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Combating Non-Consensual Pornography: A Working Paper

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“The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one ... to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass...”

- Supreme Court Justice Horace Gray, writing for the majority in
Union Pac. R. Co. v. Botsford (1891)¹

I. Defining the Issue

Non-consensual pornography is the distribution of sexually graphic images of individuals without their consent. This includes images originally obtained without consent (e.g. hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent within the context of a private or confidential relationship (e.g. images consensually given to an intimate partner who later distributes them without consent, popularly referred to as “revenge porn”). Non-consensual pornography does not include images taken of individuals in public or of people engaged in unsolicited and unlawful sexual activity, such as flashing.

While existing voyeurism and computer hacking laws at both the federal and state level may prohibit the non-consensual *observation and recording* of individuals in states of undress or engaged in sexual activity, the non-consensual *disclosure* of sexually graphic images in itself is currently not clearly prohibited by any federal law and by only two state criminal laws (New Jersey’s and California’s²). In other words, with regard to sexually graphic images, current law wrongly treats consent to sexual images as an absolute, rather than a contextual, concept. Both legal and social norms respect contextual consent in other situations: for example, a person who consents to physical contact in one context is not assumed to have consented to physical contact in other contexts.³ Contextual consent likewise means that an individual who consents to being viewed intimately in one context should not be assumed to have consented to being viewed intimately in other contexts.

II. The Scope of the Harm

Non-consensual pornography transforms unwilling individuals into sexual entertainment for strangers. A vengeful ex-partner or malicious hacker can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can become the first several pages of “hits” on the victim’s name in a

¹ 141 U.S. 250 (1891)

² As explained in Section VII, New Jersey’s law is comprehensive, while California’s law is limited.

³ The concept of contextual consent is reflected in criminal law (especially with regard to assault and rape), tort law (especially with regard to privacy), and contract law. For more, see Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 155 (2004) (“whether a particular action is determined a violation of privacy is a function of several variables, including the nature of the situation, or context; the nature of the information in relation to that context; the roles of agents receiving information; their relationships to information subjects; on what terms the information is shared by the subject; and the terms of further dissemination.”); Mary Anne Franks, “Why You Can’t Punch a Boxer in the Face When He Asks You for Directions: Consent, Context, and Humanity.”

<http://www.concurringopinions.com/archives/2013/02/why-you-cant-punch-a-boxer-in-the-face-when-he-asks-you-for-directions-consent-context-and-humanity.html> (February 9, 2013).

search engine, as well as being emailed or otherwise exhibited to the victim's family, employers, co-workers, and/or fellow students. Victims are frequently threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools. Some victims have committed suicide.⁴ Non-consensual pornography can destroy victims' intimate relationships as well as their educational and employment opportunities. While non-consensual pornography can affect both male and female individuals, empirical evidence indicates that the majority of victims are women and girls, and that women and girls face more serious consequences as a result of their victimization.⁵ By violating legal and social commitments to gender equality, non-consensual pornography is similar to sexual harassment, rape, and domestic violence.

III. The Inadequacy of Existing Legal Responses: Civil Claims

The most obvious existing legal responses are civil claims, including tort actions involving privacy or intentional infliction of emotional distress claims; sexual harassment claims; and copyright claims. Civil litigation of any kind, however, places a tremendous burden on the victim and in many cases will be an implausible or impossible approach. Civil litigation requires money, time, and access to legal resources. It also often requires further dissemination of the harmful material. The irony of privacy actions is that they generally require further breaches of privacy to be effective. Moreover, the priority of most victims is the removal of the material, not monetary compensation. Additionally, in many cases defendants will not have enough financial resources to make a damages claim worthwhile (i.e., many defendants are judgment-proof).

A. Tort Law

Tort actions are effectively precluded when the images and videos are transmitted via the Internet. Section 230 of the Communications Decency Act has largely been interpreted to grant website owners and operators immunity for tortious material submitted by third-party users. According to this section, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁶ For example, if an individual hacks into a person's computer, obtains a sexually explicit photograph, and submits it to a website, the website owner carries no liability for displaying or even publicizing it.⁷ While the victim could initiate a tort action against the individual who first obtained and submitted the

⁴ See Julia Dahl, "Audrie Pott, Rehtaeh Parsons suicides show sexual cyber-bullying is 'pervasive' and 'getting worse,' expert says," CBS NEWS, April 12, 2013, http://www.cbsnews.com/8301-504083_162-57579366-504083/audrie-pott-rehtaeh-parsons-suicides-show-sexual-cyber-bullying-is-pervasive-and-getting-worse-expert-says/; Observer.com's Betabeat, "A Victim Speaks: Standing Up to a Revenge Porn Tormentor," May 1, 2013, (<http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>).

