely legal perspective, there is a relatively simple response to this incongruity in support between the two bills: the GPS Act is proposed to protect an expressed privacy right against unrea-

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<sup>216</sup> H.R. 5896.

<sup>217</sup> H.R. 1062.

<sup>218</sup> See *supra* Section II.B.1.b; see also *infra* Section IV.A.

<sup>219</sup> See Fulton, *supra* note 10 (noting support for the 2013 GPS Act).

<sup>220</sup> See Cohen, *supra* note 12, at 332–34 (describing how “[c]onsenting to one is not consenting to all”).

sonable search and seizures *explicitly* stated in the Fourth Amendment.<sup>221</sup> In contrast, there is arguably no explicit right of protection against the dissemination of one’s naked pictures as advocates of the IPPA would hope.<sup>222</sup> This position was bolstered by the United States Supreme Court’s relatively recent holding in *United States v. Jones*, where the Court held that location tracking by law enforcement does in fact implicate the Fourth Amendment.<sup>223</sup> Explaining how intimate geolocation data can be, Justice Sonia Sotomayor stated

GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. . . .

Awareness that the Government may be watching chills associational and expressive freedoms.

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<sup>221</sup> Kate Tummarello, *Congress Must Protect American’s Location Privacy*, ELECTRONIC FRONTIER FOUND. (Feb. 17, 2017), <https://www EFF.ORG/deep links/2017/02/congress-must-protect-americans-location-privacy>.

<sup>222</sup> See Fuchs, *supra* note 113 (noting that “[r]evenge porn could be held up as another exception [to free speech], since it obviously wasn’t considered by the authors of America’s Constitution”). However, this privacy may be found in the substantive component of the Due Process Clauses, as discussed above. See *supra* note 171.

<sup>223</sup> *United States v. Jones*, 565 U.S. 400, 404 (2012). Even more recently, the Supreme Court extended this Fourth Amendment protection to carrier cell-site records that reveal a phone’s location. See *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). Relying largely on the same privacy premises of Justice Sotomayor’s concurrence, *infra* note 219, the Court noted that “[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection.” *Carpenter*, 138 S. Ct. at 2217. Quoting its rationale from *Katz v. United States*, the Court likewise highlighted that “what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). Further pointing to the “revealing nature” of a phone’s locational data, the Court dismissed the argument that the sole act of sharing the information completely diminishes one’s reasonable expectation of privacy in such intimate information. *Id.* at 2219–20. As discussed further in this Note, these arguments can and should likewise be utilized in upholding legislation enacted to criminalize nonconsensual pornography.

And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse.<sup>224</sup>

Though the focus of the GPS Act's criminal sanction against nonconsensual distribution of geolocation information is aimed at private entities, particularly commercial service providers,<sup>225</sup> this provision is likely utilized as an added safeguard to the bill's general bulwark protecting the foundational right of privacy against the government encompassed in the Fourth Amendment.

Thus, on its face, the focus of the GPS Act is to protect individuals against *government* intrusions, while the IPPA protects against private intrusions. This likely plays a large part behind the difference in support, as this country was founded on the general principle of governmental distrust and suspicion.<sup>226</sup> This systemic distrust of the government serves as a beneficial check on government excesses and oversteps.<sup>227</sup> Thus, citizens and their respective legislative representatives may be more inclined to support and uphold laws, such as the GPS Act, that function as a check against governmental abuse of power, even if that means limiting the rights of private entities.<sup>228</sup> Nonetheless, the GPS Act, despite its facially justified check on governmental intrusions, does in fact include private intrusions, and the legislation must withstand scrutiny in its entirety, not simply in its more amenable applications.

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<sup>224</sup> *Jones*, 565 U.S. at 415–16 (Sotomayor, J., concurring).

<sup>225</sup> Press Release, Ron Wyden, *supra* note 182.

<sup>226</sup> See Lynn Vavreck, *The Long Decline of Trust in Government, and Why That Can Be Patriotic*, N.Y. TIMES: UPSHOT (July 3, 2015), <https://www.nytimes.com/2015/07/04/upshot/the-long-decline-of-trust-in-government-and-why-that-can-be-patriotic.html> (“Questioning the aims and efforts of [the] government is a foundation of American citizenship. It’s how the nation was born.”).

<sup>227</sup> See, e.g., Ari Shapiro, *Distrusting Government: As American As Apple Pie*, NPR (Apr. 9, 2010, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=126028106>. For an overview on trends in government distrust, see *Trust in Government: The Season of Discontent*, NPR, <https://www.npr.org/series/126051549/trust-in-government-the-season-of-discontent> (last visited Jan. 7, 2018).

<sup>228</sup> This same notion of governmental wrongs versus individual wrongs may serve as a basis for a societal lack of empathy for victims of nonconsensual pornography (or a societal empathetic view toward *perpetrators* of nonconsensual pornography). See *infra* Section IV.B.

