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“FOR HIS EYES ONLY”: Why Federal Legislation Is Needed To Combat Revenge Porn

Erica Souza*

INTRODUCTION

He told her the pictures would be for his eyes only.¹ He promised they would be hidden away on a compact disc.² So Annmarie Chiarini, after relentless coaxing, agreed to send nude photographs of herself to her long-distance boyfriend, Joey.³

Annmarie’s ordeal began when they broke up in 2010.⁴ Joey promised to “destroy” her.⁵ He put the disc containing Annmarie’s photos up for auction on eBay under the listing “English Professor Nude Photos!” and forwarded the link to Annmarie’s friends and acquaintances.⁶

Consumed by humiliation, Annmarie oscillated “between panic and persistent anxiety.”⁷ She would often wake up at 3:00 AM

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¹ Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don’t Want Anyone Else to Face this*, THE GUARDIAN (NOV. 19, 2013, 7:30 AM), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

² Anne Flaherty, *‘Revenge Porn’ Victims Press for New Laws*, THE BIG STORY (NOV. 15, 2013, 5:34 PM), <http://bigstory.ap.org/article/revenge-porn-victims-press-new-laws>.

³ Chiarini, *supra* note 1. “Joey” is the name Annmarie uses to identify her ex-boyfriend in her article. His name has been changed.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

to check her email and run a Google search of her name before being able to settle down.⁸ Though the e-Bay auction had been removed, her torment was not over.⁹ During one night of frantic searching, Annmarie found a pornographic website with a profile claiming to be hers.¹⁰ It featured the photos from Joey's disc, as well as her full name, the city where she lived, the name of the college where she taught, and a solicitation for sex.¹¹ The profile was only 14 days old, but it had already been viewed over 3,000 times.¹² Annmarie later learned that copies of the original disc were mailed to her boss and to her son's kindergarten teacher.¹³

Damage control ate up Annmarie's time. She reported Joey for abuse on several websites and brought online printouts to a local police precinct.¹⁴ The officers merely snickered and explained that there was nothing they could do as no crime had been committed.¹⁵ According to Annmarie, "It drove my shame and embarrassment to a paralyzing level."¹⁶ She feared for her safety.¹⁷ Following her therapist's advice, Annmarie requested leave from work, but her employer denied her request under the rationale that she "perpetrated the incident" herself.¹⁸ She again contacted the police, but received the same response: because she originally posed for and sent the photographs voluntarily, it was technically legal in the state where Annmarie lived for someone else to post those photographs, even without her consent.¹⁹

Nonconsensual pornography, commonly referred to as "revenge porn," is defined as the distribution of sexually graphic images of individuals "without consent or for no legitimate purpose."²⁰ Often these intimate photos or videos are originally created or obtained with the consent of the subject within the confines of an intimate relationship.²¹ Images need not to have been posted by "a

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Flaherty, *supra* note 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Chiarini, *supra* note 1.

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, CYBER CIVIL RIGHTS INITIATIVE 2 (Nov. 2, 2015), <http://www.cybercivilrights.org/guide-to-legislation>.

²¹ *Id.*

scorned ex-lover or friend, in order to seek revenge after a relationship has gone sour,”²² or include nudity²³ in order to be considered revenge porn. A hacker or a rapist can also perpetrate revenge porn simply by circulating an explicit image of a person without his or her consent.²⁴

Nonconsensual pornography causes dramatic and, in some cases, irreversible harm to the victim.²⁵ Beyond the obvious embarrassment suffered,²⁶ victims are often threatened with bodily harm,²⁷ fired from their jobs,²⁸ or forced to change their names.²⁹ Some have been driven to suicide.³⁰

Today, intimate photo-sharing among partners is common,³¹ and not coincidentally, revenge porn postings are on the rise.³² In the absence of relevant criminal statutes, perpetrators are rarely

²² Mary Anne Franks, *What is Revenge Porn? Frequently Asked Questions*, CYBER CIVIL RIGHTS INITIATIVE (2015), <http://www.cybercivilrights.org/faqs>.

²³ See *infra* Part IV(B)(4) (describing that intimate images not including nudity can be equally harmful).

²⁴ This note however will focus primarily on images taken or received with consent within the confines of a relationship. See Franks, *A Guide for Legislators*, *supra* note 20, at 2.

²⁵ See *id.*

²⁶ See, e.g., Chiarini, *supra* note 1.

²⁷ See, e.g., Ruth Styles, *Angry Victims of Revenge Porn Reveal How They Were Deluged with Revolting Sexual Comments and Rape Threats After Explicit Photos Were Posted Online*, DAILY MAIL (last updated Aug. 17, 2015, 7:51 AM), <http://www.dailymail.co.uk/femail/article-3200674/Revenge-porn-victims-tell-humiliation-anger.html> (Victim, Laura, describes receiving comments such as, “I want to rape you now”).

²⁸ See Ariel Ronneburger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 SYRACUSE SCI. & TECH. L. REP. 1, 9 (2009) (an award-winning Texas high school teacher was fired after a co-worker discovered nude photos of the teacher online).

²⁹ See, e.g., Holly Jacobs, *A Message from Our Founder, Dr. Holly Jacobs*, CYBER CIVIL RIGHTS INITIATIVE (Sept. 8, 2013), <http://www.cybercivilrights.org/a-message-from-our-founder-holly-jacobs>.

³⁰ See, e.g., Emily Bazelon, *Another Sexting Tragedy*, SLATE (Apr. 12, 2013, 6:06 PM), http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parsons_how_should_the_legal_system_treat_nonconsensual.html (reporting on two teenage girls who hanged themselves after being victimized and humiliated).

³¹ Sheila M. Eldred, *Why Do People Take Nude Photos of Themselves?*, DISCOVERY NEWS (Sept. 3, 2014, 3:20 PM), <http://news.discovery.com/human/life/why-do-people-take-nude-photos-of-themselves-140903.htm> (citing a McAfee study in which 54% of U.S. adults said they have participated in “sexting,” and 70% of 18-24 year olds admit to receiving “racy texts, nude photos or explicit videos” in a message).

³² Franks, *A Guide for Legislators*, *supra* note 20, at 2. An average of 20 to 30 victims contact the Cyber Civil Rights Initiative (CCRI) each month.

held accountable for their actions and victims are rarely remedied.³³ “In the real world, civil lawsuits are no remedy at all,” says Mitchell Matorin, an attorney who has represented revenge porn victims.³⁴ Civil litigation is costly,³⁵ and even if a lawyer is willing to take on a case,³⁶ the harms inflicted on revenge porn victims often do not fit nicely into existing legal theories of remediable injury.³⁷ To address this problem, twenty-seven states have enacted laws that criminalize the distribution of nonconsensual pornography.³⁸ However, these state laws vary in scope,³⁹ and they often contain loopholes, such as prohibiting prosecution when the images originated as “selfies,”⁴⁰ or requiring a specific motive of the perpetrator.⁴¹ This leaves too many victims without a remedy.

One state, Illinois, has crafted a law that addresses these failings. The Non-Consensual Dissemination of Private Sexual Images statute in the Illinois Criminal Code allows a revenge porn victim

³³ See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 349 (2014).

³⁴ Mitchell J. Matorin, *In the Real World, Revenge Porn is Far Worse Than Making It Illegal*, TPM (Oct. 18, 2013, 6:00 AM), <http://talkingpointsmemo.com/cafe/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn>.

³⁵ Bruce Anderson of Cyber Investigation Services estimates that it can cost anywhere from \$15,000 to \$100,000 to hire a lawyer to bring a civil suit for revenge porn. Allison Pohle, *Why Doesn't Massachusetts Have a Revenge Porn Law?*, BOSTON.COM (March 23, 2015, 6:39 PM), <http://www.boston.com/news/2015/03/23/why-doesn-massachusetts-have-revenge-porn-law/JGIysBq-JOVpypG3dvqYInL/story.html>.

³⁶ See *Last Week Tonight with John Oliver: Online Harassment* (HBO), YouTube (June 21, 2015) (referencing an interview with Annmarie Chiarini where she describes the difficulty in finding a lawyer to take her case).

³⁷ See generally Citron & Franks, *supra* note 33, at 349; *infra* Part III.

³⁸ *27 States Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE (2016), <http://www.cybercivilrights.org/revenge-porn-laws/> (last visited Apr. 14, 2016).

