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The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy

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HELL HATH NO FURY LIKE A WOMAN PORNED: REVENGE
PORN AND THE NEED FOR A FEDERAL NONCONSENSUAL
PORNOGRAPHY STATUTE

*Aubrey Burris**

Abstract

Revenge porn is the term used to describe an intimate image or video that is initially shared within the context of a private relationship but is later publicly disclosed, usually on the Internet, without the consent of the individual featured in the explicit graphic. This nonconsensual disclosure is generally fueled by an intent to harm, humiliate, and harass the individual after the relationship has deteriorated. Revenge porn is fundamentally understood as nonconsensual pornography and is an increasingly common method of malicious cyber-harassment. This Note explores why the epidemic of revenge porn should be legally addressed and suggests a solution to the problem. This Note argues that a federal statute is needed to combat nonconsensual pornography and that a clear and narrow federal statute can pass First Amendment scrutiny. Finally, this Note proposes a model federal statute that can serve as a basis to achieve these goals. In brief, this Note exposes the insidious harms of nonconsensual pornography and urges that a narrowly tailored federal criminal statute is the proper vehicle to address the revenge porn epidemic.

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* J.D., University of Florida 2015, B.A.; Stetson University 2012. My accomplishments are a result of the loving support of my family and so this Note is dedicated to them. I am also grateful for the support and guidance from so many members of the University of Florida Levin College of Law community.

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INTRODUCTION

Gone are the days when typical post-breakup behavior consisted merely of sulking in self-pity or burning an ex’s photos. Today, a more permanent and insidious method of vengeance is available for those scorned: revenge porn.¹

Consider this modern day relationship scenario: college sweethearts remain in a long-distance relationship after graduation. While away earning her Ph.D., the girl sends her beloved a “sexy” naked photo of herself (called a nude “selfie”²) to build sexual anticipation for the next time they meet. As time passes, the two move in different directions, and the girl ends the relationship. Out of spite, her “ex” anonymously posts the private photo on websites³ that exist solely for the malicious purpose of shaming

1. This Note refers to “revenge porn” as an intimate or sexual graphic image featuring at least one subject who was either unaware that the private act was being fixed on a tangible medium of expression or was unaware of or opposed to the image’s distribution, most commonly over the Internet. Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 44 (2012) [hereinafter Bartow, *Copyright Law*] (defining revenge porn); see Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 245 (2011) (describing revenge porn as “[h]omemade porn uploaded by an ex-girlfriend or (usually) ex-boyfriend after [a] particularly vicious breakup as a means of humiliating the ex or just for own amusement” (first alteration in original) (internal quotation marks omitted)).

2. *Definition of selfie in English*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited Sept. 8, 2014).

3. Revenge porn gained attention when Hunter Moore launched the now-defunct website IsAnyoneUp.com, which featured submitted nude photos with the identifying information of the individuals in the photos. Kashmir Hill, *Hunter Moore Will Post Your Nude Photos but Will Only Include Your Home Address If He Thinks You’re a Horrible Person*, FORBES (Dec. 5, 2012, 5:16 PM), <http://www.forbes.com/sites/kashmirhill/2012/12/05/hunter-moore-is-going-to-start-posting-your-nude-photos-again-but-will-only-post-your-home-address-if-he-thinks-youre-a-horrible-person/>.

and exploiting girls who send nude selfies to their partners.⁴ Often, the posts include the victim's full name, phone number, home and work addresses, and other personal information.⁵

This scenario depicts the real-life victimization of Holly Jacobs.⁶ Unfortunately, Holly Jacobs is just one member in an ever-growing group of victims who are continually subjected to painful humiliation and cyber-harassment after ex-partners and hackers publically broadcast their intimate moments.⁷

At its core, revenge porn is nonconsensual, involuntary pornography.⁸

4. Other "revenge porn" sites include ShesAHomewrecker.com, which is a suburban mother's website dedicated to shaming "homewreckers" by posting their intimate photos and personal information online, and the now infamous site called UGotPosted.com. See Joshua M. Patton, *Ariella Alexander, Suburban Mother, Runs Revenge Porn Sites*, OPPOSING VIEWS (Dec. 13, 2013), <http://www.opposingviews.com/i/technology/internet/ariella-alexander-suburban-mother-runs-revenge-porn-sites>; Don Thompson, *Man Who Ran 'Revenge Porn' Site UGotPosted.com Charged After Allegedly Extorting Tens of Thousands of Dollars from Victims*, NATIONAL POST (Dec. 11, 2013), <http://news.nationalpost.com/2013/12/11/man-who-ran-revenge-porn-site-ugotposted-com-charged-after-allegedly-extorting-tens-of-thousands-of-dollars-from-victims/>.

5. See Steven Nelson, *New Federal Legislation Could Take a Nip Out of 'Revenge Porn'*, U.S. NEWS (Nov. 21, 2013), <http://www.usnews.com/news/articles/2013/11/21/new-federal-legislation-could-take-a-nip-out-of-revenge-porn> ("'Revenge porn' includes images and videos posted online by former significant others and features such items as nude photos, salacious emails and lewd texts. The content is often posted on niche websites, sometimes with the victim's personal information, including their name, workplace and contact information.").

6. As a graduate student, Jacobs's nude photos went viral after a breakup, forcing her to quit her job and eventually change her name due to prolific cyber-harassment by those who gained full-time public access to her private photos and personal information. Jacobs is now a well-known victim of revenge porn and the founder of a campaign to end revenge porn. See *CCRI Board of Directors*, CYBER CIVIL RIGHTS INITIATIVE, http://www.cybercivilrights.org/ccri_board_of_directors (last visited Sept. 8, 2014); END REVENGE PORN, <http://www.endrevengeporn.org/> (last visited Sept. 8, 2014). For more details of Ms. Jacobs's personal story, see Holly Jacobs, *Being a Victim of Revenge Porn Forced Me to Change My Name*, XOJANE.COM (Nov. 13, 2013, 11:00 AM), <http://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs>.

7. Many other victims have received unwanted attention from the media and even complete strangers after being subjected to involuntary online porn. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009) (explaining the harms suffered by Cecilia Barnes after her former boyfriend posted nude photos with personal information online); Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html> (recounting the story of revenge porn victim Marianna Taschinger); Lorelei Laird, *Striking Back at Revenge Porn*, A.B.A. J., Nov. 2013, at 45–46 (describing how victims like Holly Touns and Rebekah Wells have spoken out about suffering from involuntary pornography).

8. This Note uses the terms "revenge porn," "nonconsensual pornography," and "involuntary pornography" interchangeably, as revenge porn is essentially the involuntary distribution of sexual images or, similarly, the nonconsensual distribution of images that could be considered "pornographic" or at least "sexually charged." "Revenge porn" is now a common umbrella term for all forms of nonconsensual pornography, even if the distribution was not motivated by "revenge" per se. See Mary Anne Franks, *Criminalizing "Revenge Porn": Frequently Asked Questions 1* (Oct. 9, 2013) [hereinafter Franks, FAQ] (unpublished manuscript), <http://ssrn.com/abstract=2337998>

Thus, the nonconsensual distribution of these private photos is a serious form of cyber-harassment.⁹

The primary issue with revenge porn is consent: someone publically distributes the sexually graphic images of others without their consent. Does one who consents to the taking of a private photo, even by self-producing the image and sharing it with a partner, simultaneously consent to the public distribution of that image to the entire world? This Note explores why the law should address the epidemic of revenge porn and suggests a solution to the problem. This Note argues that ending the distribution of nonconsensual pornography is crucial and can be achieved while still upholding First Amendment rights. Furthermore, it argues that a narrowly crafted federal criminal statute is needed to achieve that goal.

This Note presents its argument in four Parts. Part I explains the recent proliferation of revenge porn as a result of expanding technology. It then specifically defines revenge porn and argues that even if an individual consents to the creation of an intimate image, the nonconsensual distribution of that image makes revenge porn a unique form of cyber-harassment. Part I also explores some of the significant harms caused by nonconsensual pornography.

Part II explains why existing laws fail to adequately address nonconsensual pornography. It explains that, because there is no adequate civil remedy, the legislature must criminalize such behavior. Part II then argues that existing state and federal criminal laws insufficiently address the distribution of nonconsensual pornography and that a federal criminal statute is necessary to fully address the online distribution of nonconsensual pornography.

Part III addresses First Amendment concerns surrounding the regulation of revenge porn. It explores the significant harms of nonconsensual distribution of intimate images in light of the protected speech rights of distributors. Specifically, Part III argues that nonconsensual pornography is a socially harmful form of cyber-harassment that should be unprotected by

(recognizing “revenge porn” as “nonconsensual pornography”); Eric Goldman, *California’s New Law Shows It’s Not Easy to Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:03 PM), <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/> (noting that “revenge” porn is often called “involuntary” porn). For a more detailed discussion on the defining characteristics of nonconsensual pornography, see *infra* Section I.B.

9. See David Gray et al., *Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 794 (2013) (explaining that revenge porn is a general form of cyber-harassment because such common sites “encourage sexualized online abuse . . . *IsAnyoneUp.com* provides a notorious example.”); *Illinois Lawmaker Takes Aim at ‘Revenge Porn’ Posters and Peddlers with New Proposal*, HUFFINGTON POST (Jan. 30, 2014, 4:01 PM), http://www.huffingtonpost.com/2014/01/30/illinois-revenge-porn_n_4697718.html (“Despite what is advertised, ‘Revenge Porn’ is not pornography. When it all comes down, Revenge Porn is simply harassment.” (quoting a Change.org petition) (internal quotation marks omitted)).

the First Amendment, and that criminalization is the best response to such harassment.

Part IV concludes by proposing a federal criminal statute to control the problem and explains why a practical extension of existing criminal laws is an effective response. In addition, Part IV argues that, to be effective, such criminal laws must address the nonconsensual distribution of photos that were originally created with the consent of the victim and sent under implied privacy by the victim (or simply, victims who sent selfies). The goal of the federal statute proposed by this Note is to uphold an individual's privacy rights while comprehensively addressing the many facets of involuntary pornography and comporting with free speech principles.

I. THE EPIDEMIC OF NONCONSENSUAL PORNOGRAPHY MUST BE ADDRESSED

The increasing trend of nonconsensual pornography necessitates a full understanding of why revenge porn is a unique form of cyber-harassment. This Part explains why nonconsensual distributions of such private information causes significant harm to victims and is worthy of regulation.

A. *The Encouraged Role of Technology in Intimate Relationships*

Despite the debate surrounding the wisdom of sending a nude selfie, sharing intimate images with a partner is both legal and very common.¹⁰ It is reasonable to expect that private photos shared between intimate partners should remain private and should not be published to the entire online world.¹¹ Unfortunately, whether caused by naivety or lack of foresight, many people do not consider where a message will end up when sending an image for their partner's eyes only.¹² Married couples are even less

10. The popularity of sharing sexually charged images within private relationships has significantly increased along with advances in technology. See Suzanne Choney, *Nearly 1 in 5 Smartphone Users Are Sexting*, TODAY (June 6, 2012, 7:11 PM), <http://www.today.com/tech/nearly-1-5-smartphone-users-are-sexting-816897> (reporting that one in five American adults who own a smartphone reported using it to share explicit photos or text messages); Joanna Stern, *Mom and Dad Are Sexting: 18 Percent of Adults Send Lewd Text Messages*, ABC NEWS (June 8, 2012, 11:00 AM), <http://abcnews.go.com/blogs/technology/2012/06/mom-and-dad-are-sexting-18-percent-of-adults-send-lewd-messages/> (describing surveys in which “[e]ven percent of Americans admitted that they recorded explicit videos on their phones” and “18 percent of American smartphone owners say they sext”).