⁵ See Jill Filipovic, "Revenge Porn is About Degrading Women," <http://rsnorg.org/opinion2/273-40/15795-revenge-porn-is-about-degrading-women>; Danielle Citron, "Cyber Stalking and Cyber Harassment: A Devastating and Endemic Problem," *Concurring Opinions*, <http://www.concurringopinions.com/archives/2012/03/cyber-stalking-and-cyber-harassment-a-devastating-and-endemic-problem.html>.

⁶ 47 U.S.C. §230(c)(1)

⁷ The Ninth Circuit in *Fair Housing Council v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008), resisted the sweeping immunity interpretation of CDA §230, but it seems to be an outlier case so far.

photo, to do so she would not only have to know who the individual is, but also be able to prove it - no small feat given the ability of Internet users to act anonymously or pseudonymously, and the reluctance of websites and service providers to supply identifying information about their users.

B. Sexual Harassment Law

Non-consensual pornography in many cases is sexual harassment in the straightforward, intuitive sense of the term. As defined by the Equal Employment Opportunity Commission, sexual harassment includes “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”⁸ Unfortunately, protections against sexual harassment have little force outside of employment and educational settings under current law.⁹ Accordingly, while non-consensual pornography that is produced, distributed, or accessed by a victim's co-workers, employers, school officials, or fellow students raises the possibility of a hostile environment sexual harassment claim under Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972, such claims would not be available to address non-consensual pornography falling outside this narrow category.

C. Copyright Law

Copyright law is a more promising avenue for some victims of non-consensual pornography because CDA §230 does not immunize websites from copyright claims.¹⁰ If a victim took the image or video herself, she is the copyright owner and can in theory take action against unauthorized use. This strategy has proven successful in some cases. However, this option will not be of use to the many victims who do not take the images or videos themselves. Some lawyers and scholars have suggested that an expansive conception of “joint authorship” might cover these victims,¹¹ but it is not clear how much traction this theory will have in actual cases. Moreover, similar problems of publicity, time, and resources that accompany tort claims hinder copyright claims.

IV. The Inadequacy of Existing Legal Responses: Criminal Law

As mentioned above, some forms of non-consensual pornography can be addressed by federal and state criminal laws regulating child pornography, stalking, harassment, voyeurism, and computer hacking. However, no federal criminal law explicitly recognizes the non-consensual disclosure of

⁸ 29 C.F.R. § 1604.11 [1980].

⁹ I have argued that the protection against sexual harassment, as a form of sex discrimination, should not be so limited. See Mary Anne Franks, *Sexual Harassment 2.0*, 71 MARYLAND L. REV. 655 (2012).

¹⁰ 47 USC § 230 (e)(2): “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”

¹¹ See Derek Bambauer, “Beating Revenge Porn With Copyright,” <https://blogs.law.harvard.edu/infolaw/2013/01/25/beating-revenge-porn-with-copyright/>.

sexually intimate images of adults as a crime in itself, and only two states so far have laws that do so. Not every state has comprehensive anti-voyeurism laws, and even those that do only protect victims whose images were taken without their knowledge and consent, not victims who consented to give their pictures to one intimate partner for private use. Federal and state laws prohibiting harassment and stalking only apply if the victim can show that the non-consensual pornography is part of a larger pattern of conduct intended to distress or harm the victim, which does not apply to the many purveyors of non-consensual pornography motivated by a desire for money or notoriety. While “pornography” is to some degree regulated by federal criminal law, this regulation focuses almost exclusively on the age of the individuals portrayed. Pornography regulations pay little to no attention to whether the individuals have consented to be portrayed in such a manner.

The following is a list of applicable federal criminal laws and a brief explanation of the limitations of each. Cognate state criminal laws regulating child pornography, stalking, harassment, voyeurism, and computer hacking are similarly limited.

