

A Breach of Trust: Fighting Nonconsensual Pornography

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ABSTRACT: Nonconsensual pornography, also known as “revenge porn,” is the distribution of sexually graphic or intimate images of individuals without their consent. As scholars have argued, it is, and should be treated as, a crime. But even with a national law criminalizing nonconsensual pornography, attorneys have to get creative to provide necessary civil remedies to victims in need. This Essay argues that practitioners should add the tort of breach of confidentiality to their arsenal of tools to fight nonconsensual pornography. Presenting evidence from, among other sources, a series of first-person interviews with victims of cyberharassment, this Essay shows that nonconsensual pornography does violence to essential social norms of trust at the core of social interaction. As such, the tort of breach of confidentiality, which focuses on remedying breaches of trust, should be deployed to help victims of “revenge porn” obtain justice.

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I. INTRODUCTION

Nonconsensual pornography, also known as “revenge porn,”¹ is the distribution of sexually graphic or intimate images of individuals without their consent.² It can have devastating effects: Victims experience severe anxiety and depression and they are often placed in physical danger. They lose their jobs and have difficulty finding new ones. Many have to recede from online life, move far away, and even change their names to escape revenge porn’s long shadow.³ In response, 35 states and the District of Columbia have criminalized the practice,⁴ with legislation introduced in several others.⁵ Only

1. The essential evil of revenge porn is not the motive animating the behavior, but the invasion of privacy and the transformation of victims into objects without their consent. See Mary Anne Franks, *How to Defeat ‘Revenge Porn’: First, Recognize It’s About Privacy, Not Revenge*, HUFFINGTON POST (June 22, 2015, 8:22 AM), http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn_b_7624900.html. For ease of comprehension, I will use “revenge porn,” “nonconsensual pornography,” and “cyberexploitation” interchangeably. The latter two are, however, far more appropriate terms.

2. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

3. See DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 6–10 (2014) (discussing some of the devastating personal effects of cyberharassment).

4. ALASKA STAT. ANN. § 11.61.120 (West 2015); ARIZ. REV. STAT. ANN. § 13-1425 (Supp. 2015); ARK. CODE ANN. § 5-26-314 (Supp. 2015); CAL. PENAL CODE § 647 (West Supp. 2016); COLO. REV. STAT. ANN. § 18-7-107 (West Supp. 2015); CONN. GEN. STAT. ANN. § 53a-189a (West 2012 & Supp. 2016); DEL. CODE ANN. tit. 11, § 1335 (2015); D.C. CODE ANN. §§ 22-3051 to 22-3057 (West 2016); FLA. STAT. § 784.049 (2015); GA. CODE ANN. § 16-11-90 (West Supp. 2015); HAW. REV. STAT. § 711-1110.9 (2014); IDAHO CODE ANN. § 18-6609 (West 2016); 720 ILL. COMP. STAT. ANN. § 5/11-23.5 (2014); KAN. STAT. ANN. § 21-6101 (8) (West 2016); LA. REV. STAT. ANN. § 14:283.2 (2004 & Supp. 2016); ME. REV. STAT. ANN. tit. 17-A, § 511-A (West Supp. 2015); MD. CODE ANN., CRIM. LAW § 3-809 (West Supp. 2015); MICH. COMP. LAWS ANN. §§ 750.145e, 750.145f (West 2016); MINN. STAT. ANN. § 617.261 (West 2016); NEV. REV. STAT. ANN. § 200.780 (West 2015); N.H. REV. STAT. ANN. § 644:9-a (2016); N.J. STAT. ANN. § 2C:14-9 (West 2015); N.M. STAT. ANN. § 30-37A-1 (West 2016); N.C. GEN. STAT. § 14-190.5A (2015); N.D. CENT. CODE § 12.1-17-07.2 (Supp. 2015); OKLA. STAT. ANN. tit. 21, § 1040.13b (West 2016); OR. REV. STAT. § 163.472 (2015); 18 PA. CONS. STAT. § 3131 (2015); TENN. CODE ANN. § 39-17-318 (West 2016); TEX. PENAL CODE ANN. § 21.16 (West Supp. 2015); UTAH CODE ANN. § 76-5b-203 (West 2016); VT. STAT. ANN. tit. 13, § 2606 (Supp. 2015); VA. CODE ANN. § 18.2-386.2 (2014); WASH. REV. CODE ANN. § 9A.86.010 (West 2016); WIS. STAT. § 942.09 (2013–2014).

5. Legislation has been introduced in Kentucky, Massachusetts, Missouri, New York, and South Carolina. See, e.g., Lana Jones, *Bill Would Make ‘Revenge Porn’ a Crime in Massachusetts*, CBS BOS. (June 5, 2015, 1:52 PM), <http://boston.cbslocal.com/2015/06/05/bill-would-make-revenge-porn-a-crime-in-massachusetts>; Tammy Mutasa, *‘Revenge Porn’ Bill Passes Unanimously in Kentucky House*, WLWT5 (Feb. 15, 2016, 11:48 PM), <http://www.wlwt.com/news/-Revenge-porn-bill-passes-unanimously-in-Kentucky-House/38013094>; Collin Reischman, *Engler Files ‘Revenge*

nine states offer victims civil remedies.⁶ Google, Twitter, and even Reddit and Pornhub are just a few of the internet platforms that have banned it,⁷ and many, like Microsoft, provide users with forms and procedures to initiate the take-down or de-link process.⁸