³⁹ See, e.g., N.J. STAT. ANN. § 2C:14-9 (West 2004) (sharing explicit images without permission is Invasion of Privacy in the Third Degree and punishable by three to five years in prison and a fine up to \$30,000); CAL. PENAL CODE § 647(j)(4) (2015) (revenge porn is a disorderly conduct misdemeanor punishable by up to six months in jail and/or a fine up to \$1,000).

⁴⁰ “Selfie” is defined as a “photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media.” *Selfie*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited Apr. 21, 2016); see, e.g., CAL. PENAL CODE § 647(j)(4)(D)(i)-(iii) (2015); Grace Wyler, *Do Revenge Porn Laws Actually Help Anyone?*, MOTHERBOARD (Oct. 9, 2013, 8:30 AM), <http://motherboard.vice.com/blog/do-revenge-porn-laws-actually-help-anyone> (pointing out the loophole in California’s law as it does not cover images that originated as “selfies,” and only penalizes individuals who both take and distribute images).

⁴¹ See, e.g., HAW. REV. STAT. § 711-1110.9(1)(b) (2014); N.Y. PENAL LAW § 250.45(1) (McKinney 2014).

to recover damages no matter the origin of the images, and requires only an intent to disseminate the image rather than an intent to cause harm.⁴²

This Article argues that lawmakers should adopt a federal criminal statute modeled after Illinois’ in order to prevent perpetrators of revenge porn from slipping through the cracks of inadequate state law.⁴³ Part II describes how revenge porn has become a widespread problem within the United States, explaining why it should legally be considered a form of sexual abuse and addressing common misconceptions regarding consent in the context of personal-information sharing. Part III discusses the current lack of legal remedies available to revenge porn victims, and finally, Part IV proposes a comprehensive amendment to the United States Code aimed at closing common loopholes in revenge porn laws and providing victims with the recognition and remedies they deserve.

I. REVENGE PORN IS SEXUAL ABUSE

A. *A Brief History of Revenge Porn*

Though nonconsensual pornography may seem like a 21st century problem, it first arose as a legal issue in the 1980s. In February of 1980, a Texas couple, LaJuan and Billy Wood, were shocked to discover that LaJuan’s nude image appeared in the latest issue of *Hustler Magazine*.⁴⁴ At that time, *Hustler Magazine* published a monthly column with photos submitted by readers of themselves.⁴⁵ The couple recognized the image as one they had taken together, but they insisted they never submitted it to *Hustler*.⁴⁶ In fact, the photograph had been stolen from their bedroom drawer by a neighbor who mailed it to the magazine along with a forged consent form.⁴⁷ *Hustler* published the photo along with information about LaJuan, some of which was true, such as her name and her hobby of collecting arrowheads; some of it false and inflammatory, such as her age, address, and fantasy of being “tied down and screwed by two bikers.”⁴⁸ As a result, LaJuan suffered severe mental anguish requiring psychological treatment for six weeks.⁴⁹

⁴² 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2015).

⁴³ *Id.*; see 27 *States Have Revenge Porn Laws*, *supra* note 38.

⁴⁴ *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1085 (5th Cir. 1984).

⁴⁵ *Id.* at 1086.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1085-86.

⁴⁸ *Id.* at 1086.

⁴⁹ *Id.*

Since then, technology has made it vastly easier to distribute explicit images of people without their consent. A 2013 study conducted by the Cyber Civil Rights Initiative found that over 60 percent of the 1606 total respondents had shared intimate photos or videos of themselves with another,⁵⁰ and 23 percent had been victims of revenge porn.⁵¹ The same study also found that women were the victims in roughly 90 percent of revenge porn cases,⁵² and over 80 percent of revenge porn victims had taken the original photo or video themselves.⁵³

B. *Vehicles for Revenge*

Despite the dispute over the wisdom of adults taking and sending a nude “selfie,”⁵⁴ this behavior is both legal and very common.⁵⁵ Certainly many individuals understand the risks as the media thrives on exposing celebrities⁵⁶ and politicians⁵⁷ who take and send nude photos or videos. Ironically, however, the media also promotes sending photos as a “fun, easy and usually harmless way to spice up” a couple’s love life.⁵⁸ Therefore, because of the social acceptability of sending such images⁵⁹ coupled with the wealth of technology to facilitate such conduct,⁶⁰ any law criminalizing revenge porn must include selfies.

⁵⁰ *Revenge Porn Statistics*, CYBER CIVIL RIGHTS INITIATIVE I, http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/12/RPStatistics.pdf (last visited Apr. 20, 2016).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See How to Stop from Being a Victim of Revenge Porn*, DMCA, <https://www.dmca.com/FAQ/How-to-stop-from-being-a-victim-of-revenge-porn> (last visited Apr. 17, 2016) (“Do NOT take pictures (or videos) of yourself in any compromising position especially in various stages of undress – period.”) (capitalization in original).

⁵⁵ *See Eldred, supra* note 31.

⁵⁶ *See, e.g., id.* (referring to nude photos of actress Jennifer Lawrence that were ripped from Apple’s iCloud).

⁵⁷ Anthony Weiner resigned from Congress in 2011 amid the publication of intimate photos that he originally sent through text messages. *See, e.g., 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.

⁵⁸ 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).

⁵⁹ *See id.*

⁶⁰ Applications like “Snapchat” indirectly encourage sexting on the premise that images will self-delete in a matter of seconds. However, their privacy policy admits it cannot ensure deletion. *See Nicole A. Poltash, Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH. 14, 21

Revenge porn can also originate as an image taken of the victim by another person. Typically, these images are created consensually within the confines of an intimate relationship.⁶¹ It is often the scorned ex-lover who posts these images without the victim’s consent, as happened to Annmarie.⁶² However, as LaJuan’s experience demonstrates, the perpetrator may be a thief or a hacker rather than the victim’s intimate partner.

In addition to the nonconsensual dissemination of explicit images, the dissemination of personal information in connection with such images, known as “doxxing,” can be even more harmful.⁶³ More than half of all nonconsensual images posted on the Internet are accompanied by victims’ names.⁶⁴ The harm caused by posting personal identifying information alongside revenge porn can be enormous.⁶⁵ Perpetrators have even gone as far as to divulge victims’ social security numbers.⁶⁶ When coupled with the nonconsensual dissemination of a pornographic image, doxxing is a potent weapon for perpetrators, as it makes the images easier to find and easier to attribute to the victim.⁶⁷

An especially pernicious feature of revenge porn is a process known as “downstream distribution,” or the re-posting of images on the Internet by third parties who are not the original poster.⁶⁸ While the initial revenge porn post may eventually be removed, the offending image can be re-posted by others who captured it before its removal, making it virtually impossible for a victim to completely eradicate the images from the Internet once and for all.

(2013) (“Snapchat does not and cannot entirely live up to this claim [that “the data is completely deleted”], giving users a false sense of security”) (quoting Meghan Kelly, *Sorry, Guys – Snapchat Videos can be Saved (Updated)*, VENTUREBEAT.COM (Dec. 28, 2012, 7:52 AM), <http://venturebeat.com/2012/12/28/save-snapchat-content/>).

⁶¹ See, e.g., Lena Chen, *I was the Harvard Harlot*, SALON (May 23, 2011, 6:01 PM), http://www.salon.com/2011/05/24/harvard_harlot_sexual_shame.

⁶² *Revenge Porn Statistics*, *supra* note 50, at 1 (63% of victims said the material was posted by an ex-boyfriend or ex-girlfriend.).

⁶³ C.A. GOLDBERG PLLC, *Let’s Talk About Dox, Baby*, (Mar. 10, 2014), <http://www.cagoldberglaw.com/lets-talk-about-dox-baby>.

⁶⁴ *Revenge Porn Statistics*, *supra* note 50, at 1 (59% of victims said their full name accompanied the photo).

⁶⁵ See generally *id.*

⁶⁶ *Id.*

⁶⁷ See *id.*

⁶⁸ John Stang, *‘Revenge Porn’ Could Face New Legal Retaliation*, CROSSCUT (Feb. 11, 2015), <http://crosscut.com/2015/02/revenge-porn-face-new-legal-retaliation/> (“It’s not the original posting that does the danger, but the downstream reposting,” said King County assistant prosecutor, Gary Ernsdorff).