A. Sexual Exploitation and Other Abuse of Children

18 U.S.C. 2257 sets out recordkeeping requirements for producers of pornography. There are two serious limitations to this law for the purposes of addressing non-consensual pornography. First, the statute’s definition of “producer” essentially tracks the definition of the Communications Decency Act §230: that is, it does not include websites or servers that facilitate or distribute material submitted by third-party users, which are precisely the type of websites and servers most likely to be engaged in non-consensual pornography. Second, as the law’s title indicates, the statute focuses almost exclusively on age-verifying identification. It sets out no requirements to verify that the individuals portrayed have consented to the use of their images.

B. Interstate Anti-Stalking Punishment and Prevention Act

18 U.S.C. 2261A makes it a crime “for anyone who travels in interstate or foreign commerce to use the mail, any interactive computer service, or any interstate or foreign commerce facility to engage in a course of conduct that causes substantial emotional distress to a person or causes the person or a relative to fear for his or her life or physical safety.” This statute could and should apply to some instances of non-consensual pornography. Non-consensual pornography is often part of a pattern of intimate partner stalking and harassment. Unfortunately, few law enforcement officials and prosecutors treat it as such.

In addition, many perpetrators of non-consensual pornography may not fulfill the intent requirement of the statute, namely, the intent to “kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress” to the victim. Many admitted purveyors of nonconsensual pornography maintain, with some plausibility, that their sole intention is to obtain notoriety, fulfill some sexual desire, or increase traffic for their websites.

C. Video Voyeurism Prevention Act of 2004

18 U.S.C. 1801 makes it a crime to intentionally “capture an image of a private area of an individual without their consent, and knowingly do[] so under circumstances in which the individual has a reasonable expectation of privacy.” This statute’s definition of “capture” includes “broadcasting,” which suggests that it could be used to apply to the non-consensual disclosure of such images. However, the statute’s jurisdiction is very limited, confined to the “the special maritime and territorial jurisdiction of the United States.” It also does not make explicitly clear whether a person retains a “reasonable expectation of privacy” with regard to images shared or exchanged within the context of a confidential or private relationship. The statute could conceivably be modified, however, to effectively address non-consensual pornography, a possibility that is explored in VII(B).

D. Computer Fraud and Abuse Act

18 U.S.C. 1030 addresses various forms of computer fraud and hacking. Because the accessing, uploading, or dissemination of nonconsensual pornography can involve computer fraud and hacking, some perpetrators would theoretically run afoul of this statute. However, such activity is not the real target of this statute, and there are ways to participate in the creation or distribution of nonconsensual pornography that do not involve hacking or fraud as defined by this statute.

V. The Importance of a Criminal Law Approach

Non-consensual pornography is on the rise in part because there is little incentive for malicious actors to refrain from such behavior. While victims can try to take advantage of a patchwork of civil and criminal laws that can be brought to bear on the harms they experience, there is no existing clear legal or social prohibition against non-consensual pornography in itself. Criminal law is both the most principled and the most effective avenue to preventing and addressing online non-consensual pornography.¹² While non-consensual pornography can constitute a violation of privacy and/or an infringement of copyright, it is also an act of sexual use without consent. When such sexual use is inflicted on an individual’s physical body, it is considered rape or sexual assault. The fact that non-consensual pornography does not involve physical contact does not make it any less a form of sexual abuse.

Federal and state criminal laws regarding voyeurism, stalking and harassment, and child pornography demonstrate the legal and social understanding that physical contact is not necessary to cause great harm and suffering. Criminal laws prohibiting voyeurism rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person’s consent not only inflicts dignitary harms upon the individual observed, but inflicts a social harm serious enough to warrant criminal prohibition and punishment. Stalking and harassment laws reflect the understanding that some forms of non-physical conduct can produce such distress and intimidation as to be justly prohibited by criminal law.

¹² As attorney Erica Johnstone puts it, “Even if people aren’t afraid of being sued because they have nothing to lose, they are afraid of being convicted of a crime because that shows up on their record forever.” Tracy Clark-Flory, Salon.com, “Criminalizing Revenge Porn,” April 6, 2013. (http://www.salon.com/2013/04/07/criminalizing_revenge_porn/).