11. See *infra* notes 52–53 and accompanying text. This reasonable expectation regarding the use of photos within the relationship mirrors other societal expectations. For example, take the case of the stolen credit card. “[S]omeone who gives a credit-card number to a merchant has the right to expect that it won’t be used to commit fraud. If it is, no one blames the victim.” Editors, *Tackling the Menace of Revenge Porn*, BLOOMBERG VIEW (Oct. 13, 2013, 6:00 PM), <http://www.bloombergtview.com/articles/2013-10-13/tackling-the-menace-of-revenge-porn>.

12. “Sexts” *All the Rage Among College Students*, CBSNEWS (July 21, 2011, 2:48 PM), <http://www.cbsnews.com/news/sexts-all-the-rage-among-college-students/>. Revenge porn was

likely to consider the potential future ramifications of divorce or disloyalty when sharing explicit images with their spouses.¹³

Certainly, now more than ever, society *should* be fully aware of the dangers of sexting.¹⁴ The media thrives on exposing scandals of shamed celebrities¹⁵ and politicians¹⁶ who send nude selfies. Ironically, at the same time the media promotes sending intimate photos as an “easy and usually harmless way to spice up” a couple’s love life.¹⁷

With endorsements from accepted sources like Fox News and the

prevalent even several years ago. For example, in 2011, a University of Rhode Island study found that 56% of its student body had “received suggestive images” from a partner. *Id.* (noting the increase in sexting and forwarding messages without a partner’s consent).

13. Sending private explicit photos is very often endorsed in the media as a method of “heat[ing] things up in a marriage,” yet the media rarely discusses the consequences of creating and sharing intimate images, even among spouses. See Sarah Pierce, *Sexting for Adults*, HITCHED <http://www.hitchedmag.com/article.php?id=764> (last visited July 11, 2014) (describing sexting as a “playful way” for “adults in consenting, long-term relationships like marriage” to “improve intimacy” and stay connected); see also *infra* notes 20–22 and accompanying text.

14. Sexting can be defined as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular phones or over the Internet.” *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009) (quoting plaintiffs’ complaint) (internal quotation marks omitted); see also Jamie L. Williams, Note, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017, 1029 (2012) (“‘Revenge porn,’ an act by which teens disseminate images of an ex-boyfriend or ex-girlfriend following a break-up for the purposes of humiliating that person, is also an increasingly common consequence of sexting.”).

15. American culture is now bombarded with a steady stream of celebrity “sexting scandals” including those of Scarlett Johansson and Brett Favre, who were both subject to public humiliation after they allegedly sent nude selfies from their cell phones. See Courtney Hazlett, *Scarlett Johansson Talks Photo Scandal, Divorce*, TODAY (Dec. 12, 2011, 9:56 AM), <http://www.today.com/entertainment/scarlett-johansson-talks-photo-scandal-divorce-6C9555618>; Barry Wilner, *Brett Favre Scandal: NFL Looking into Allegations of Sex Texts*, HUFFINGTON POST (Oct. 9, 2010, 12:40 AM), http://www.huffingtonpost.com/2010/10/08/brett-favre-scandal-nfl-n_756229.html.

16. Anthony Weiner resigned from Congress in 2011 after the first of multiple incidents involving the publication of intimate images of himself that were originally sent through sexts. See Andy Ostroy, *WeinerGate 2.0: The Misadventures of Carlos Danger*, HUFFINGTON POST (July 25, 2013, 10:38 AM), http://www.huffingtonpost.com/andy-ostroy/weiner-20-the-misadventures_b_3647217.html; see also Kelly M. Feeley, *Hiring Sexters to Teach Children: Creating Predictable and Flexible Standards for Negligent Hiring in Schools*, 42 N.M. L. REV. 83, 85–86 (2012) (highlighting the seriousness of sexting, which led Weiner to resign from Congress). Political journalists theorize that the subsequent release of mayoral candidate Anthony Weiner’s sexting messages and photos caused the candidate to lose the 2013 New York City Mayoral Election as well. See *Poll: Weiner Drops to 4th Place in Wake of Sexting Scandal*, CBS LOCAL N.Y. (July 29, 2013, 11:10 PM), <http://newyork.cbslocal.com/2013/07/29/weiner-staying-in-mayors-race-after-campaign-manager-quits/> (noting that a “majority of likely voters—53 percent—[thought] Weiner should step aside in light of recent revelations of another sexting scandal”).

17. Jessica Leshnoff, *Sexting Not Just for Kids*, AARP, http://www.aarp.org/relationships/love-sex/info-11-2009/sexting_not_just_for_kids.html (last updated June 2011); see *supra* note 13 and accompanying text.

American Associations of Retired Persons (AARP),¹⁸ sexting is no longer considered a rebellious form of high-tech flirting for teens and celebrities.¹⁹ Respected publications feature articles that describe the intimate exchange as “[a] day-long tease [that] can lead to a night-long in-person session”²⁰ and recommend sexting to baby-boomers and older couples who frequently travel, live in different cities or just “have trouble connecting throughout the day.”²¹ Some religious internet forums have not only condoned sexting, but have even encouraged it.²² Public endorsements of this behavior among adults coupled with new technology that “promises” to keep sexting more “private”²³ all foster a false sense of security and privacy for those who consider sharing explicit images despite the very real possibility of future betrayal and unforeseen public disclosure.²⁴

This cultural praise of digital intimacy, coupled with incredible

18. See Jenny Block, *The Do's and Don'ts of Sexting*, FOX NEWS (Feb. 17, 2011), <http://www.foxnews.com/health/2011/02/16/dos-donts-sexting/>; Leshnoff, *supra* note 17.

19. See, e.g., Sonia Aslam, *Many Young People Don't Consider 'Sexting' Taboo*, NEWS1130 (July 26, 2012, 8:56 AM), <http://www.news1130.com/2012/07/26/many-young-people-dont-consider-sexting-taboo-survey/> (describing survey results of young adults showing “[s]exting apparently isn't as risqué as once thought”); Bob Sullivan, *Seniors Are Sexting, Oversharing, McAfee Says*, BOBSULLIVAN (Oct. 25, 2013), <https://bobsullivan.net/technology-run-amok/seniors-are-sexting-oversharing-mcafee-says/> (“24% of older mobile consumers have used their device to send intimate personal photos, texts, or emails.” Moreover, “[w]hat was once considered private or even taboo is not only fair game, it's expected. But this can have serious consequences from the ending of friendships to exposure to physical harm” (internal quotation marks omitted)).

20. Block, *supra* note 18.

21. Leshnoff, *supra* note 17.

22. *Sex, SPOUSES, and the Internet - Part I: SEXTING*, BLOGGING KNIGHT'S QUEST (Oct. 4, 2011), <http://blog.knightsquest.org/?p=2268> (describing the “transmission of suggestive/erotic text messages, pictures, or videos via cell phone” as an act that “can add [a] little bit of spice or act as a substitute for physical intimacy when [married] couples are apart”); Tim Levert & Tasha Levert, *[Technology] Sexting. There, We Said It*, MORETHANDODGEBALL (Dec. 5, 2013), <http://www.morethandodgeball.com/simply-insider/technology-sexting-there-we-saidit/#sthash.8axPalwn.dpuf> (using a youth ministry online forum to encourage married couples to sext their spouses).

23. For a review of new technological advances in mobile apps that offer to help keep sexting more “private,” see Max Knoblauch, *7 Apps for Steamy Text Sessions*, MASHABLE (Aug. 14, 2013), <http://mashable.com/2013/08/14/sexting-apps/>.

24. The mobile phone application “Snapchat” fosters a new false sense of privacy that encourages sexting nude photos under the premise that they will self-delete from the viewer in a matter of seconds. However, Snapchat’s privacy policy admits that it cannot ensure that any naked photos sent through the application will be only available for a maximum of ten seconds. See Nicole A. Poltash, Note, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH J.L. & TECH. 14, 14–15 (2013) available at <http://jolt.richmond.edu/v19i4/article14.pdf> (explaining that Snapchat does not live up to its claims of image deletion that give users a false sense of security); Graham Cluley, *Does Snapchat Offer Safe Sexting from Smartphones, or a False Sense of Security?* (Nov. 6, 2012), <http://nakedsecurity.sophos.com/2012/11/06/snapchat-sexting-app-security/> (noting that illusory privacy policy guarantees from applications like Snapchat give users a false sense of security because nude photos are actually vulnerable to public disclosure).

technological advances,²⁵ has caused an alarming increase in sexting by young people,²⁶ leaving them vulnerable to damaging consequences for the rest of their lives.²⁷ Regardless of individual opinions about the intelligence of exchanging intimate photos with a partner, revenge porn is spreading like wildfire.²⁸

The failure to recognize the severe personal and social harms generated by the public distribution of sexually explicit images may fuel our culture's acceptance and promotion of sexting. Society's harsh judgment²⁹ of individuals whose images are unintentionally made public creates an "encourage the act, but blame the actor" paradox³⁰ that generates

25. Eric S. Latzer, *The Search for a Sensible Sexting Solution: A Call for Legislative Action*, 41 SETON HALL L. REV. 1039, 1040 (2011) (noting the effects of rapid changes in technology on sexting).

26. See *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009) (noting the popularity of sexting between American teenagers and that nearly 20% of teenagers have sexted).

27. The legal implications of teen sexting and criminal legislation regarding peer-to-peer explicit photo swapping have spurred much debate. See Jordan J. Szymialis, Note, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND. L. REV. 301, 302 (2010) (exploring the implications of intimate photo exchanging between teen couples and how "[t]he law has failed to adapt quickly enough to teens sending these images"); Sarah Wastler, Note, *The Harm in "Sexting"?*, 33 HARV. J. L. & GENDER 687, 687 (2010) (explaining the serious consequences of teenage sexting).

28. Nonconsensual pornography has become such a serious global harm that many countries around the world are recognizing the need for legal regulation. Israel became the first country to entirely ban revenge porn with criminal legislation. Sam Frizell, *Israel Bans 'Revenge Porn'*, TIME (Jan. 7, 2014), <http://world.time.com/2014/01/07/israel-bans-revenge-porn/>. See generally 11 September, 2013, PARL. DEB., Scot. Parl. (2013) 22344 (U.K.) [hereinafter PARLIAMENTARY DEBATES], available at <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9019> (noting in parliamentary debate that revenge porn has spread across the U.K and that "the threat of distributing or the distribution of such material can be used as a tactic of domestic abuse, continuing controlling behavior that characterises [sic] such abuse"); Miles Godfrey, *Revenge Porn Reaching Dangerous Levels Experts Warn*, COURIER-MAIL (Nov. 22, 2013, 3:00 PM), <http://www.couriermail.com.au/news/revenge-porn-reaching-dangerous-levels-experts-warn/story-fnk1378p-1226766102893> (discussing the harm of revenge porn and the need for Australian laws to keep up with such harassing uses of technology).

