NOTES & COMMENTS

ERADICATING REVENGE PORN: INTIMATE IMAGES AS PERSONAL IDENTIFYING INFORMATION

by
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Revenge porn refers to the display and dissemination of a person's sexually explicit images without his or her consent. Amid a rise in revenge porn, victims and attorneys have employed an assortment of legal remedies to protect victims and punish perpetrators. Tort, copyright, and criminal laws provide victims with promising protections, but serious deficiencies render them inadequate tools to eradicate the crime. Additionally, both tort and criminal revenge porn laws may encounter free speech challenges, which are likely to succeed under Supreme Court precedent. In Florida Star v. B.J.F.*, the Court greatly limited the privacy rights of sexual abuse victims in the face of First Amendment concerns.*

Despite Florida Star*, personal identifying information (PII) is afforded increasingly robust protection under the umbrella of information privacy without running afoul of the First Amendment. The limited effect of* Florida Star *on information privacy laws can be traced to concerns over the increased exposure of private information due to technological innovations that allow such information to be more easily processed and more widely shared. As with the sharing of PII, the Internet plays an*

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incontrovertible role in revenge porn due to its ability to amplify the audience and create an enduring record of the injury. Because intimate images fit within congressional approaches to defining PII and the themes justifying information privacy, this Comment advocates the treatment of intimate images as PII.

I. INTRODUCTION

Revenge porn, also known as nonconsensual pornography, refers to the display and dissemination of an individual's sexually explicit images without her consent.[1] Efforts to eradicate the crime have met with limited success due to the serious shortcomings of existing remedies. Tort remedies, though available in every state, lack any legal mechanism for victims to remove images from the Internet and may face First Amendment hurdles. Copyright law does allow victims to request removal of images, but only if the victim is the author of the image, meaning she herself captured the photo. Additionally, the victim must search out each site on which her images appear—a difficult if not impossible task. Criminalization of revenge porn may be the key to eradicating the practice by deterring the nonconsensual display and distribution in the first place. Unfortunately, criminal statutes may encounter First Amendment challenges, which have the potential to succeed under United States Supreme Court precedent. Although the Court has greatly limited the privacy rights of victims of sexual abuse, information privacy

[1] Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 424 (2014).

laws show promise for revenge porn victims. Under the umbrella of information privacy, personal identifying information (PII) is afforded strong privacy protection—without running afoul of the First Amendment—in recognition of the challenges posed by advances in technology. Because intimate images fit within congressional approaches to defining PII and the themes justifying information privacy, this Comment advocates the treatment of intimate images as PII.

Revenge porn is no rarity. One survey found that one out of ten former partners threatens to post intimate and sexually explicit photographs of an ex-partner on the Internet, and of those, nearly 60 percent actually do so.[2] Today, adults commonly share nude images of themselves with romantic partners.[3] The majority of the time the trust entailed in such an exchange is not broken,[4] but when that trust is broken, the results are devastating. Victims of nonconsensual pornography are predominately women,[5] and ex-partners comprise the majority of perpetrators.[6] In fact, revenge porn is often a tool employed in intimate partner violence.[7] Victims regularly suffer significant emotional distress that disrupts their lives, including anxiety, depression, panic attacks, suicidal ideation, and anorexia nervosa.[8] This is especially

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[2] *Id.*

[3] Michael Salter & Thomas Crofts, *Responding to Revenge Porn: Challenges to Online Legal Impunity*, *in* NEW VIEWS ON PORNOGRAPHY 233, 237 (Lynn Comella & Shira Tarrant eds., 2015) ("[A] representative sample of 647 American adults aged 19 to 24 found 33 percent had sent a nude or semi-nude image of themselves to someone else and surveys based on convenience samples find that up to 50 percent of adults have done the same.").

[4] *Id.* ("While revenge porn is illustrative of patterns of coercion and abuse, it would seem that the exchange of self-produced nude images is often mutual, pleasurable, and relatively harmless.").

[5] *Id.* at 233 (noting that revenge porn is "primarily perpetrated by men and disproportionately impacts women"); *see also* Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 227 (2011) [hereinafter Franks, *Unwilling Avatars*] (noting that cyber harassment in general disproportionately affects women).

[6] Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, CYBER C.R. INITIATIVE 11 (Sept. 22, 2016), https://www.cybercivilrights.org/guide-to-legislation/ [hereinafter Franks, *Drafting*] (noting that 57 percent of victims say their ex-boyfriends posted the images). *But see* Levendowski, *supra* note 1, at 424, 425 n.12 (indicating that images posted by "jaded ex-lovers" constitutes 36 percent of revenge porn). Hacking constitutes about 40 percent of revenge porn and voyeuristic filming constitutes roughly 10 percent. *Id.* at 424, 424 n.9, 425 n.11. This Comment will focus on revenge porn posted by ex-partners.

[7] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 351 (2014); *see also Drafting*, *supra* note 6, at 2 ("[A]busers us[e] the threat of disclosure to keep their partners from leaving or reporting their abuse to law enforcement.").

[8] Franks, *Drafting*, *supra* note 6, at 11 ("93% of victims said they have suffered significant emotional distress due to being a victim."); Citron & Franks, *supra* note 7,

likely where personal identifying information—which may include a victim's full name, email address, home address, work address, phone number, social network information, and more—accompanies the images, encouraging viewers to contact the victim.[9] Perpetrators of revenge porn commonly include such information.[10] As a result, viewers frequently solicit victims for sex and send victims other communications with abusive and threatening undertones.[11] Victims also suffer reputational damage that harms their educational and employment prospects.[12] Some perpetrators go so far as to send the images directly to the victim's employers, coworkers, family, and friends.[13]

Revenge porn is on the rise, and the Internet has played an integral role in this unfortunate trend. Although many webhosts voluntarily remove revenge porn at the request of the victim,[14] others are less cooperative.[15] In fact, websites and blogs presently exist specifically to solicit revenge porn.[16] The images proliferate easily,[17] are difficult to

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at 351; Lydia Wheeler, *Lawmaker Eyes "Revenge Porn" Crackdown*, THE HILL (July 15, 2015), http://thehill.com/regulation/247954-lawmaker-eyes-revenge-porn-crackdown.

[9] Citron & Franks, *supra* note 7, at 350–51 ("In a study of 1,244 individuals, over 50% of victims reported that their naked photos appeared next to their full name and social network profile; over 20% of victims reported that their e-mail addresses and telephone numbers appeared next to their naked photos."); *see also* Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, THE GUARDIAN (Nov. 19, 2013), https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change (discussing how her boyfriend used her images to pretend to be her and solicit sex online).

[10] Franks, *Drafting*, *supra* note 6, at 11.

[11] *Id.* at 2 ("Victims are frequently threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools. Some victims have committed suicide."); Salter & Crofts, *supra* note 3, at 237 ("[D]istress is further amplified by the viscerally misogynist online networks that have mobilized to stalk, harass, and threaten revenge porn victims."); Citron & Franks, *supra* note 7, at 350 (noting that after a woman's ex-boyfriend distributed DVDs of her performing sex acts on him, along with her name, address, and phone number, she was approached and called by unknown men "who took the video as a sexual proposition").

[12] Wheeler, *supra* note 8; Levendowski, *supra* note 1, at 424; Citron & Franks, *supra* note 7, at 352.

[13] Citron & Franks, *supra* note 7, at 350; Chiarini, *supra* note 9.

[14] *See, e.g.*, *Remove "Revenge Porn" from Google*, GOOGLE, https://support.google.com/websearch/answer/6302812?hl=en; Jacqueline Beauchere, "*Revenge Porn": Putting Victims Back in Control*, MICROSOFT (July 22, 2015), https://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control/#sm.0000xqis2m2fsdnuuh61ybbsx1s1s; Leo Kelion, *Facebook Revenge Porn to Be Blocked from Reposts*, BBC NEWS (Apr. 5, 2017), http://www.bbc.com/news/technology-39502265.

[15] *See* Salter & Crofts, *supra* note 3, at 240.

[16] *Id.* at 233. Following the suicide of a woman whose images were posted on Hunter Moore's revenge porn site, IsAnyoneUp?, Moore commented that the suicide would only increase his advertising revenue. *Id.* at 240.

remove,[18] and reach a large number of individuals with minimal effort required on the part of the poster.[19] As a result, cyber harassment may be "even more pernicious and long-lasting than real-life harassment."[20]

Revenge porn, like the majority of sex crimes, is a gender-based crime,[21] and the Internet drastically augments this effect. Although "[t]he reduction of women to their bodies has been a tactic of sexist and misogynist forces for a very long time," cyberspace is a "place where existing gender inequalities are amplified and entrenched."[22] While some victims of revenge porn are men,[23] "they are very unlikely to experience the coordinate campaigns of ongoing abuse and humiliation that have targeted female victims,"[24] revealing the fundamental role gender plays in revenge porn. Moreover, cultural attitudes toward sex and the consensual photographing of sex help to explain the rise of revenge porn and the lackluster efforts to eradicate it.[25] Cultural condemnation is particularly strong with regard to women's sexuality and leads to "excessive focus on individual responsibility and risk management [that] obscures the gendered differentials and inequities of interpersonal relations, amplifying existing cultural logics that blame women who experience gendered violence."[26]

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[17] Franks, *Drafting*, *supra* note 6, at 2 ("In a matter of days, [the] image can dominate the first several pages of search engine results for the victim's name . . . .").

[18] Salter & Crofts, *supra* note 3, at 237 ("Efforts to permanently remove such images face almost insurmountable barriers, because images may be shared via peer-to-peer servers, stored on multiple computers in multiple jurisdictions, or hosted by Web sites whose servers use various means to hide their location and identity.").

[19] *Id.* at 235 ("The Internet transcends the physical limitations of VHS and prior media technologies, enabling the almost simultaneous production and distribution of image and video to a potentially global audience. In instances where an individual seeks to maliciously distribute a sexual image or video of another, the Internet acts as what is termed a force multiplier, making the material publicly and internationally available.").

[20] *See* Franks, *Unwilling Avatars*, *supra* note 5, at 227 (attributing the severity of online harassment to the anonymity the Internet affords harassers, the amplification of the audience, the permanence of the post, and virtual captivity).

[21] Citron & Franks, *supra* note 7, at 353 (estimating that 90 percent of revenge porn victims are female); *see also National Crime Victims' Rights Week Resource Guide*, U.S. DEP'T OF JUSTICE, 2015, § 6.

[22] Franks, *Unwilling Avatars*, *supra* note 5, at 228.

[23] In one fairly publicized case involving a male victim of nonconsensual pornography, Tyler Clementi's roommate at Rutgers University filmed him having sex with a man and watched the live stream with several friends. Citron & Franks, *supra* note 7, at 372. When Clementi discovered the invasion, he committed suicide. *Id.* The roommate, Dahrun Ravi, was charged and convicted under New Jersey's nonconsensual pornography statute. *Id.*

[24] Salter & Crofts, *supra* note 3, at 238.

[25] *See id.* at 233, 236.

[26] *Id.* at 236.

Amid a surge in revenge porn, victims, advocates, and legislators are attempting to find the best remedy, or combination of remedies, to protect victims and redress the harms they suffer.[27] This process must necessarily grapple with the impact of the Internet on the execution of the crime and the damage inflicted on victims. In other words, to adequately address revenge porn, we must consider the Internet's ability to magnify the dissemination of the images and create a permanent record of the betrayal, thus intensifying the psychological and reputational harm suffered.[28] This may require "that old doctrines be modified to account for this new harm,"[29] as occurred in the context of information privacy law.[30] Due to the Internet's ability to amplify the audience and create an enduring record of the injury, legislatures, advocates, and courts should treat the sharing of intimate images no differently than the sharing of personal identifying information, which is afforded increasingly robust protection in the face of technological innovation.[31]

Part II of this Comment discusses remedies available through copyright, tort, and criminal law, as well as the benefits and shortcomings of each. Part III considers the limitations the First Amendment imposes on the remedies discussed in Part II. Part IV analyzes the Supreme Court case of *Florida Star*, which greatly limited privacy torts in the face of First Amendment concerns. Part V argues that the rationale underlying information privacy laws—to protect privacy in the face of technological innovation in order to foster a society in which all members may participate—applies equally to intimate images.