This is why a single revenge porn post can result in a victim living in perpetual fear, changing her name, and getting fired from her job.⁶⁹

C. *Revenge Porn as Sexual Abuse*

The primary issue underlying revenge porn is consent. While voluntarily sharing a photograph or video with another person is by definition consensual, this sharing is often done with an implied or expressed understanding that it will remain private between the parties.⁷⁰ After all, research published by the tech company, McAfee, in 2013 shows that 94 percent of Americans trust that their intimate data and photographs are “safe in the hands of their partners.”⁷¹ Nevertheless, perpetrators continue to disseminate these images even if they were received in the context of an intimate relationship. Criminalizing the dissemination of revenge porn would encourage society to acknowledge that posting a sexually explicit image of an individual without her consent amounts to sexual abuse.⁷²

Though nonconsensual pornography does not involve physical contact between victim and perpetrator, the harm to the violated party can be as severe as that inflicted upon victims of physical sexual abuse.⁷³ As U.S. Supreme Court Justice Horace Gray wrote in 1891, “The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one . . . to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass. . . .”⁷⁴ Some members of the international community have endorsed definitions of sexual violence that do not require physical contact. In *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda noted that “[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”⁷⁵ Additionally, in *Prosecutor v. Furundžija*, the International Criminal Tribunal for the former Yugoslavia recognized “all serious abuses of a sexual

⁶⁹ *Revenge Porn Statistics*, *supra* note 50, at 2.

⁷⁰ Citron & Franks, *supra* note 33, at 354.

⁷¹ *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, MCAFEE FOR BUSINESS (Feb. 4, 2013), <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx>.

⁷² Citron & Franks, *supra* note 33, at 362.

⁷³ *See Revenge Porn Statistics*, *supra* note 50, at 1-2 (93% of revenge porn victims have suffered significant emotional distress as a result and over 50% have fears about how it will affect professional advancement and their children).

⁷⁴ *Union P. R. Co. v. Botsford*, 141 U.S. 250, 252 (1891).

⁷⁵ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <http://www.unictcr.org/sites/unictcr.org/files/case-documents/ictcr-96-4/trial-judgements/en/980902.pdf>.

nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”⁷⁶ Revenge porn, though not a physical act, is a forced sexual indignity and should therefore qualify as a form of sexual abuse.

Further, the condemnation of child pornography, both legal and societal, illustrates that sexual images can be harmful to an individual and qualifies as a form of sexual abuse.⁷⁷ In *New York v. Ferber*, the Supreme Court noted that the distribution of child pornography is “intrinsically related to the sexual abuse of children,” adding that perhaps “the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”⁷⁸ Though child pornography and revenge porn are not equivalent, in both cases it is the lack of consent and the harm suffered by victims—which is not necessarily connected to any abusive physical contact—that renders their distribution repellent to society.

Some argue against criminalizing revenge porn on the grounds that consent to share an image translates to consent in other contexts.⁷⁹ According to this argument, once an individual sends an image of herself to another or allows another to photograph her, the keeper of that photograph may do with it what he will.⁸⁰ Individuals who share an intimate photo, critics contend, do so “in the knowledge that it may one day end up online.”⁸¹

However, it is crucial to distinguish between isolated acts of consent or omissions thereof. The consent to create and send a photo or the consent to be photographed by another is one act of consent that cannot be equated with consenting to distribute that

⁷⁶ Case No. IT-95-17/1-T, Judgment, ¶186 (Int’l Crim. Trib. for the Former Yugoslavia, Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

⁷⁷ See *Child Pornography*, U.S. DEP’T OF JUSTICE (June 3, 2015), <http://www.justice.gov/criminal-ceos/child-pornography> (“Images of child pornography are also referred to as child sexual abuse images.”).

⁷⁸ *New York v. Ferber*, 458 U.S. 747, 759-60 (1982).

⁷⁹ Derek Mead, *Why Isn’t Revenge Porn Illegal Everywhere?*, MOTHERBOARD (Sept. 5, 2013, 11:00 AM), <http://motherboard.vice.com/blog/why-isnt-revenge-porn-illegal-everywhere>.

⁸⁰ *Id.*

⁸¹ Lara Prendergast, *Revenge Porn’s Ukip Poster Girl Highlights the Dangers of Digital Media*, THE SPECTATOR (Apr. 28, 2014, 3:00 PM), <http://blogs.new.spectator.co.uk/2014/04/revenge-porns-new-poster-girl-highlights-the-dangers-of-digital-media>.

photo to others outside of the private relationship,⁸² because those who consent to be photographed or send a photograph typically do so with a reasonable expectation of privacy.⁸³

While the U.S. Supreme Court has suggested that an individual forfeits an expectation of privacy for information voluntarily disclosed to a third party,⁸⁴ this doctrine has been questioned by courts in contexts in which individuals may still have reasonably expected the information to remain private with respect to third parties.⁸⁵ Regarding the Third Party Doctrine, Justice Sotomayor wrote in her concurring opinion in *United States v. Jones* that:

[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. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties.⁸⁶

Justice Sotomayor suggests that certain information deserves privacy protection even if it has been voluntarily shared with another individual. With respect to nonconsensual pornography, the Third Party Doctrine should not apply. Rather, the law should focus objectively on the extent of public dissemination that a reasonable person should have expected to follow from the consensual disclosure.⁸⁷ Thus, the act of sharing an intimate image that carries a reasonable expectation of confidentiality should not result in a waiver of all privacy expectations once the image is in another's possession.

⁸² See DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE*, 147 (Harvard Univ. Press, 2014) ("A victim's consensual sharing of nude photos with a confidante is often regarded as wide-ranging permission to share them with the public.").

⁸³ Citron & Franks, *supra* note 33, at 354 ("[V]ictims have told us time and again, they shared their explicit images or permitted the naked photos to be taken because, and *only* because, their partners assured them that the explicit images would be kept confidential.").

⁸⁴ *United States v. Miller*, 425 U.S. 435, 443 (1976); *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).

⁸⁵ See, e.g., *State v. Walton*, 324 P.3d 876, 901 (Haw. 2014) (holding that the Third Party Doctrine is "untenable in a technological age where in the ordinary course of life, individuals will of necessity have disclosed a boundless amount of information to third parties"); *Commonwealth v. Cote*, 556 N.E.2d 45, 50 (Mass. 1990) (holding that the Third Party Doctrine is only applicable in cases where the individual is aware that the information shared will not remain private).

⁸⁶ *United States v. Jones*, 132 S.Ct. 945, 957 (2012) (Sotomayor, J., concurring).

⁸⁷ Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 921 (2005).

However, current laws fail to offer recourse for violations of such privacy when they limit recovery for revenge porn victims.

II. CURRENT LAWS FAIL TO ADEQUATELY ADDRESS THE PROBLEM

Although some states have recently made efforts to address the issue of nonconsensual pornography, these attempts fail to offer justice for all victims. As a result of time and monetary constraints, it is impossible or impractical for the majority of revenge porn victims to pursue civil remedies.⁸⁸ Seeking justice in the criminal system is also fraught with challenges. Current state efforts to criminalize revenge porn have been largely ineffective, either because they are too wide-sweeping, calling into question their constitutionality; or because they are narrow and loophole-filled, denying a remedy to too many victims.⁸⁹ In this section, I explore the challenges of creating appropriate civil and criminal penalties, and argue that, in their current state, these laws do little to remedy victims or dissuade perpetrators.

A. *Civil Remedies Are Impractical*

Many of those opposed to criminalizing revenge porn argue that existing civil remedies can provide sufficient redress for victims.⁹⁰ Unfortunately, this is not accurate. Whether based on theories of tort or copyright, civil suits offer only a "modest deterrence and remedy,"⁹¹ and are often never pursued by possible plaintiffs for practical reasons.⁹²

1. Tort

In theory, tort law seems to offer potentially adequate remedies to victims of revenge porn. Victims can bring suit under a theory of intentional infliction of emotional distress (IIED) against the perpetrator if they can prove severe emotional suffering intentionally or recklessly caused by the perpetrator's outrageous conduct.⁹³ Victims could also potentially bring suit under the privacy tort of public disclosure of private fact.⁹⁴ Here, a plaintiff would have to

⁸⁸ See generally Citron & Franks, *supra* note 33, at 357.

⁸⁹ See generally Hope Robertson, *The Criminalization of Revenge Porn*, CAMPBELL L. OBSERVER (July 21, 2015), <http://campbelllawobserver.com/the-criminalization-of-revenge-porn>.

⁹⁰ 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>.

⁹¹ Citron & Franks, *supra* note 33, at 357.

⁹² *Id.*

⁹³ Restatement (Second) of Torts § 46 (Am. Law Inst. 1965).