29. Some critics of revenge porn legislation argue that victims should be held accountable for their actions and young adults should be left to deal with unintended consequences of trusting their partners with intimate images. See Karen De Coster, *Revenge Porn is "Cyber Rape"? I Argue Not.*, KAREN DE COSTER (Oct. 1, 2013), <http://karendecoster.com/revenge-porn-is-cyber-rape-i-argue-not.html> (arguing that victims like "Holly [Jacobs] created [their] own dilemma as a result of [their] injudicious choice," and thus should be left to "pay[] for it due to [their] inability to assess the overall character of a former lover" without relying on state action or additional criminal laws); Martin Hill, *As the U.S. Implodes, Lawmakers Across the Nation Push for State and Federal Laws Governing 'Revenge Porn.'* LIBERTY FIGHT (Oct. 11, 2013), http://libertyfight.com/2013/as_US_implodes_lawmakers_obsess_on_revenge_porn.html (describing revenge porn legislation as protecting "witless and irresponsible people from the consequences of their own bad choices").

30. This paradox is generated by a culture that supports the private exchange of sexual images, but also shames such behavior when the consequences are undesirable.

substantial unanticipated problems for victims of revenge porn.³¹ Because of the stigmatization, harassment, and loss of privacy that follows publication of sexually explicit images, individuals who are betrayed and have private photos disclosed can readily be classified as “victims.”³²

B. *Understanding Nonconsensual Pornography*

This Note addresses only the distribution of *nonconsensual* images. As Professor Mary Anne Franks recognizes, nonconsensual images include images originally obtained *without* the subject’s consent³³ as well as images originally obtained *with* the subject’s consent in a “private or confidential relationship.”³⁴ Because this Note is concerned with protecting free speech rights, it uses a definition of nonconsensual pornography that does not include images taken of individuals in public.³⁵

While the act of sending a photo is consensual on its face, one must understand the context in which consent is given to combat revenge porn. It is crucial to distinguish between the separate acts of consent: the victim’s consent to create the photo, the victim’s consent to “sext” the photo to a partner, and the victim’s consent to have the photo distributed to individuals outside the private relationship.³⁶

One of the greatest difficulties in fighting the nonconsensual disclosure of private images is that the photos are usually self-created, which raises

31. Blaming involuntary porn victims makes it difficult for the public to recognize the importance of implied trust and confidences in private sexual contexts. *See infra* Section I.B.

32. For a discussion of the consequences of nonconsensual pornography and its victims, see *infra* Section I.C.

33. While existing laws (such as voyeurism or computer hacking laws) at both the state and federal level “prohibit the non-consensual observation and recording of individuals in states of undress or engaged in sexual activity, the non-consensual *disclosure* of sexually graphic images in itself is currently not expressly prohibited by any federal law.” Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper 3* (Sept. 7, 2014) [hereinafter Franks, Working Paper] (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=23365

37. Further, only a minority of states have criminal laws prohibiting such nonconsensual disclosure. *See id.*; National Conference of State Legislatures, *State ‘Revenge Porn’ Legislation* (Sept. 2, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx>.

34. *See* Franks, Working Paper, *supra* note 33, at 3. (“This includes images originally obtained without consent (e.g. hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent within the context of a private or confidential relationship (e.g. images consensually given to an intimate partner who later distributes them without consent . . .”).

35. Excluding images that are taken in public reiterates the proposed statute’s intent to maintain promotion of free public speech while protecting individuals who have a reasonable expectation of privacy in the intimate image. This exclusion seeks to address situations where some “sexually charged” material could be created in an image without solicitation, in a public area, such as nude sunbathing or flashing the camera. For further discussion of this exemption as included in the proposed statute, see *infra* Section IV.B.

36. These levels of consent determine whether the act is covered by the proposed statute. The primary focus of this Note is on the lack of consent for distribution beyond the private relationship.

issues regarding the scope of consent of the original disclosure.³⁷ Most often, explicit photos shared within the confines of a private relationship are voluntarily sent by an individual who has some reasonable expectation that the images will be viewed privately only by the receiver.³⁸ Generally, this reasonable expectation of privacy is based on the express or implied understanding that the intimate images will remain confidential.³⁹ Consent to share the photos between the two individuals in a private relationship does not mean a person consents to publically exhibit the photos to the entire world through unrestricted displays such as “slut-shaming” websites.⁴⁰

Critics of revenge porn legislation argue that “consensual sharing in one context—a trusted relationship—translates into consent in other contexts—posting to the world.”⁴¹ But consent is not absolute; rather, it depends on context.⁴² Legal and social norms treat consent as a contextual concept in many other situations.⁴³ For example, society recognizes that one cannot assume that an individual who consents to sexual contact in one context also consents to sexual contact in other contexts.⁴⁴ Similarly, individuals who consent to having private images of their body shared between doctors do not necessarily consent to the doctor displaying those images on the

37. According to recent surveys, up to 80% of revenge porn cases involve victims who took the photo or video themselves. Press Release, Cyber Civil Rights Initiative, Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims (Sept. 10, 2013), http://www.cybercivilrights.org/press_releases; Jessica Roy, *California’s New Anti-Revenge Porn Bill Won’t Protect Most Victims*, TIME (Oct. 3, 2013), <http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/>.

38. See Heather Kelly, *New California ‘Revenge Porn’ Law May Miss Some Victims*, CNN, (Oct. 3, 2013, 6:32 AM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/> (“Up to 80% of revenge porn victims had taken the photos themselves, according to a recent survey by the Cyber Civil Rights Initiative.”).

39. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 354 (2014) (“As revenge porn victims have told us time and again, they shared their explicit images or permitted them to be taken because, and *only* because, their partners assured them that they would be kept confidential.”).

40. “Slut-shaming” is “a term used to describe the act of criticizing or insulting individuals for their perceived sexual availability, behavior, or history as a way to ‘shame or degrade them.’” LiJia Gong & Alina Hoffman, Note, *Sexing and Slut-Shaming: Why Prosecution of Teen Self-Sexters Harms Women*, 13 GEO. J. GENDER & L. 577, 580 (2012).

41. See Citron & Franks, *supra* note 39, at 354.

42. See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010) (explaining the theory and framework of contextual integrity and privacy expectations).

43. Franks, Working Paper, *supra* note 33, at 3.

44. *Id.*; see also Mary Ann Franks, *Why You Can’t Punch a Boxer in the Face When He Asks You for Directions*, CONCURRING OPINIONS (Feb. 9, 2013) [hereinafter Franks, *Punch a Boxer*], <http://www.concurringopinions.com/archives/2013/02/why-you-cant-punch-a-boxer-in-the-face-when-he-asks-you-for-directions-consent-context-and-humanity.html> (explaining the contextual nature of consent for social and legal norms within society).

doctor's website or distributing them to the patient's employer.⁴⁵ Thus, the law should not assume that individuals who agree to being viewed sexually in one *private* context also agree to being viewed sexually in other *public* contexts.⁴⁶ Whether in the context of commercial models or private relationships, people generally do not assume that individuals who consent to being photographed for one purpose also consent to the use of those images for another purpose.⁴⁷ Our society accepts these boundaries because context and social norms influence our understanding of privacy and consent.⁴⁸ Clearly, sharing one's intimate photos with another person in a trusting relationship differs from sharing one's intimate photos with the entire world.

Information may deserve privacy protection even if it has been shared with another person.⁴⁹ Privacy law and tort actions support this idea and can protect information that is disclosed to others.⁵⁰ For example, Professor Lior Strahilevitz's social network theory of privacy explains that the law should focus on the substantial objective inquiry of reasonable privacy expectations given the context of the initial disclosure.⁵¹ To properly analyze the consent given for the disclosure of private information, the law should ask what extent of public dissemination would

45. See Woodrow Hartzog, *Social Data*, 74 OHIO ST. L.J. 995, 1013 (2013) ("Relational boundaries are the foundation for numerous privacy laws, such as HIPAA, as well as the doctrine of confidentiality, which is one of the oldest and most fundamental concepts within privacy law." (footnote omitted)).

46. This same reasoning underlies the purpose of Title V of the Gramm-Leach-Bliley Act. A consumer's consent to share their private information with a financial institution in one context is not blanket consent to share that individual's personal information in other contexts, such as with third parties. Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–27 (2012).

47. See Franks, *Punch a Boxer*, *supra* note 44.

48. For more examples and discussion of the contextual nature of consent and privacy, see NISSENBAUM, *supra* note 42 (explaining that privacy is contextual and determined by social norms); DANIEL SOLOVE, *UNDERSTANDING PRIVACY* (2008) (explaining the importance of context in understanding privacy issues).

49. The third-party doctrine, which forfeits an individual's reasonable expectation of privacy for information voluntarily disclosed to another party, has already been denounced in the context of private cell phone records. See *Riley v. California*, No. 13–132, slip op. at 8–10 (U.S. June 25, 2014). The third-party doctrine should also be challenged in the context of sexual privacy for intimate information shared with a private partner. See *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."); Joe Palazzolo, *Is The Third Party (Doctrine) Winding Down?*, WALL ST. J.L. BLOG (Nov. 22, 2013, 5:39 PM), <http://blogs.wsj.com/law/2013/11/22/is-the-third-party-doctrine-winding-down/> (noting recent challenges to the third-party doctrine).

50. See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 926–27 (2005) (explaining how social norms and context determine the scope and expectations of privacy).

51. See Strahilevitz, *supra* note 50, at 933; see also Connie Davis Powell, *Privacy for Social Networking*, 34 U. ARK. LITTLE ROCK L. REV. 689, 704 (2012) (discussing the social networks theory of privacy).

a reasonable individual have expected after disclosing that information to others?⁵² In a private relationship, a reasonable individual can expect that intimate photos shared confidentially in the relationship should be kept private.⁵³ It is not legally significant that some people may find it “morally questionable” to send explicit selfies.⁵⁴ Sharing sensitive personal information—a nude photo, medical record, or Social Security number—with a reasonable expectation of confidentiality does not waive all privacy expectations regarding that information.⁵⁵

C. *The Harm Caused by Nonconsensual Pornography*

The nonconsensual distribution of pornography converts unwilling citizens into sexual commodities subjected to public humiliation.⁵⁶ Lack of consent distinguishes involuntary pornography from other “willing” forms of pornography, and the insidious personal aspect of revenge porn makes the individuals harmed by this behavior easily identifiable as “victims.”⁵⁷ Often, the distributor adds an additional layer of harassment and humiliation by including personal information along with the private image.⁵⁸ Including identifying information ensures that internet searches of the victim’s name will produce the image, which increases the chance that the victim’s employers, friends, and family will be exposed to the humiliation.⁵⁹

52. See Strahilevitz, *supra* note 50, at 921.

53. The reasonableness of privacy expectations in a recorded photograph has been debated. However, the inclusion of identifying personal information coupled with the sexual nature of the private image bolsters the reasonableness of expecting that information to remain within the confines of the private relationship. See Sarah Jameson, Note, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 *COMMLAW CONCEPTUS* 231, 265 (2008) (noting that as modern technology and methods of public social expression evolve, “privacy safeguards should be maintained, meaning that information that is considered private by reasonable individuals should remain private”); see also Antonio M. Haynes, Note, *The Age of Consent: When Is Sexting No Longer “Speech Integral to Criminal Conduct”?*, 97 *CORNELL L. REV.* 369, 386 (2012) (suggesting that adults have a reasonable expectation that their relationships will continue and that their explicit photographs will not be shown to someone else).