II. REMEDIES AND LOOPHOLES

Victims of revenge porn, with the help of attorneys and legislators, have creatively employed an assortment of legal remedies to protect the various interests implicated when sexually explicit images are posted online without the victim's consent. Three primary remedies are tort actions for intentional infliction of emotional distress (IIED), copyright protection, and criminal statutes targeting the posters of revenge porn.

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[27] *See, e.g.*, Wheeler, *supra* note 8; Liz Halloran, *Race to Stop "Revenge Porn" Raises Free Speech Worries*, NPR (Mar. 6, 2014), http://www.npr.org/sections/itsallpolitics/2014/03/06/286388840/race-to-stop-revenge-porn-raises-free-speech-worries.

[28] Paul B. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 70 (2014).

[29] *Id.*

[30] *See infra*, Part IV.

[31] *Id.*

The protections afforded by each as well as their shortcomings are discussed in turn.[32]

A. Tort Law

Several scholars have advocated for the use of tort law to protect victims of revenge porn.[33] All states have some form of intentional infliction of emotional distress tort, and every state allows tort plaintiffs to recover civil damages, making tort remedies readily accessible to victims of revenge porn.[34] Tort law also has a long history of adapting to novel injuries and is inherently flexible due to its fact-specific inquiries.[35] Two primary types of tort are usually raised in relation to revenge porn: intentional infliction of emotional distress and invasion of privacy.[36] The first is addressed here, and the second is discussed throughout Parts III and IV of this Comment.

The Restatement (Third) of Torts describes the intentional infliction of emotional distress tort as "[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm . . . ."[37] The tort is very fact-specific, particularly the outrageousness element.[38] Victims of revenge porn commonly experience emotional trauma and disruption of their lives as a result of their victimization.[39] Although the Internet exacerbates its scope and duration, the injury suffered is not unique to revenge porn. Rather, "society's objections to revenge porn are rooted in precisely the types of harms that [emotional distress torts] [are] intended

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[32] Other proposed remedies include an implied contract of confidentiality and the adoption of the right to be forgotten. *See generally* Larkin, *supra* note 28; Robert Kirk Walker, Note, *The Right to be Forgotten*, 64 HASTINGS L.J. 257 (2012).

[33] *See, e.g.*, Jenna K. Stokes, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929 (2014); Larkin, *supra* note 28.

[34] Stokes, *supra* note 33, at 950.

[35] *See* Larkin, *supra* note 28, at 82; *see also* Stokes, *supra* note 33, at 949–50.

[36] *See, e.g.*, *In re* Grossman, 538 B.R. 34, 38 (Bankr. E.D. Cal. 2015) (plaintiff filed "a lawsuit for invasion of privacy and intentional infliction of emotional distress"); Patel v. Hussain, 485 S.W.3d 153, 157 (Tex. App. 2016) (plaintiff sued for intentional infliction of emotional distress, among other charges); GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 753 (Tex. App. 2014) ("plaintiffs assert causes of action against GoDaddy 'for intentional infliction of emotional distress,'" among others).

[37] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (AM. LAW INST. 2012). Alternatively, a victim could bring a negligent infliction of emotional distress claim. Only IIED is discussed here.

[38] *Id.* at § 46 cmt. d (listing factors).

[39] *See supra* notes 13–14 and accompanying text.

to address."[40] Victims may therefore have success bringing emotional distress claims.[41]

An intentional infliction of emotional distress claim, however, is neither flawless nor holistic. First, a victim may not have the financial resources to file a tort lawsuit.[42] Even if she does, her claim may fail for a variety of reasons. For one, defendants may raise a First Amendment defense to state tort suits.[43] The availability of the defense turns on whether the speech at issue is of public or private concern.[44] The United States Supreme Court announced this "public concern test" in *Snyder v. Phelps* as follows:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.[45]

Although revenge porn may seem completely at odds with the concept of "public concern," under the Court's standard it could easily qualify as a "matter of . . . concern to the community, or . . . of legitimate news interest."[46] For example, in *Snyder*, the content of the Westboro Baptist Church's signs—insulting and derogatory comments aimed at gay people—was found to "relate[] to broad issues of interest to society at large," in part because "the political and moral conduct of the United States and its citizens . . . are matters of public import."[47] Similar arguments would be made regarding revenge porn and the public

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[40] Stokes, *supra* note 33, at 940; *see also id.* at 948 ("Revenge porn is objectionable to society for reasons that are not Internet-specific, but instead grounded in the same moral instincts that support recognition of torts like IIED."); Larkin, *supra* note 28, at 76–94 (2014).

[41] *See* Larkin, *supra* note 28, at 78–80; Stokes, *supra* note 33, at 949.

[42] Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 662 (2016); Mary Anne Franks, *Criminalizing "Revenge Porn": Frequently Asked Questions* 2 (Oct. 12, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337998 [hereinafter Franks, *Criminalizing*].

[43] Snyder v. Phelps, 562 U.S. 443, 451 (2011) ("The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress." (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988))).

[44] *Snyder*, 562 U.S. at 451–52 ("[S]peech on matters of public concern . . . is at the heart of the First Amendment's protection" (internal quotation marks and citations omitted)).

[45] *Id.* at 453 (internal quotation marks and citations omitted).

[46] *Id.*

[47] *Id.* at 454.

import of the "moral conduct" of citizens.[48] The signs at issue in *Snyder* displayed words as opposed to sexually explicit images.[49] Like revenge porn, however, the speech in *Snyder* concerned the sexuality of particular citizens and aimed to criticize—and, in so doing, circumscribe—the sexual autonomy of those citizens. Therefore, despite the different medium, it is not implausible that a court would find revenge porn qualifies as a matter of public concern subject to a First Amendment defense.

In addition to a First Amendment defense, defendants may also raise a consent defense.[50] For example, Benjamin Barber, the first person convicted under Oregon's revenge porn statute, sued in federal court for a temporary restraining order (TRO) against his state criminal prosecution, alleging that the Oregon statute violated his First Amendment rights and his copyright in the images.[51] He also argued that his production and dissemination of the images was consensual and for commercial purposes.[52] The TRO was denied.[53]

In some contexts, especially jury trials, the success of a consent defense may depend in large part on the biases of the factfinder. Society's condemnation of women's sexuality lead "[s]ome [to] argue that a woman's consensual sharing of sexually explicit photos with a trusted confidant should be taken as wide-ranging permission to share them with the public."[54] Thus, the factfinder's biases regarding women's bodily and sexual autonomy might affect the scope of consent found. And even if the victim wins on the merits, the defendant may be judgment-proof if he is without the financial resources to pay the judgment, which is often the case.[55]

Furthermore, revenge porn victims typically cannot seek damages from webhosts. Under § 230 of the Communications Decency Act,[56] interactive service providers (ISPs) are immune from liability for material

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[48] For an example of this argument, see John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 227 n.62 (2014).

[49] *Snyder*, 562 U.S. at 443.

[50] Larkin, *supra* note 28, at 80–81.

[51] Barber v. Vance, No. 3:16-cv-2105-AC, 2016 WL 6647936, at *1 (D. Or. Nov. 9, 2016).

[52] *Id.* at *2.

[53] *Id.* at *7.

[54] *See* Citron & Franks, *supra* note 7, at 348 ("This disregard for harms undermining women's autonomy is closely tied to idiosyncratic, dangerous views about consent with regard to sex."); *id.* at 354–56.

[55] Koppelman, *supra* note 42, at 662; Franks, *Criminalizing*, *supra* note 42, at 2; Larkin, *supra* note 28, at 71 n.48 ("The general rule is that [revenge porn perpetrators] are not wealthy . . . . They're young men and they think it's funny.").

[56] 47 U.S.C. § 230 (2012).

posted by third-party users.[57] Normally, revenge porn sites do not create the images they host—the victims or the uploaders do.[58] So long as the ISP does not revise or edit the uploaded material,[59] § 230 immunizes the ISP for hosting revenge porn posts.[60] Accordingly, it is "nearly impossible for victims to go after traffickers of revenge porn using [tort law]."[61] But perhaps the greatest shortcoming of tort law is the lack of any legal mechanism for removing the images from the Internet. One of the central concerns of revenge porn victims is regaining their privacy, which necessarily requires removal.[62] Thus, although an intentional infliction of emotional distress claim may provide the occasional victim with a damages award, tort law alone affords revenge porn victims an incomplete remedy.

B. Copyright Law and DMCA Takedown

At first glance, copyright appears to offer qualifying victims the greatest remedy because it provides a legal mechanism to remove the images from the Internet.[63] To be eligible for copyright protection, the work must be an "original work[] of authorship," among other things.[64] For images, this generally means the author is the photographer rather than the subject of the photo, unless the photographer and the subject are the same person. Victims take a large majority of the images that are

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[57] *Id.*

[58] Levendowski, *supra* note 1, at 428.

[59] Additionally, the Ninth Circuit held that a website loses CDA immunity "if it contributes materially to the alleged illegality of the conduct," for example, by "elicit[ing] the allegedly illegal content and mak[ing] aggressive use of it in conducting its business." Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1168, 1172 (9th Cir. 2008). And a federal district court held that a website that was "not only offensive but tortious" and which "specifically encourage[s] development of what is offensive about the content" of the website loses CDA immunity. Jones v. Dirty World Entm't Recordings, LLC, 840 F. Supp. 2d 1008, 1011–12 (E.D. Ky. 2012).

[60] Larkin, *supra* note 28, at 67.

[61] Levendowski, *supra* note 1, at 427; *see also* Larkin, *supra* note 28, at 66 (describing section 230 as the "principal obstacle" to victims' recovery of damages).

[62] *See* Citron & Franks, *supra* note 7, at 358–60.

[63] *See* Levendowski, *supra* note 1, at 426 ("Copyright establishes a uniform method for revenge porn victims to remove their images, target websites that refuse to comply with takedown notices, and, in some cases, receive monetary damages. . . . [I]t is the most efficient and predictable means of protecting victims of revenge porn.").

[64] *See* 17 U.S.C. § 102 (2012) (laying out the subject matter of copyright protection).

later disseminated as revenge porn, so called "selfies,"[65] which means the average revenge porn victim holds copyright in those images.[66] Revenge porn victims who did not themselves take the sexually explicit photos, however, fail to satisfy the authorship requirement of copyright and are ineligible for protection.[67]

If a victim satisfies the authorship requirement, she is entitled to copyright protection.[68] The most significant benefit of copyright protection is takedown under the Digital Millennium Copyright Act (DMCA), which allows a victim to request that a webhost remove her images.[69] The Act does not require a victim to register her copyright in order to take advantage of DMCA takedown.[70] She must simply follow the notification requirements laid out in the statute to request that an Online Service Provider (OSP) remove the allegedly infringing material residing on its system.[71] The target of the takedown—the person who posted the material—may file a counter-notification if that person believes in good faith that the material was removed or targeted by mistake.[72] If this happens, the victim must file a copyright infringement lawsuit within ten days to prevent the OSP from restoring the material.[73] An infringement lawsuit may also seek damages, either actual or statutory.[74] OSPs are often immune from liability under § 512 of the Copyright Act, but risk losing immunity if they ignore takedown requests.[75] Even then, both they and the posters may be judgment proof.[76]

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[65] Larkin, *supra* note 28, at 63 n.23 (estimating that 80 percent of revenge porn images are selfies); Levendowski, *supra* note 1, at 426 (estimating that more than 80 percent of revenge porn images are selfies).