This landscape, though markedly improved from just five years ago, still inadequately protects victims, most of whom are women.⁹ After substantial media attention¹⁰ and the tireless efforts of the Cyber Civil Rights Initiative,¹¹ Congresswoman Jackie Speier finally introduced her proposal for a federal criminal nonconsensual pornography law on July 14, 2016.¹² The legislation

Porn' Bill, MO. TIMES (Jan. 28, 2014), <http://themissouritimes.com/7918/engler-files-revenge-porn-bill>. Notably, Rhode Island's Governor, Gina Raimondo, recently became the first governor to veto a revenge porn bill. See Katherine Gregg, *Raimondo Vetoes 'Revenge Porn' Bill*, PROVIDENCE J. (June 21, 2016, 7:43 PM), <http://www.providencejournal.com/news/20160621/raimondo-vetoes-revenge-porn-bill>.

6. CAL. CIVIL CODE § 1708.85 (West Supp. 2016); FLA. STAT. § 784.049(5) (2015); N.C. GEN. STAT. § 14-190.5A(g) (2015); N.D. CENT. CODE § 32-03-58 (Supp. 2015); 42 PA. CONS. STAT. § 8316.1 (2015); TEX. CIV. PRAC. & REMEDIES CODE ANN. § 98B (West Supp. 2015); VT. STAT. ANN. tit. 13, § 2606 (Supp. 2015); WASH. REV. CODE ANN. § 4.24.795 (West 2016); WIS. STAT. § 995.50(2)(d) (2013-2014).

7. Christina Cauterucci, *Pornhub Takes One Small Step to Fight Revenge Porn*, SLATE (Oct. 14, 2015, 5:24 PM), http://www.slate.com/blogs/xx_factor/2015/10/14/pornhub_combats_revenge_porn.html; Samuel Gibbs, *Twitter Bans Revenge Porn in User Policy Sharpening*, GUARDIAN (Mar. 12, 2015, 8:13 AM), <https://www.theguardian.com/technology/2015/mar/12/twitter-bans-revenge-porn-in-user-policy-sharpening>; Amanda Hess, *Reddit Has Banned Revenge Porn. Sort Of.*, SLATE (Feb. 25, 2015, 11:36 AM), http://www.slate.com/blogs/the_slatest/2015/02/25/reddit_bans_revenge_porn_victims_advocates_and_the_aclu_react_to_the_new.html; Heather Kelly & Laurie Segall, *Google Bans Revenge Porn*, CNN MONEY (June 19, 2015, 7:00 PM), <http://money.cnn.com/2015/06/19/technology/google-bans-revenge-porn>.

8. See, e.g., *Report Content to Microsoft*, MICROSOFT, https://support.microsoft.com/en-us/getsupport?oasplink=start_1.o.o.o&wfname=capsub&productkey=RevengePorn&ccsid=635809546145079810 (last visited Nov. 12, 2016).

9. Numbers of revenge porn victims are hard to come by given self-reporting biases and the likelihood of underreporting. The Cyber Civil Rights Initiative organization suggests that approximately 90% of victims are women. *Power in Numbers*, CYBER C.R. INITIATIVE (Jan. 3, 2014), <http://www.cybercivilrights.org/revenge-porn-infographic>. A Press Investigation study conducted in the United Kingdom in July 2015 found that "eight females for every male" report being victimized by revenge porn. Oliver Wheaton, *There's Been a Massive Rise in Revenge Porn*, METRO (July 16, 2015, 7:36 AM), <http://metro.co.uk/2015/07/16/massive-rise-in-revenge-porn-incidents-including-victims-as-young-as-11-5297962>. Given also the prevalence of women-only "revenge porn" sites, it is reasonable to conclude that the vast majority of victims are women.

10. See generally Citron & Franks, *supra* note 2; Mario Trujillo, *John Oliver Calls for 'Revenge Porn' Laws*, THE HILL (June 22, 2015, 10:01 AM), <http://thehill.com/policy/technology/245690-john-oliver-calls-for-revenge-porn-laws>.

11. Mary Anne Franks, *Congresswoman Jackie Speier Introduces Federal Bill Against NCP*, CYBER C.R. INITIATIVE (July 18, 2016), <http://www.cybercivilrights.org/fed-bill-intro>. The bill is called the Intimate Privacy Protection Act ("IPPA"). *Id.*

12. Press Release, Congresswoman Jackie Speier, Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn (July 14, 2016), <https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual>.

still has far to go before it becomes law. Even with such a law, civil remedies are hard to come by. Section 230 of the Communications Decency Act still immunizes almost all websites that host this form of cyberexploitation.¹³ High walls of anonymity make it difficult to seek redress against harassers. And few practicing lawyers have the knowledge and skill necessary to successfully help victims seek justice.