54. For a discussion on blaming revenge porn victims for believing that their photos will remain private, see Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, *CONCURRING OPINIONS* (Feb. 1, 2013), <http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html>.

55. Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 *HARV. J.L. & TECH.* 1, 17 (2007) (“The current privacy doctrine also protects certain subject matter that is normatively recognized as private, like sexual details and intimate communications.”).

56. Katy Steinmetz, *A New Strategy for Prosecuting Revenge Porn*, *TIME* (Dec. 10, 2013), <http://nation.time.com/2013/12/10/a-new-strategy-for-prosecuting-revenge-porn/> (quoting Attorney General Kamala Harris as saying that a revenge porn site had “turned [unsuspecting victims’] public humiliation and betrayal into a commodity with the potential to devastate lives”).

57. See, e.g., *supra* notes 2–7 and accompanying text.

58. See *supra* note 5 and accompanying text.

59. This feature is a defining characteristic of Hunter Moore’s revenge porn site. See *supra* note 3 and accompanying text; Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*,

Anonymity makes the Internet a dangerous and uncontrollable forum.⁶⁰ Nonconsensual pornography quickly ruins victims' lives and "transforms unwilling individuals into sexual entertainment for strangers."⁶¹ Once it is published outside the private relationship, thousands of people can view the nude photo;⁶² it can also be easily distributed to the victim's employer, coworkers, family and friends.⁶³ Unsurprisingly, many victims are fired from their jobs, forced to quit their careers, or required to change their names to escape the humiliation and exploitation of their personal information being posted online.⁶⁴ Several victims have filed lawsuits based on the loss of educational and employment opportunities from the online posting of their naked photos.⁶⁵

The dangers inherent in publicizing an individual's most private information warrant the criminalization of such forms of cyber-harassment.⁶⁶ Because the image poster can anonymously attach the subject's contact information and physical address, victims are frequently harassed, stalked, and threatened.⁶⁷ An article in the American Bar Association Journal correctly captured the abusive nature of nonconsensual

ROLLING STONE (Oct. 11, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet-20121113>.

60. See generally DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007) (discussing how quickly damaging information spreads through the Internet); Byran H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 503 (noting the need for regulation of online anonymity).

61. Franks, FAQ, *supra* note 8, at 1.

62. Hunter Moore has noted that his revenge porn site IsAnyoneUp.com received "roughly 350,000 unique visitors . . . on a robust day." Morris, *supra* note 59.

63. Aside from sites specifically dedicated to publishing "revenge porn," there are many other methods of publication that are equally harassing to victims. For example, a female professor's boyfriend started an online auction with her nude photos and linked the page to her employer's Facebook pages. The images appeared on a porn website and were seen by students. Her employer was unsympathetic when she was asked to take a medical leave while being treated for symptoms of post-traumatic stress disorder. Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013, 7:30 AM), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

64. See Laird, *supra* note 7, at 46.

65. See, e.g., Jones v. Dirty World Entm't. Recordings, LLC, 840 F. Supp. 2d 1008, 1009–10 (E.D. Ky. 2012); Leser v. Penido, 62 A.D.3d 510, 510 (N.Y. App. Div. 2009); Complaint, Jacobs v. Seay, 13-1362 6CA 02 (Fla. Cir. Ct. Apr. 18, 2013); Second Amended Complaint, Lester v. Mineta, 2006 WL 3741949 (N.D. Cal. Mar. 3, 2006) (No. C 04-03074 SI); Plaintiffs' Original Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction, Touns v. Godaddy.com, No. D130018-C (Dist. Ct. Tex. Orange Cnty. June 18, 2013).

66. Victims of revenge porn are repeatedly threatened with sexual assault and nonconsensual pornography can even lead to physical attack. See Citron & Franks, *supra* note 39, at 350.

67. Loretta Park, *Layton Revenge Porn Case Draws Utah Legislature's Interest*, STANDARD EXAMINER (Jan. 29, 2014, 4:25 PM), <http://e.standard.net/stories/2014/01/28/layton-revenge-porn-case-draws-utah-legislatures-interest> ("Studies have shown that victims of revenge porn are harassed, stalked, threatened, they lose jobs, are forced to change schools and some commit suicide . . .").

pornography, noting that “the abuse is often very sexualized—threats of rape, false prostitution ads, calling victims ‘sluts’—even when the victim is a man.”⁶⁸ Both male and female victims have committed suicide, and surveys reveal that almost half of all victims have contemplated suicide after the nonconsensual dissemination ruined their lives.⁶⁹

With such devastating consequences stemming from a blatant invasion of privacy, commentators have readily compared revenge porn to sexual harassment, domestic violence, and cyber-rape.⁷⁰ Nonconsensual pornography has fueled tactics of domestic abuse and sexual violence in relationships around the world, and has caused the British Parliament to take action.⁷¹ Coercive partners commonly use the recording of intimate images along with the actual and threatened distribution of such images to control their relationships.⁷² The cyber stalking and domestic abuse that stems from disseminating such intimate images denies women control over their bodies, reputations, and lives.⁷³

68. Laird, *supra* note 7, at 47.

69. See Charlotte Laws, *I've Been Called the "Erin Brockovich" of Revenge Porn, and for the First Time Ever, Here Is My Entire Uncensored Story of Death Threats, Anonymous and the FBI*, XOJANE.COM (Nov. 21, 2013, 11:00 AM), <http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn> (“At least two women have killed themselves over revenge porn, and Cyber Civil Rights Initiative studies show that 47 percent of victims contemplate suicide.”); Beth Stebner, *I'm Tired of Hiding': Revenge-Porn Victim Speaks Out over Her Abuse After She Claims Ex Posted Explicit Photos of Her Online*, N.Y. DAILY NEWS (May 3, 2013, 12:05 PM), <http://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147> (noting the New Jersey “revenge porn law” was passed following the suicide of Rutgers student Tyler Clemente, who killed himself after his roommate posted an explicit video of him and another man).

70. See Franks, FAQ, *supra* note 8, at 1; Frank Holland, *Cyber Rape. Revenge Porn.*, TODAY'S CHI. WOMAN (Apr. 1, 2013), <http://www.tcwmag.com/cyber-rape-revenge-porn/>.

71. See PARLIAMENTARY DEBATES, *supra* note 28 (noting a discussion in parliament over the spread of revenge porn across the U.K. as a tactic of cyber abuse, controlling behavior, and domestic violence).

72. See Jessica Farrish, *An Eye for Revenge*, REG.-HERALD (Jan. 22, 2014), <http://www.register-herald.com/features/x1767993198/An-eye-for-revenge> (describing revenge porn as a common method for abusers to control their victims); Dan Kelly, *'Revenge Porn' Targeted by P.A. Lawmakers*, MORNING CALL (Nov. 26, 2013), http://articles.mcall.com/2013-11-26/news/mc-pa-revenge-porn-20131126_1_photos-state-legislature-law (noting an increase in domestic violence cases involving abuse by threats to publicly post private naked photos); Heather Robertson, *Into the World of Revenge Pornography*, BAD HOUSEKEEPING (Jan. 13, 2014), <http://www.bad-housekeeping.com/2014/01/13/into-the-world-of-revenge-pornography/> (“[W]omen’s groups are hearing more and more that this is becoming a part of domestic abuse. Partners are using the threat of posting provocative images online to trap women in abusive relationships.”).

73. See Citron & Franks, *supra* note 39, at 352 (discussing the “professional costs of revenge porn”); see also Farrish, *supra* note 72 (comparing revenge porn to other forms of violence against women because “[t]hey encourage men to ignore women’s rights to their own bodies and to use sex to punish women whose behavior they wish to control . . . These forms of gendered violence . . . constrain (a woman’s) ability to live, work and participate freely in society.” (third alteration in original) (internal quotation marks omitted)).

Aside from the dangers and threats posed to victims of revenge porn, the inherent betrayal of trust within private relationships poses a significant threat to human intimacy.⁷⁴ Further, nonconsensual pornography diminishes women and men, both sexually and professionally, when a victim's sexuality is subject to slut-shaming and other forms of degrading harassment.⁷⁵ In a society interested in fostering intimacy, gender equality, and privacy, there is great interest in discouraging the nonconsensual distribution of these intimate images.⁷⁶

II. EXISTING LAWS FAIL TO ADEQUATELY ADDRESS REVENGE PORN

Although some states have made efforts to address the distribution of nonconsensual pornography, these new state laws and existing federal laws fail to sufficiently address the problem presented by revenge porn. Before discussing this Note's suggested solution through a federal statute, this Part will detail the current inadequacy of laws in this arena. This Part will demonstrate why a federal criminal statute is needed to even begin making a dent in the revenge porn problem.

A. *Existing Civil Actions Do Not Sufficiently Address Nonconsensual Pornography*

Why can't existing civil remedies solve the problem of revenge porn? This Section seeks to answer that question. Due to the growing epidemic of revenge porn and the inability of existing civil laws to adequately address the issue, several states have proposed or enacted legislation to restrict the nonconsensual disclosure of private images.⁷⁷ Advocates for change, however, propose more comprehensive state criminal laws⁷⁸ or federal criminal statutes.⁷⁹ Despite this, critics of additional legislation argue that

74. Strahilevitz, *supra* note 50, at 927 n.20.

75. See Jill Filipovic, 'Revenge Porn' is About Degrading Women Sexually and Professionally, *GUARDIAN* (Jan. 28, 2013, 5:23 PM), <http://www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women>; Gong & Hoffman, *supra* note 40.

76. Professor Anita Allen has explored the idea that the government should restrict particular individual liberties in order to prevent the deterioration of societal expectations of privacy. Anita L. Allen, *Coercing Privacy*, 40 *WM. & MARY L. REV.* 723, 755–57 (1999).

77. After New Jersey and California successfully passed legislation specifically targeting nonconsensual pornography, other states including Florida, New York, and Texas have proposed similar bills. Laird, *supra* note 7, at 49. As of August 2014, eleven states have enacted laws to prevent revenge porn. National Conference of State Legislatures, *supra* note 33.

78. See Mark Bennett, *A Better Revenge-Porn Statute*, *DEFENDING PEOPLE* (Oct. 26, 2013) [hereinafter Bennett, *A Better Statute*], <http://blog.bennettandbennett.com/2013/10/a-better-revenge-porn-statute.html> (suggesting a drafting scheme for state revenge porn regulations that do not offend First Amendment principles).

79. See *infra* notes 156–58 and accompanying text.

existing tort,⁸⁰ contract,⁸¹ or copyright⁸² liability laws adequately address the issue. Other commentators suggest that free speech rights should trump any harm caused by nonconsensual distribution.⁸³ This Part shows why a federal criminal statute is necessary by demonstrating how existing remedies through civil litigation are inadequate.

Existing legal remedies through civil actions are inadequate for several reasons. Nonconsensual pornography does not seem to fit well into any existing civil remedy.⁸⁴ As explained later in this Section, even if available civil remedies might address some instances of involuntary porn, civil actions provide little deterrence for this global issue. Furthermore, the practical issues associated with civil litigation render this option impossible for many victims.