The legal and social condemnation of child pornography is another example of our society's collective understanding that the production, viewing, and distribution of certain kinds of sexual images are harms in themselves. In *New York v. Ferber* (1982), the Supreme Court recognized that the production and distribution of child pornography is distinct from the underlying crime of the sexual abuse of children.¹³ The Court observed that "the distribution of photographs and films depicting sexual activity by juveniles... are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."¹⁴ When images and videos of sexual assaults and surreptitious observation are distributed and consumed, they likewise inflict further harms on the victims and on society distinct from the criminal acts to which the victims were originally subjected. The trafficking in this material moreover increases the demand for images and videos that exploit the individuals portrayed. This is why the Court in *Ferber* held that it is necessary to shut down the "distribution network" of child pornography in order to reduce the sexual exploitation of children: "The most expeditious, if not the only practical, method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."¹⁵ Victims of non-consensual pornography of any age are harmed each time a person views or shares their intimate images, and to allow the traffic in such images to flourish increases the demand and the pervasiveness of such images.

International criminal law provides precedent and perspective on this issue. Both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have employed a definition of sexual violence that does not require physical contact. In both tribunals, forced nudity was found to be a form of sexual violence.¹⁶ In the *Akayesu* case, the ICTR found that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."¹⁷ In the *Furundzija* case, the ICTY similarly found that international criminal law punishes not only rape, but "all serious abuse of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force, intimidation in a way that is degrading and humiliating for the victim's dignity."¹⁸

VII. Model State Criminal Laws Compared: New Jersey and California

To date, New Jersey and California are the only states with laws against non-consensual pornography.¹⁹ New Jersey's law, which has been on the books for nearly a decade,²⁰ has faced no serious constitutional or other challenges to date. California's law was passed in October 2013. New

¹³ 458 U.S. 747

¹⁴ *Id.* at 759.

¹⁵ *Id.* at 760.

¹⁶ See ANN-MARIE DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND ICTR (2005) 135-7; HELEN DURHAM, TRACEY GURD (EDS.), LISTENING TO THE SILENCES: WOMEN AND WAR (2005), 146-7.

¹⁷ <http://www.unict.org/tabid/128/Default.aspx?id=18&mnid=4>

¹⁸ <http://www.icty.org/case/furundzija/4>

¹⁹ Legislators in Florida attempted to pass a much less clear and much less comprehensive bill in their most recent term, but the measure died in committee. There are indications that the bill's original sponsors will attempt to introduce the bill again in their next session.

²⁰ New Jersey's law took effect on January 8, 2004.

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Jersey's law is far more comprehensive than California's. This section will detail New Jersey's superior approach to the issue and explain the weaknesses of California's approach.

A. New Jersey

New Jersey offers an extremely promising approach to the harm of non-consensual pornography. New Jersey criminalizes certain invasions of privacy, in particular invasions involving intimate photographs or videos. The relevant law prohibits the non-consensual observation, recording, or disclosure of intimate images, recognizing that each of these actions constitutes a distinct harm.

According to New Jersey 2C: 14-9,

1. a. An actor commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, and under circumstances in which a reasonable person would know that another may expose intimate parts or may engage in sexual penetration or sexual contact, he observes another person without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

b. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b. of N.J.S.2C: 43-3, a fine not to exceed \$30,000 may be imposed for a violation of this subsection.

d. It is an affirmative defense to a crime under this section that:

- (1) the actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified in subsection a., b., or c., and**
- (2) the actor acted with a lawful purpose.**

New Jersey's approach is commendable in that it treats the conduct seriously while providing specific definitions and affirmative defenses that guard the statute against First Amendment overbreadth. The law has been in effect since 2004 without serious challenge, and there have been at least two successful prosecutions of non-consensual pornography so far.²¹ Under New Jersey law, a

²¹ See *State of New Jersey v. Parsons*, N.J. super. Unpub. Lexis 2972 (2011). In 2012, Brandon Carangelo was charged under the New Jersey statute for uploading pictures of his ex-girlfriend without her consent. See http://www.nj.com/hudson/index.ssf/2012/10/bayonne_man_charged_with_posti.html. According to court records, he was found guilty.

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third-degree crime carries a prison sentence of between 3 and 5 years; fourth-degree crimes carry a sentence of up to 18 months.²²

B. California

On October 1, 2013, California governor Jerry Brown signed into law an anti-revenge porn measure proposed by state senator Anthony Cannella (R-Ceres). The bill, SB 255 - Disorderly Conduct: Invasion of Privacy, provides as follows:

“any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress, is guilty of disorderly conduct.”