[66] *See* Levendowski, *supra* note 1, at 440.

[67] Mary Anne Franks tells the story of a Missouri woman whose then-husband snapped photos of her as she exited the shower, unaware of his presence in the bathroom. Franks, *Drafting*, *supra* note 6, at 14. When she finally received a protective order against him seven years later, he immediately uploaded the image to a notorious revenge porn site and connected the image to her professional and social media profiles. *Id.* Copyright would afford this revenge porn victim no remedy, as she was not the author of the image.

[68] *See* Levendowski, *supra* note 1, at 440.

[69] *See* 17 U.S.C. § 102 (2012).

[70] Levendowski, *supra* note 1, at 443; *see also id.* ("Victims can also issue de-indexing requests to search engines, like Google or Yahoo, to remove infringing links from search results."). Section 512 of the DMCA provides immunity for qualified service providers who comply with the section's notice and takedown procedures. *See* 17 U.S.C. § 512 (2012). The full takedown procedures and requirements for service provider immunity are outside the scope of this Comment.

[71] *See* 17 U.S.C. § 512(c)(3) (2012).

[72] *Id.* § 512(g)(3).

[73] *Id.* § 512(g)(2).

[74] *Id.* § 504(a).

[75] *Id.* § 512 (2016). CDA § 230 does *not* provide webhost immunity against copyright infringement lawsuits. Ari Ezra Waldman, *Images of Harassment: Copyright*

Infringement lawsuits pose further problems. In order to bring an infringement lawsuit, a copyright owner must register her copyright with the United States Copyright Office.[77] As part of the registration process, the owner must submit copies of the work in which she seeks copyright.[78] But copyright protection expires after 70 years, meaning an owner's registered work is eventually released into the public domain.[79] So, although copyright protection may allow for takedowns and does not confront CDA § 230 obstacles in the form of ISP immunity, the remedy is still flawed. Due to the eventual expiration of copyright protection, some victims may view registration of the images as antithetical to their ultimate goal: remove the images from the Internet in order to recover as much of their privacy as possible.

Victims face additional hurdles when attempting to enforce their copyrights. In order to take advantage of DMCA protections, victims must locate the websites on which their images appear and send takedown notices to each.[80] The nature of the Internet makes this difficult because images reach "a potentially global audience" almost instantly and may be

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Law and Revenge Porn, 23 FED. B. COUNCIL Q. 15, 15. (2015). However, ISPs that comply with § 512's notice and takedown procedures are immune from copyright infringement liability under that section. 17 U.S.C. § 512.

[76] *See* Larkin, *supra* note 28, at 71 n.48 ("'The general rule is that these people are not wealthy,' [attorney John] Morgan says. 'They're young men and they think it's funny.'" (quoting Lorelei Laird, *Victims Are Taking On 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, ABA J. (Nov. 8, 2013), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_ photos_they_didnt_c/)).

[77] 17 U.S.C. § 411(a) (2012). The fact that the victim herself never published the image does not affect her rights in the image. *See* 17 U.S.C. § 104(a) (2012) ("The works specified by sections 102 and 103, while unpublished, are subject to protection under this title . . . ."); *see also id.* § 106 (giving the copyright owner exclusive rights to "distribute copies . . . of the copyrighted work to the public" and "display the copyrighted work publicly," among others). Nor does the fact that a victim may never have wished to publish the images. Stewart v. Abend, 495 U.S. 207, 228–29 (1990) ("[A]lthough dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works . . . . [N]othing in the copyright statutes would prevent an author from hoarding all of this works during the term of the copyright."); Levendowski, *supra* note 1, at 442 ("Revenge porn victims are a perfect example of the ways in which negative copyrights incentivize creation: those images would never have been shared if victims did not believe they could control who saw them."). Therefore, that a victim may have shared the image with the poster would not affect her copyright in the image. *Id.* at 441.

[78] 17 U.S.C. § 407 (2012). One possibility for victims of revenge porn is to request publication of a regulation on the Register of Copyrights categorically exempting revenge porn from this requirement. *See* 17 U.S.C. § 407(c) (2016).

[79] 17 U.S.C. § 302(a) (2012).

[80] Larkin, *supra* note 28, at 71 n.48.

"shared via peer-to-peer servers, stored on multiple computers in multiple jurisdictions, or hosted by websites whose servers use various means to hide their location and identity."[81] The nature of revenge porn makes it even worse. The intent of revenge porn is to inflict extensive reputational and emotional harm on the victim,[82] which "trollers" of revenge porn sites help to accomplish.[83] As a result, some advocates worry that victims' attempts to remove the images will unintentionally draw more attention to them, especially if the images appear on revenge porn sites.[84] These websites solicit revenge porn and, therefore, will be reluctant to remove it. They may even go so far as to "create additional posts about victims who request takedowns or encourage users to re-post victims' images onto other websites."[85] Thus, although copyright protection allows some victims to remove their images from the Internet and recover damages, its serious shortcomings render it inadequate to address revenge porn.

Copyright law and other civil remedies afford incomplete protection, as shown by the surge in reports of revenge porn and the proliferation of sites soliciting such material prior to its criminalization.[86] Additionally, civil remedies fail to stop the spread of the images once disclosed. The threat of criminal penalties, on the other hand, is more likely to deter would-be posters in the first place. In most cases, criminal convictions remain on the poster's record.[87] What's more, criminal penalties convey social condemnation for the conduct.[88] Existing criminal statutes, such as harassment and voyeurism laws, fail to adequately address revenge porn.[89] Therefore, the direct criminalization of nonconsensual pornography is imperative.[90]

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[81] *See* Salter & Crofts, *supra* note 3, at 235, 237.

[82] Levendowski, *supra* note 1, at 443–44.

[83] *See* Salter & Crofts, *supra* note 3, at 238.

[84] *See* Levendowski, *supra* note 1, at 444; *see also* Larkin, *supra* note 28, at 71 n.48 ("[T]here is the risk, known as the 'Streisand effect,' that seeking relief may increase awareness of the privacy violation.").

[85] Levendowski, *supra* note 1, at 444.

[86] Citron & Franks, *supra* note 7, at 357–61; *id.* at 361 ("Nonconsensual pornography's rise is surely related to the fact that malicious actors have little incentive to refrain from such behavior.").

[87] *Id.* at 349; Larkin, *supra* note 28, at 69 (describing criminalization of revenge porn as a "powerful deterrent").

[88] Citron & Franks, *supra* note 7, at 349.

[89] *Id.* at 345, 349. Harassment laws, for example, commonly require a harassing course of conduct, which a single post fails to establish. *Id.* at 345. And revenge porn usually does not satisfy voyeurism laws, which criminalize the unconsented viewing or recording of a person's intimate parts, because victims often allow the poster to capture the images or take the images themselves. *Id.* at 347, 363.

[90] *See generally id.*; *see also id.* at 349, 365–70.

C. Criminal Law

The criminalization of revenge porn is on the rise. In 2014, Professors Danielle Keats Citron and Mary Anne Franks[91] wrote an article that advocated criminal statutes aimed specifically at revenge porn.[92] Both professors are involved with the Cyber Civil Rights Initiative ("CCRI"), a nonprofit organization "serving thousands of [revenge porn] victims around the world and advocating for technological, social, and legal innovation to fight online abuse."[93] At the time they published their article, only six states had criminalized revenge porn.[94] By 2017, 38 states and the District of Columbia had enacted legislation prohibiting revenge porn.[95] Professor Franks helped draft a federal revenge porn bill, the Intimate Privacy Protection Act,[96] which Representative Jackie Speier introduced in July 2016.[97] The stated purpose of the Act is "to provide that it is unlawful to knowingly distribute a private, visual depiction of a person's intimate parts or of a person engaging in sexually explicit conduct, with reckless disregard for the person's lack of consent to the

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[91] Professor Citron is the Morton & Sophia Macht Professor of Law at the University of Maryland and teaches information privacy law and other subjects. *Danielle Citron Faculty Profile*, UNIVERSITY OF MARYLAND, http://www.law.umaryland.edu/faculty/profiles/faculty.html?facultynum=028. She publishes extensively on cybercrime, information privacy, and revenge porn. *Id.* Professor Franks is a Professor of Law at the University of Miami School of Law and teaches criminal law, First Amendment law, and other subjects. *Mary Anne Franks Faculty Profile*, MIAMI LAW, http://www.law.miami.edu/faculty/mary-anne-franks. She drafted the first model criminal revenge porn statute. *Id.*

[92] *See* Citron & Franks, *supra* note 7.

[93] *About*, CCRI, https://www.cybercivilrights.org/welcome/. Professor Franks serves as the Vice President and Legislative & Tech Policy Director of CCRI, and Professor Citron serves as an advisor. *CCRI Board of Directors and Advisors*, CCRI, https://www.cybercivilrights.org/ccri-board/.

[94] Citron & Franks, *supra* note 7, at 371. Those states were New Jersey, Alaska, Texas, California, Idaho, and Utah. *Id.* New Jersey was the first state to criminalize nonconsensual pornography, with the statute taking effect in January 2004. *Id.* at 371 & n.160; *see also* N.J. STAT. ANN. § 2C:14-9 (2017). The statute made the posting or sharing of intimate images without the subject's consent a third-degree crime carrying a three- to five-year prison sentence. N.J. STAT. ANN. §§ 2C:52-2, 2C:14-9, 2C:43-6 (2016). There have been multiple convictions under this statute. Citron & Franks, *supra* note 7, at 371–72.

[95] *See, e.g.*, ALASKA STAT. § 11.61.120 (2017); HAW. REV. STAT. § 711-1110.9 (2017); OR. REV. STAT. § 163.472 (2017); WASH. REV. CODE § 9A.86.010 (2017); s*ee also Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws/. The Uniform Military Code also prohibits the dissemination of nude photographs, but only when the images were captured without the subject's consent. 10 U.S.C. § 920c (2012).

[96] Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. § 1802 (2016); Wheeler, *supra* note 8.

[97] H.R. 5896.

distribution, and for other purposes."[98] Unfortunately, no action has been taken since the bill was referred to the House Subcommittee on Crime, Terrorism, Homeland Security, and Investigations in August 2016.[99]

Critics of the criminalization of revenge porn make various arguments. The number of victims on revenge porn sites, for example, raises concerns that criminalization of revenge porn would drain prosecutorial resources.[100] Another argument stresses that victims could avoid the harm by refraining from taking and sharing sexually explicit images, which one scholar advanced despite opining that it "somewhat borders on victim blaming."[101] In fact, this argument *centers* on victim blaming by placing the impetus of crime avoidance on the victim as opposed to the perpetrator. This argument also fails to acknowledge the abusive aspect of revenge porn. Many couples choose to share intimate images with one another;[102] only a few people choose to disclose the images in breach of a partner's trust.[103]

Revenge porn is a form of sexual abuse and should be treated as such.[104] However, due to the lack of obvious physical abuse accompanying the disclosure of the images, some critics argue that revenge porn is speech and, thus, revenge porn statutes are unconstitutional prohibitions on free speech.[105] Such First Amendment challenges to revenge porn legislation may prevail, as in the case of *Ex Parte Thompson*.[106] There, the Court of Criminal Appeals of Texas considered Texas Penal Code § 21.15(b)(1), which made it a crime to photograph or record a person without that person's consent and with the intent to sexually arouse or gratify another.[107] The court determined the statute was content based

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[98] *Id.*

[99] *Id.*

[100] *See* Citron & Franks, *supra* note 7, at 367, 389 (describing how a single instance of nonconsensual distribution of a private image may only be a misdemeanor, and prosecutors are unwilling to expend limited resources on such low level charges).