Tort law cannot cure the immense harms that occur when a victim's intimate images are publicly displayed without the victim's consent. Tort actions against the websites that publish the explicit photos are effectively

80. See, e.g., Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), <http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/> (arguing that revenge porn should be dealt with in civil courts rather than creating a new criminal statute because "victim[s] can go after the initial vengeful discloser under a tort theory of public disclosure of private information and even the intentional infliction of emotional distress").

81. See, e.g., Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 888 (2006) (suggesting a contract theory of confidentiality to maintain privacy expectations for information and photographs within the confines of private relationships).

82. See, e.g., Bartow, *Copyright Law, supra* note 1, at 45 (discussing copyright law protections regarding revenge porn); Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 838–40 (2008) (discussing solutions to copyright protection issues of user-generated internet pornography); Derek Bambauer, *Beating Revenge Porn with Copyright*, INFO/LAW BLOG (Jan. 25, 2013), <https://blogs.law.harvard.edu/infolaw/2013/01/25/beating-revenge-porn-with-copyright/> (noting that a victim "can often take a legally defensible position that she is an author of the [harmful] photo").

83. See, e.g., Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, DEFENDING PEOPLE (Oct. 14, 2013) [hereinafter Bennett, *Criminalizing Revenge Porn?*], <http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional.html> (criticizing proposals from Professors Franks and Citron for a federal anti-revenge porn statute as an affront to the First Amendment); Cathy Reisenwitz, *Revenge Porn Is Awful, but the Law Against It Is Worse*, TALKING POINTS (Oct. 16, 2013, 9:35 AM), <http://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse/> ("Banning revenge porn undoubtedly lowers [the bar of free speech so egregious that it violates the First Amendment], and comes with some consequences which are problematic for freedom of the press."); cf. Bennett, *Criminalizing Revenge Porn?*, *supra* (discussing the U.S. Supreme Court's hesitation to place videos that depict the "intentional illegal torture and killing of animals without serious religious, political, scientific, educational, journalistic, historical, or artistic value" in a category unprotected by the First Amendment (internal quotation marks omitted)).

84. While the majority of nonconsensual distribution cases do not fit precisely within existing tort law, certain revenge porn situations may allow a victim to bring possible tort actions under intentional infliction of emotional distress or sexual harassment law.

precluded when the images are distributed through the Internet.⁸⁵ As discussed in more detail later in this Part, 47 U.S.C. § 230 of the Communications Decency Act (CDA) provides increased protection for online service providers and users from liability based on third-party content. Section 230 of the CDA specifically applies in this context because it gives website operators sweeping immunity from liability when no federal criminal statute regulates the conduct.⁸⁶ Because these regulations generally grant immunity to operators for tortious material submitted by third-party users, the absence of a federal criminal statute makes tort action against the websites that publish nonconsensual pornography virtually impossible.⁸⁷ While victims can sometimes recover damages from their former partner, victims generally prefer to have the damaging material disappear so they can move on with their lives, rather than recover damages.⁸⁸

Although a victim may initiate a tort action against the individual who initially possessed and disclosed the photo, this approach requires that the victim must prove the discloser's identity.⁸⁹ Under the guise of internet anonymity, the continual distribution of the image through numerous websites makes it almost impossible to prove the original publisher's identity.⁹⁰ Even if a victim can prove the original publisher's identity, the chances of recovering damages are slim at best. Victims may spend enormous amounts of money and time attempting to collect negligible damages from former partners who are effectively judgment-proof.⁹¹

85. For a detailed discussion of the problem in tort actions against website operators, see Skyler McDonald, Note, *Defamation in the Internet Age: Why Roommates.com Isn't Enough to Change the Rules for Anonymous Gossip Websites*, 62 FLA. L. REV. 259, 260 (2010).

86. See 47 U.S.C. § 230; *infra* Section II.C.

87. Laird, *supra* note 7, at 47 (“But while suing the website is efficient, the law may forbid it. Section 230 of the CDA grants website operators immunity from lawsuits over their users’ speech,” which is “a measure intended to preserve online free speech. Revenge porn sites often invoke it, and some experts believe it protects them”).

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

89. See Daniel Zharkovsky, Note “*If Man Will Strike, Strike Through the Mask*”: *Striking Through Section 230 Defenses Using the Tort of Intentional Infliction of Emotional Distress*, 44 COLUM. J.L. & SOC. PROBS. 193, 210 (2010) (explaining how often creators of malicious content cannot be identified, “leav[ing] victims unable to recover damages and powerless to stop the harm”).

90. Willard Foxton, *Revenge Porn and Snapchat: How Young Women Are Being Lured into Sharing Naked Photos and Videos with Strangers*, TELEGRAPH (Feb. 13, 2013), <http://blogs.telegraph.co.uk/technology/willardfoxton2/100008808/revenge-porn-and-snapchathow-young-women-are-being-lured-into-sharing-naked-photos-and-videos-with-strangers/> (“Only the (usually anonymous) individual who posted the pictures can be fined. So, if the woman wanted her pictures removed from the site, she would have to work out who shared her pictures, then prosecute them. The site owners won’t lift a finger [because] they are making millions of dollars from young women’s pain.”).

91. Laird, *supra* note 7, at 50 (noting that defendants in revenge porn cases are “typically individuals who can’t pay a large judgment”).

Copyright law may help certain victims because websites are not granted § 230 immunity⁹² for federal intellectual property claims.⁹³ While selfies are the most common method of sharing intimate photos,⁹⁴ there are many instances when a victim gives consent for a partner to take a photo or video but not to publically disclose it. Copyright claims, however, can only be brought by the person who created the image.⁹⁵ Any sex tape or intimate photo made or taken by the victim's partner would be excluded from copyright protection.⁹⁶

Further, the same practical problems associated with tort claims also accompany copyright actions. Aside from any modest relief offered by existing tort or copyright laws, civil litigation casts a tremendous burden on the victim.⁹⁷ The difficulties of civil litigation make this potential remedy impractical or impossible in most cases. Civil actions are extremely costly and time-consuming, they bring further public attention to the private material, and they offer little hope for remedy.⁹⁸ With such great financial and emotional burdens, the majority of victims consider the cost/benefit ratio of pursuing civil litigation overwhelming and practically hopeless. Criminal laws are an effective solution because they do not share the financial and privacy concerns of civil litigation and also provide for quick takedowns of the private images—the main goal for most victims.⁹⁹

B. *A Federal Criminal Law is Necessary to Combat the Issue*

Despite the inadequacies of existing civil laws, nonconsensual pornography victims should not be left without a remedy. A partner's

92. 47 U.S.C. § 230(e)(2) (2012) (“Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”).

93. See Bartow, *Copyright Law*, *supra* note 1, at 35–36 (discussing copyright law protections in the context of pornography).

94. See *supra* notes 37–38 and accompanying text.

95. Ariel Ronneburger, Note, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP., 1, 17 (“[U]nder current copyright law, only the copyright holder has the ability to control the use of photos and videos. Since the copyright in an image or work of art is always granted to the creator rather than the subject of the work, only the creator has a legal right to control its use, while the subjects of the pornographic materials have no ownership rights.”).

96. See *id.* An expansion of “joint authorship” may cover victims of non-consensual pornography. See Bambauer, *supra* note 82.

97. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 120 (1983).

98. See Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, JOLT DIG. (May 23, 2013), <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> (“[F]iling suit is expensive and runs the ‘Streisand Effect’ risk of drawing more attention to the very material a victim is hoping to suppress.”).

99. The issues associated with a victim's lack of control over whether a prosecutor brings criminal charges is beyond the scope of this Note. See Laird, *supra* note 7, at 49 (explaining why proponents of a federal revenge porn statute think criminalization is better than civil litigation).

expectation—however naive—that their companion will respect their intimate privacy, is not a reasonable basis for leaving their reputation and chances of professional success ruined indefinitely, with no means of recovery.

Criminal penalties are warranted where the conduct harms society as a whole.¹⁰⁰ The majority of revenge porn victims are women¹⁰¹ and, unfortunately, because of antiquated double standards, these women are judged more harshly than men for their sexual behavior.¹⁰² Nonconsensual pornography inflicts humiliation, manipulation, abuse, and danger on its victims.¹⁰³ The impact this harm has on women, men, private relationships, and society in general warrants effective laws that criminalize revenge porn.

New federal criminal legislation is necessary because the nonconsensual distribution of private sexual images is not clearly prohibited by any existing federal law, and state criminal laws are severely deficient.¹⁰⁴ A federal statute would cover the nonconsensual distribution of online images¹⁰⁵ and provide states with the muscle they need to properly prosecute offenders.¹⁰⁶ To protect First Amendment principles,

100. Lichter, *supra* note 98 (explaining why criminal penalties are warranted for revenge porn).

101. Lucia Graves, *Can Banning 'Revenge Porn' Win Muriel Bowser the Millennial Vote?*, NAT'L J. (Apr. 9, 2014), <http://www.nationaljournal.com/politics/can-banning-revenge-porn-win-muriel-bowser-the-millennial-vote-20140409> ("That revenge porn mostly targets women (and often young women) shouldn't come as a surprise. There aren't popular revenge-porn sites with pictures of naked men." (internal quotation marks omitted)).

102. Laird, *supra* note 7, at 47–48 (describing how victims are often disparaged as "stupid" or "slutty" for taking the photos due to a "sexual double standard").

103. See *supra* notes 67–69 and accompanying text.

104. Very few states have successfully enacted legislation making it illegal to post a sexual photo online without the subject's consent. See National Conference of State Legislatures, *supra* note 33. However, current and proposed revenge porn statutes are especially inadequate for victims of posted selfies. See Julia Dahl, "Revenge Porn" Law in California a Good First Step, but Flawed, CBSNEWS (Oct. 3, 2013, 11:54 AM), http://www.cbsnews.com/8301-504083_162-57605761-504083/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/; Nelson, *supra* note 5 ("Self-shot photos are not covered by the California law and victims must prove emotional distress."). The Cyber Civil Rights Initiative tracks the status of revenge porn legislation within each state. See *Impact Legislation in Your State*, END REVENGE PORN <http://www.endrevengeporn.org/interact-ive-map/> (last visited July 12, 2014).

105. The U.S. Constitution grants federal lawmakers the power to regulate the instrumentalities of interstate commerce. U.S. CONST. art. 1, § 8, cl. 3. The internet is "an instrumentality or channel of interstate commerce." *United States v. Hornaday*, 392 F.3d 1306, 1310 (11th Cir. 2004).

106. The shortcomings of each state criminal statute is beyond the scope of this Note. It is worth noting, though, that while a few states may have laws to cover some instances of revenge porn, those laws generally do not cover the most common cases involving selfies. Moreover, not every state has the same criminal laws with equal levels of coverage. See Roy, *supra* note 37 (discussing the flaws in California's revenge porn legislation regarding the coverage of self-shots).

Congress should use existing laws¹⁰⁷ as a guide to develop a stand-alone nonconsensual pornography statute.