Furthermore, notably lacking from the legal discourse regarding the GPS Act are any of the First Amendment concerns brought up in discussions about nonconsensual pornography regulations.<sup>229</sup> This absence may derive from the same justifications regarding *who* the proposed bills would be regulating—in other words, the government versus individuals. A substantial First Amendment concern presents itself when the speech to be regulated is individual speech; this may be less so when regulating the government.<sup>230</sup> However, it is important to note that the GPS Act’s regulation of nonconsensual disclosure is in fact aimed at private entities and commercial service providers. But, again, since this provision is likely seen as an added layer of protection against *government intrusion*, the First Amendment concerns may fall to the wayside.

More importantly for this First Amendment comparative analysis, however, is the concept of expressive versus non-expressive speech or activity, as well as viewpoint-based and non-viewpoint based speech.<sup>231</sup> Laws that regulate conduct or speech that is considered expressive are analyzed under a strict scrutiny standard, unless the law is considered a content-neutral “time, place, and manner” restriction, which is subject to a lesser form of scrutiny.<sup>232</sup> Likewise, commercial speech and incidental restraints on expressive conduct are subject only to intermediate scrutiny.<sup>233</sup> The Supreme Court has further held that even content-based regulations may be valid under the First Amendment if they primarily address “harmful

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<sup>229</sup> See *supra* Section II.B.1.

<sup>230</sup> See generally Humbach, *Privacy*, *supra* note 123, at 27.

<sup>231</sup> See Franks, “*Revenge Porn*” *Reform*, *supra* note 11, at 1318–24.

<sup>232</sup> *Id.* at 1317–18.

<sup>233</sup> Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2836–37 (2005) (“In *United States v. O’Brien*, the Supreme Court held that incidental restraints on expressive conduct are evaluated under a four-factor intermediate scrutiny test. Within a decade, the Court held, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, that restrictions on commercial speech are also subject to intermediate scrutiny. Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court formalized its analysis of commercial speech by adopting a four-factor test that closely parallels the one created in *O’Brien*.”).

secondary effects rather than the expressive content of particular conduct.”<sup>234</sup>

Opponents of nonconsensual pornography regulations argue that the distribution of these illicit images is inherently expressive and viewpoint-based, and thus, should receive the full protection of the First Amendment.<sup>235</sup> Advocates of such regulations argue that if these laws are to trigger First Amendment scrutiny whatsoever, they should be viewed as content-neutral time, place, and manner restrictions.<sup>236</sup> Entire law review articles have been dedicated to deciding this conflict;<sup>237</sup> however, what matters for this analysis is that the “speech” involved in the GPS Act—in other words, geolocation information—does not seem to fall within the purview of expressive or viewpoint-based speech like that of the IPPA. Though advocates of the GPS Act emphasize how inherently personal geolocation information can be,<sup>238</sup> it is doubtful these “chilling effects” imposed on commercial service providers will amount to the same magnitude of criticism warranting First Amendment concerns.

On the other hand, the inherently personal attributes of geolocation information could potentially lead to the (albeit weak) argument that this information is expressive speech. As Justice Sotomayor and advocates of the GPS Act highlight, geolocation information can provide extremely intimate views of an individual’s livelihood, perhaps more similar to that of nonconsensual pornography than taken at first glance.<sup>239</sup> Especially for a First Amendment analysis, where the social value of the speech is weighed against the potential social

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<sup>234</sup> Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1322 (citing *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))).

<sup>235</sup> See John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 217, 235–36 (2014) [hereinafter Humbach, *Constitution*] (claiming that revenge porn laws “constitute unconstitutional content discrimination, viewpoint discrimination and speaker discrimination, not to mention prior restraint”).

<sup>236</sup> See Franks, “*Revenge Porn*” Reform, *supra* note 11, at 1317–18.

<sup>237</sup> See, e.g., Cohen, *supra* note 12.

<sup>238</sup> See Press Release, Ron Wyden, *supra* note 182.

<sup>239</sup> *Jones*, 565 U.S. at 415–16; Press Release, Ron Wyden, *supra* note 182.

harm of regulating the speech, it is curious why First Amendment concerns are not raised for regulations of geolocation information.<sup>240</sup> As geolocation information would predominantly be used for law enforcement purposes,<sup>241</sup> the social value of such information may substantially outweigh the social harm of regulating such speech, especially when compared to nonconsensual pornography, which arguably retains no other purpose than to harm the victim.<sup>242</sup>

Nonetheless, the free speech implications of the GPS Act's regulation against the nonconsensual disclosure of an individual's geolocation information is outshined by its protections against unreasonable government intrusions explicitly in violation of the Fourth Amendment—an *unambiguous* right that the IPPA's protection against invasions of sexual privacy and individual autonomy may lack.