⁹⁴ *Id.* § 652D.

prove the publicized matter (presumably the nonconsensual image) is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public.⁹⁵ Victims, depending on their specific circumstances, could possibly succeed with this claim, as publishing a private person's nude photograph is not generally a matter that legitimately concerns the public.⁹⁶ However, like other tort claims, both IIED and public disclosure impose substantial burdens for victims to overcome through strong language such as "outrageous," "severe," and "highly offensive."⁹⁷

While it is true that revenge porn victims have brought claims in tort and won,⁹⁸ most victims decline to bring suits for several reasons.⁹⁹ First, most victims lack the necessary resources and simply cannot afford it.¹⁰⁰ As comedian, John Oliver, humorously articulated the quandary, "most people don't keep a shoebox full of money marked: 'Just in case a total piece of shit tries to ruin my life.'"¹⁰¹ Having funds available to bring suit is even more difficult for victims who have lost their jobs because of the online revenge posts and are struggling as it is just to pay the rent.¹⁰² Resources aside, it may be challenging simply to find an attorney willing to take the

⁹⁵ *Id.*

⁹⁶ See generally *Daily Times Democrat v. Graham*, 162 So. 2d 474, 477 (Ala. 1964) (holding a newspaper violated a woman's right to privacy when it published a picture of her body exposed after her dress was blown up by air jets because there was "nothing of legitimate news value in the photograph" and because it "could properly be classified as obscene."); see also William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 416 n.270 (1960) ("It may nevertheless be suggested that there must be yet some undefined limits of common decency as to what can be published about anyone; and that a photograph of indecent exposure, for example, can never be legitimate 'news.'"); Nick Madigan & Ravi Somaiya, *Hefty Damages to Hulk Hogan in Gawker Suit*, N.Y. TIMES, March 18, 2016, at A1 (reporting on a Florida court holding it was an invasion of privacy for Gawker to publish a sex tape of Hulk Hogan).

⁹⁷ Sarah Bloom, *No Vengeance for 'Revenge Porn' Victims: Unraveling Why This Latest Female-centric, Intimate-partner Offense is Still Legal and Why We Should Criminalize It*, 42 FORDHAM URB. L.J. 233, 257-58 (2014).

⁹⁸ See, e.g., *Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *7 (D. Haw. June 12, 2011).

⁹⁹ See generally Citron & Franks, *supra* note 33, at 358.

¹⁰⁰ *Id.*; see Pohle, *supra* note 35; see e.g., *Last Week Tonight*, *supra* note 36 (playing a piece of an interview with Annmarie Chiarini where she describes the high cost of finding a lawyer and not having the money as a single mother).

¹⁰¹ *Last Week Tonight*, *supra* note 36.

¹⁰² Citron & Franks, *supra* note 33, at 358.

case.¹⁰³ Many lawyers are not familiar with this area of law,¹⁰⁴ and while some may be sympathetic to victims and offer their services on a *pro bono* basis, their numbers are few and their practices subject to geographic limitations.¹⁰⁵ In addition, plaintiffs must generally proceed in court under their real, legal names.¹⁰⁶ This may dissuade from commencing suit a victim who fears unwanted publicity or has unofficially changed his or her name for privacy reasons.¹⁰⁷

It is even more difficult to secure a remedy for a victim when a perpetrator is “judgment proof” or unidentifiable. Even in the most ideal of circumstances, defendants often do not have enough money to make the victim “whole” again.¹⁰⁸ In other cases, victims cannot identify the perpetrator because he or she is a third person who continues to repost an image on the Internet.¹⁰⁹ A victim would receive little to no remedy in cases like these and, ultimately, might spend thousands of dollars on legal fees without seeing any result.¹¹⁰ Moreover, regardless of any potential damage awards, suing a person in tort will not remove the photos from the Internet and even a preventive injunction cannot guarantee that others will stop re-posting the image.¹¹¹

Website operators have no incentive to regulate the activities of their users or track users down because operators generally have legal immunity under Section 230 of the Communications Decency

¹⁰³ See *Last Week Tonight*, *supra* note 36 (referencing Annmarie’s interview where she describes a lawyer denying her case and telling her to get better boyfriends).

¹⁰⁴ Citron & Franks, *supra* note 33, at 358.

¹⁰⁵ EndRevengePorn.org lists 28 “revenge porn” lawyers who are licensed to practice in only 19 states as well as the District of Columbia and Puerto Rico. *Attorneys, CYBER CIVIL RIGHTS INITIATIVE*, <http://www.cybercivilrights.org/professionals-helping-victims/> (last visited Apr. 21, 2016).

¹⁰⁶ Citron & Franks, *supra* note 33, at 358.

¹⁰⁷ *Id.*

¹⁰⁸ See *id.*; see also Bloom, *supra* note 97, at 258.

¹⁰⁹ Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 530 (2013) (“The Internet’s architectural protocols do not provide an easy way for one user to identify other users.”); Citron & Franks, *supra* note 33, at 359.

¹¹⁰ Bloom, *supra* note 97, at 258.

¹¹¹ Matorin, *supra* note 34; Citron & Franks, *supra* note 33, at 258-59; Mary Anne Franks, *Why Revenge Porn Must be a Crime*, NEW YORK DAILY NEWS (Feb. 26, 2014), <http://www.nydailynews.com/opinion/revenge-porn-crime-article-1.1702725>. Courts struggle with the application of injunctions as relief in revenge porn cases. See e.g., *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. Dist. Ct. App. 2014) (“A temporary injunction is an ‘extraordinary remedy’ that should be granted ‘sparingly and only after the moving party has alleged and proved facts entitling [him] to relief.’” (quoting *Liberty Fin. Mortg. Corp. v. Clampitt*, 667 So. 2d 880, 881 (Fla. 2d DCA 1996))).

Act (CDA).¹¹² The CDA makes it a crime for an individual to make obscene material available by computer to anyone.¹¹³ However, Section 230 establishes that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another.”¹¹⁴ Courts have interpreted Section 230 to provide immunity to website operators and Internet service providers in cases where third parties have posted tortious material on their sites.¹¹⁵ Since many websites that are host to revenge porn images are merely providing a forum for users to post and are not themselves responsible for the “creation or development of the information,”¹¹⁶ website operators would likely be immune under Section 230.

In this environment, “takedown services,” or websites that offer to remove a victim’s image from the Internet in return for a several-hundred dollar fee, have become popular and are often advertised next to revenge porn images.¹¹⁷ These lucrative businesses are often run by the revenge porn sites themselves, and therefore have incentive to encourage perpetrators to post images, because more posts mean more fees from victims desperate to have their images removed.¹¹⁸ A handful of prominent Internet platforms such as Facebook, Twitter, Google, and Instagram have recently adopted procedures to assist victims in reporting and removing nonconsensual images.¹¹⁹ While this is helpful to victims after the fact, it neither prevents nor dissuades perpetrators from posting revenge porn in

¹¹² 47 U.S.C. § 230 (2012).

¹¹³ 47 U.S.C. § 223 (2012); Henry Cohen, Cong. Research Serv., 96-321 A, The Communications Decency Act of 1996 (1997), http://www.ipmall.info/hosted_resources/crs/96-321.pdf.

¹¹⁴ 47 U.S.C. § 230(c)(1).

¹¹⁵ See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

¹¹⁶ 47 U.S.C. § 230(f)(3).

¹¹⁷ See, e.g., Jessica Roy, *Victims of Revenge Porn Mount Class Action Suit Against GoDaddy and Texxxan.com*, OBSERVER (Jan. 21, 2013, 10:58 AM), <http://observer.com/2013/01/victims-of-revenge-porn-mount-class-action-suit-against-godaddy-and-texxxan-com/> (statement of a victim) (“[They] said they would be happy to remove the pictures for me if I would enter my credit card information . . . I went from being depressed and embarrassed to being really pissed off.”).

¹¹⁸ Mike Masnick, *Marc Randazza Goes to War Against Revenge Porn Sites Over Alleged ‘Takedown Lawyer’ Business Model*, TECH DIRT (Oct. 31, 2012, 3:21 AM), <https://www.techdirt.com/articles/20121031/00071620891/marc-randazza-goes-to-war-against-revenge-porn-site-over-alleged-takedown-lawyer-business-model.shtml> (last visited Apr. 23, 2016) (describing the website “Is Anybody Down” where an alleged “lawyer” posted an ad offering to remove photos for a \$250 fee).

¹¹⁹ *Online Removal Guide*, CYBER CIVIL RIGHTS INITIATIVE (2016), <http://www.endrevengeporn.org/online-removal/> (last visited Apr. 23, 2016).

the first place, as even an image posted for a brief time on one of these platforms can cause serious damage to a person’s life.¹²⁰

Established tort law therefore fails to provide adequate remedies for victims, who must look elsewhere for justice.