C. *Dealing with CDA § 230*

What about the individuals responsible for the operation of revenge porn and slut-shaming websites?¹⁰⁸ Section 230 of the CDA governs website operators.¹⁰⁹ The liability of revenge porn site operators may be construed differently under the CDA,¹¹⁰ depending on the extent to which the operator engaged in the illegal online conduct and posts.¹¹¹ Section 230's immunity clearly applies to intermediaries of third-party content.¹¹² Thus, if used to hold user-generated websites liable, the proposed federal statute is too broad to pass constitutional scrutiny under the First Amendment.¹¹³ Website operators rarely have specific knowledge about the consent or reasonable privacy expectations of the victim.¹¹⁴ Therefore, most website operators would not fall directly under the language of the federal statute proposed in this Note.¹¹⁵ However, the CDA expressly states that nothing in § 230 can be construed to impair the enforcement of Title

107. Existing laws include federal cyber stalking and video voyeurism statutes. Section 2261A of Title 18, which addresses stalking, could possibly be amended in alignment with the objectives of this Note's proposed statute. However, such an amendment would need to cover self-shots and single images that were consensually shared within the reasonable expectations of privacy in the private relationship.

108. While it is generally accepted that revenge porn websites are given sweeping immunity for civil liability under § 230, the language of the CDA statute would still allow victims to obtain relief if a federal criminal statute came into existence. *See Communications Decency Act*, 47 U.S.C. § 230 (2012).

109. *Id.*

110. *See* Mary Anne Franks, *The Lawless Internet?* HUFFINGTON POST (Dec. 18, 2013, 5:35 PM) [hereinafter Franks, *The Lawless Internet?*], http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html (describing the misconceptions surrounding various interpretations of § 230).

111. The CDA distinguishes providers of "interactive computer services" from "information content providers." Information content providers are legal persons responsible "in whole or in part for the creation or development for the creation or development of information," while an interactive computer service only "provides or enables computer access by multiple users to a computer server." 47 U.S.C. §§ 230(f)(2)–(3).

112. *See* Franks, *The Lawless Internet?*, *supra* note 110 ("§230 protects intermediaries from liability for the actions of others, not individuals from liability for their own illegal conduct.").

113. Most revenge porn sites are not fully user-generated websites, but it generally cannot be proven that the website operators had specific knowledge about the consent or reasonable privacy expectations of the subject featured in photos submitted from third parties. *See* Laird, *supra* note 7, at 50 ("Nor does Section 230 apply when the website was a co-developer of the content. . . . None of these sites are truly user-generated content." (internal quotation marks omitted)).

114. Despite possible interpretations of immunity from criminal liability under § 230, this Note advocates for criminal prosecution only of the party with whom the victim maintained a reasonable expectation of privacy in the context of their private relationship.

115. *See* discussion *infra* Section IV.A.

18 or any other federal criminal statute.¹¹⁶ Accordingly, a website owner who directly engages in illegal conduct (and thus is not just an intermediary of third-party conduct)¹¹⁷ could be held liable for the content if a federal criminal statute for revenge porn was in place.¹¹⁸

Courts determine whether a website is responsible for the development of user content, however, “[t]he message to website operators is clear: If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.”¹¹⁹ Holding unscrupulous website operators liable when they knowingly allow users to share private sexual images beyond the private relationship without consent of both parties, is consistent with the CDA’s underlying goals,¹²⁰ which include “ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”¹²¹ Additionally, if enacted, the proposed statute’s prohibition of internet entities raising a § 230 defense would further promote another express goal of the CDA: “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.”¹²²

116. 47 U.S.C. § 230(e)(1). This provision also states that § 230 shall not be construed to impair the enforcement of Chapter 71 of the United States Code (relating to obscenity). Thus, possible § 230 immunity would not impair the prohibition of revenge porn if that prohibition were enforced under obscenity law.

117. The argument over whether § 230’s immunity extends to site operators who actively facilitate the publishing of revenge porn is beyond the scope of this Note, however, this determination will largely turn on the role of the website operator and the extent to which the operator engages in the illegal behavior.

118. This Note does not take a definite position on whether a website’s purposeful solicitation of revenge porn makes the site a co-developer of the content, thus lacking § 230 immunity. However, a recent U.S. Court of Appeals for the Ninth Circuit decision may shed light on the question. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (“[I]f the editor publishes material that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination. He is thus properly deemed a developer and not entitled to CDA immunity.”); *see also* McDonald, *supra* note 85, at 274 (noting that “[t]he majority in *Roommates.com* correctly found that there should be a link between what is allowable in the real world and on the Internet. The [CDA] was not meant to create a lawless no-man’s-land on the Internet.” (internal quotation marks omitted)).

119. *Roommates.com*, 521 F.3d at 1175.

120. For more discussion on how the CDA affects revenge porn, see Danielle Citron, *Revenge Porn and the Uphill Battle to Sue Site Operators*, CONCURRING OPINIONS (Jan. 25, 2013), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-sue-site-operators.html>; Ali Grace Zieglosky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L.J. 1307, 1325–31 (2010).

121. 47 U.S.C. § 230(b)(5).

122. *Id.* § 230(b)(3).

III. REVENGE PORN AND THE FIRST AMENDMENT

While it is debatable whether revenge porn has any redeeming social value, it is clear that posting explicit images online is a form of speech.¹²³ However, as the media continues to expose the devastating effects of unchecked revenge porn, fear and uncertainty will restrict another form of expression: speech through the exchange of intimate images in private relationships.¹²⁴ If the hallmark of free speech protections is to “allow ‘free trade in ideas,’”¹²⁵ then society should discourage behavior that instills fear of nonconsensual public disclosure of intimate ideas and actually hinders the free trade of expression within private relationships.

A. *The First Amendment is Not a Blanket Protection for All Speech*

A federal statute against nonconsensual pornography faces First Amendment challenges because it is a content-based regulation of speech.¹²⁶ Courts presume speech is protected—and thus content-based speech regulations are presumptively invalid¹²⁷—unless the speech falls into an unprotected category of speech.¹²⁸ The Supreme Court has clarified that the First Amendment is not absolute and that the law does not protect certain categories.¹²⁹

While the Court has long recognized the government’s ability to regulate certain categories of expression without raising any constitutional concern, during the last decade several First Amendment cases have confirmed the constitutionality of restrictions on content for certain categories of speech.¹³⁰ These cases suggest that Congress can regulate the nonconsensual disclosure of explicit images under a federal statute that

123. *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 329–331 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986) (noting that pornography threatens women’s rights to equality and physical safety which “demonstrates the power of pornography as speech,” and, therefore, the need to constitutionally protect pornography under the First Amendment).

124. *See supra* Section II.C.

125. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

126. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000) (describing First Amendment concerns with content-based regulations on free speech).

127. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 395–96 (1992) (explaining constitutional standards of content-based regulations of unprotected speech).

128. *Black*, 538 U.S. at 358–59 (describing categories of unprotected speech).

129. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”); *Black*, 538 U.S. at 358–59 (describing categories of unprotected speech that have passed constitutional scrutiny); Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 844–45 (2005) (explaining the historically unprotected categories of speech).

130. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *San Diego v. Roe*, 543 U.S. 77, 80 (2004); *Black*, 538 U.S. at 358–59.

passes constitutional muster. The Court's recent decision in *United States v. Stevens* highlights several areas of speech that Congress is constitutionally permitted to restrict: obscenity, defamation, fraud, speech that imminently incites illegal activity, and speech integral to criminal conduct.¹³¹

Prior to the reconfirmation of unprotected areas in *Stevens*, the Supreme Court previously established several specific types of unprotected speech including: threats,¹³² fighting words,¹³³ child pornography,¹³⁴ and obscene speech that fell within a narrow test.¹³⁵ In *Virginia v. Black*, the Court explained that restrictions in these areas are justified because the speech is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."¹³⁶

B. *Nonconsensual Pornography Falls in Line with the Court's Recognition of Unprotected Speech*

A federal statute restricting nonconsensual distribution survives constitutional scrutiny because it covers an already defined category of unprotected speech: Obscenity.¹³⁷ First Amendment scholars agree that explicit images of nonconsenting subjects likely fall under the category of obscenity and therefore do not receive First Amendment protection, however, they may only be regulated by narrow legislation.¹³⁸ Accordingly,

131. *Stevens*, 130 S. Ct. at 1584.

132. See, e.g., *Black*, 538 U.S. at 359; *Watts v. United States*, 394 U.S. 705, 707 (1969).

133. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *Chaplinsky*, 315 U.S. at 571–72.

134. See, e.g., *New York v. Ferber*, 458 U.S. 747, 756–63 (1982).

135. See, e.g., *Miller v. California*, 413 U.S. 15, 23–24 (1973).

136. *Black*, 538 U.S. at 358–59 (2003) (quoting *R.A.V.*, 505 U.S. at 382–83) (internal quotation marks omitted).

137. This Note argues that nonconsensual pornography falls under one of the already-recognized categories of unprotected speech confirmed by *Stevens*. However, *Stevens* also stated that the declared categories of unprotected speech are not foreclosed. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.").

138. See, e.g., Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/>. Professor Volokh has written:

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

this Note's proposed federal statute requires the image to qualify as an obscenity.¹³⁹ Though the obscenity doctrine has developed through a long line of precedent, the Court's current test for obscenity, from *Miller v. California*, supports such a characterization of nonconsensual pornography.¹⁴⁰

In *Miller*, the Court set out the following three-prong test for determining whether a work is obscene:

- (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁴¹

To pass constitutional muster under current obscenity law, this Note's proposed federal statute incorporates the *Miller* test in several ways.¹⁴² The proposed statute's definition of "obscene" expressly includes the first two factors from *Miller*. The statute's exception for "matters of legitimate public concern including acts that serve a bona fide and legitimate scientific, educational, governmental, artistic, or other similar newsworthy purpose" incorporates the third *Miller* factor.¹⁴³ Including the third factor as a separate exception serves to expressly exempt content with legitimate public value rather than leaving public value as merely a factor for the jury

Id.; see also Andrew M. Ironside, *Criminalizing Revenge Porn Need Not Violate the First Amendment*, C.R.L. & POL'Y BLOG (Feb. 20, 2014), http://lawprofessors.typepad.com/civil_rights/2013/11/criminalizing-revenge-porn-need-not-violate-the-first-amendment.html.

139. See discussion *infra* Section IV.A.

140. *Miller*, 413 U.S. at 24.

141. *Id.* There is great debate surrounding the applicability of *Miller*'s community standards test in the context of an "online community." While the distribution of a work through cyberspace does not occur in terms of *Miller*'s traditional local communities, which are defined by geography, many communities would likely find the nonconsensual disclosure of an unsuspecting individual's private sexual photos obscene. Although this issue is beyond the scope of this article, for further discussion, see Sarah Kagan, Note, *Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights*, 38 HASTINGS CONST. L.Q. 233, 237–38 (2010) (suggesting a national community standard for user-generated website posting); Frederick B. Lim, Note, *Obscenity and Cyberspace: Community Standards in an On-line World*, 20 COLUM.-VLA J.L. & ARTS 291, 292–93 (1996) (discussing the unique problems regarding *Miller*'s community standards in cyberspace).

142. Not all pornography should be categorized as obscene. In order to survive constitutional scrutiny, the proposed statute uses most of the language from *Miller*'s obscenity test. Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 647 (2000) (exploring the pitfalls of many attempts to categorize pornographic material as obscene).