The crime is classified as a misdemeanor punishable by up to 6 months in prison and a \$1000 fine (up to 1 year in prison and \$2000 fine for second offense).

While it is commendable that California has taken a step towards addressing the problem of non-consensual pornography, there are several serious weaknesses of the law. The first is that the law does not cover images taken by the victims themselves (so-called “self-shots”). According to a recent study by the Cyber Civil Rights Initiative, up to 80% of revenge porn victims belong to this category. There is no principled reason to distinguish between victims in this way, and such a distinction will impose an additional burden on victims to prove that they did not take the images in question.

The second weakness of California’s law is the requirement that the perpetrator act “with the intent to cause serious emotional distress” and that the victim “suffer[] serious emotional distress.” Many purveyors of non-consensual pornography, especially those who host websites that traffic in such material, can plausibly claim that they have no intent to “cause serious emotional distress.”²³ They may seek money or notoriety and in many cases do not even know the people whose images they use.²⁴ Even in cases where the perpetrator does act with such intent, the burden is made unnecessarily heavier for prosecutors by having to demonstrate this intent beyond a reasonable doubt. The requirement that victims must suffer serious emotional distress raises questions about the potentially invasive and humiliating testimony they will be forced to give to convince a court of their distress.

The third weakness of California’s law is the classification of the conduct as a misdemeanor with a light maximum sentence and fine. Such minor punishment fails to send a strong message to would-be perpetrators and will be a less effective deterrent than a law like New Jersey’s.

²² <http://www.csclarklaw.com/new-jersey-laws-statutes/new-jersey-criminal-statutes-2c43-1-degrees-of-crimes.html>

²³ The problems here are similar to those raised by harassment and stalking statutory language on intent. *See* V.B.

²⁴ Joe Mullin, “How a ‘Revenge Porn’ Site Got Built,” <http://arstechnica.com/tech-policy/2013/02/how-a-revenge-porn-site-got-built-fake-identities-to-trade-photos/>.

VIII. Recommendations

Both state and federal criminal laws are necessary to address this issue. State criminal laws are necessary to address conduct that does not cross state lines.²⁵ Federal law is necessary because state laws are limited both by jurisdiction and by the Communications Decency Act §230, which creates high hurdles for either civil or criminal charges against website operators who distribute non-consensual pornography.²⁶ Given that the Internet has greatly amplified the scope and harm of non-consensual pornography, an effective law must also reach Internet traffickers. According to existing federal provisions, using the Internet to transmit information qualifies as “interstate commerce,” which Congress has the power to regulate. Combined with the fact that CDA §230 does not shield websites from federal criminal liability,²⁷ this means that a federal criminal prohibition is both appropriate and necessary to fully address the problem of non-consensual pornography.

To be featured in pornographic depictions against one’s will is a form of sexual abuse, and state and federal definitions of sexual abuse could be modified to reflect this.. Non-consensual pornography is more accurately conceptualized as a form of sexual abuse than as an invasion of privacy (or as harassment, as some states characterize it). As such, state legislators could consider including it along with other sex offenses, establishing confidentiality for victims and requiring convicted perpetrators to register as sex offenders. On the federal level, the definition of “sexual act” could be amended to include the sexual use of actual visual representations (not drawings or written descriptions) of an individual’s body without consent, so that non-consensual pornography that occurs in interstate commerce (via email or other Internet communication) could be included in the federal definition of “sexual assault.” Language for this expanded definition could be borrowed from international criminal case law.²⁸ This amendment could alternatively be made to the federal stalking statute, which already establishes prohibitions against certain forms of interstate sexual crimes.

Alternatively, state and federal laws can address the issue of non-consensual pornography without categorizing it as a form of sexual abuse. New Jersey’s law provides a strong example of a state

²⁵ See, e.g., the case of David Feltmeyer, who allegedly distributed sexually explicit DVDs of his ex-girlfriend on the windshields of cars in her neighborhood after she declined to continue a relationship with him. “Police: Man Left DVDS of ex Girlfriend Performing Sex Acts on Car Windshields,” AP News, March 3, 2007 (<http://www.foxnews.com/story/2007/03/03/police-man-left-dvds-ex-girlfriend-performing-sex-acts-on-car-windshields/>).