2. Copyright

At first glance, copyright law may appear to be a more viable option for victims seeking to remove unwanted images from the Internet, because while Section 230 of the Communications Decency Act immunizes websites from tort claims, it does not immunize websites from federal intellectual property claims.¹²¹ If a victim created the original image herself, then she is considered the copyright owner¹²² and is entitled to protection under the Digital Millennium Copyright Act (DMCA). Under Section 512 of the DMCA, a victim may file a notice against a website to have an infringing item (in this case, the victim’s photograph) removed from the site.¹²³ However, in order to seek protection under Section 512, the copyright owner must register the copyright.¹²⁴ This is a problem in the context of revenge porn.

While registering a copyright is not logistically challenging, doing so for the purpose of protecting a revenge porn image requires the victim to be exposed “all over again—this time to the government.”¹²⁵ So, ironically, to copyright an image and stop strangers from seeing their nude pictures, victims have to send more pictures of their naked body to more strangers (the individuals at

¹²⁰ Chiarini, *supra* note 1 (Her images had been viewed over 3,000 times after only 14 days online.)

¹²¹ 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.”).

¹²² See *Copyright in General*, U.S. COPYRIGHT OFFICE, <http://copyright.gov/help/faq/faq-general.html#register> (last visited Apr. 23, 2016) (“Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works.”).

¹²³ 17 U.S.C. § 512(c)(1)(C) (2012) (“A service provider shall not be liable . . . if the service provider . . . upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing. . .”).

¹²⁴ See *Copyright Basics*, U.S. COPYRIGHT OFFICE 7 (May 2012), <http://copyright.gov/circs/circ01.pdf> (“[R]egistration is not a condition of copyright protection. Even though registration is not a requirement for protection . . . [b]efore an infringement suit may be filed in court, registration is necessary for works of U.S. origin.”).

¹²⁵ Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN MONEY (Apr. 27, 2015, 1:32 PM), <http://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/> (last visited Apr. 24, 2016).

the U.S. Copyright Office).¹²⁶ Though a successful registration can effectuate a takedown from the identified website,¹²⁷ the registered images are sent to the copyright office and appear in the Library of Congress' public catalog alongside copyright owners' names and image descriptions.¹²⁸ Though copyright law can provide help to victims who own the copyright of their images and are willing to register them, this avenue is not available to victims whose posted photographs or videos were created by others.¹²⁹

B. *Current Criminal Laws Are Ineffective*

Existing federal and state criminal laws are just as ineffective as tort and copyright law at addressing revenge porn. Twenty-three states lack criminal statutes specifically aimed at revenge porn,¹³⁰ forcing prosecutors to rely on other criminal theories in order to convict a revenge porn perpetrator. Some argue that specific statutes criminalizing revenge porn are unnecessary, since criminal harassment and stalking laws already apply to the distribution of sexual images.¹³¹ However, in practice, prosecutors have a difficult time convicting revenge porn perpetrators under state and federal harassment and stalking laws for a variety of reasons.¹³²

First, criminal harassment and stalking statutes require showing that the defendant has engaged in a pattern or in repeated behavior.¹³³ For example, the federal stalking statute states that it is a felony to use any "interactive computer service" to "engage in a *course of conduct*" that places an individual in reasonable fear of death or serious bodily injury or that would reasonably be

¹²⁶ See generally *Last Week Tonight*, *supra* note 36.

¹²⁷ Another condition to a successful copyright claim is that the website server must be located in the United States. Lorelei Laird, *Victims Are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, A.B.A. J. (Nov. 1, 2013, 9:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/ ("[F]oreign websites don't care about DMCA takedown notices. Indeed, several sites have reportedly moved to overseas hosts to avoid legal consequences in the U.S.").

¹²⁸ Fink, *supra* note 125 (noting that one victim was able to keep the images out of the Library of Congress through a request for special relief, but she could not prevent them from appearing in the public catalog with her real name).

¹²⁹ See *Copyright in General*, *supra* note 122; see also Fink, *supra* note 125.

¹³⁰ See *27 States Have Revenge Porn Laws*, *supra* note 38 (indicating by inference that twenty-three states still lack revenge porn laws).

¹³¹ See, e.g., 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/> (last visited Apr. 24, 2016).

¹³² See Bloom, *supra* note 97, at 259-62.

¹³³ *Id.* at 259; Citron & Franks, *supra* note 33, at 365.

“expected to cause substantial emotional distress.”¹³⁴ Because a conviction requires proving the defendant engaged in a “course of conduct,” a perpetrator who posted an image just once is unlikely to be convicted, no matter that the single post may have metastasized via downstream distribution and destroyed the victim’s professional life and mental health. The statute also requires proof that the defendant acted with the intent to “kill, injure, harass, or intimidate.”¹³⁵ If a defendant can convince the jury that he posted the images for the sole purpose of self-amusement, and not to harm the victim, then he can again expect an acquittal.¹³⁶

Second, some state harassment laws require that the defendant’s conduct be aimed directly at the victim.¹³⁷ In *People v. Barber*, a 2014 case, a New York trial court dismissed harassment charges against a man who posted naked images of a woman to his Twitter account and sent the images to the victim’s employer and sister.¹³⁸ The court’s rationale for the dismissal was that the man did not send any of the images to the victim herself, and “[a]bsent any communication directly to the complainant,” there was no harassment under New York law.¹³⁹ According to Mary Anne Franks, a University of Miami Law School professor, “[*People v. Barber* is] a textbook example of why there’s a gap in the law.”¹⁴⁰ Under this interpretation of the statute, a person who posts revenge porn to a website (or a dozen websites) but makes no direct contact with the victim cannot be charged with harassment. By extension, victims in other states may face similar issues with harassment statutes also drawn to require conduct aimed directly at the victim.

In turn, a majority of U.S. state legislatures have implicitly recognized that revenge porn is not adequately addressed in their criminal codes. Twenty-seven states have adopted laws criminalizing revenge porn.¹⁴¹ However, these laws vary widely in terms of how they treat perpetrators.¹⁴² The variance in penalties for convicted perpetrators, and the fact that twenty-three states have

¹³⁴ 18 U.S.C. § 2261A(2) (2012) (emphasis added).

¹³⁵ *Id.*

¹³⁶ *See infra* Part IV.B.1.

¹³⁷ *See, e.g.*, MASS. GEN. LAWS ch. 265, § 43A (2010); HAW. REV. STAT. § 711-1106 (2009).

¹³⁸ *People v. Barber*, No. 2013NY059761, slip op., 2014 WL 641316, *8 (N.Y. Crim. Ct. Feb. 18, 2014).

¹³⁹ *Id.* at *5.

¹⁴⁰ Erin Donaghue, *Judge Throws out New York “Revenge Porn” Case*, CBS NEWS (Feb. 25, 2014, 4:42 PM) <http://www.cbsnews.com/news/judge-throws-out-new-york-revenge-porn-case/> (last visited Apr. 24, 2016).

¹⁴¹ 27 States Have Revenge Porn Laws, *supra* note 38.

¹⁴² *See infra* Part IV.B.6.

failed to criminalize revenge porn altogether, serves to undermine efforts to acknowledge revenge porn as a serious offense with cruel consequences for victims.¹⁴³

Neither the threat of civil litigation nor criminal penalties (where they exist) is enough to dissuade perpetrators of revenge porn.¹⁴⁴ Civil litigation is impractical and often compounds the harm suffered by victims, by imposing substantial legal fees on plaintiff-victims and/or forcing them to publicly register the images that have caused them such distress.¹⁴⁵ Most criminal statutes—where they even exist at all—fail to adequately deter perpetrators from continuing to post because of ever-shifting loopholes engendered by technological development.¹⁴⁶ Victims need a comprehensive federal criminal statute to step in where states have failed.

III. PROPOSAL

In order to effectively deter the dissemination of nonconsensual pornography and ensure justice for victims, I propose that Chapter 109A of the United States Code regarding Sexual Abuse¹⁴⁷ should be amended to provide language targeted at criminalizing such activity. The likely result of a national amendment would be the elimination of jurisdictional gaps, and the creation of a nationwide standard to which perpetrators can expect to be held accountable. If modeled after Illinois' Non-consensual Dissemination of Private Sexual Images law, such an amendment would address the failings of most current state criminal laws as well as loopholes created by technical advancements.¹⁴⁸

A. *Diagram of Proposed Amendment*

Within the United States Code Chapter 109A, I propose adding the following language, creating § 2242A: Nonconsensual Dissemination of Sexual Images:¹⁴⁹

¹⁴³ See Bloom, *supra* note 97, at 277-78.