[101] *Id.* at 348–49, 366–67.

[102] Salter & Crofts, *supra* note 3, at 237 ("[A] representative sample of 647 American adults aged 19 to 24 found 33 percent had sent a nude or semi-nude image of themselves to someone else and surveys based on convenience samples find that up to 50 percent of adults have done the same." (footnote omitted)).

[103] Levendowski, *supra* note 1, at 424 ("[A]ccording to one survey, one in ten former partners threaten to post sexually explicit images of their exes online and an estimated sixty percent of those follow through.").

[104] Citron & Franks, *supra* note 7, at 363 (arguing that voyeurism laws prove that physical contact is not a prerequisite to harm and suffering).

[105] *See, e.g.*, Humbach, *supra* note 48, at 218.

[106] Ex Parte Thompson,442 S.W.3d 325, 348 (Tex. Crim. App. 2014).

[107] *Id.* at 330, 348–51.

and thus applied strict scrutiny.[108] Because the court found that the portion of the statute at issue was "not the least restrictive means of protecting the substantial privacy interests in question," it struck down § 21.15(b)(1) as unconstitutional.[109] The court also found the statute was overbroad, noting that the "statute could easily be applied to an entertainment reporter who takes a photograph of an attractive celebrity on a public street."[110] The Texas legislature later amended the statute to comply with the court's First Amendment analysis.[111] It has yet to be overturned.

First Amendment challenges to revenge porn criminalization are by no means insurmountable. Citron and Franks offer advice for drafting constitutional criminal revenge porn statutes, recommending that legislators ensure statutes clarify the perpetrator's required mental state, require proof of harm to the victim, delineate clear exceptions to avoid over-breadth challenges under the First Amendment, and take care to provide specific and clear definitions of key terms.[112] If criminal revenge porn statutes can survive First Amendment challenges, they may be the best approach to eradicating revenge porn. Still, even with careful drafting, revenge porn statutes face challenges due to the Supreme Court's *Florida Star* decision, which greatly circumscribed the privacy interests of victims of various forms of sexual abuse.

III. FIRST AMENDMENT LIMITATIONS AND *FLORIDA STAR*

As discussed above, posters of revenge porn and free speech advocates contend that criminal and civil revenge porn statutes infringe First Amendment free speech rights. The argument is that attempts to impose liability—whether via criminal or tort laws—violate the poster's free speech rights because of the "censorious" effect of such laws.[113] These laws thus constitute content discrimination that, under Supreme Court precedent, must either fit within a recognized free speech exception or survive strict scrutiny.[114] Revenge porn does not fit within

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[108] *Id.* at 348 ("To be subject to intermediate scrutiny, then, the provision must be a content-neutral time, place, or manner restriction."); *id.* at 345.

[109] *Id.* at 348.

[110] *Id.* at 350. Concern over the application of revenge porn statutes to journalists is not uncommon. For example, discussing the unintended consequences of revenge porn legislation Amanda Levendowski notes that Arizona's 2014 law "would apply to journalists' coverage of New York mayoral candidate Anthony Weiner's second sexting scandal." Levendowski, *supra* note 1, at 438 n.88.

[111] *See* Tex. PENAL CODE § 21.15 (2017).

[112] *Thompson*, 442 S.W.3d at 386–90.

[113] Larkin, *supra* note 28, at 98.

[114] *See* Humbach, *supra* note 48, at 221("[R]evenge porn laws face a major First Amendment hurdle because their explicit and unabashed aim is to punish and suppress disfavored speech.").

any existing exceptions, and the Supreme Court has expressed unwillingness to carve out further exceptions. Unfortunately for victims of revenge porn, First Amendment precedent greatly limits the protection afforded to victim privacy rights in the face of free speech concerns and may impair the ability of statutes—both criminal revenge porn statutes and tort statutes invoked against perpetrators of revenge porn—to withstand strict scrutiny.[115]

A. Free Speech Exceptions

In order to understand the validity of a First Amendment defense in this context, it is helpful to examine why revenge porn does not fall within any unprotected category of speech. The Supreme Court recognizes only a few types of expression the government may regulate without running afoul of the First Amendment.[116]

One type of expression the government may regulate is "true threats."[117] "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[118] Although revenge porn sites are rife with rape and assault threats launched at victims, they are often made by anonymous commenters.[119] The original poster of the images—the target of revenge porn statutes—may not have made explicit or direct threats. Even if accused of doing so, the poster may escape liability by simply claiming he neither intended nor knew the victim would view the communication as a threat.[120] As such, prosecutors and victims would likely find little success evoking the "true threats" exception in the face of free speech defenses.[121]

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[115] Florida Star v. B.J.F., 491 U.S. 524, 541 (1989). Copyright does not generally face free speech hurdles. *See* Koppelman, s*upra* note 42, at 673.

[116] *See* Virginia v. Black, 538 U.S. 343, 358 (2003).

[117] *Id.* at 359.

[118] *Id.*

[119] *See* Franks, *supra* note 5, at 227, 229, 255–56.

[120] *See* Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (declining to address the First Amendment issue in a criminal case because the parties failed to address the defendant's mental state—in particular, whether the defendant made the communication with the purpose of threatening the recipient or with knowledge that the recipient would deem the communication a threat); *see also* Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 153 (2011); Levendowski, *supra* note 1, at 433 ("In *United States v. Baker*, a federal district court judge dismissed the government's claim against a man who corresponded via e-mail with an unidentified Internet acquaintance about brutally raping a female classmate because his conversations were shared fantasies that could not 'possibly amount to a true threat.'" (quoting United States v. Baker, 890 F. Supp. 1375, 1388 (E.D. Mich. 1995), *aff'd sub nom* United States v. Alkhabaz, 104 F.3d 1492, 1492 (6th Cir. 1997))).

[121] Levendowski, *supra* note 1, at 433.

A related category of unprotected speech is incitement.[122] States may not prohibit speech that advocates violence or violation of the law, "*except where* such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action."[123] Posters of revenge porn sometimes include personal identifying information with the images as well as instructions to contact or even approach the victim.[124] Ensuing communications undoubtedly terrify victims, but the contact alone generally does not constitute a violation of the law.[125] Therefore, the original message with instructions to approach does not incite lawless action. And even where criminal conduct does follow—such as assault or stalking by men who viewed the images and PII online, which allowed them to locate and identify the victim—the original post is unlikely to satisfy the imminence requirement of the incitement exception.[126]

Indirect incitement, or words that "men of common intelligence would understand would be words likely to cause an average addressee to fight," also falls outside First Amendment protection.[127] Typically, the words must be communicated face-to-face to qualify for the exception.[128] Thus, images and other information posted to revenge porn sites—communicated neither face-to-face nor directly to the victim—would not qualify.[129]

Revenge porn also eludes the obscenity exception. Obscenity is "material which deals with sex in a manner appealing to prurient interest."[130] Portrayals of nudity and sex do not automatically qualify as obscene.[131] The Supreme Court announced the following test for obscenity in *Miller v. California*:[132]

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[122] Brandenburg v. Ohio, 395 U.S. 444, 444 (1969) (emphasis added).

[123] *Id.*

[124] Citron & Franks, *supra* note 7, at 351, 357.

[125] Levendowski, *supra* note 1, at 433.

[126] *See* Lidksy, *supra* note 120, at 153. ("Speech may not be punished merely 'because it increases the chance an unlawful act will be committed at some indefinite future time.'" (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002))).

[127] Chaplinksy v. New Hampshire, 315 U.S. 568, 573 (1942); *id.* at 572 (further describing "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[128] Lewis v. New Orleans, 408 U.S. 913, 913 (1972); *Chaplinksy*, 315 U.S. at 573; Byrnes v. Manchester, 848 F. Supp. 2d 146, 157 (D.N.H. 2012).

[129] *See, e.g.*, Lidksy, *supra* note 120, at 152–53 (concluding that Terry Jones' online speech—he posted a video of his fellow pastor burning a Quran—failed to satisfy the "fighting words" standard because "he did not communicate face-to-face in a manner calculated to trigger violence in his audience").

[130] Roth v. United States, 354 U.S. 476, 477 (1957).

[131] *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards.").

[132] Miller v. California, 413 U.S. 15, 24 (1973).

> (a) [W]hether "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.[133]

The Court further clarified that "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct."[134] Most revenge porn will not meet this standard, as the selfies that primarily comprise revenge porn do not qualify as "patently offensive" and "hard core." The obscenity exception is therefore unlikely to serve as a bar to a First Amendment defense to revenge porn laws.

Perhaps most relevant to revenge porn is the child pornography exception. Although the vast majority of revenge porn victims are not minors, and therefore would not fall within this exception, many of the justifications for refusing to protect child pornography under the First Amendment apply in the revenge porn context as well. Criminalization of child pornography reveals social condemnation of viewing and distributing—not simply creating—certain kinds of sexually explicit images.[135] Child pornography cases, like most pornography cases, originally fell within the purview of the obscenity exemption.[136] New York and other states began enacting statutes that criminalized child pornography without requiring the materials to qualify as legally obscene, arguably failing to meet the *Miller* standard.[137] Nevertheless, the Supreme Court upheld these statutes in *New York v. Ferber*, giving states "greater leeway" in regulating child pornography and creating a new exception to the First Amendment.[138] The Court justified the lack of protection afforded to child pornography as "expression" on a number of grounds, including "the surpassing importance" of the government interest in protecting children from sexual exploitation; the inextricable link between the production and distribution of the images and child sexual abuse; the permanence of the record of abuse; and the additional harm done to children when that record is circulated.[139]

Arguably, many of the justifications for categorically excluding child pornography from free speech protection apply to revenge porn as well.

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[133] *Id.* (internal citations omitted).

[134] *Id.* at 27.

[135] Citron & Franks, *supra* note 7, at 363–64.

[136] New York v. Ferber, 458 U.S. 747, 754–57 (1982).

[137] *Id.* at 749–50.

[138] *Id.* at 756–65.

[139] *Id.* at 757.

Victims of child pornography and revenge porn are both unwilling participants; victims of revenge porn may take the images themselves or allow a sexual partner to take the images, but they are still unwilling participants in the public display and distribution of the images. Additionally, the permanent record of the abuse creates a lasting impact, a lifelong stigma that is difficult to escape.[140] There are, however, important differences, the most obvious being age and consent. For one, states' interest in protecting children from sexual exploitation does not apply to most instances of revenge porn.[141] Moreover, most revenge porn victims allowed the photos to be taken or took the photos themselves.[142] Thus, the invasion of privacy and emotional harm suffered by revenge porn victims do not correspond with the sexual abuse and exploitation suffered by child pornography victims. Although this does not mean that revenge porn victims consented to public distribution of the images, their often voluntary participation in capturing the images may make them less sympathetic to many audiences than the unwilling and abused victims of child pornography. For these reasons, revenge porn statutes fail to overcome free speech defenses under the child pornography exception and its justifications.

B. New Exception?

The alleged clash between the First Amendment and efforts to protect revenge porn victims have led some to call for a new unprotected category of speech.[143] The Supreme Court, however, has expressed reluctance to create additional categorical exemptions. In *United States v. Stevens*, the Court confronted a First Amendment challenge to a federal statute criminalizing the creation, distribution, and possession of depictions of animal cruelty.[144] The Government argued that depictions of animal cruelty should be categorically exempt from First Amendment protection.[145] In striking down the statute as overbroad, the Supreme Court indicated that its decision in *Ferber* did not signal its readiness nor

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[140] Levendowski, *supra* note 1, at 431 n.46 ("Victims' descriptions of feeling victimized when images reappear or strangers approach them in public because of the images is eerily reminiscent of the 'haunting harm' described by child pornography victims."); *see also supra* notes 14–20 and accompanying text.