143. See *infra* note 167 and accompanying text; discussion *infra* Section IV.A.

to consider when evaluating potential obscenity. This express exemption provides more rigorous protection for the free speech principles underlying the First Amendment.

At the core of the First Amendment's protection is speech regarding matters of public concern.¹⁴⁴ In *Snyder v. Phelps*, the Court underscored the crucial distinction between speech that is of public concern and speech regarding purely private matters.¹⁴⁵ Speech on public issues "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection."¹⁴⁶ The Court also reiterated that "[n]ot all speech is of equal First Amendment importance."¹⁴⁷ Purely private matters receive less rigorous protections.¹⁴⁸ This differential treatment is warranted because restricting speech regarding purely private matters does not implicate the same constitutional concerns as restricting speech on matters of public concern, such as the risk of a potential burden on "a meaningful dialogue of ideas" and "the risk of a reaction of self-censorship" on important public issues.¹⁴⁹ Sexually explicit images exchanged in the context of an intimate relationship are certainly a private matter, provided they meet the requirements of this Note's proposed statute and do not qualify under the statute's exception for matters of legitimate public concern.¹⁵⁰ Thus, nonconsensual pornography that does not concern public matters deserves less rigorous protection.¹⁵¹

In most instances, freely disclosing a non-consenting individual's sexual and private images contributes little to informing the public on issues of political or cultural concern. Instead, nonconsensual pornography significantly hinders private expression.¹⁵² Fear that millions of strangers may view one's private sexual expression, even with no immediate threat of their public disclosure, would significantly inhibit an individual's

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

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

146. *Id.* (internal quotation marks omitted); see also *Connick v. Myers*, 461 U.S. 138, 145 (1982).

147. *Snyder*, 131 S. Ct. at 1215 (internal quotation marks omitted).

148. *Id.*

149. *Id.* at 1215–16 (internal quotation marks omitted).

150. The Court has recognized a right to refrain from public expression for narrowly defined instances such as this. *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 559 (1985) ("There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." (internal quotation marks omitted)).

151. As discussed in Part IV, rare situations like the disclosure of Congressman Anthony Weiner's explicit photos *would* raise important matters of public concern. The exception is included to uphold constitutional safeguards for matters of legitimate public interest. See, e.g., *supra* note 16.

152. The fear of public disclosure of such private matters has a chilling effect on private speech.

willingness to express intimacy through tangible mediums.¹⁵³ Our democratic society has an essential interest in maintaining the privacy of communication to allow citizens to “think and act creatively and constructively.”¹⁵⁴

The protection and accountability gained from a federal statute would help foster private speech. Statutory protection would remove the anxiety of engaging in intimate speech with no legal recourse if that speech is exposed outside the boundaries of the private relationship. In sum, despite a federal statute’s restrictions on speech, “the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives.”¹⁵⁵

IV. A NARROW STATUTE FOR NONCONSENSUAL PORNOGRAPHY

This Part concludes by proposing a federal criminal statute to control the nonconsensual pornography problem. The proposed law comports with free speech principles and upholds individual privacy rights while comprehensively addressing the many facets of involuntary pornography.

A. *Proposed Federal Criminal Statute*

Legal scholars and legislators have sought to address the pressing issue of nonconsensual pornography by drafting proposals for state and federal criminal statutes.¹⁵⁶ Professor Mary Anne Franks has been at the forefront of these legislative efforts on both the state and federal levels.¹⁵⁷ Attempting to fill the gaps left by the inadequate statutes of a minority of states, Professor Franks proposed a federal statute that would criminalize the posting of an individual’s private nude photo online without obtaining the individual’s consent.¹⁵⁸ Free speech advocates have opposed Franks’s proposed statute.¹⁵⁹ However, legislators and free speech scholars alike admit that given the unique nature of the invasion of privacy, harm, and

153. This risk of chilling private speech arising from the public disclosure of private matters must be considered in conjunction with whether the speech discloses matters of public concern. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (explaining the societal interest in protecting private speech on private matters, but holding that private speech concerning matters of public issue deserved more rigorous protection).

154. PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967).

155. *Bartnicki*, 532 U.S. at 537–38 (Breyer, J., concurring).

156. See *supra* notes 78, 104 and accompanying text; *infra* notes 157, 165 and accompanying text.

157. See, e.g., Franks, FAQ, *supra* note 8; Franks, *Why We Need*, *supra* note 88.

158. Franks, Working Paper, *supra* note 33, at 11–14.

159. See, e.g., Bennett, *Criminalizing Revenge Porn?*, *supra* note 83; Scott H. Greenfield, *New York to Revenge Porn: Any Selfies of Lawprof Mary Anne Franks? (Update x2)*, SIMPLE JUSTICE (Oct. 8, 2013), <http://blog.simplejustice.us/2013/10/08/new-york-to-revenge-porn-any-selfies-of-lawprof-mary-anne-franks/>.

conduct involved in revenge porn, a narrowly crafted federal statute should pass constitutional muster.¹⁶⁰ This Note proposes a federal statute crafted in response to Professor Franks's overly broad proposal and its free speech critics.

The following statute should be added to Title 18 of the United States Code to remedy the prospective problems of nonconsensual pornography:

- (A) Whoever intentionally uses the mail, any interactive computer service, any electronic means, or any facility of interstate or foreign commerce to disclose a sexually graphic and obscene visual depiction of an individual without their consent, to harm or harass that individual, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.
- (B) In this section—
- (1) the term ‘electronic means’ means any equipment dependent on electrical power to access an information service including email, instant messaging, blogs, websites, telephones, and text messages;
 - (2) The term “disclose” includes distribution, publication, dissemination, transfer, sale, delivery, trade, offer, or advertisement of a sexually graphic image to a public audience;
 - (3) The term “sexually graphic” means revealing an individual’s naked genitals or naked pubic area;
 - (4) The term obscene means¹⁶¹:

160. Jerry Brito, *Are Laws Against “Revenge Porn” A Good Idea?*, REASON.COM (Oct. 21, 2013, 1:30 PM), <http://reason.com/archives/2013/10/21/are-laws-against-revenge-porn-a-good-ide> (“Free speech absolutism can seem naive in the face of revenge porn’s very real consequences.”); Volokh, *supra* note 138 (noting that a clear and narrow statute “would likely be upheld by the courts”).

161. This definition of obscenity is taken from *Miller v. California*, 413 U.S. 15, 24 (1973), the language of state obscenity laws, Tex. Penal Code Ann. § 43.23 (West 2014), and suggestions from Mark Bennett, who has criticized the revenge porn statutes proposed by Professor Mary Anne

- (a) The average person, applying contemporary community standards would find, taking into account the manner of its distribution outside the private relationship and the lack of the subject's consent, that taken as a whole the image appeals to the prurient interest in sex;
 - (b) Taking into account the manner of its distribution outside the private relationship and the lack of the subject's consent, the visual depiction portrays or describes:
 - (1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, or exposing an individual engaged in sexually explicit conduct; or
 - (2) Patently offensive representations or descriptions of masturbation, excretory functions, lewd exhibition of the genitals, the genitals in a state of sexual stimulation or arousal, sexual stimulation with a device;
 - (c) For purposes of this statute, "sexually explicit conduct" means sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex.¹⁶²
- (5) The term "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.¹⁶³

Frank's on First Amendment grounds, see Bennett, *A Better Statute*, *supra* note 78; Bennett, *Criminalizing Revenge Porn?*, *supra* note 83.

162. This definition was taken from the language of 18 U.S.C. § 2256(2)(A)(i) (2012).

163. This definition was taken from the language of 18 U.S.C. § 2256(5).

- (6) “to harm or harass” means intending to harass, invade the lawful privacy of, or cause emotional distress to such an individual; or with reckless disregard for the possibility that this production or disclosure will have the effect of harming, harassing, invading the lawful privacy of, or causing emotional distress to the individual;
- (a) There is a rebuttable presumption that the public disclosure of a sexually graphic visual depiction without the individual’s consent, where the image was not taken in a commercial setting and the individual is not a public figure, is likely to cause that individual harm.
- (7) The term “under circumstances in which that individual has a reasonable expectation of privacy” means circumstances in which a reasonable person would believe that he or she gave consent to capture or possess the image only to their partner in a private relationship, without being concerned that an intimate image of the individual would be disclosed beyond the context of a private or confidential relationship.¹⁶⁴
- (a) There is a rebuttable presumption that a person who has consented to the capture or possession of a sexually graphic image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that relationship.
- (C) Exceptions:
- (1) This section shall not apply to situations involving voluntary exposure in public or commercial settings.¹⁶⁵
- (2) This section does not prohibit any legitimate law enforcement, correctional, or intelligence activity.

164. This language is based on the definition of the term “under circumstances in which that individual has a reasonable expectation of privacy” found in 18 U.S.C. § 1801(a)(5).

165. Taken from the language of 18 U.S.C. § 1801(b)(5)(B) as well as from the language of a proposed Maryland statute. H.B. 0064, 2013 Gen. Assemb., Reg. Sess. (Md. 2013), *available at* <http://mgaleg.maryland.gov/2014RS/bills/hb/hb0064F.pdf>.

- (3) This section shall not apply to a person acting in compliance with a subpoena or court order for use in a legal proceeding.¹⁶⁶
- (4) This section shall not apply to disclosure of matters of legitimate public concern including acts that serve a bona fide and legitimate scientific, educational, governmental, artistic, or other similar newsworthy purpose.¹⁶⁷

B. *Analysis of the Proposed Statute*

The statute seeks to prohibit only the intentional distribution of private graphic nude photos of an individual who did not consent to the distribution of those photos, where the individual had a reasonable expectation of privacy that the photos would not be disclosed outside of the established private relationship, and distribution was intended to harass, harm, invade the lawful privacy of or cause emotional distress to the individual. To achieve that narrow goal, the statute relies, as a starting point, on existing state and federal criminal laws, several states' proposed or enacted revenge porn statutes, and Professor Franks's proposal.

The statute begins with the common federal jurisdictional hook for the use of any facility of interstate or foreign commerce as defined in the United States Code.¹⁶⁸ The included definition of "any electronic means" is comprehensive enough to include any means of electronic publishing that might be used to publicize a photo. This Note has already explained that it is crucial to include the obscenity requirement because obscenity is already classified as a form of unprotected speech.¹⁶⁹

The statute differs from other proposals because the photo's creation is separated from the photo's disclosure, and the statute only prohibits the nonconsensual disclosure of the photo.¹⁷⁰ Several reasons justify this distinction. First, the distinction recognizes the contextual nature of

166. This language is taken from the revenge porn bill proposed by Maryland legislator John Cardin in October of 2013. The bill includes several exceptions, including for a law enforcement official in connection with a criminal prosecution and matters related to public interest. H.B. 0064, *supra* note 165.

167. This language is taken from the third prong of the obscenity test in *Miller* and also from the revenge porn bill proposed by Maryland legislator John Cardin in October of 2013. *See id.*; *Miller v. California*, 413 U.S. 15, 24 (1973).

168. U.S. CONST. art. 1, § 8, cl. 3. This jurisdictional hook is used in many criminal statutes under Title 18 of the United States Code. *See, e.g.*, 18 U.S.C. § 1952.

169. *See* discussion *supra* Section III.B.