As a result, those that are helping victims combat revenge porn are getting creative. Because revenge porn is, at bottom, an invasion of privacy that transforms ordinary individuals into sexual objects for anyone with an Internet connection, many attorneys look to state privacy torts—like public disclosure of private facts—to help victims seek redress. Advocates may also use the Digital Millennium Copyright Act’s notice-and-takedown procedure to force websites to remove images that were originally taken by the victim.¹⁴ They prod internet platforms to use their considerable power to both wipe revenge porn from their websites and encourage good digital citizenship. They represent victims in front of school disciplinary committees. And they work with law enforcement to take action when images depict minors.¹⁵

None of these tools are panaceas. Traditional privacy torts are not always viable claims, especially when the images had previously been shared with another person.¹⁶ And even then, most privacy torts require plaintiffs to jump over high evidentiary hurdles. Copyright law is only applicable where the victim takes the photograph herself (a “selfie”). Good faith negotiation relies on uncertain corporate goodwill. And students and minors age 15 and under appear in only 17.5% of revenge porn cases.¹⁷ Absent a comprehensive nuclear option, however, these conventional tools are all we have.

As Danielle Keats Citron and Mary Anne Franks have argued, revenge

13. 47 U.S.C. § 230(c)(1) (2012). Under its current interpretation, § 230 immunizes from suit most websites that host images of revenge porn. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–35 (4th Cir. 1997). As this Essay’s sole focus is civil remedies against the perpetrator, I leave for future work a discussion of § 230 reform and interpretation. Notably, the IPPA would apply penalties to an “interactive computer service” that “intentionally promotes or solicits content that it knows to be in violation of” the law. *See* Discussion Draft, Intimate Privacy Protection Act of 2016, 114th Cong.

14. 17 U.S.C. § 512 (2012); *see also* Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U.J. INTELL. PROP. & ENT. L. 422, 442–44 (2014).

15. Carrie Goldberg & Elisa D’Amico, Representing Victims of Nonconsensual Pornography, Address at the First Annual Tyler Clementi Internet Safety Conference (Oct. 3, 2015), <http://nyls.mediasite.com/mediasite/Play/2ce011422edd4252bad2944788c3d4491d?catalog=17eb0fea-2b11-42ed-9f42-92f68aee6051>.

16. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977). Daniel Solove has called this the “secrecy paradigm,” or the requirement that information be absolutely secret in order to be protected as private. *See* DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 42–44, 143–45 (2004).

17. *See* INTERNET WATCH FOUND., EMERGING PATTERNS AND TRENDS REPORT #1: ONLINE-PRODUCED SEXUAL CONTENT 3 (2015), <https://www.iwf.org.uk/assets/media/resources/Emerging%20Patterns%20and%20Trends%20Report%201%20-%20Online-Produced%20Sexual%20Content%20website%20March%202015.pdf>.

porn is, and should be treated as, a crime.¹⁸ It is also an egregious breach of the privacy and trust that make intimate relationships so dynamic, enduring, and socially beneficial.¹⁹ Therefore, this Essay recommends that practitioners add another weapon to their arsenal to eradicate revenge porn: the tort of breach of confidentiality. The tort holds liable those who, without consent, divulge information disclosed to them in a context that they either know or should have known included an expectation of confidentiality, resulting in harm to the victim.²⁰ It focuses on relationships and protects the information we share with others based on the expectations of trust inherent in those relationships.²¹ It is also divorced from motive. As such, it is an apt civil law weapon against revenge porn.

Using the tort of breach of confidentiality to fight revenge porn has several practical and doctrinal advantages. As a matter of legal practice, the tort's elements neatly track the factual contexts that give rise to many incidents of revenge porn, and it offers victims a sorely needed civil remedy for their harassment. It also captures conduct copyright law cannot by reaching beyond images in which victims hold the copyright. Doctrinally, the tort of breach of confidentiality accurately reflects an underappreciated social wrong of revenge porn: posting an intimate or sexually graphic image of another without her consent erodes the social trust at the core of all social relationships. Because that trust is essential for a well-functioning society, the law has an interest in valuing and protecting it.

This is not to say that the tort of breach of confidentiality is the only or always the best weapon against revenge porn. Tort law generally cannot solve the problem on its own. With respect to the particular tort of breach of confidentiality, it is underdeveloped in the United States and its application to the cyberharassment context would require American courts to learn lessons from the more robust British law of confidence. Fortunately, adapting to new problems is precisely the kind of dynamism for which the common law

18. Citron & Franks, *supra* note 2, at 346.

19. Elsewhere, I have argued that, in the information privacy context, invasions of privacy are really breaches of trust. See generally Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559 (2015) (arguing that invasions of privacy are breaches of trust). When discussing revenge porn, scholars and policy makers use the language of breach of trust. See, e.g., Citron & Franks, *supra* note 2, at 345 (“‘Jane’ allowed her ex-boyfriend to photograph her naked because, as he assured her, it would be for his eyes only. After their breakup, he betrayed her trust.” (footnotes omitted)); Peter Henn, *Shocking Statistics Reveal Revenge Porn Victims Aged Between 12 and 67*, EXPRESS (July 16, 2015, 12:01 AM), <http://www.express.co.uk/news/uk/591465/Revenge-Porn-victims-12-67> (“Criminal Justice Minister Mike Penning said: ‘Revenge porn is an abuse of trust that can leave people feeling humiliated and degraded.’”).

20. This formulation of the elements of the tort is based on the collection and analysis of breach of confidentiality cases in Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 156–73 (2007), and in Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1428–34, 1448–55 (1982).