²⁶ State laws will not have force to the extent that they are inconsistent with the terms of CDA §230. 47 USC §230 (e)(3): “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” A recent letter from the National Association of Attorneys General urged Congress to revise §230 so that it cannot preempt state criminal law. The current wording and interpretation of §230, these Attorneys General maintain, impairs criminal prosecutions of child trafficking. See <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1465&context=historical> (July 23, 2013).

²⁷ 47 USC § 230 (e)(1): “Nothing in this section shall be construed to impair the enforcement of ... any ... Federal criminal statute.” While websites and Internet servers would likely escape liability for state criminal violations because of CDA §230, state law could reach the individuals responsible for the original non-consensual disclosure.

²⁸ See Section V.

criminal law that takes this approach. Model versions of both state and federal laws are suggested below. To date, three states – New York, Wisconsin, and Alabama – are using the model state statute proposed below as a basis for their draft legislation. New York legislators introduced their version of the statute in October 2013.²⁹

A. Model State Statute

Whoever intentionally discloses a photograph, film, videotape, recording, or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual contact without that person's consent, under circumstances in which the person has a reasonable expectation of privacy, commits a crime. A person who has consented to the capture or possession of an image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that relationship.

(a) Definitions: For the purposes of this section,

- 1) "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer.
- 2) "intimate parts" means the naked genitals, pubic area, buttocks, or female adult nipple of the person.
- 3) "sexual contact" means sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex.

(b) Exceptions:

- 1) This section shall not apply to lawful and common practices of law enforcement, reporting of unlawful activity, or legal proceedings.
- 2) This section shall not apply to situations involving voluntary exposure in public or commercial settings.

B. Model Federal Statute³⁰

This section offers two options for the federal criminalization of non-consensual pornography. The first addresses non-consensual pornography as an independent issue, while the second amends the current federal criminal prohibition of video voyeurism to clearly address non-consensual pornography.

Option 1

I. Whoever intentionally uses the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct or travels in interstate or foreign commerce

²⁹ As of October 7, 2013, the legislation, sponsored by Assemblyman Edward C. Braunstein (D-Bayside) and Senator Joseph A. Griffo (R-C-IP, Rome), is nearly identical to the model state statute proposed here.

³⁰ The definitions offered in the proposed federal statute differ somewhat from those of the proposed state statute because the latter are based on definitions from existing federal law. The former is based on definitions from the only existing state law prohibiting non-consensual disclosure of intimate images.

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or within the special maritime and territorial jurisdiction of the United States to produce or disclose a sexually graphic visual depiction of an individual without that individual's consent shall be fined under this title or imprisoned not more than one year, or both.

(A) The falsification of proof of consent shall be punishable by law.

(B) State Attorneys General shall have the authority to enforce the provisions of this law.

II. Definitions:

(A) "Disclosure" includes creation, distribution, publication, dissemination, transfer, sale, purchase, delivery, trade, offering, or advertising;

(B) "Sexually graphic" means revealing intimate areas of an individual or exposing an individual engaged in sexually explicit conduct;

1. "Intimate areas" is defined as in 18 USC § 1801 [slightly modified]: "the naked genitals, pubic area, buttocks, or any portion of the female breast below the top of the areola";

2. "Sexually explicit conduct" as defined in 18 USC § 2256 [modified]: "(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex";

3. "Visual depiction" is defined as in 18 USC § 2256: "includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

III. Exceptions:

(A) This section shall not apply to lawful and common practices of law enforcement, criminal reporting, or legal proceedings.

(B) This section shall not apply to situations involving voluntary exposure in public or commercial settings.

Option 2

18 USC §1801 (Video Voyeurism Act), is amended to read:

(a) Whoever, ~~in the special maritime and territorial jurisdiction of the United States,~~ **uses the mail, any interactive computer service, or any facility of interstate or foreign commerce, or travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States with** the intent to capture an image of a private area of an individual **or of an image of an individual engaging in sexually explicit conduct** without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.