¹⁴⁴ See Franks, *supra* note 20, at 2 (noting that an average of 20 to 30 victims contact the Cyber Civil Rights Initiative every month).

¹⁴⁵ See Citron & Franks, *supra* note 33, at 357-60.

¹⁴⁶ See generally Robertson, *supra* note 89.

¹⁴⁷ See *supra* Part II (arguing that Revenge Porn qualifies as a form of Sexual Abuse).

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

¹⁴⁹ The Illinois statute uses the phrase "private sexual images." In drafting, I have intentionally removed the word "private" in the title of the proposed statute and offense as it can connote that the image was received in the confines of a private relationship. The statute should be broad enough to also cover images taken without the subject's consent (e.g., in situations of rape or in situations of hackers tapping into a person's computer camera without consent).

A. An individual commits nonconsensual dissemination of sexual images when he or she:

(1) Intentionally, knowingly, or recklessly reproduces, distributes, publishes, sells, or otherwise disseminates an image of another person:

a. Who is at least 18 years of age; and

b. Who is identifiable from the image itself or information displayed in connection with the image; and

c. Who is engaged in a sexual act,¹⁵⁰ sexual contact, or whose intimate parts are exposed in whole or in part;¹⁵¹ and

See, e.g., Radhika Sanghani, *Chrissy Chambers: ‘My Rape Became Revenge Porn in the UK’*, THE TELEGRAPH (June 17, 2015, 8:00 AM), <http://www.telegraph.co.uk/women/womens-life/11677742/YouTube-Chrissy-Chambers-My-rape-became-revenge-porn-in-the-UK.html> (last visited Apr. 24, 2016); DIGITAL CITIZENS ALLIANCE, SELLING “SLAVING”: OUTING THE PRINCIPAL ENABLERS THAT PROFIT FROM PUSHING MALWARE AND PUT YOUR PRIVACY AT RISK 3 (July 2015), [https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B-9D3A76/07027202-8151-4903-](https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B-9D3A76/07027202-8151-4903-9c40-b6a8503743aa.pdf)

[9c40-b6a8503743aa.pdf](https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B-9D3A76/07027202-8151-4903-9c40-b6a8503743aa.pdf).

¹⁵⁰ “Sexual act” as defined under § 2246 should be expanded to include “any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another.” 720 ILL. COMP. STAT. 5/11-23.5 (a)(2) (2015).

¹⁵¹ Both “sexual act” and “sexual contact” are already defined within chapter 109A in § 2246. 18 U.S.C. § 2246 (2012). However, “sexual act” should be expanded. *See supra* note 150. Under § 2246, “sexual act” means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

“Sexual Contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. 18 U.S.C. § 2246 (2012).

(2) Obtains the image under circumstances in which a reasonable person would know or understand that image was to remain private;¹⁵² and

(3) Knows or should have known that the person in the image has not consented to the dissemination.¹⁵³

B. The following acts are exempt from the provisions in this section:

(1) Dissemination of images involving voluntary exposure in public or commercial settings; or

(2) Dissemination made to aid a criminal investigation that is otherwise lawful, to report unlawful conduct, or to serve a lawful public purpose.¹⁵⁴

I also propose that the punishment for dissemination of such images mirror the punishment for federal cyber-stalking,¹⁵⁵ in which defendants can be punished for up to five years in jail, fined up to \$250,000, or both.¹⁵⁶ As a substitute for tort relief, victims should be entitled to full and timely restitution as a remedy for any harm they suffered as a result of the offender's actions.¹⁵⁷

B. *Effects of Proposed Legislation*

The proposed amendment would be successful because (1) it focuses on intent to disseminate rather than intent to harm, (2) it includes "selfies" within the scope of nonconsensual pornography, (3) it punishes victim identification, (4) images covered by the legislation are not limited to those featuring nudity, (5) it holds tertiary distributors liable, and (7) it imposes harsh penalties. The proposed amendment is therefore a sweeping response to a multi-dimensional problem and, as written, would likely survive a Constitutional challenge.

¹⁵² A reasonable person might understand an image is meant to remain private in circumstances where the image is shared only between an intimate couple. *See supra* Part II(C) and accompanying footnotes. For example, a reasonable person in the circumstances would likely have understood that LaJuan Wood's images were meant to remain private. *See supra* Part II(A) and accompanying footnotes.

¹⁵³ *See* 720 ILL. COMP. STAT. 5/11-23.5 (b)(3) (2015). Language altered to be in accordance with definitions already included in Chapter 109A. 18 U.S.C. § 2246 (2012).

¹⁵⁴ *See* Franks, *supra* note 20, at 9.

¹⁵⁵ 18 U.S.C. § 2261A (2013).

¹⁵⁶ *See, e.g., id.*

¹⁵⁷ 18 U.S.C. § 3771(a)(6) (2015).

1. The Focus Is on Intent to Disseminate, Not Intent to Harm

Currently, some state criminal statutes require that the offender intended to cause severe emotional distress to the victim in order to possibly be held criminally liable for revenge porn.¹⁵⁸ While the intent to cause emotional distress may motivate the offender’s behavior—such as the stereotypical break up revenge scenario—perpetrators disseminate images for a variety of reasons.¹⁵⁹ For instance, after news broke that members of a Penn State fraternity had uploaded photos of unconscious, naked women to private Facebook pages, a fraternity member defended the conduct to reporters by insisting that it “wasn’t malicious whatsoever. It wasn’t intended to hurt anyone... It was an entirely satirical group and it was funny to some extent.”¹⁶⁰ Or, in the words of the proprietor of a once popular revenge porn site, “I call it entertainment. . . . [W]e just want the pictures there for entertainment purposes and business. . . . [O]ur business goal is to become big and profitable.”¹⁶¹ Thus, intent-to-harm requirements distinguish between victims of the same conduct, and prohibit some victims’ recovery based on factors completely outside of the victims’ control.¹⁶² Including an intent-to-harm requirement also incentivizes perpetrators to continue such conduct so long as they can plausibly deny an intent to hurt anyone.¹⁶³

In contrast, by merely requiring intent to disseminate, the proposed statute gives priority to the victims. After all, the harm suffered in nonconsensual pornography cases is devastating regardless of the motive.¹⁶⁴ The proposed amendment would therefore remedy a wider group of victims and dissuade offenders who publish revenge porn simply for entertainment or profit.

¹⁵⁸ See, e.g., HAW. REV. STAT. § 711-1110.9(b) (2014); N.Y. PENAL LAW § 250.45(1) (McKinney 2014).

¹⁵⁹ Carrie Goldberg, *Seven Reasons Illinois is Leading the Fight Against Revenge Porn*, CYBER CIVIL RIGHTS INITIATIVE (Dec. 31, 2014), <http://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn/> (last visited Apr. 25, 2016); see also Franks, *supra* note 20, at 5 (“The law SHOULD NOT confuse mens rea . . . with motive.”).

¹⁶⁰ Holly Otterbein, *Member of Penn State’s Kappa Delta Rho Defends Fraternity*, PHILA. MAG. (Mar. 18, 2015, 4:36 PM), <http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/> (last visited Apr. 25, 2016).

¹⁶¹ Brian Maass, *Revenge Porn’ Website has Colorado Women Outraged*, CBS DENVER (Feb. 3, 2013, 10:13 PM), <http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/> (last visited Apr. 25, 2016).

¹⁶² See Franks, *supra* note 20, at 5-6.

¹⁶³ See *id.*

¹⁶⁴ See generally Chiarini, *supra* note 1.

2. Selfies

Any law criminalizing revenge porn must include liability for images that originated as selfies, as failure to do so would prohibit recovery for up to 80 percent of victims.¹⁶⁵ California's statute criminalizing revenge porn, which has since been amended to include self-taken images, originally limited the scope of the law to include only images taken by the perpetrator.¹⁶⁶ The statute punished any person who photographed or recorded another and then proceeded to distribute the image with the intent to cause serious emotional distress.¹⁶⁷ Though California prosecutors were able to get its first conviction under this version of the statute,¹⁶⁸ the original language precluded prosecution in most revenge porn cases because of its exclusion of "selfies."¹⁶⁹ By simply using the word "image" without specifying a requirement for its origin, the proposed amendment would apply to images taken by the victim, by the perpetrator, or by a third party.