21. See Richards & Solove, *supra* note 20, at 125.

of torts is uniquely suited. But it cannot adapt if practitioners do not try. In a world without a comprehensive national response to the epidemic of cyberexploitation, creative attorneys need as many weapons as possible to help victims seek justice. The tort of breach of confidentiality should be among them.

II. REVENGE PORN AS SOCIAL HARM

Revenge porn devastates its victims. It is also a cancer on society. Individual psychological and physical injury may help the public appreciate the extent of the problem and help practitioners prove particularized injury for certain civil claims, but the broader social harm is also relevant for determining an appropriate response. For a particular tort claim to make sense as a weapon against revenge porn, it has to both compensate the victim and deter the undesirable social behavior at the core of the wrong.²² It should, as Durkheim argued, express society's social values.²³

In this part, I argue that trust is one of those essential social values, and that in addition to harming victims, nonconsensual pornography does violence to essential social norms of trust that are at the core of social interaction. It makes sense, then, to look to ways to remedy breaches of trust in response.

A. THE NARRATIVE OF INDIVIDUAL HARM

In *Hate Crimes in Cyberspace*, Danielle Citron tells the story of Holly, whose ex-boyfriend posted online nude photographs of her and a sexually revealing webcam video featuring her.²⁴ The posts also included her full name, email address, screen shots of her personal Facebook page, and links to her online biography—he even included her work address.²⁵ She was hounded with sexual and harassing emails from strangers, especially after her profile

22. One theory sees tort law as a remedial regime that compensates victims. See, e.g., Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 113–14 (1990) (citing Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990)). A deterrence theory suggests that tort law also serves a regulatory function with the goal of maximizing social utility and deterring antisocial behavior including, as I argue, breaching trust. See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981). It is true that the deterrence theory of tort law has traditionally been the bailiwick of economists and economic thinkers like Posner and Guido Calabresi. But as Gary Schwartz has argued, deterrence can also serve “generous, warm-hearted, compassionate, and humane” ends beyond the cold rationality of economic efficiency. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1831 (1997).

23. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 24 (W.D. Halls trans., 1984) (noting how law reflects social norms).

24. CITRON, *supra* note 3, at 45.

25. *Id.*

appeared on a website that arranged sexual encounters.²⁶ Someone sent her photos to her boss and colleagues.²⁷ By 2012, nearly 90% of the first ten pages of a Google search of her name included links to the images and videos.²⁸

Holly reported feeling “terrorized,” “afraid,” and “helpless”—common reactions for victims of cyberharassment.²⁹ She worried constantly about being stalked and raped; she never walked alone at night and would “get the chills” every time she noticed someone looking at her.³⁰ She was “anxious” about her personal safety and professional prospects, and she felt blamed for what happened.³¹ In my own research, I have spoken to nearly 60 LGBTQ targets of cyberharassment. The fraction that report being victims of revenge porn report similar effects.³² Kate M., for example, a victim of revenge porn, stalking, and almost a victim of rape, stated that she “was constantly looking over her shoulder,” and that she was “crippled” by “fear and anxiety.” She “couldn’t go out of the house for days and eventually started believing that [she] brought this on [her]self.”³³ Steven, who found several nude images of himself on multiple amateur pornography sites, felt “sick every day. [He] was nervous, sometimes shaking, from the moment [he] woke up to the moment [he] fell asleep, if [he] ever slept.”³⁴

Holly, Kate, and Steven are just three examples of a larger problem. Victims of cyberharassment, generally, and revenge porn, in particular, experience “significant emotional distress.”³⁵ Some experience panic attacks and develop eating disorders.³⁶ They withdraw from both face-to-face and online social activities. As Citron and Franks have noted, revenge porn also raises the risk of stalking and physical attack.³⁷ Young victims experience negative educational outcomes and report higher rates of suicidal thoughts; adults find it impossible to be productive, lose their jobs, and cannot find new ones.³⁸ Many have had to move to escape physical harm; some have had to

26. *Id.* at 45–46.

27. *Id.* at 46.

28. *Id.* at 48.

29. *Id.* at 48–49.

30. *Id.* at 48.

31. *Id.* at 48–49.

32. There is, as yet, no data on the rates of revenge porn victimization in the LGBTQ community. I am currently conducting a study to fill that gap. For now, my ethnographic research provides anecdotal evidence that revenge porn tends to hit the LGBTQ community when women come out as lesbians after breaking up with men and when gay men participate in geolocation networking mobile apps.

33. Telephone interview with “Kate M.” (July 14, 2015) (notes on file with author).

34. Telephone interview with “Steven P.” (Aug. 11, 2015) (notes on file with author). Steven, an openly gay man, sent sexually graphic images to individuals he met on the mobile app Grindr.

35. *Power in Numbers*, *supra* note 9.

36. Citron & Franks, *supra* note 2, at 351 (“Anorexia nervosa and depression are common ailments for individuals who are harassed online.” (footnote omitted)).

37. *Id.* at 350.