[141] Amanda Lenhart, Michele Ybarra & Myeshia Price-Feeney, *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* CTR. FOR INNOVATIVE PUBLIC HEALTH RESEARCH (2016), *available at* https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf.

[142] *See supra* note 67.

[143] *See, e.g.*, Alix Iris Cohen, Note, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300, 300 (2015).

[144] 559 U.S. 460, 464 (2010).

[145] *Id.* at 468.

its authority to create countless new categories of unprotected speech.[146] As such, many legal commentators have opined that the Supreme Court will not recognize any additional exceptions.[147] And aside from this expressed reluctance, the privacy interests of revenge porn victims would not likely justify a new categorical exemption under Supreme Court precedent, which greatly limits victim privacy rights in the face of First Amendment challenges.[148]

C. Free Speech Protection and Strict Scrutiny

Free speech protection arises from the First Amendment of the United States Constitution, which states in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[149] In defining the contours of this constitutional right the Supreme Court has acknowledged that freedom of speech is essential to both individual autonomy and a functioning democracy.[150] By protecting freedom of speech, the First Amendment safeguards the search for the truth in the so-called "marketplace of ideas."[151] In order for the protection to have any power, the government must not dictate public discussion by censoring certain speech.[152] As such, the Supreme Court has repeatedly recognized that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or

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[146] *Id.* at 472 ("Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."); *see also* United States v. Alvarez, 567 U.S. 709, 717 (2012) ("In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits. Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar.'" (internal quotation marks and citations omitted)).

[147] *See, e.g.*, Humbach, *supra* note 48 at 236–37; *see also id.* at 240 ("[T]he Court has never suggested that privacy interests could be the basis of a categorical exception to First Amendment protection.").

[148] *See* Florida Star v. B.J.F., 491 U.S. 524, 530 (1989); s*ee also infra*, Part III.D.

[149] U.S. CONST. amend. I.

[150] *See* Globe Newspaper Co. v. Superior Ct. for the Cty. of Norfolk, 457 U.S. 596, 604 (1982) (declaring that freedom of speech "ensure[s] that the individual citizen can effectively participate in and contribute to our republican system of self-government"); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) (indicating that a principal goal of free speech protection is to "ultimately produce a more capable citizenry and more perfect polity").

[151] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[152] Consol. Edison Co. of N.Y v. Pub. Serv. Comm'n of N.Y, 447 U.S. 530, 537–38 (1980).

its content."[153] Consequently, content-based restrictions on speech are "presumed invalid."[154]

In order to overcome the presumptive invalidity of content-based regulations, the Government must show that the statute at issue withstands strict scrutiny.[155] To do so, the statute "must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[156] This standard is difficult to meet, even in contexts where particularly compelling government interests are at play, such as the protection of minors.[157]

A defendant may raise a First Amendment defense to both tort and criminal claims brought in response to the distribution of revenge porn. As discussed above, revenge porn may well fall within the realm of "public concern" that entitles a defendant to assert a free speech defense to tort suits.[158] Further, criminal revenge porn statutes target particular speech, and thus qualify as content-based restrictions.[159] Therefore, a state must be able to prove a statute is narrowly tailored to promote a compelling state interest.[160] The primary state interest that supports enactment of revenge porn statutes is victim privacy.[161] Unfortunately for victims of revenge porn and related sexual privacy invasions, Supreme

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[153] Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002).

[154] United States v. Alvarez, 567 U.S. 709, 716–17 (2012).

[155] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

[156] *Id.*

[157] *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126–30 (1989) (applying strict scrutiny to a statute banning indecent "dial-a-porn" in order to protect children from exposure to sexually explicit messages and finding the statute unconstitutional due to the existence of a less restrictive means of achieving the Government's goal, even though the effectiveness of that alternative means was unknown); *Playboy Entm't Grp.*, 529 U.S. at 806–27 (applying strict scrutiny to a statute requiring television operators to scramble or block adult entertainment channels during hours when children might view them and finding the statute unconstitutional because a less restrictive means of accomplishing the provision's goal *may* exist in a different section of the same Act *if* that section were adequately advertised); Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002) (applying strict scrutiny to a law banning virtual child porn and finding the statute overbroad and unconstitutional); United States v. Stevens, 559 U.S. 460, 472–82 (2010) (applying strict scrutiny to a statute banning the creation, sale, and possession of animal cruelty films and finding the statute unconstitutionally overbroad); *see also* Humbach, *supra* note 48, at 2344 (discussing First Amendment cases and concluding, "The Court is not quick to strike down speech it does not like.").

[158] *See supra* notes 45–49.

[159] *See* Humbach, *supra* note 48, at 250.

[160] *Playboy Entm't Grp.*, 529 U.S. at 803, 813.

[161] *See* Florida Star v. B.J.F., 491 U.S. 524 (1989). In *Florida Star*, there was a statute that proscribed the "print, publish, or broadcast" of identifying facts or information about victims of sexual offenses in order to preserve victims' privacy. *Id.* at 526.

Court precedent holds that privacy rights are insufficient to overcome a free speech defense when the defendant reveals truthful information that was legally obtained.[162]

D. Overcoming Strict Scrutiny after Florida Star v. B.J.F.

In *Florida Star v. B.J.F.*, the Supreme Court held that the First Amendment protects a newspaper's publication of a rape victim's name that the newspaper lawfully acquired from a police report.[163] Although this holding may seem narrow, the case has had far-reaching consequences, limiting the ability of victim privacy rights to withstand strict scrutiny when confronted with First Amendment defenses.[164]

The Florida Star, a newspaper serving Jacksonville, Florida, revealed the identity of a rape victim, B.J.F., in a story reporting the crime.[165] This disclosure violated Florida law[166] as well as The Florida Star's internal policy against publishing the names of rape victims.[167] The Florida Star obtained the victim's name from a police report found in the pressroom of the Duval County Sheriff's Department, to which the Department did not restrict access.[168] In response to the publication, B.J.F. filed suit in Duval County Circuit Court against The Florida Star, alleging violation of the applicable Florida statute.[169]

At trial, B.J.F. testified regarding the impact the public, unconsented to disclosure of her rape had on her life and the severe emotional distress she suffered.[170] She learned of the disclosure from coworkers and

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[162] *Id.* at 524.

[163] *Id.* at 526.

[164] *See, e.g.*, Ex Parte Thompson, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014) (striking down a revenge porn statute aiming to protect victim privacy as unconstitutional and overbroad under the First Amendment); s*ee also* Barbara Lynn Pederson, Florida Star v. B.J.F.: *The Rape of the Right to Privacy*, 23 J. MARSHALL L. REV. 731, 751 (1990); Jacqueline R. Rolfs, Note, The Florida Star v. B.J.F.: *The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107, 1127–28; Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299, 312 (1991). *But see* Patrick J. McNulty, *Public Disclosure of Private Facts: There Is Life After* Florida Star, 50 DRAKE L. REV. 93, 98 (2001). Cases striking down other state law causes of action in the face of First Amendment defenses have cited *Florida Star*, illustrating that the ripple effect of the decision extends beyond privacy rights. *See* Snyder v. Phelps, 562 U.S. 443, 460 (2011).

[165] *Florida Star*, 491 U.S. at 527.

[166] "No person shall print, publish, or broadcast . . . the name, address, or other identifying fact or information of the victim of any sexual offense . . . ." FLA. STAT. § 794.03 (2017) (quoted in *Florida Star*, 491 U.S. at 526 n.1 (1989)).

[167] *Florida Star*, 491 U.S. at 528.

[168] *Id.* at 527.

[169] *Id.* at 528. B.J.F. also brought suit against the Sheriff's Department, which settled with B.J.F. prior to trial. *Id.*

[170] *Id.*

acquaintances, people who likely did not know and would never have known of B.J.F.'s rape absent the publication.[171] She also received repeated rape threats over the phone.[172] These events prompted her to move, change her phone number, seek police protection, and obtain mental health counseling.[173] In defense, The Florida Star alleged that the Florida statute violated the First Amendment.[174] The trial judge ruled from the bench that the statute did not violate the First Amendment but instead struck the appropriate balance between First Amendment and privacy rights.[175] After the trial judge found The Florida Star *per se* negligent, the jury found in favor of B.J.F. on causation and awarded her compensatory and punitive damages.[176] The First District Court of Appeal affirmed, and the Supreme Court of Florida denied discretionary review.[177] The Florida Star then appealed to the United States Supreme Court, which ultimately reversed.[178]

The Supreme Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[179] The applicable statute, the Court found, failed to satisfactorily serve such an interest.[180] In reaching its conclusion, the Supreme Court applied the following test, articulated in *Smith v. Daily Mail Publishing, Co.*:

> The first inquiry is whether the newspaper "lawfully obtain[ed] truthful information about a matter of public significance.". . . The second inquiry is whether imposing liability on [The Florida Star] pursuant to § 794.03 serves "a need to further a state interest of the highest order."[181]

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[171] *Id.*

[172] *Id.*

[173] *Id.* The parallels between the harms suffered by B.J.F. and victims of revenge porn are remarkable. *See supra* Part I.

[174] *Id.* at 528.

[175] *Id.*

[176] *Id.* at 528–29.

[177] *Id.* at 529.

[178] *Id.*

[179] *Id.* at 541. The Court often uses "interest of the highest order" and "compelling interest" interchangeably under the strict scrutiny standard. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (finding that the statute at issue "serves compelling state interests of the highest order"); Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010) (describing the government interest as "of the highest order" in its strict scrutiny analysis).

[180] *Florida Star*, 491 U.S. at 541.

[181] *Id.* at 536, 537 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

The Court found that the article at issue involved a matter of "paramount public import," namely a violent crime committed in the community, and was both truthful and lawfully obtained.[182] Thus, the first inquiry weighed in favor of First Amendment protection.

As to the second inquiry, B.J.F. argued that the statute served three related interests: protecting the privacy rights of victims of sexual assault and related offenses; protecting the physical safety of these victims, who may be targeted if their names and addresses become known to their attackers; and encouraging victims of such offenses to report the crimes without fear of public exposure.[183] Although the Court recognized that the interests advanced by B.J.F. are highly significant, the Court concluded that "imposing liability for publication under the circumstances of this case is too precipitous a means of advancing these interests to convince us that there is a 'need' within the meaning of the *Daily Mail* formulation for Florida to take this extreme step."[184] Thus, despite recognizing that "press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society,'"[185] the Court found that the second inquiry also weighed in favor of First Amendment protection.[186] The Court therefore struck down the statute as unconstitutional.[187] In so doing, the Court held that a victim's right to privacy is *not* a state interest of the highest order.[188]

Justice White's dissent focused on the damage that would result, both to the individual victim and to society at large, from the majority's decision to permit publication of a fact as private as a rape victim's name.[189] He observed that "the violation [B.J.F.] suffered at a rapist's knifepoint marked only the beginning of her ordeal," acknowledging the severe emotional harm she suffered following the publication of her name.[190] He extended that harm to the public at large, lamenting the injury the majority's holding would inflict on interests in a "civilized and

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[182] *Florida Star*, 491 U.S. at 528, 536–37.

[183] *Id.* at 537.

[184] *Id.*

[185] *Id.* at 533 (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975)).

[186] *Id.* at 541.