### B. *A Societal Analysis*

Aside from the relevant legal reasoning behind affording each bill a different level of support—or lack thereof—there may also be supplementary societal principles causing these discrepancies. Underscoring these principles is the concept of empathy and its role in societal, legislative, and criminal reform.

Historically, crimes against women and young girls have been gravely under-criminalized.<sup>243</sup> Nationally and internationally, there has been, and continues to be, a systemic failure of the world's legal systems to adequately and effectively protect women from abuse of

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<sup>240</sup> See Cohen, *supra* note 12, at 311–12 (describing the balancing test used to determine whether speech should be protected by the First Amendment).

<sup>241</sup> See Jess Bravin & Brent Kendall, *Police Need Warrant for Cellphone Location Data*, *Supreme Court Rules*, WALL STREET J. (June 22, 2018, 7:18 PM), <https://www.wsj.com/articles/u-s-supreme-court-rules-police-need-warrant-for-most-cellphone-location-data-1529678019>.

<sup>242</sup> Cohen, *supra* note 12, at 335.

<sup>243</sup> See Kim Swanson, *Crime Against Women - a Brief History of Laws in the US*, GET INCLUSIVE (Mar. 28, 2014), <https://www.getinclusive.com/blog/crime-women-brief-history-laws-us>.

all varieties.<sup>244</sup> This has been especially true when the abuse endured is of a sexual nature—physically, mentally, or emotionally.<sup>245</sup> With the advent of legislative reform in the United States protecting women’s rights, the criminal legal landscape has dramatically changed. Yet, our country is still plagued by a lack of recognition for women’s rights to sexual, physical, and expressive autonomy—a fundamental flaw underlining the reason why there may be a societal lack of empathy for victims of nonconsensual pornography.

The majority of victims of nonconsensual pornography are women.<sup>246</sup> Despite evidence that a majority of the population may engage in the consensual sharing of intimate pictures or videos with sexual partners,<sup>247</sup> a much greater majority of individuals use geo-location information,<sup>248</sup> and thus, may more readily identify with the harms protected by the GPS Act rather than the IPPA.<sup>249</sup> This highlights the potential empathy rift in the protections imposed by the respective bills.

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<sup>244</sup> Sophie Edwards, *How the Legal System Is Failing to Protect Women and Girls from Sexual Violence*, DEVEX (Mar. 6, 2017), <https://www.devex.com/news/how-the-legal-system-is-failing-to-protect-women-and-girls-from-sexual-violence-89573>; Swanson, *supra* note 236.

<sup>245</sup> Edwards, *supra* note 244. For example, marital rape was only recently outlawed in all fifty states in 1993, yet some states still treat the crime as “separate” from other forms of sexual assault. Jennifer A. Bennice & Patricia A. Resick, *Marital Rape: History, Research, and Practice*, 4 TRAUMA VIOLENCE & ABUSE 228, 231–32 (2003); Samantha Allen, *Marital Rape Is Semi-legal in 8 States*, DAILY BEAST (June 9, 2015, 5:15 AM), <https://www.thedailybeast.com/marital-rape-is-semi-legal-in-8-states>.

<sup>246</sup> CYBER CIVIL RIGHTS INITIATIVE, *supra* note 26, at 1; EATON ET AL., *supra* note 25, at 13. This statistic results from the self-reporting of victims of nonconsensual pornography; however, there may be nuances as to why this may be the case that this Note does not discuss or analyze. Thus, this statistic—as with all statistics—should be viewed contextually. This Note does not purport that men cannot and are not the victims of nonconsensual pornography.

<sup>247</sup> See *supra* notes 29–30 and accompanying text.

<sup>248</sup> See Monica Anderson, *More Americans Using Smartphones for Getting Directions, Streaming TV*, PEW RES. CTR. (Jan. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/01/29/us-smartphone-use/> (“Nine-in-ten smartphone owners use their phone to get directions, recommendations or other information related to their location, up from 74% in 2013.”).

<sup>249</sup> One may also argue that there is a form of guilt associated with this sexual conduct that is then projected onto victims of nonconsensual pornography, creating a societal “blame the victim” mentality.

Victims of nonconsensual pornography are often overlooked or even criticized with the all too common notion that they “shouldn’t have taken or sent the picture.” This stigmatizing mentality is inherent in what is considered “rape culture,” a culture in which prevalent attitudes and behaviors normalize, justify, and tolerate sexual crimes.<sup>250</sup> Victims of sexual assault are likewise blamed and chastised in a similar manner: “She shouldn’t have worn that skirt;” “she shouldn’t have gotten that drunk;” “she was too flirtatious.” These are paradigmatic of the “victim blaming” that acts as a form of repression of women’s freedom of choice and sexual expression, and further highlights the lack of empathy for victims of these crimes in a society where we have accepted the degradation of women and justified sexual crimes as warranted or deserving. Victim blaming is parallel to a lack of empathy, and thus, it is important to recognize this flaw in our legal and criminal jurisprudence as an issue that must be addressed.<sup>251</sup> Because many do not identify or empathize with victims of nonconsensual pornography, either because they are not a woman or because they do not engage in sending or receiving intimate pictures, many do not feel the urgency to protect against the harms created by the crime.