(b) In this section—

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- (1) the term “capture”, with respect to an image, means to videotape, photograph, film, record by any means, or broadcast;
 - (2) the term “broadcast” means to electronically transmit a visual image with the intent that it be viewed by a person or persons;
 - (3) the term “a private area of the individual” means the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual;
 - (4) the term “female breast” means any portion of the female breast below the top of the areola;
 - (5) the term "sexually explicit conduct" means graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and
 - (6) the term “under circumstances in which that individual has a reasonable expectation of privacy” means—
 - (A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the individual was being captured; or
 - (B) circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place; or
 - (C) circumstances in which a reasonable person would believe that an image of their private areas or of their sexually explicit conduct would remain within the confines of a private or confidential relationship.
- (c) This section does not prohibit any lawful law enforcement, correctional, **commercial**, or intelligence activity.

IX. First Amendment Concerns

The First Amendment’s protection of free speech is not absolute. The First Amendment does not protect stalking, harassment, true threats, child pornography, incitement, obscenity, fighting words, libel, fraud, expression directly related to criminal conduct, or discrimination.³¹ First Amendment protection is moreover greatly reduced for matters of “purely private concern.” Prohibiting the non-consensual disclosure of sexually graphic images can be justified by any or all of the following five reasons:

1. The First Amendment does not serve as a blanket protection for **malicious, harmful conduct** simply because such conduct may have an expressive dimension. Stalking, harassment, voyeurism,

³¹ U.S. v. Stevens, 130 S.Ct. 1577, 1580 (2010) (internal citations omitted).

and threats can all take the form of speech or expression, yet the criminalization of such conduct is common and carefully crafted criminal statutes prohibiting this conduct have not been held to violate First Amendment principles.³² The non-consensual disclosure of sexually intimate images is no different.

2. The non-consensual disclosure of sexually graphic images is a matter of **purely private concern**, which the Supreme Court has held does not warrant the robust protection afforded to expression of matters of public concern. The Supreme Court has “long recognized that not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’ ... In contrast, speech on matters of purely private concern is of less First Amendment concern.”³³ While some matters of private concern may receive First Amendment protection, there must be some legitimate interest in the consumption of such images for this to be the case.³⁴ There is no such legitimate interest in disclosing or consuming sexually explicit images without the subjects’ consent. Prohibiting the non-consensual disclosure of sexually graphic images of individuals poses “no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.”³⁵

3. Sexually intimate images of individuals disclosed without consent belongs to the category of “**obscenity**,” which the Supreme Court has determined does not receive First Amendment protection. In *Miller v. California*, the Court set out the following guidelines for determining whether material is obscene: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”³⁶ The Supreme Court provided two “plain examples” of “sexual conduct” that could be regulated:

“(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”³⁷

Disclosing pictures and videos that expose an individual’s genitals or reveal an individual engaging in a sexual act without that individual’s consent easily qualifies as a “patently offensive representation” of sexual conduct. Such material moreover offers no “serious literary, artistic, political, or scientific value.”³⁸

³² See Timothy L. Allsup, *United States v. Cassidy: The Federal Interstate Stalking Statute and Freedom of Speech*, 13 N.C. J.L. & TECH. ON. 227, 239-243 (2012).

³³ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-60 (1985) (internal citations omitted).

³⁴ *Connick v. Myers*, 461 U.S. 138, 147 (1983).

³⁵ *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (internal citations omitted).

³⁶ *Miller v. California*, 413 U.S. 15, 23 (1973).

³⁷ *Id.* at 25.

³⁸ Noted First Amendment scholar Eugene Volokh has written that “a suitably clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there’s good reason to think

4. The “**publication of private facts**” tort is widely accepted by the majority of courts to comply with the First Amendment, although the Supreme Court has yet to rule explicitly on the constitutionality of this tort with regard to matters not of public record. According to the *Restatement (Second) of Torts*, “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”³⁹ In *New York Times v. Sullivan*, the Court observed that criminal statutes afford more safeguards to defendants than tort actions, suggesting that criminal regulation of conduct raises fewer First Amendment issues than tort actions.⁴⁰ If so, then a carefully-crafted criminal statute prohibiting the publication of private facts – including the non-consensual publication of sexually intimate images - should pass constitutional muster.