38. *Id.* at 353 (collecting reports and studies).

change their names to escape the otherwise permanent stain of online harassment. Almost all victims report feelings of hopelessness, as well.³⁹

B. *REVENGE PORN'S SOCIAL HARM: A BREACH OF TRUST*

And yet, revenge porn's harmful effects do not stop at the victim's psychological, social, and professional health. In addition to causing devastating harm to individuals, revenge porn damages society, as well. Citron has argued that revenge porn, as a gendered and sexualized phenomenon, discriminates against women.⁴⁰ That important argument need not be repeated here. This Essay adds a further point: revenge porn is antisocial behavior that breaches the trust inherent in intimate social relationships and necessary for social interaction. Any response to the problem must adequately address this core wrong—breach of trust—if it hopes to both help victims seek redress and change social norms.⁴¹

Trust is a resource of social capital between or among two or more persons concerning the expectations that other members of their community will behave according to accepted norms.⁴² It is the “favorable expectation regarding . . . the actions and intentions of others,”⁴³ or the belief that others will behave in a predictable manner. As such, it deals in expectations and perceptions. For example, if I ask a friend to hold my spare set of house keys, I trust she will not break in and steal from me. When an individual speaks with relative strangers in a support group like Alcoholics Anonymous, she trusts that they will not divulge her secrets. I cannot know for certain that my neighbor will not abuse her key privileges or that my fellow support group members will keep my confidences, so trust allows me to interact with and rely on them. And I earn all sorts of positive rewards as a result.⁴⁴ If I never trusted,

39. CITRON, *supra* note 3, at 35–55.

40. *See generally id.*

41. *See* DURKHEIM, *supra* note 23, at 24; *see also, e.g.*, Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 68 (2002) (noting that motorcycle helmet laws impact our belief that helmets make us safe); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 349 (1997) (noting that laws can both intentionally and unintentionally affect social norms); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 86–88 (1999) (noting that behavior and laws are related); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043 (1996) (noting that civil rights laws have had an effect on the meaning of nondiscrimination).

42. Alejandro Portes & Julia Sensenbrenner, *Embeddedness and Immigration: Notes on the Social Determinants of Economic Action*, 98 AM. J. SOC. 1320, 1332 (1993).

43. Ari Ezra Waldman, *Privacy, Sharing, and Trust: The Facebook Study*, 67 CASE W. RES. L. REV. (forthcoming 2017) (manuscript at 6) (citing J. David Lewis & Andrew Weigert, *Trust as a Social Reality*, 63 SOC. FORCES 967, 968 (1985)), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726929; *see also* Guido Möllering, *The Nature of Trust: From Georg Simmel to a Theory of Expectation, Interpretation and Suspension*, 35 SOCIOLOGY 403, 404 (2001); Ken Newton & Sonja Zmerli, *Three Forms of Trust and Their Association*, 3 EUR. POL. SCI. REV. 169, 171 (2011).

44. Trust helps us deal with uncertainty and complexity by allowing us to rely on the recommendations of others. *See* TALCOTT PARSONS, *ACTION THEORY AND THE HUMAN CONDITION*

my social life would be paralyzed. As Niklas Luhmann stated: “trust begins where knowledge ends.”⁴⁵ It is the mutual “faithfulness” on which all social interaction depends.⁴⁶

Trust is at the core of individuals’ decisions to share personal information with others.⁴⁷ From support groups⁴⁸ to social friends and even websites,⁴⁹ trust is the linchpin that gives individuals the comfort and confidence to share. Trust can arise from explicit or implicit social cues. One may preface a conversation by stating: “This is to be kept between us.” Or, two people sharing a secret at a party might physically turn their bodies away from the crowd, huddle down, and whisper.⁵⁰ Trust can also be based on experience and expectations developed over a history of sharing and confidentiality. Trust and a willingness to disclose may also emanate directly from social network norms and the identities of the network’s members. Gene Shelley’s study of sharing one’s HIV status with others is a good illustration.⁵¹ HIV status is, for many, private but not secret: many of the same people that choose to hide their status from acquaintances, friends, and even family for fear of ostracism, stigmatization, homophobia, or worse,⁵² are willing to share it with relative strangers who are also living with HIV.⁵³ Several participants in Shelley’s ethnography explained why: “I would tell my support group. Everyone there is HIV-positive and I’m comfortable there.”⁵⁴ Another stated:

46–47 (1978). Plus, it encourages therapeutic sharing by giving all individuals—from alcoholics and those suffering from depression to close friends—the confidence they need to disclose personal and perhaps stigmatizing information. *See, e.g.*, AARON T. BECK & BRAD A. ALFORD, *DEPRESSION: CAUSES AND TREATMENT* 292–324 (2d ed. 2009). For a more in-depth discussion of the social benefits of particular social trust, see Waldman, *supra* note 19, at 601–05.

45. See Waldman, *supra* note 19, at 604 & n.272; see also Patricia M. Doney et al., *Understanding the Influence of National Culture on the Development of Trust*, 23 *ACAD. OF MGMT. REV.* 601, 603 (1998).

46. See Waldman, *supra* note 19, at 602.

47. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 *U.C. DAVIS L. REV.* 1183, 1205 & n.104 (2016); Jessica Litman, *Information Privacy/Information Property*, 52 *STAN. L. REV.* 1283, 1308–10 (2000); see also Waldman, *supra* note 43 (providing empirical evidence based on a study of Facebook users that trust is essential in individuals’ decision to share personal information online).

48. See Gene A. Shelley et al., *Who Knows Your HIV Status? What HIV+ Patients and Their Network Members Know About Each Other*, 17 *SOC. NETWORKS* 189, 204 (1995).