170. Although Franks has admitted that creation and dissemination might be necessarily separated as distinct issues, her proposed statutes include "creation" under the definition of disclosure. Franks, Comment to *Why We Need*, *supra* note 88 (noting that "creation and dissemination might be usefully (and even necessarily) separated for purposes of a criminal statute").

consent.¹⁷¹ This is critical where an individual may consent to the taking of a photo, but not consent to the public distribution of that photo.¹⁷² Creating a sexually graphic photo without consent is a distinct problem in itself.¹⁷³ Second, because existing laws prohibit creating photos of unassuming individuals in reasonable privacy,¹⁷⁴ the statute is narrowly tailored to cover only the nonconsensual public disclosure of such private photos.

The definition of disclosure includes the words “to a public audience” to prevent over-breadth, because the broad distribution of the image on a public forum is what makes revenge porn so harmful and uncontrollable.¹⁷⁵ For example, if a man shows his friend an explicit photo of his girlfriend by flashing the image from his cellphone screen, the harm caused by the temporary disclosure is less significant and more controllable than if that man posted the photo on a revenge porn website or emailed it to their mutual friends. The harms of nonconsensual pornography stem from its uncontainable public accessibility by employers, family, friends, and strangers;¹⁷⁶ thus, federal criminal statutes should be limited to disclosures to a public audience.

A clear *mens rea* is essential to avoid the risk of criminalizing innocent behavior. The statute includes an intent element to avoid criminal liability for “accidental” disclosure in cases of computer hacking or unintentional disclosure by a partner.¹⁷⁷ Under the proposal, prosecutors must show that the discloser distributed the images knowing that the subject did not consent to their disclosure and that the subject had a reasonable expectation that the images would be kept confidential within the confines of the private relationship.¹⁷⁸ The statute further narrows the regulation with a requirement that the accused intentionally disclose the image “to harass or harm” the individual.¹⁷⁹ This element imposes criminalization only in instances of intentional disclosure (versus accidental disclosure), where any shred of content value is buried by conduct with the purpose to harm victims.¹⁸⁰ Although this language may prevent prosecution in

171. See discussion *supra* Section I.B.

172. See discussion *supra* Section I.B.

173. And thus is separately addressed through other laws.

174. See, e.g., Video Voyeurism Act, 18 U.S.C. § 1801 (2012).

175. For discussion of the significant harm caused by the public dissemination of nonconsensual pornography, see discussion *supra* Section I.C.

176. See discussion *supra* Section I.C.

177. The California law also includes this *mens rea* element. See CAL. PENAL CODE § 67(j)(4)(A) (West 2014).

178. The basis for this reasonable expectation is explained *supra* Section I.B.

179. California’s statute alternatively requires proof that the discloser intended to inflict serious emotional distress by the disclosure. See CAL. PENAL CODE § 67(j)(4)(A) (West 2014). That requirement is narrower than the intent to harm or harass.

180. The intent requirement narrows the law to only apply when the defendant intended to harm or harass the victim. It may be challenging for prosecutors to prove a defendant’s intent without an admission from the defendant, but the rebuttable presumption of intent to harm by

instances where the discloser carelessly shows an individual's naked photo to others without knowing the subject did not consent, this particular language is necessary to survive a constitutional challenge and prevent overly broad criminalization.

In light of the contextual nature of consent, the statute restricts the dissemination of private images only when the disclosure occurs "without that individual's consent." To properly interpret the statute, the only question regarding consent is whether the individual consented to the disclosure of the photo, regardless of whether the individual consented to the original taking or possession of the photo.¹⁸¹ This language allows the statute to apply to selfies.¹⁸² There is no justifiable legal distinction between an image taken by the victim's partner and an image taken by the victim if both types of images are distributed beyond the context of the victim's privacy expectations and without the victim's consent.¹⁸³ Without language to ensure the coverage of selfies, the statute would be virtually toothless.¹⁸⁴ As with any crime, the prosecution would carry the burden of demonstrating the element of non-consent to show that the individual did not consent to the disclosure of the photo. If the accused demonstrated express consent by the individual to disseminate the photo, then the disclosure would not be criminal under the statute.

The statute requires the individual to have a reasonable expectation of privacy that the photo will only be disclosed to their partner.¹⁸⁵ Courts must determine the victim's reasonable expectation of privacy by an objective standard to survive constitutional challenge. This language is necessary and helpful for several reasons. First, the reasonable expectation requirement further limits the scope of the statute for the purpose of avoiding First Amendment violations.¹⁸⁶ Second, when an individual has a reasonable expectation that the photo will not be publicly broadcast, the

nonconsensual disclosure is included for this purpose. Even in situations where the defendant had additional intentions, such as profiting from selling the photo or increasing website traffic, there is a presumption they had reckless disregard for harm to the victim.

181. The various consents should be relatively clear to distinguish. *See supra* note 36.

182. California's law excludes self-shots. *See* CAL. PENAL CODE § 67(j)(4)(A) (West 2014).

183. *See* Michael L. Baroni, *New "Revenge Porn" Law Is Impotent*, OC LAWYER (Feb. 2014), <http://www.virtualonlineeditions.com/article/+New+%E2%80%9CRevenge+Porn%E2%80%9D+Law+Is+Impotent/1620323/0/article.html> (noting issues with courts deciding who "took" the image).

184. *See supra* notes 37–38 and accompanying text.

185. Franks suggests a reasonable expectation requirement in Version 2 of her Model State Statute and in Option 2 in her Model Federal Statute. *See* Franks, Working Paper, *supra* note 33, at 9–14.

186. It has been argued that courts may interpret the reasonable expectation of privacy too narrowly. Franks, Comment to *Why We Need*, *supra* note 88 (noting that the statute "might be interpreted too narrowly to do victims much good"). However, to limit the statute's scope for First Amendment purposes, the inclusion of this requirement is more favorable than not.

disclosure can be readily viewed as a breach of confidential trust,¹⁸⁷ similar to that in a fiduciary relationship.¹⁸⁸ If the individual's expectation of privacy is reasonable as defined in the statute, it is more likely that both partners expressed the understanding that the photos were to remain within the confines of the private relationship.¹⁸⁹ The nonconsensual disclosure of intimate photos within this context of mutually understood privacy is where the line-drawing for unprotected speech occurs.¹⁹⁰ Third, the expectation of privacy further reinforces the other crucial elements and exceptions of the statute. An individual cannot have a reasonable expectation of privacy if they give consent to have the photos disclosed beyond the private relationship. An individual who is voluntarily exposed in public or commercial settings cannot have a reasonable expectation of privacy. Finally, when a victim is reasonable in expecting the photo to remain confidential, the invasion of lawful privacy is more obvious and society is less likely to blame the victim.¹⁹¹ The statute's rebuttable presumption of a reasonable expectation of privacy helps distinguish situations where invasion of a victim's privacy stems from a reasonable understanding that the photos were to remain within the confidential relationship from situations like one-night stands or girls sexting unassuming acquaintances where no such understanding is shared between the parties.¹⁹²

187. Implied contracts of confidentiality may form between couples in "intimate relationships" during "a course of romantic dealing between two adults in which the parties intend to form or at least investigate the possibility of forming an ongoing, stable relationship." In intimate relationships, "private[] embarrassing information," including "sexy pictures," is exchanged between the partners. McClurg, *supra* note 81, at 917, 923, 927.

188. As in fiduciary relationships, the implied confidentiality creates a reasonable expectation of privacy. Because intimate relationships do not include purely physical relationships, no breach of confidentiality or reasonable expectation of privacy would form in situations like one night stands or mere acquaintances. *Id.* at 925.

189. This requirement may be difficult for prosecutors to establish, but the term's definition and the rebuttable presumption included in the proposed statute are helpful. Courts can also look to the interpretation of this term in the Video Voyeurism Act. 18 U.S.C. § 1801(a)–(b) (2012).

190. See Pete Brush, *1st Amendment Poses Hurdle for NY 'Revenge Porn' Bills*, LAW360 (Oct. 08, 2013), <http://www.law360.com/articles/479052/1st-amendment-poses-hurdle-for-ny-revenge-porn-bills>. Discussing bills to crack down on revenge porn in New York, privacy expert Neil Richards stated that the statute's inclusion of a reasonable expectation of privacy presumption within private relationships "does a nice job of balancing the important personal interests at stake with the First Amendment. The First Amendment is strong, powerful and important—but it's not absolute." *Id.* (internal quotation marks omitted).

191. See *id.* (stating that the reasonable expectation language "take[s] away the ability of a lawyer to help a client beat a criminal charge on free-speech grounds by arguing that, in sharing the image in the first place, the complainant waived any expectation of privacy").

192. It is crucial that the language does not limit protection to only the confines of a private or confidential relationship. Mary Anne Franks, Comment to *Legal Developments in Revenge Porn: An Interview with Mary Anne Franks*, CONCURRING OPINIONS (Oct. 10, 2013), <http://www.concurringopinions.com/archives/2013/10/legal-developments-in-revenge-porn-an-interview-with-mary-anne-franks.html> ("[I]t applies whenever a person has a reasonable expectation of

Section (C) of the proposed statute establishes clear exceptions to prevent overbroad application and unconstitutionality. If the images are matters of legitimate public importance or legitimate law enforcement activity, their disclosure should not be criminalized. As with any statutory exemption, whether specific facts fall under one of the exceptions will be determined by the court.¹⁹³

There remains the possibility of including an additional requirement of proof of harm to the victim. It has been suggested that, in order to pass constitutional muster, the statute should require that the victim suffer harm such as emotional distress, economic harm, or harassment by third parties. However, the statute purposefully excludes this requirement because it includes other elements that are fundamentally linked to the harm suffered by the victim. The “to harm or harass that individual” language already requires prosecutors to prove that the discloser knew or intended the victim would suffer harm. The definition of disclosure also requires the disclosure be available to a public audience because such wide distributions inherently hurt victims. As to the argument that the law should not criminalize disclosure that has no impact on victims: Virtually every victim who seeks criminal relief under the statute would have suffered at least some emotional distress.¹⁹⁴ Any further requirement of harm actually suffered would be easy to prove and an unnecessary addition to the statute.

CONCLUSION

The law currently provides virtually no practical remedy to victims of involuntary pornography. Once partners in expressive loving relationships, victims quickly become unwilling subjects of harassment and abuse with no legal recourse or avenue to control the scope of the damage. As society comes to appreciate the lack of legal protection for instances of nonconsensual disclosure, fear will hinder individuals in private relationships from engaging in this intimate expression.

A federal criminal statute banning nonconsensual pornography would be a progressive act, reinforcing the crucial interest in protecting confidential expression in the confines of private relationships. A narrowly crafted federal statute would complement existing laws, provide force in instances of internet disclosure and still be acceptable under the First Amendment. While it cannot undo the humiliation suffered from these involuntary exposures, a new law can offer victims some recourse and act

privacy. It simply additionally makes clear that a person who consents to an image being taken within such a relationship retains an expectation of privacy beyond that relationship.”).

193. Regarding the exception for matters of public concern, the Court in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), articulated some guiding principles on whether speech concerns matters of public importance. See *id.* at 1216.

194. If this requirement were added, the victim would likely only need to have suffered some emotional distress, which would almost always arise after disclosure of private explicit photos.

as a deterrent to the individuals who knowingly choose to inflict harm through this pernicious method of cyber-harassment.

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