5. Because the non-consensual disclosure of sexually intimate images is a practice disproportionately targeted at women and girls, it is a form of **discrimination** that produces harmful **secondary effects** and as such is not protected by the First Amendment. The First Amendment does not protect discriminatory conduct,⁴¹ and regulations that are predominantly concerned with harmful secondary effects rather than the expressive content of particular conduct do not violate the First Amendment.⁴² Prohibitions against discrimination on the basis of race, sex, national origin, and other categories, even when such discrimination takes the form of “expression,” have been upheld by the Supreme Court.⁴³ Title II and Title VII of the Civil Rights Act of 1964, along with Title IX of the Education Amendments of 1972, all allow for the regulation of certain forms of speech and expression when they violate fundamental principles of equality and non-discrimination. Apart from the harm that non-consensual pornography inflicts on individual victims, it inflicts discriminatory harms on society as a whole. Like rape, domestic violence, and sexual harassment (i.e., abuses directed primarily at women and girls) non-consensual pornography reinforces the message that women’s bodies belong to men, and that the terms of women’s participation in any sphere of life are

that the subject did not consent to publication of such pictures, would likely be upheld by the courts ... [C]ourts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value.” The Volokh Conspiracy, <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/>.

³⁹ RESTATEMENT (SECOND) OF TORTS (1977), §652D, Publicity Given to Private Life.

⁴⁰ “Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

⁴¹ “[A]ntidiscrimination laws... have long been held constitutional.” *Wisconsin v Mitchell*, 508 U.S. 476, 476 (1993)

⁴² “Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is “justified without reference to the content of the ... speech,” ... Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (internal citations omitted).

⁴³ “[S]ince words can in some circumstances violate laws directed not against speech, but against conduct ... a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech... Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (internal citations omitted).

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to be determined by their willingness to endure sexual subordination and humiliation. Non-consensual pornography causes women to lose jobs, leave school, change their names, and fear for their physical safety, driving women out of public spaces and out of public discourse. Combating this form of sex discrimination is not only consistent with longstanding First Amendment principles, but comports with equally important Fourteenth Amendment equal protection principles.

X. Recommended Resources

A. Websites

www.withoutmyconsent.org
www.endrevengeporn.org
www.womentagainstrevengeporn.com
<http://annmariechiarini.com/>

B. News Articles

The New York Times, “Victims Push Laws to End Online Revenge Posts,” September 23, 2013 (<http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?pagewanted=all>).

Slate.com, “Why Do We Tolerate Revenge Porn?, September 25, 2013 (http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html).

San Francisco Chronicle, “Public Humiliation Over Private Photos,” February 8, 2013 (<http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php#page-1>).

Salon.com, “Criminalizing Revenge Porn,” April 6, 2013 (http://www.salon.com/2013/04/07/criminalizing_revenge_porn/).

Observer.com’s Betabeat, “A Victim Speaks: Standing Up to a Revenge Porn Tormentor,” May 1, 2013, (<http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/>).

MSN, “Florida’s bill Florida pushes bill to criminalize 'revenge porn,’” April 9, 2013 (<http://news.msn.com/us/florida-pushes-bill-to-criminalize-revenge-porn/>).

DAME Magazine, “The Fight to Criminalize Revenge Porn,” April 11, 2013 (<http://www.damemagazine.com/2013/04/11/fight-criminalize-revenge-porn/>).

Salon.com, Will California Criminalize Revenge Porn?, August 27, 2013 (http://www.salon.com/2013/08/27/will_california_criminalize_revenge_porn/).

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Nerve.com, "My Ex Posted 'Revenge Porn' Photos of Me," January 8, 2013
<http://www.nerve.com/love-sex/true-stories/my-ex-posted-revenge-porn-photos-of-me>

C. Blog Posts

Danielle Citron, "Revenge Porn and the Uphill Battle to Sue Site Operators."
<http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-sue-site-operators.html> (January 25, 2013).

Danielle Citron, "Revenge Porn and the Uphill Battle to Sue Site Operators, Part II."
<http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html> (January 25, 2013).

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

Mary Anne Franks, "Why You Can't Punch a Boxer in the Face When He Asks You for Directions: Consent, Context, and Humanity."
<http://www.concurringopinions.com/archives/2013/02/why-you-cant-punch-a-boxer-in-the-face-when-he-asks-you-for-directions-consent-context-and-humanity.html> (February 9, 2013).

Mary Anne Franks, "Adventures in Victim Blaming: Revenge Porn Edition."
<http://www.concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html> (February 1, 2013).

D. Academic Articles

Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799 (2008).

Danielle Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011); *Sexual Harassment 2.0*, 71 MARYLAND L. REV. 655 (2012).

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