[187] *Id.*

[188] *Id.*

[189] Justice White's opinion echoed the influential article credited with establishing the privacy tort. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). There the authors declared:

> [M]odern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects . . . [but also] results in a lowering of social standards and of morality.

Id. at 196.

[190] *Florida Star*, 491 U.S. at 542 (White, J., dissenting).

humane society," "simple standards of decency," and "quality of life."[191] Like the majority, Justice White recognized the tension between privacy and free speech rights, but he disagreed with the majority regarding where to draw the line.[192] Although he recognized the right to privacy should not be absolute, Justice White criticized the majority for affording it too little weight[193]and expressed concern over the consequences of the majority's ruling: "[T]he Court accepts [The Florida Star's] invitation to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here."[194] This prediction proved accurate; *Florida Star* muddied the boundaries of the privacy tort and perhaps even eliminated the ability of sexual privacy to qualify as a compelling state interest.[195]

IV. PRIVACY RIGHTS FOLLOWING *FLORIDA STAR*—USING INFORMATION PRIVACY TO PROTECT REVENGE PORN VICTIMS IN THE INTERNET AGE

Florida Star greatly limited privacy rights, particularly when confronted with First Amendment challenges.[196] There are narrow areas, however, in which strong privacy protections remain with little First Amendment pushback, including information privacy.[197] Several scholars

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[191] *Id.* at 547 & n.2, 552.

[192] *Id.* at 553.

[193] *Id.* at 550–51.

[194] *Id.* at 550 (internal citation omitted).

[195] *See, e.g.*, Ex Parte Thompson, 442 S.W.3d 325, 351 (Tex. Crim. App. 2014) (striking down a revenge porn statute aiming to protect victim privacy as unconstitutional and overbroad under the First Amendment); see *supra* note 164 and accompanying text. Cases striking down other state law causes of action in the face of First Amendment defenses have cited *Florida Star*, illustrating the ripple effect of the decision. *See* Snyder v. Phelps, 562 U.S. 443, 460 (2011).

[196] *The Right to Privacy* is credited as the origin of the privacy tort. Warren & Brandeis, *supra* note 189. In-depth discussions of the history and development of privacy rights in the United States as well as the perceived appropriateness of the *Florida Star* decision are outside the scope of this Comment. For a discussion of the origins of privacy rights as well as a comparison of the privacy tort with the constitutional right to privacy, see Ruth Gavison, *Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437, 444–56 (1992). For a discussion of the four privacy torts and their application to revenge porn, see Levendowski, *supra* note 1 at 433–37. For a discussion of the flaws in the Court's *Florida Star* analysis, see Marta Goldman Stanton, Comment, Florida Star v. B.J.F.: *The Wrongful Obliteration of the Tort of Invasion of Privacy Through Publication of Private Facts,* 18 HASTINGS CONST. L. Q. 391, 412–16 (1991).

[197] *See infra* Part IV.C; *see also* Mary D. Fan, *Constitutionalizing Information Privacy by Assumption,* 14 U. PA. J. CONST. L. 953, 954 (2012) ("The hypothetical constitutional

question the validity of information privacy laws under First Amendment doctrine[198] and the Supreme Court has repeatedly avoided defining the contours of a right to information privacy.[199] Still, since the 1970s, information privacy laws have continued to develop.[200] In fact, statutes and regulations directed at protecting PII that existed at the time of *Florida Star* remained untouched by the decision.[201] The limited effect of *Florida Star* on information privacy laws can be traced to concerns over the increased exposure of private information due to technological innovations that allow such information to be more easily processed and more widely shared. Although some have analogized intimate images given to partners to credit cards given to waiters or other information exchanged in the normal course of a given relationship,[202] none have rigorously examined how intimate images fit within Congress' approach to defining PII and reasons for protecting it. Because the challenges to privacy posed by advances in technology are equally applicable in the revenge porn context, this Comment argues that statutes aimed at revenge porn should be viewed through the same lens as information privacy laws.

A. Revenge Porn Falls Within the Definition of PII

Information privacy laws generally center on PII.[203] These laws evolved in tandem with the development of the computer and the

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right to informational privacy has governed by assumption in the lower courts for more than three decades.").

[198] *See, e.g.*, Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051 (2000) ("While privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.").

[199] Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 176–84 (2015).

[200] Yuen Yi Chung, *Goodbye PII: Contextual Regulations for Online Behavioral Targeting*, 14 J. HIGH TECH. L. 413, 417–18 (2014).

[201] *Id.* (describing the ongoing development of information privacy laws from the 1970s to present).

[202] *See, e.g.*, Citron & Franks, *supra* note 7 at 355.

[203] Chung, *supra* note 200, at 415 (describing PII as a "jurisdictional trigger" for many state and federal information privacy laws); *see also* Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1816 (2011) ("PII is one of the most central concepts in privacy regulation."). In the absence of PII, there is generally no privacy harm pursuant to information privacy statutes. *Id.* Several scholars have questioned the utility of limiting privacy harm to PII, as "technologists can take information that appears on its face to be non-identifiable and turn it into identifiable data." *Id.*

increased ease of connecting people with data.[204] Despite the ongoing expansion over the last several decades of PII-related information privacy laws, Congress has not adopted a uniform definition of PII.[205] In an effort to determine the boundaries and scope of PII protection, Professors and leading privacy law experts Paul M. Schwartz and David J. Solove[206] surveyed federal information privacy statutes and regulations and identified three overarching congressional approaches to defining PII—the tautological approach, the non-public approach, and the specific-types approach.[207] The tautological approach defines PII as "any information that identifies a person."[208] The Video Privacy Protection Act (VPPA) follows this approach and defines "personally identifiable information" as "information which identifies a person."[209] The non-public approach focuses on what PII is *not*—namely, "information that is publicly accessible and information that is purely statistical."[210] An example of a statute defining PII using the non-public approach is the Gramm-Leach-Bliley Act (GLBA), which defines "personally identifiable financial information" as "nonpublic personal information."[211] The statute does not define "nonpublic," but it likely means information not in the public domain.[212] The specific-types approach lists the types of data that constitute PII; therefore, "if information falls into an enumerated

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[204] Schwartz & Solove, *supra* note 203, at 1817; *id.* at 1820 ("PII first became an issue in the 1960s with the rise of the computer. . . . The computer did not merely increase the amount of information that entities collected—it changed how that data could be organized, accessed, and searched.").

[205] *Id.* at 1819.

[206] Paul M. Schwartz is the Jefferson E. Peyser Professor of Law at Berkeley Law School and Co-Director of the Berkeley Center for Law & Technology. *Paul Schwartz Faculty Profile*, BERKELEY LAW, https://www.law.berkeley.edu/our-faculty/faculty-profiles/paul-schwartz/ (last visited April 15, 2017). He teaches information privacy law and has published extensively on the subject. *Id.* The Supreme Court of Texas has cited Professor Schwartz as an "expert on German data protection law" in a case involving a conflict between Texas and Germany law. Volkswagen, A.G. v. Valdez, 909 S.W.2d 900, 902 (Tex. 1995). Daniel J. Solove is the John Marshall Harlan Research Professor of Law at George Washington University Law School. *Bio*, DANIEL J. SOLOVE, https://www.danielsolove.com/bio/ (last visited April 15, 2017). He founded TeachPrivacy, a company that provides information privacy and security training, and regularly writes regarding privacy law and technology. *Id.* The New Jersey Supreme Court cited Professor Solove in an opinion extending the New Jersey Constitution's privacy protection to information privacy in subscriber information provided to Internet service providers." *See* State v. Reid, 194 A.2d 386, 398–99 (N.J. 2008).

[207] *See* Schwartz & Solove, *supra* note 203, at 1828–36.

[208] *Id.* at 1829.

[209] 18 U.S.C. § 2710 (a)(3) (2012); Schwartz & Solove, *supra* note 203, at 1829.

[210] Schwartz & Solove, *supra* note 203, at 1830.

[211] 15 U.S.C. § 6809(4)(A) (2012); Schwartz & Solove, *supra* note 203, at 1830.

[212] Schwartz & Solove, *supra* note 203, at 1830.

category, it becomes per se PII by operation of the statute."[213] The Children's Online Privacy Protection Act employs this approach and defines "personal information" as "individually identifiable information about an individual collected online," listing nine categories of qualifying information.[214]

Although Schwartz and Solove did not address intimate images as PII, their rigorous analysis of how Congress has categorized information privacy is useful in determining whether intimate images fit within the PII framework and thus merit protection under the umbrella of information privacy. Revenge porn undoubtedly "identifies a person."[215] Not only do posters often include the name, physical address, email address, social media information, and other PII of the victim alongside the images[216]—the very PII that information privacy laws protect in other contexts[217]—but the images themselves also identify the subject of the photo in an extremely exposed, degrading, and damaging manner.[218] Protecting photographs from disclosure due to their ability to identify is not unheard of in the context of information privacy. For example, Health Insurance Portability and Accountability Act (HIPAA) regulations require the de-identification of certain health information for that information to be considered "*not* individually identifiable."[219] To comply with these PII regulations, providers must remove certain identifying information, including the name, phone number, email address, SSN, and "full-face photographic images and any comparable images."[220] The inclusion of photographs in this list verifies that photographs qualify as identifying information, for without their removal from health records such information may be used to identify the individual. Therefore, revenge porn statutes protect PII under the "tautological" approach because they protect PII in the form of photographs.

Revenge porn statutes also fulfill the "non-public" approach to defining PII, for they apply to images not previously disseminated widely by the subject that are subsequently posted online without the subject's

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[213] *Id.* at 1831.

[214] 15 U.S.C. § 6501(8) (2012); Schwartz & Solove, *supra* note 203, at 1831.

[215] Schwartz & Solove, *supra* note 203, at 1829.

[216] Citron & Franks, *supra* note 7, at 350–51.

[217] *See, e.g.*, 34 C.F.R. § 99.3 (2016) (a Family Educational Rights and Privacy Act (FERPA) regulation defining PII to include a student's name, address, SSN, DOB, and "[o]ther information that, alone or in combination, is linked or linkable to a specific student").

[218] *See* Koppelman, *supra* note 42, at 686 ("There is a tight causal connection between [revenge porn] and harm. A single posting to a website can have a permanently life-altering effect on its target, imposing a spoiled identity that it is impossible to ever escape.").

[219] 45 C.F.R. § 164.514(b) (2016) (emphasis added).

[220] *Id.* § 164.514 (b)(2)(i).

consent. That the victim shared the photo with the poster does not destroy the "non-public" classification of the images. The sharing of private health, financial, and other personal information with the entities regulated by information privacy laws does not destroy the expectation of privacy in the information if that information is not generally available to the public. The same should be true for revenge porn.[221] Finally, many revenge porn statutes satisfy the "specific-types" approach by listing what sorts of images or motivations fall within the purview of the statute. For example, Washington's revenge porn law delineates three elements that must be met for the dissemination to qualify as "disclosing intimate images."[222] If an image meets the elements, it qualifies as revenge porn and would thus constitute a criminal disclosure of intimate images, the information in which the statutes requires privacy.

Revenge porn statutes comply with the three congressional approaches to defining PII identified by Schwartz and Solove. More importantly, common themes advanced for protecting PII justify the targeting of revenge porn under the penumbra of information privacy.

B. Revenge Porn Satisfies the Themes of Information Privacy

In addition to the above definitional approaches to PII, a few major themes justify the protection of information privacy, including challenges posed by technological innovation as well as promotion of trust and participation in a given system. These themes apply equally to revenge porn and support protection of privacy in intimate images under the umbrella of information privacy.