In contrast, most individuals in the United States use some form of technology that enables geolocation information services, such as a smartphone, GPS device, or WiFi.<sup>252</sup> Put frankly, everyone uses geolocation services, and though statistics show a majority of people may also engage in consensual “sexting,” individuals will feel less

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<sup>250</sup> Zerlina Maxwell, Opinion, *Rape Culture Is Real*, TIME (Mar. 27, 2014), <http://time.com/40110/rape-culture-is-real/>.

<sup>251</sup> This is especially important considering that only 20.6% of the 535 seats in Congress are held by women. *Women in Congress 2018*, CAWP, <http://www.cawp.rutgers.edu/women-us-congress-2018> (last visited Sept. 3, 2018); see also Danielle Kurtzleben, *A Record Number of Women Will Serve in Congress (with Potentially More to Come)*, NPR (Nov. 7, 2018, 7:29 AM), <https://www.npr.org/2018/11/07/665019211/a-record-number-of-women-will-serve-in-congress-with-potentially-more-to-come> (noting that the November 2018 midterm elections increased the percentage of women in Congress from twenty percent (20%) to nearly twenty-three percent (23%)—“a new high, but far from parity”).

<sup>252</sup> Paul Hitlin, *Internet, Social Media Use and Device Ownership in U.S. Have Plateaued After Years of Growth*, PEW RES. CTR. (Sept. 28, 2018), <http://www.pewresearch.org/fact-tank/2018/09/28/internet-social-media-use-and-device-ownership-in-u-s-have-plateaued-after-years-of-growth/>.



affected by a crime that has not or may not be committed against them, as opposed to one that they are continuously at risk of.

There is a general discomfort with the concept of the government, large companies, or the general public having access to one's geolocation information, which is why numerous federal and state laws have been enacted and upheld as protections against gross invasions of privacy under the Fourth Amendment and other consumer protection regulations.<sup>253</sup> However, this discomfort seems to lessen in relation to nonconsensual pornography, likely due to the general belief that a person who willingly sent intimate photographs expected, or should have expected, those photographs would be disseminated—that they deserved it.

Referring to the criminalization of revenge porn, former judge and Fox News analyst Andrew Napolitano stated, "Criminalizing the distribution of that which was freely given and freely received would be invalidated under the First Amendment."<sup>254</sup> However, it is unlikely that Judge Napolitano and other opposers would maintain such sentiment if the same reasoning were applied to his or her geolocation information, credit card information, or social security numbers, all of which have likely been "freely given" in some context or another. In short, empathy is the sole foundational difference between the two concepts and a potential explanation for the inconsistency in the levels of support between the GPS Act and the IPPA.

#### CONCLUSION: MAKING THEM WORK

Both the GPS Act and the IPPA strike at the very core of the fundamental principles of privacy inherent in American jurispru-

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<sup>253</sup> Another potential empathy rift between the GPS Act and the IPPA involves the concept of punishing large corporate entities, such as commercial service providers in the GPS Act, versus punishing individuals per the IPPA. Citizens may feel less offended by a criminal regulation against large corporations as opposed to individuals because they may identify with the perpetrators of nonconsensual pornography. Again, this may derive from the not uncommon notion that nonconsensual pornography is innocent, that everyone does it, or that victims who initially consent are somehow deserving. This is not to say that every person who is not knowledgeable of the harms of nonconsensual pornography is a bad person or otherwise devious but is further reason to emphasize the need for its criminalization. Failing to do so will further perpetuate this mentality.

<sup>254</sup> Fuchs, *supra* note 113.

dence. Both criminalize the nonconsensual disclosure of an individual's personal and intimate information, and thus, represent important values in our nation's legal system. However, the discrepancies in support of the bills have underlined somewhat of a privacy hierarchy, where we as a society, and Congress as our representatives, favor one form of privacy over another.

With the proper knowledge of the extent of harms addressed by the criminalization of nonconsensual pornography, increased support for the IPPA can and should be established. More importantly, however, is the need for an increase in empathy, and the understanding that the privacy protected by the GPS Act is contextually the same as the privacy protected by the IPPA.

With carefully tailored legislative drafting, including clear definitions of consent, both proposed bills can withstand constitutional scrutiny and should be upheld as archetypes of the American legal system's protection against gross invasions of privacy.

Neither form of privacy is the hierarchal superior.