3. Doxxing

Posting personal information in connection with a revenge porn image can exponentially increase the harm suffered by the victim.¹⁷⁰ Besides deterring perpetrators from publishing identifying information in connection with an image, Part A(1)(b) of the proposed amendment also acts as a safeguard for alleged perpetrators who commit "victimless" crimes. Because Part A(1)(b) would define an image as nonconsensual pornography only when the subject of the image can be identified either visually or through other information accompanying the image, it protects against frivolous and unwarranted prosecution. Without a requirement that the subject be identifiable to others, the law would be overly broad and possibly lead to the criminalization of victimless and otherwise lawful acts.¹⁷¹

¹⁶⁵ *Revenge Porn Statistics*, *supra* note 50, at 1.

¹⁶⁶ See Hunter Schwarz, *California's Revenge Porn Law, Which Notoriously Didn't Include Selfies, Now Will*, WASH. POST (Aug. 27, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/08/27/californias-revenge-porn-law-which-notoriously-didnt-include-selfies-now-will/> (last visited Apr. 25, 2016).

¹⁶⁷ CAL. PENAL CODE § 647 (2010 & Supp. 2016).

¹⁶⁸ Veronica Rocha, *'Revenge Porn' Conviction Is a First Under California Law*, L.A. TIMES (Dec. 4, 2014, 5:00 PM), <http://www.latimes.com/local/crime/la-me-1204-revenge-porn-20141205-story.html> (last visited Apr. 25, 2016).

¹⁶⁹ See 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.endrevengeporn.org/main_2013/wp-content/uploads/2015/06/SB255_Press-Release.pdf.

¹⁷⁰ See *supra* Part II.B.

¹⁷¹ Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn: How*

4. Images Without Nudity

A revenge porn law should recognize that not all intimate sexual acts involve nudity.¹⁷² Expanding the definition of “sexual act” within Chapter 109A to also include “any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim”¹⁷³ would impose liability when an image shows a victim who has been ejaculated upon, regardless of whether the victim is nude.¹⁷⁴ A narrowly drafted law only concerned with images of nudity fails to consider the full scope of images that would cause harm if distributed without the subject’s consent.¹⁷⁵

In 2015, Congresswoman Jackie Speier introduced a discussion draft of a bill to make revenge porn a federal crime by amending Chapter 88 of Title 18 within the United States Code.¹⁷⁶ Unfortunately, the statute would apply only to images depicting “sexually explicit conduct, the naked genitals or post-pubescent female nipple of a person,” and in any case, the bill has gone nowhere.¹⁷⁷ It is time for a renewed push for a federal law that would apply to images that feature sexual acts or sexual contact even when the subject is clothed.¹⁷⁸

5. Liability for Downstream Distributors

Several state laws punish only the original publisher of revenge porn, which does nothing to deter downstream distributors from continuing to repost images on other platforms.¹⁷⁹ By expanding (or limiting, depending on one’s point of view) liability to those who knew or reasonably should have known that the images they

a Law Protecting Victims Can Avoid Running Afoul of the First Amendment, 90 CHI.-KENT. L. REV. 247, 268 (2015).

¹⁷² Goldberg, *supra* note 159.

¹⁷³ See *supra* notes 152-54 and accompanying text.

¹⁷⁴ Goldberg, *supra* note 159.

¹⁷⁵ See Franks, *supra* note 20, at 7-8.

¹⁷⁶ INTIMATE PRIVACY PROTECTION ACT OF 2015, H.R. DISCUSSION DRAFT, 114TH CONG., 1ST SESS. (2015), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2006&context=historical>.

¹⁷⁷ *Id.* at 2, 10. “Sexually explicit conduct” is defined by § 2256 (2)(A) as actual or simulated: (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. § 2256(2)(A).

¹⁷⁸ See, e.g., Barbara Herman, *Illinois Passes Revenge Porn Law with Teeth: ‘Other States Should Copy,’ Says Privacy Lawyer*, INT’L BUS. TIMES (Jan. 6, 2015, 4:18 PM), <http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974> (last visited Apr. 25, 2016).

¹⁷⁹ Goldberg, *supra* note 159.

distributed were intended to be private and that no consent by the subject was given, the proposed amendment accomplishes two things at once. First, it prevents the potential for limitless liability, as it takes into account whether a reasonable person in the downstream distributor's position would have understood that the image was meant to be private and that the victim had not consented to its dissemination.¹⁸⁰ At the same time, in our era of "viral" images that can rack up thousands of views within just days or hours,¹⁸¹ the reasonable person standard will help deter downstream posters when it is clear that an image is being distributed nonconsensually.¹⁸²

6. Penalties

Society has long since recognized the notion that the punishment should fit the crime, ("*Culpa poenae par esto*"), and whether it be under a utilitarian theory yielding deterrence or a retributive theory, revenge porn should be classified as a felony with appropriate sentences. Because the harm inflicted on victims can be severe, those guilty of disseminating revenge porn should face serious penalties.¹⁸³ However, state laws criminalizing revenge porn vary regarding the punishments available, and are split on classifying the crime as a misdemeanor or as a felony.¹⁸⁴ There are several problems with categorizing revenge porn as a mere misdemeanor.¹⁸⁵ First, it sends a message to victims that the harm they suffered is not taken seriously by society.¹⁸⁶ Generally, misdemeanors carry sentences of no more than a year imprisonment,¹⁸⁷ and such a classification would put revenge porn on the same level as lesser crimes such as petty theft and public intoxication. Second, a misdemeanor classification decreases incentives for law enforcement to dedicate significant time and resources to investigating such conduct.¹⁸⁸ Victims of misdemeanor harassment, for example, are often told that their cases are not serious enough to warrant an in-depth

¹⁸⁰ *Id.*

¹⁸¹ *See, e.g.*, Chiarini, *supra* note 1 (Her images had been viewed over 3,000 times after only 14 days online.).

¹⁸² Goldberg, *supra* note 159.

¹⁸³ *See generally* Citron & Franks, *supra* note 33, at 389.

¹⁸⁴ *See, e.g.*, COLO. REV. STAT. § § 18-1.3-501 (1)(A), 18-7-107 (misdemeanor punishable by between six and eighteen months in prison and "the court shall fine the defendant up to ten thousand dollars"); HAW. REV. STAT. § § 706-660 (1) (b), 711-1110.9 (felony carrying a maximum possible penalty of five years in prison).

¹⁸⁵ *See* Citron & Franks, *supra* note 33, at 389.

¹⁸⁶ *Id.*

¹⁸⁷ 18 U.S.C. § 3559(a) (2006).

¹⁸⁸ *See* Citron & Franks, *supra* note 33, at 389.

investigation.¹⁸⁹ Lastly, classifying revenge porn as a misdemeanor as opposed to a felony provides a weak deterrent, as perpetrators know their actions will not be punished as harshly as are other sexual-abuse related crimes.¹⁹⁰

Applying cyber-stalking punishments to revenge porn underscores the seriousness of the crime. For many victims, the effects of revenge porn reverberate for a long time: many lose their jobs, are forced to change their names,¹⁹¹ and some feel compelled to go into hiding for their safety. For others, it is a death sentence: many victims struggle with suicidal thoughts,¹⁹² and some victims have even taken their own lives. Therefore, because the harm suffered is quite severe, the penalty for causing such harm should be justifiably serious.¹⁹³

C. *Free Speech Challenges*

The biggest obstacle to federal revenge porn legislation is free speech concerns arising under the First Amendment.¹⁹⁴ It is the hallmark of free speech protections that a “free trade in ideas” is allowed even if the majority of people find those ideas distasteful,¹⁹⁵ and courts have firmly established that posting explicit images on the Internet is a form of speech.¹⁹⁶ Thus, on its face, a federal statute against nonconsensual pornography would be a content-based regulation of speech,¹⁹⁷ and may even chill legitimate protected speech.¹⁹⁸

Content-based regulations are presumptively invalid.¹⁹⁹ However, the protections afforded by the First Amendment are not

¹⁸⁹ *Id.* at 366-67 (citing Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 392-95 (2009)).

¹⁹⁰ *Id.* at 389.

¹⁹¹ *Revenge Porn Statistics*, *supra* note 50, at 1-2.

¹⁹² *Id.* at 2.

¹⁹³ *See* Goldberg, *supra* note 159.

¹⁹⁴ The pertinent part of the First Amendment states: “Congress shall make no law... abridging the freedom of speech...” U.S. CONST. amend. I.