One theme that pervades information privacy laws is the promotion of trust in and use of a given system. By promoting the privacy of various types of PII and improving the access of individuals to their private records maintained by various entities, information privacy laws inspire trust in a given system, which in turn encourages people to use and participate in that system. For example, Congress passed HIPAA[223] to protect confidential health information, restore trust in the healthcare system, and improve consumers' access to their own healthcare

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[221] *See, e.g.*, Larkin, *supra* note 28, at 86 ("[I]t is a mistake to treat privacy as an all-or-nothing decision—that is, to treat information as private or confidential only if no one else is aware of it."). *But see* Waldman, *supra* note 75, at 15("[C]ourts too often confuse sending an image to one person, even a partner in a relationship, with general revelation that extinguishes expectations of privacy."). Despite concerns that courts may be unwilling to consider the context of disclosure of images in determining the expectation of privacy, courts have done exactly this in the context of information privacy laws and should follow a similar approach for revenge porn laws.

[222] WASH. REV. CODE § 9A.86.010 (2017).

[223] 42 U.S.C. § 1320d–6 (2012).

records.[224] These goals interrelate—the protection of confidential information and the ability of consumers to access their information promote trust in the system. The GLBA[225] took a similar approach, focusing on efficient competition between banks, enhancing the integrity of the banking system, and improving access to banking services.[226] GLBA thus focused on the overall effectiveness of the banking system, which would promote trust in and use of that system.[227]

The VPPA[228] went a step further and focused on the ability to participate freely.[229] Congress enacted VPPA to address concerns over the consequences of public dissemination of personal records, as expressed in the Senate Report for the Act: "The danger here is that a watched society is a conformist society, in which individuals are chilled in their pursuit of ideas and their willingness to experiment with ideas outside of the mainstream."[230] Congress recognized that lack of privacy may prevent full and free participation in a given system or, more generally, in society at large, acting contrary to the goals of democracy.[231]

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[224] David R. Morantz, Comment, *HIPAA's Headaches: A Call for a First Amendment Exception to the Newly Enacted Health Care Privacy Rules*, 53 KAN. L. REV. 479, 481 (2005) (citing Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000) (codified at 45 C.F.R pts. 160, 164)).

[225] 15 U.S.C. § 6801–6827 (2012).

[226] Vincent Di Lorenzo, *Gramm-Leach-Bliley Act Challenges Financial Regulators to Assure Safe Transition in Banking*, 72-OCT. N.Y. ST. B. ASS'N J. 36, 36 (2000) (citing H. R. REP. NO. 106-434, at 151–52 (1999) (Conf. Rep.) and S. REP. NO. 106-44, at 4 (1999)).

[227] *Id.* at 38 (discussing the fear of "diminished public confidence" prior to the passage of the Act).

[228] 18 U.S.C. § 2710 (2012).

[229] S. REP. NO. 100–599 (1988).

[230] *Id.* at 7 (quoting the testimony of ACLU counsel Janlori Goldman before Senate and House Judiciary Subcommittees). Additionally, VPAA was concerned with the "trail of information generated by every transaction." *Id.* "These 'information pools' create privacy interests that directly affect the ability of people to express their opinions, to join in association with others, and to enjoy the freedom and independence that the Constitution was established to safeguard." *Id.*

[231] Senator Leahy, a proponent of VPPA, said as much in his testimony before the Senate Judiciary Committee during a hearing regarding the nomination of Robert H. Bork to the Supreme Court:

> I think [sharing of video rental records and other personal information] is wrong. I think that really is Big Brother, and I think it is something that we have to guard against. . . . [Privacy] is an issue that goes to the deepest yearnings of all Americans that we are free and we cherish our freedom and we want our freedom. We want to be left alone.

Id. at 5–6 (alterations in original); s*ee also* Edward J. Janger & Paul M. Schwartz, *The Gramm-Leach-Bliley Act, Information Privacy, and the Limits of Default Rules*, 86 MINN. L. REV. 1219, 1250–51 (2002) ("[I]nformation privacy should be conceptualized as a value constitutive of democratic society."); CHARLES J. SYKES, THE END OF PRIVACY 18–19 (1999) ("[C]onsider what happens when privacy is utterly distinguished. Imagine a society where the personal is always the political and the distance between comrades

The goal of promoting trust and participation in a given system applies equally to revenge porn. Victims of revenge porn often find themselves the targets of online campaigns of harassment launched by "trollers" of revenge porn sites.[232] This harassment coupled with the difficulty of removing revenge porn images from the Internet cause many victims to withdraw from participation in cyberspace altogether.[233] In fact, such withdrawal may be the poster's intent.[234] In modern society, withdrawal from cyberspace necessarily correlates with withdrawal from society in general, as our digital and physical lives are intrinsically related.[235] One sphere of life from which revenge porn victims often withdraw is the workforce due to the harsh career consequences they too often endure from the circulation of intimate photographs. One woman, for example, was fired from a government agency after her naked images circulated at work.[236]Other victims may lose opportunities or income after closing down blogs due to online harassment.[237] Revenge porn inevitably turns up during the job application process due to the difficulty of removing the images from the Internet and employers' reliance on applicants' online presence as part of the initial screening process.[238] As a result, some revenge porn victims may completely refrain from applying for certain employment out of fear that the employer will discover their images during the application process.[239]

To view revenge porn as relevant to a victim's qualification for employment[240] fails to account for the use of revenge porn to harass,

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is dissolved. . . . What we cannot imagine is such a society that is also *free.*"); *id.* at 22 ("The link between democracy and privacy is not at all accidental; without a private zone, public life is impossible.").

[232] Mary Anne Franks describes cyberspace as it currently exists as "a state of license in which certain groups with power oppress, threaten and harass groups with less power." Franks, *Unwilling Avatars*, *supra* note 5, at 230. A state of license is "one in which some groups have taken liberty at the expense of others." *Id.* (quoting JOHN LOCKE, TWO TREATISES ON GOVERNMENT AND A LETTER CONCERNING TOLERATION (1689), *reprinted in* RETHINKING THE WESTERN TRADITION 102 (Ian Shapiro ed., 2003)).

[233] *See* Citron & Franks, *supra* note 7, at 352.

[234] Salter & Crofts, *supra* note 3, at 238 ("Such harassment and threats of sexualized violence appear designed to force the withdrawal of their targets from public life altogether.").

[235] *See* Koppelman, *supra* note 42, at 685 ("Revenge pornography has induced women to quit their jobs, disappear from the Internet, and move away from their homes.").

[236] Citron & Franks, *supra* note 7, at 352–53.

[237] *Id.*

[238] *Id.* at 352.

[239] A discovery of naked images will undoubtedly harm the victim's chance of receiving an interview, let alone getting the job. *Id.*

[240] For example, John A. Humbach argues:

> The more fundamental reason that revenge porn leads to lost opportunity is that it conveys information that *matters*, at least to some people. When revenge porn

degrade, humiliate, and abuse. Revenge porn is often employed in domestic violence; a perpetrator may coercively capture the images and then use them to blackmail the victim into remaining in the relationship.[241] This view also fails to recognize that victims of revenge porn are at an increased risk of stalking and physical assault, so the harm inflicted goes beyond reputational.[242] Even if physical abuse does not follow dissemination of the images, revenge porn is still a form of sexual abuse.[243] If one major goal of information privacy protection is to promote free and full participation in a democratic society, an abusive tactic that aims to discourage victim participation in public life easily falls within its purview. If we are willing to declare that the video rental history for a candidate of the United States Supreme Court, or anyone else for that matter,[244] is "nobody's business,"[245] we should be willing to do the same for intimate images, the dissemination of which is designed to degrade the victim and obstruct her full and free participation in society.

A related theme supporting information privacy laws is the challenge to privacy posed by technological innovation, which has increased the ease with which information may be processed, accessed, and shared. In response to the "rise of the computer" and innovation of data processing technology, Congress began passing information privacy legislation in the 1970s, beginning with the Fair Credit Reporting Act of 1970,[246] the Family Educational Rights and Privacy Act ("FERPA") of 1974,[247] and the Privacy Act of 1974.[248] Although Congress enacted numerous information

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> victims encounter employment barriers, it is ultimately because, like it or not, some employers apparently regard the fact that a person makes nude self-portraits as a legitimate hiring concern—employers such as public schools, libraries, day care centers, churches, social welfare agencies and police forces come immediately to mind.

Humbach, *supra* note 48, at 228–29.

[241] Citron & Franks, *supra* note 7, at 351; Chiarini, *supra* note 9 ("[H]e said he was going to auction off a CD of 88 naked images of me that I allowed him to take after three months of relentless pressure. . . . Then he said the words that would change the course of my life: 'I will destroy you.'"); Holly Jacobs, *Victims of Revenge Porn Deserve Real Protection*, THE GUARDIAN (Oct. 8, 2013), https://www.theguardian.com/commentisfree/2013/oct/08/victims-revenge-porn-deserve-protection ("My ex-boyfriend . . . expos[ed] me in my most intimate moments. He did it for control. He did it for revenge. He did it for whatever reasons perpetrators normally have for stalking, harassing, and violating others.").

[242] Citron & Franks, *supra* note 7, at 350.

[243] *Id.* at 362–63.

[244] *See* Video Privacy Protection Act, 18 U.S.C. § 2710 (2012).

[245] S. REP. No. 100-599, at 5 (1988) (quoting the testimony of Senator Leahy, a proponent of the bill, before the Senate Judiciary Committee during a hearing regarding the nomination of Robert H. Bork to the Supreme Court).

[246] 15 U.S.C. § 1681b (2012); Schwartz & Solove, *supra* note 203, at 1820–21.

[247] 20 U.S.C. § 1232g (2012); *see also* Schwartz & Solove, *supra* note 203, at 1821.

[248] 5 U.S.C. § 552 (2012).

privacy statutes prior to the *Florida Star* decision, they remained intact following the decision.[249] Likewise, *Florida Star* has not posed a barrier to new information privacy laws; to this day, Congress continues to consider and pass legislation related to information privacy.[250]

The legislative history of VPPA and HIPAA provide particular insight into congressional concern over the impact of technology on privacy. Congress passed the VPPA in 1988 following the publication of the video rental records of Judge Robert H. Bork, a nominee for the United States Supreme Court.[251] At Judge Bork's nomination hearing, several senators expressed their aversion to the invasion of his privacy.[252] One was Senator Leahy, an eventual proponent of VPPA, who declared that the movies Judge Bork rented were "nobody's business."[253] Senator Leahy addressed the relative ease of such invasions due to advances in technology:

> [I]n an era of interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in a store, what kind of food they like, what sort of television programs they watch, who are some of the people they telephone. . . . I think that is wrong. I think that really is Big Brother, and I think it is something that we have to guard against. [Privacy] is not a conservative or a liberal or moderate issue. It is an issue that goes to the deepest yearnings of all Americans that we are free and we cherish our freedom and we want our freedom. We want to be left alone.[254]

Senator Leahy's testimony expresses concern over the effect of technology on the degree and ease of the invasion, but he also takes issue with the invasion itself. The VPPA as enacted likewise focuses on the invasion; its preamble states that its purpose is "to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audiovisual materials."[255] Still, the effect of technological

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[249] *See* Chung, *supra* note 200, at 417–18 (describing the ongoing development of information privacy laws from the 1970s to present).

[250] *See* Cyber Intelligence Sharing and Protection Act, H.R. 234, 114th Congress (2015).

[251] S. REP. No. 100-599, at 5 (1988).

[252] *See generally id.*

[253] *Id.*

[254] *Id.* at 5–6. Senator Simon also testified regarding the impact of technological advances: "The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before." *Id.* at 6.

[255] Video Privacy Protection Act of 1988, Pub L. No. 100-618, 102 Stat. 3195 (1988) (codified as amended at 18 U.S.C. §§ 2701–2711); *see also* S. REP. No. 100-599, at 1 (1988).

innovation on privacy was a major focus, as revealed by the Senate report, legislative history, and original impetus for enacting the bill.