49. See Timothy Morey et al., *Customer Data: Designing for Transparency and Trust*, *HARV. BUS. REV.* (May 2015), <https://hbr.org/2015/05/customer-data-designing-for-transparency-and-trust>.

50. These implicit cues of confidentiality are discussed at length in ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 112–32 (1959) (discussing the “back stage” of social interaction); see also generally ERVING GOFFMAN, *STRATEGIC INTERACTION* (1972).

51. See generally Shelley et al., *supra* note 48.

52. See generally LAUREL SPRAGUE, *THE SERO PROJECT, LEGAL VULNERABILITIES RELATED TO HIV* (2013), http://seroproject.com/wp-content/uploads/2013/07/Young-people-of-color-and-criminalization_Sero-results-2013.pdf.

53. Shelley et al., *supra* note 48, at 204.

54. *Id.*

“The only two people, aside from members of my support group and doctors, who know are my former lover (who gave her the HIV) and my son’s father.”⁵⁵

Trust is, therefore, an essential social norm. Not only is trust everywhere (it is reasonable to assume everyone trusts at least someone),⁵⁶ scholars have also shown that where trust between individuals exists, the conditions are there for the members of that society to build trust in government and corporate institutions and to become more trusting, optimistic, and open, in general.⁵⁷ And, as Robert Putnam famously showed, when those social forces erode, society suffers.⁵⁸

Victims of revenge porn who have spoken about their experiences had developed trust with their harassers and had those expectations destroyed when they were betrayed. Holly “trusted” her ex-boyfriend to keep her nude images secret.⁵⁹ Kate “trusted” that her ex-boyfriend “at least was reasonable. I mean, after all, we were in love and we’d been together for some time. Is that so ridiculous?”⁶⁰ Steven, who shared a graphic photo of himself on a mobile app on which such photo sharing is common and expected, stated that “we’re all in this together. If you don’t share photos, you can’t really participate. I think we all do it expecting that the guy on the other end can be trusted to be discrete.”⁶¹ They trusted that their interaction partners would act in keeping with the expectations and norms of the social context. Some of them trusted based on implicit cues and experience; some trusted based on their social network.⁶² In each case, nonconsensual pornography destroyed that trust.

Experts, lawmakers, and the media also use the language of trust to capture the social harm of revenge porn. When they introduced legislation to make it easier for law enforcement to prosecute those who engage in nonconsensual pornography, California State Senator Anthony Canella and Assemblyman Mike Gatto stated that perpetrators were “exploit[ing] intimacy

55. *Id.* (parenthetical in original).

56. See Newton & Zmerli, *supra* note 43, at 171 (citing Eric M. Uslaner, *Democracy and Social Capital*, in *DEMOCRACY AND TRUST* 121, 123 (Mark E. Warren ed., 1999)).

57. So-called “general social trust” is the belief that most people can be trusted. “Institutional trust” is the trust individuals have in institutions, agencies, organizations, and government. See Newton & Zmerli, *supra* note 43, at 169–71.

58. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 347–49 (2000) (arguing, in part, that the decline of community involvement has contributed to a decline in trust among citizens and a decline in the political health of our society).

59. CITRON, *supra* note 3, at 45.

60. Telephone Interview with “Kate M.”, *supra* note 33.

61. Telephone Interview with “Steven P.”, *supra* note 34.

62. Trust among individuals can develop in a variety of ways. See Waldman, *supra* note 19 (collecting the social science literature on the development of particular social trust and highlighting the role of experience, explicit and implicit social cues, and transference from knowns to unknowns).

and trust” for financial gain or petty revenge.⁶³ Senator Cannella described the problem as “lives . . . being destroyed because another person they trusted distributed compromising photos of them online.”⁶⁴ In an opinion piece for *Aljazeera America*, Danielle Citron stated that “the nonconsensual posting of people’s nude photos [is] in violation of their trust and confidence.”⁶⁵ Woodrow Hartzog and Neil Richards did the same in their op-eds on combatting revenge porn in *The Atlantic* and *Aljazeera*, respectively.⁶⁶

Individuals share graphic or intimate images with others when the social context includes expectations of trust that recipients will behave with discretion and keep those images confidential.⁶⁷ Transforming those images into pornography for strangers is an invasion of privacy precisely because it erodes both the trust that had developed between the victim and her harasser and, as we have seen, the broader social trust that keeps social interaction humming along. Therefore, to address revenge porn’s particularized and social harms, it makes sense to look to legal remedies that hold liable those who breach trust.

III. WEAPONS TO FIGHT REVENGE PORN

Traditional civil remedies fall short of that goal. Public disclosure of private facts, for example, attacks the harm of revelation or publicity of private matters, which, though important, is only one part of the panoply of revenge porn harms. By redressing the harm of theft of one’s creative property, copyright law offers practitioners a tool for taking down some images of revenge porn. But it minimizes attendant individual and social harm by ignoring revenge porn’s moral evil. It lacks the expressive effect of a societal condemnation: what is wrong about nonconsensual pornography is not simply the unauthorized taking of someone else’s picture, or the wide dissemination of that image, but the transformation of an otherwise private person into a sexual object for others against her will. This Part briefly describes how certain civil remedies can be used to combat revenge porn and

63. *Sen. Cannella Introduces Additional Legislation to Combat Cyber Exploitation and Revenge Porn*, SENATOR ANTHONY CANNELLA (Mar. 2, 2015), <http://district12.csrc.us/content/sen-cannella-introduces-additional-legislation-combat-cyber-exploitation-and-revenge-porn>.