¹⁹⁵ *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

¹⁹⁶ *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd sub nom.*, *Hudnut v. Am. Booksellers Ass'n*, 475 U.S. 1001 (1986) (discussing the “power of pornography as [free] speech” and the need to constitutionally protect pornography under the First Amendment).

¹⁹⁷ *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000) (determining that legislation aimed at regulating pornography is in essence content-based regulation).

¹⁹⁸ Samantha H. Scheller, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 554-55 (2015).

¹⁹⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

absolute.²⁰⁰ There are certain classes of speech that may be regulated and restricted without violating the Constitution.²⁰¹ The Supreme Court's recent decision in *United States v. Stevens* outlines several categories of speech that Congress is constitutionally permitted to restrict: obscenity, defamation, fraud, speech that incites illegal activity, and speech integral to criminal conduct.²⁰² Prior to *Stevens*, the Court recognized additional types of unprotected free speech such as threats,²⁰³ fighting words,²⁰⁴ child pornography,²⁰⁵ and obscene speech that met a narrow test.²⁰⁶ The Court has explained in multiple instances that these restrictions 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."²⁰⁷

A federal statute restricting the nonconsensual distribution of pornography therefore would likely survive constitutional scrutiny because it falls within an already recognized category of unprotected speech: obscenity. At least one First Amendment scholar, UCLA Law Professor Eugene Volokh, agrees that sexually intimate images distributed of nonconsenting subjects likely fall under the category of obscenity and do not receive First Amendment protections.²⁰⁸

The Court's current test for obscenity, set out in *Miller v. California*, supports a finding that nonconsensual pornography would be considered obscene.²⁰⁹ The guidelines for determining whether material is obscene are:

- (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

²⁰⁰ *Black*, 538 U.S. at 358.

²⁰¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

²⁰² 559 U.S. 460, 468 (2010).

²⁰³ *Black*, 538 U.S. at 359-60.

²⁰⁴ *R.A.V.*, 505 U.S. at 386.

²⁰⁵ *New York v. Ferber*, 458 U.S. 747, 773 (1982).

²⁰⁶ *Miller v. California*, 413 U.S. 15, 23-24 (1973).

²⁰⁷ *R.A.V.*, 505 U.S. at 383 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

²⁰⁸ Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <http://volokh.com/2013/04/10/florida-revenge-porn-bill/> (last visited Apr. 25, 2016) (Professor Volokh writes: "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.").

²⁰⁹ *Miller*, 413 U.S. at 24.

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.²¹⁰

The Court further provided two “plain examples” of “sexual conduct” that could be regulated under part (b) of the test: “[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated” and “[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”²¹¹ Therefore, disseminating images that expose an individual whether nude or engaging in a sexual act without that individual’s consent and “in a context where there’s good reason to think that the subject did not consent to publication of such pictures”²¹² would likely qualify as a “[p]atently offensive representation” of sexual conduct, appealing to a prurient interest.²¹³ Such images offer no “serious literary, artistic, political, or scientific value,” and thus, would likely be obscene to the average person.²¹⁴

Even if courts decline to categorize revenge porn as obscene, so long as they recognize that revenge porn is not a matter of public concern, it would be afforded less protection and thus subject to reasonable regulation. Free speech is not just fundamental as an individual right, but “as a safeguard for the *social* processes of democracy;”²¹⁵ and at its core is the protection of speech regarding matters of public concern.²¹⁶ In *Snyder v. Phelps*, the Supreme Court emphasized the difference between speech regarding matters of public concern and speech regarding purely private matters.²¹⁷

²¹⁰ *Id.* (internal citations omitted). There is some debate regarding the applicability of *Miller* and its analysis of community standards in the context of an online community. For further discussion, see Sarah Kagan, Note, *Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights*, 38 HASTINGS CONST. L.Q. 233, 235, 238-39 (2010) (suggesting a national community standard for website postings).

²¹¹ *Miller*, 413 U.S. at 24-25.

²¹² Volokh, *supra* note 208 and accompanying text.

²¹³ *Miller*, 413 U.S. at 24-25.

²¹⁴ *Id.* at 24.

²¹⁵ Neil Richards, *Intellectual privacy: Rethinking Civil Liberties in the Digital Age* 36 (2015) (emphasis in original).

²¹⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)) (noting that speech on “matters of public concern” is “at the heart of the First Amendment’s protection”).

²¹⁷ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (recognizing that “restricting

Speech on matters of public concern “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection,”²¹⁸ whereas speech regarding private matters is entitled to “less rigorous” protection.²¹⁹

Sexually explicit images posted to the Internet without the subject’s consent are matters of private concern.²²⁰ Failing to regulate this type of private speech actually chills individuals’ private expression, out of fear that their private images might someday become public on the Internet.²²¹ Therefore, restrictions on revenge porn might in fact “foster[] private speech.”²²²

As a result of these free speech concerns, the proposed amendment contains exceptions for images disseminated lawfully and for a legitimate purpose, and for images of voluntary nudity in a public or commercial setting.²²³ Without these exceptions, the law would criminalize dissemination of commercial pornography and some artworks as well as disclosures made in the public interest, and would likely run afoul of the First Amendment.²²⁴

Distributing images in order to bring potentially unlawful conduct to the attention of law enforcement or for another legitimate journalistic purpose serves the public interest and should therefore be excluded from potential prosecution.²²⁵ Likewise, the voluntary exposure in public or commercial settings exception protects lawful pornography, which the Supreme Court has recognized as protected under the First Amendment.²²⁶ It also protects artistic expression, excluding liability for artists who create and publish

speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest”).

²¹⁸ *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

²¹⁹ *Id.*

²²⁰ Aubrey Burris, Note, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2349 (2014) (“freely disclosing a non-consenting individual’s sexual and private images contributes little to informing the public on issues of political or cultural concern”); *but cf.* Volokh, *supra* note 208 (noting exceptions for images that serve a “legitimate purpose”).

²²¹ Citron & Franks, *supra* note 33, at 385; Burris, *supra* note 220, at 2349 n.152 (“The fear of public disclosure of such private matters has a chilling effect on private speech.”).

²²² *See* Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).

²²³ *See supra* Part IV.A. (Proposed Amendment § 2242A(B)).

²²⁴ Franks, *supra* note 20, at 5.

²²⁵ *Id.* at 5, 9.

²²⁶ *See* Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging Stanley v. Georgia*, 94 COLUM. L. REV. 2267, 2273 n.32 (1994) (quoting *Stanley v. Georgia*, 394 U.S. 557, 568 (1969)) (“[T]he individual’s right to read or observe what he pleases . . . is . . . fundamental to our scheme of individual liberty. . .”).

nude images with the consent of the subject, as well as theatrical productions involving nudity.²²⁷ As Carrie Goldberg of the Cyber Civil Rights Initiative writes in regards to similar exceptions in the Illinois law, “[N]o journalist ever has to fear being prosecuted under this law for publishing photographs of a topless protest and no porn enthusiast needs to worry about going to jail for forwarding links to his [or her] favorite commercial hardcore sites.”²²⁸

A narrowly drawn federal statute prohibiting the dissemination of nonconsensual pornography that provides exceptions for matters of public concern and for voluntary exposure in public and commercial settings would therefore likely pass constitutional muster.

CONCLUSION

Current laws, both federal and state, offer little or no deterrent to perpetrators of revenge porn and provide virtually no remedy for victims.²²⁹ Tort law, copyright law, and criminal statutes addressing harassment and stalking are all awkward fits for the problem, and rarely succeed at redressing the victim or sanctioning the perpetrator. Where they exist, state laws specifically addressing revenge porn are often designed in a way that thwarts prosecution in a significant number of cases, or provides minimal punishment for offenders.²³⁰ It is foolish to hope that preaching at individuals to stop creating and sending intimate photos and videos will make the phenomenon of revenge porn disappear. A federal criminal statute would validate the devastating harm suffered by victims,²³¹ reinforce the freedom of expression and of confidentiality that individuals have within their private relationships,²³² and deter future offenses by imposing harsh penalties.²³³ Federal legislation ought to be enacted to help victims like Annmarie see their tormentors brought to justice and their suffering redressed.

²²⁷ See Kitchen, *supra* note 171, at 285.

²²⁸ Goldberg, *supra* note 159.

²²⁹ See *supra* Part III.

²³⁰ See *27 States Have Revenge Porn Laws*, *supra* note 38; see also *supra* Part III.B.

²³¹ See, e.g., Chiarini, *supra* note 1.

²³² See Kitchen, *supra* note 171.

²³³ See Part IV.B.6.