Congress passed HIPAA[256] in 1996—following *Florida Star*—to address the evolving healthcare system. Advances in technology allowed medical information to be shared more efficiently and cheaply, but access to information became more difficult to manage.[257] Although the original goals of the Act were to increase the portability of and access to medical care, patient privacy issues soon surfaced.[258] With the advent of the electronic medical record and the evolution of technology, patients grew increasingly apprehensive over the accessibility of their private health records.[259] HIPAA's original proposal accounted for this concern, listing protection of patients' private health information from unauthorized disclosure as one of its three primary goals.[260] Thus, despite the 1989 *Florida Star* decision that seemingly obliterated the tort of invasion of privacy, Congress continued to expand information privacy protection due to extensive anxiety over the privacy repercussions of technological innovation.[261] Information privacy represents an area in which the law has

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[256] 42 U.S.C. § 1320d-6 (2012).

[257] Daniel J. Solove, *HIPAA Turns 10: Analyzing the Past, Present and Future Impact*, 44 J. AHIMA 22 (2013). The Preamble to HIPAA's Privacy Rule, which created federal standards for the privacy of personal health information, states:

> [A]n average of 150 people from nursing staff to X-ray technicians, to billing clerks have access to a patient's medical records during the course of a typical hospitalization. While many of these individuals have a legitimate need to see all or part of a patient's records, no laws govern who those people are, what information they are able to see, and what they are and are not allowed to do with that information once they have access to it.

Id. at 25 (quoting the HIPAA Privacy Rule's preamble) (internal quotation marks omitted).

[258] Ted Agniel et al., *Ex Parte Communications with Treating Health Care Providers: Does HIPAA Change Missouri Law?*, 63 J. MO. B. 296, 296 (2007).

[259] Morantz, *supra* note 224, at 481.

[260] *Id.* at 481; *see also* Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1004 (2000) ("The speed . . . with which medical records can be transmitted from one person to another has spawned a wide set of (misguided) federal guidelines on the use and dissemination of this information.").

[261] The United States Supreme Court has also recognized the privacy issues posed by advances in technology. In *Riley v. California*, the Court considered a warrantless search and seizure of a cell phone incident to arrest. 134 S. Ct. 2474, 2480 (2014). Unanimously holding such a search unconstitutional, the Court discussed the unique privacy issues posed by technology such as cell phones:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

adjusted to deal with new technological innovation as well as technological innovation to come.

Intimate images are equally deserving of information privacy protection in the face of technological innovation. "The Internet provides a staggering means of amplification, extending the reach of [revenge porn] in unimaginable ways."[262] Images spread quickly and easily on the Internet and are nearly impossible to remove.[263] Accordingly, two scholars have described attempts by revenge porn victims to remove their images from the Internet as a game of "Whack-a-Mole," where the images surface on new sites as soon as they are removed from others.[264] The amplification effect of the Internet is particularly apparent in the context of revenge porn; "[r]evenge porn websites are meant to damage reputations and ruin lives."[265] Consequently, the trauma and invasion of privacy experienced by revenge porn victims is repeated and exacerbated. The nearly permanent record of the betrayal also creates an enduring stigma that is difficult for the victim to escape completely. If we as a society are willing to protect private information implicated in daily commercial transactions, we should also protect the privacy that is inherent to intimate partner interactions.

We protect information privacy because we recognize that such privacy is necessary—particularly in the computer age—to our ability to participate in certain transactions and in society in general. The same is true of intimate interactions with a lover, as demonstrated by the evolution of Supreme Court precedent recognizing privacy in the bedroom.[266] When a person shares a nude image with an intimate partner, she has entrusted that person with private, sensitive information.[267] Charles J. Sykes, a political commentator and proponent of robust privacy protection, aptly asks, "What woman would behave the same with her lover in the presence of her parents as she would when the

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Id. at 2494–95. At least one scholar has noted that Justice Roberts' opinion for the Court seems to echo Justice Brandeis' dissent in *Olmstead v. United States*. Kimberley N. Brown, *Outsourcing, Data Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607, 686 (2015); 277 U.S. 438 (1927). Discussing the effect of the progress of science on privacy, Justice Brandeis warned, "[I]n the application of a constitution, our contemplation cannot be only of what has been but of what may be." Olmstead v. United States, 277 U.S. 438, 473–74 (Brandeis, J., dissenting).

[262] Citron & Franks, *supra* note 7, at 350.

[263] *Id.* at 360; Salter & Crofts, *supra* note 3, at 235; Larkin, *supra* note 28, at 60.

[264] Levendowski, *supra* note 1, at 443–44; Larkin, *supra* note 28, at 71 n.48.

[265] Levendowski, *supra* note 1, at 444.

[266] SYKES, *supra* note 231, at 11 ("Starting in the 1960s, the courts have carved out a special zone of constitutionally protected privacy for almost all matters sexual, from the reading of pornography, to the right to procreate, to contraception, and even abortion.").

[267] FRANKS, *supra* note 42, at 3.

couple was alone?"[268] The exchanges between intimate partners and the trust inherent in those exchanges are *context-specific*, no different than when a patient gives her private health information to her doctor.[269]

Information privacy laws recognize that consent to use private information in one context does not represent consent to use it in all contexts. The impetus for the VPPA, as explained above, was the publication of the video rental records of Judge Bork and his family prior to his Supreme Court nomination hearing. During the hearing, a group of predominately male senators and attorneys expressed outrage over the violation of Bork's privacy, noting that his disclosure of PII to the rental store in the course of the rental transaction did not permit its use of his PII outside of that transaction.[270] The Senate Report for the VPPA reflects this sentiment, stating, "[I]nformation collected for one purpose may not be used for a different purpose without the individual's consent."[271] This notion is equally applicable to images shared with a sexual partner, particularly because such images are typically shared subject to the express condition that they remain private.[272] "While most people today would rightly recoil at the suggestion that a woman's consent to sleep with one man can be taken as consent to sleep with all of this friends, this is the very logic of revenge porn apologists."[273] In other words, to argue that a woman's sharing of an image with her intimate partner authorizes that partner to widely disseminate the image flies in the face of the principle that consent is contextual. Accordingly, a woman's privacy in her sexually explicit images should not terminate upon sharing those images with a partner, as the use of that information has been granted only in the context of the intimate relationship. To widely disseminate the images is to use private sexual information for a purpose other than that granted, and should thus constitute a punishable invasion of sexual privacy.

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[268] SYKES, *supra* note 231, at 17.

[269] FRANKS, *supra* note 42, at 3.

[270] *See supra* notes 251–254 and accompanying text.

[271] S. REP. NO. 100-599, at 8 (1988). An FTC Report regarding best privacy practices for private entities takes a similar stance: information collected for one purpose may not be used or shared in another context. FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (2012), https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.

[272] Citron & Franks, *supra* note 7, at 355 ("What lovers share with each other is not equivalent to what they share with coworkers, acquaintances, or employers."); *id.* at 348 ("[C]onsent within a trusted relationship does not equal consent outside of that relationship.").

[273] *Id.* at 348.

C. Information Privacy and the First Amendment

The lack of significant First Amendment challenges to information privacy laws[274] reflects societal approval of information privacy protection and, consequently, a designation of such information as falling outside the realm of public concern. One particularly revealing example of societal approval of information privacy is the privacy invasion that inspired the VPPA, discussed above. Despite Judge Bork's status as a public figure and his impending nomination hearings, which today would arguably qualify this information as a matter of public concern deserving free speech protection, several senators still viewed his rental history as private. What's more, they used this invasion to justify enacting the VPPA without apprehension of any First Amendment conflict.

As discussed throughout this Comment, there is reason to believe that similar protections would not be applied to intimate images due to the *Florida Star* ruling and ardent First Amendment opposition to revenge porn laws. Sadly, this is not surprising. Political, legal, and judicial systems dominated by men fail to take crimes against women seriously, especially those that undermine women's autonomy.[275] The backlash experienced by female revenge porn victims is due in part to a societal belief that "women who take and share intimate images of themselves have fallen

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[274] *See, e.g.*, Neil Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1171 (2005) (noting that fraud, trade secrets, and other laws face minimal First Amendment objection). In the context of the Family Education Rights and Privacy Act, First Amendment challenges have focused primarily on the press's right of access to records, not on the free speech of the school as the possessor of PII. *See also* Erin Escoffery, *FERPA and the Press: A Right to Access Information?*, 40 J.C. & U.L. 543, 552–57 (2014). In the context of the Gramm-Leach-Bliley Act, the Supreme Court has not considered any First Amendment issues posed by the statute, but the D.C. Circuit has. Trans Union, Corp. v. FTC, 245 F.3d 809 (D.C. Cir. 2001). The case concerned marketing lists generated by consumer credit reporting agencies, which the FCC determined contained private information subject to the Fair Credit Reporting Act of 1970. *Id.* at 811–12, 818–19; 15 U.S.C. § 1681a (2012). The court followed *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, a Supreme Court case that held that speech in the form of dissemination of a credit report generated by a consumer reporting agency warranted reduced constitutional protection because it did not concern a public matter. 472 U.S. 749, 759 (1985). The court thus found the information covered by the Act "implicates no public concern and . . . therefore warrant[s] reduced constitutional protection." Trans Union, Corp. v. FTC, 295 F.3d at 818–19. The court applied intermediate scrutiny and upheld the statute. *Id.*

[275] *See* Citron & Franks, *supra* note 7, at 347–48 ("Our society has a poor track record in addressing harms that take women and girls as their primary targets. . . . The fight to recognize domestic violence, sexual assault, and sexual harassment as serious issues has been long and difficult, and the tendency to tolerate, trivialize, or dismiss these harms persists. As revenge porn affects women and girls far more frequently than men and boys and creates far more serious consequences for them, the eagerness to minimize its harm is sadly predictable."). *See generally* SUSAN ESTRICH, REAL RAPE (1987).

outside the bounds of appropriate femininity and have become legitimate objects of public ridicule and disgust."[276] The majority of concerns over revenge porn statutes reflect a tendency to minimize harms suffered by women and to trivialize women's interest in sexual autonomy.[277]

V. CONCLUSION

Information privacy laws widely recognize that consent in one context does not equal consent in other contexts. The juxtaposition of the acceptance of this principle when applied to the privacy invasion of a high-powered man in the form of disclosure of what movies he likes to watch,[278] with the rejection of such a principle when applied to a woman sharing her intimate images with her sexual partner, hints at why revenge porn laws have not been treated like information privacy laws: gender.[279] We as a society are generally willing to recognize that privacy is context-specific, but we refuse to do so when sexual practices are involved, *particularly* the sexual practices of women.[280] However, the sharing of intimate images with a partner should subject revenge porn victims to no more blame than customers are subjected to when an agent of a bank commits identity theft using the customer's PII disclosed incident to a transaction.[281] To refuse to protect privacy in the context of revenge porn not only condones such invasions, but also denies women control over their sexual identities, their digital legacies, and their lives.

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[276] Salter & Crofts, *supra* note 3, at 233; *id.* at 236 ("Th[e] excessive focus on individual responsibility and risk management obscures the gendered differentials and inequities of interpersonal relations, amplifying existing cultural logics that blame women who experience gendered violence.").

[277] Citron & Franks, *supra* note 7, at 348–49.

[278] *See supra* notes 251–54 and 274–75 and accompanying text.

[279] Citron & Franks, *supra* note 7, at 353 (noting that an estimated 90 percent of revenge porn victims are female).

[280] *Id.* at 348–49.

[281] FRANKS, *supra* note 42, at 3.