64. *Id.*

65. Danielle Citron, Opinion, *Expand Harassment Laws to Protect Victims of Online Abuse*, ALJAZEERA AM. (Mar. 21, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/3/expand-harassment-laws-to-protect-victims-of-online-abuse.html>.

66. Woodrow Hartzog, *How to Fight Revenge Porn*, ATLANTIC (May 10, 2013), <http://www.theatlantic.com/technology/archive/2013/05/how-to-fight-revenge-porn/275759> (proposing legal remedies for victims of revenge porn, i.e., “those whose trust has been betrayed”); Neil M. Richards, Opinion, *Regulating Revenge Porn Isn’t Censorship*, ALJAZEERA AM. (Feb. 11, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/2/why-regulating-revenge-porn-isnt-censorship.html> (arguing that “[t]he disclosure of a nude photo of a person in breach of trust and privacy is similarly beneath the attention of the First Amendment, and rightly so”).

67. Indeed, individuals are much more willing to share personal information with others in these contexts, generally. See generally Waldman, *supra* note 43.

highlight the gaps they leave. In particular, this Part argues that they are inadequate remedies in part because they are aimed at wrongs at the periphery of the problem. This Part will then detail how a robust tort of breach of confidentiality can be an effective weapon for both the individual and social harms of nonconsensual pornography.

A. PUBLIC DISCLOSURE OF PRIVATE FACTS

The tort of public disclosure of private facts is chiefly concerned with the unauthorized publicity of private matters.⁶⁸ It creates liability where an individual widely discloses “a matter concerning the private life of another” that is “highly offensive to a reasonable person” and “not of legitimate concern to the public.”⁶⁹ As the South Carolina Court of Appeals stated in *McCormick v. England*, “the gravamen of the tort is publicity as opposed to mere publication.”⁷⁰ The disclosure must be public and, therefore, “[c]ommunication to a single individual or to a small group of people . . . will not give rise to liability.”⁷¹ There may be no clear rule for determining when some private matter has been given sufficient publicity to rise to the level of tort liability,⁷² but requiring a publicity trigger at all implies that the harm the tort intends to address is contingent upon revelation of a sufficient breadth.

This is evident in many public disclosure cases. For example, courts have found insufficient publicity, thus denying recovery, where information was disclosed to two people,⁷³ a “handful of people,”⁷⁴ a few co-workers,⁷⁵ several law enforcement officers,⁷⁶ an employer and a limited number of relatives;⁷⁷

68. Of course, the tort of public disclosure of private facts imposes liability on those who (1) publicize (2) private information that is (3) not of legitimate concern to the public, and (4) disseminate in a highly offensive manner. See RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977). Given this Essay’s focus on the core wrong the remedies are meant to address, I limit the focus to the tort’s distinguishing element.

69. *Id.*

70. *McCormick v. England*, 494 S.E.2d 431, 437–38 (S.C. Ct. App. 1997).

71. *Rycroft v. Gaddy*, 314 S.E.2d 39, 43 (S.C. Ct. App. 1984) (citations omitted). Notably, this rule is unevenly applied. Dan Solove, Lior Strahilevitz, and others have noted that many courts confuse privacy with secrecy, thereby preventing a plaintiff who had confided in one or several others to recover for public disclosure of private facts. See SOLOVE, *supra* note 16, at 42–47, 143–49 (calling this phenomenon the “secrecy paradigm”); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 939–43 (2005).

72. For two different proposals for bringing coherence to the publicity question, see generally Strahilevitz, *supra* note 71, and Waldman, *supra* note 19.

73. See *Huse v. Auburn Assocs., Inc.*, No. Co64136, 2011 WL 3425607, at *7 (Cal. Ct. App. Aug. 5, 2011).

74. See *Blackthorne v. Posner*, 883 F. Supp. 1443, 1456–57 (D. Or. 1995).

75. See *Vinson v. Koch Foods of Ala., L.L.C.*, No. 2:12-cv-1088-MEF, 2013 WL 5441969, at *7 (M.D. Ala. Sept. 27, 2013) (holding that disclosure to “a small number of co-workers” was insufficient); *Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 966 (Ind. Ct. App. 2001) (finding that disclosure to at most two co-workers was insufficient).

76. *Ali v. Douglas Cable Commc’ns*, 929 F. Supp. 1362, 1383–84 (D. Kan. 1996).

77. See *Vogel v. W.T. Grant Co.*, 327 A.2d 133, 137–38 (Pa. 1974).

an aunt and uncle and a friend;⁷⁸ two fellow employees and the plaintiff's mother;⁷⁹ store employees and plaintiff's son and daughter-in-law;⁸⁰ or a spouse, friends, acquaintances and co-workers.⁸¹ According to the opinions in these cases, the group of information recipients was simply not large or diverse enough to result in any harm to the plaintiff.

And yet, the unauthorized dissemination of one's sexually graphic and intimate pictures to even a "handful of people," a "few co-workers," or "an employer" would strike many as harmful, horrifying, and in need of legal redress. Indeed, many victims of revenge porn speak of the fear that specific other people—employers, future employers, relatives, and love interests—will see or receive the pictures from the victim's harasser.⁸² Distribution to them should be just as actionable as dissemination to a large group of strangers. But because the core wrong addressed by public disclosure of private facts is widespread revelation, it is not clear that the tort could capture more limited disclosures of graphic images that nevertheless objectify victims and result in significant individual and social harm.

B. COPYRIGHT LAW

The purpose of the Copyright Act is, among other things, to protect authors' creative expression, incentivize the creation of new works, and serve the public interest by making those works available for use and enjoyment.⁸³ Therefore, the law is chiefly concerned with the flow of creative property.⁸⁴ It is also focused on redressing wrongs. Unlike the tort of public disclosure of private facts, publicity is not the *sine qua non* of copyright infringement. Rather, it is unconsented taking and use.

This is evident in the statute itself. Section 106 of the Copyright Act grants copyright holders six exclusive rights: reproduction, creation of derivative works, public distribution, public performance, public display, and public performance of a sound recording via digital transmission.⁸⁵ Copyright infringement, then, can occur with a copy, regardless of distribution. As many courts have similarly acknowledged, copying is the core of copyright infringement.⁸⁶

78. See *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 622 (3d Cir. 1996).

79. See *Yoder v. Ingersoll-Rand Co.*, 31 F. Supp. 2d 565, 570 (N.D. Ohio 1997), *aff'd per curiam*, 172 F.3d 51 (6th Cir. 1998).

80. See *French v. Safeway Stores, Inc.*, 430 P.2d 1021, 1023 (Or. 1967).

81. See *Barr v. Arco Chem. Corp.*, 529 F. Supp. 1277, 1278, 1280 (S.D. Tex. 1982).

82. Telephone interview with "Kate M.", *supra* note 33; see *CITRON*, *supra* note 3, at 48.

83. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

84. Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privation*, 52 STAN. L. REV. 1201, 1203 (2000).

85. 17 U.S.C. § 106 (2012).

86. See, e.g., *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010) ("In order to establish a claim of copyright infringement, 'a plaintiff with a valid copyright must demonstrate that[] the defendant has actually copied the plaintiff's work'")

Academic, practitioner, and popular rhetoric makes the relationship even clearer. Attempting to explain why personal privacy protection lags far behind intellectual property protection in the United States, Larry Lessig argued that it was because the language of property—an infringer “takes my property”—is employed to speak about infringement of intellectual property.⁸⁷ Lawyers use the word “piracy” when referring to copyright infringement.⁸⁸ Senator Orrin Hatch used it three times in the first four sentences of his introductory statement during copyright legislation hearings in 2004.⁸⁹ He also implied that those who induce infringement are aiding and abetting theft.⁹⁰

To be sure, victims of revenge porn object to their images being “taken” and “misused” in a harmful, unexpected way.⁹¹ But that concern is, at best, secondary to the victim’s and society’s chief objection to revenge porn: it invades victims’ privacy and transforms them into sexual objects for others. To suggest that these harms are adequately addressed by treating revenge porn as theft of property gives copyright law too much credit.⁹² Nor can property be taken if it is not owned, and when images of revenge porn are not snapped by the victim, the core wrong copyright law is meant to address does not even apply.⁹³

C. BREACH OF CONFIDENTIALITY

Coupled with practical considerations—the cost of retaining counsel and litigating claims,⁹⁴ the difficult processes for unmasking anonymous

(quoting *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999)); see also *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 at 13-5 (Matthew Bender ed., 2015).

87. Lawrence Lessig, *Privacy as Property*, 69 SOC. RES. 247, 248, 253 (2002).

88. The word, or some derivation thereof, is used numerous times in trial and appellate court filings associated with *A&M Records, Inc.*, for example. See generally *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002). Notably, at least one court has banned content owners from using property rhetoric—“piracy” and “theft,” for example—during trial. See generally *Disney Enters. v. Hotfile Corp.*, 798 F.Supp.2d 1303 (S.D. Fla. 2011).

89. *Protecting Innovation and Art While Preventing Piracy: Hearing Before the Comm. on the Judiciary U.S. S.*, 108th Cong. 1 (2004) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

90. See *id.* at 1–2.

91. Telephone Interview with “Steven P.”, *supra* note 34.

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

93. See Levendowski, *supra* note 14, at 439–40 (arguing that copyright law can be an effective tool against revenge porn, but recognizing that the victim must hold the copyright in the photo at issue).

94. To solve this part of the problem, I founded the Tyler Clementi Institute for CyberSafety at New York Law School, which, among other things, includes the only pro bono law school clinic representing victims of cyberharassment, including revenge porn. *The Tyler Clementi Institute for CyberSafety*, N.Y.L.SCH., <http://www.nyls.edu/innovation-center-for-law-and-technology/institutes->

perpetrators, and the likelihood that many of them are judgment proof—the misalignment between the core wrong of nonconsensual pornography and the wrongs addressed by the tort of public disclosure of private facts and copyright law suggests that these weapons are, by themselves, inadequate paths to justice for victims. And although no single weapon could fill all the gaps left by existing remedies, practitioners need additional tools in a diverse arsenal.

An underappreciated claim that comes closest to capturing the breach of trust and privacy inherent in revenge porn is the tort of breach of confidentiality. Though historically marginalized,⁹⁵ this tort has nevertheless existed in American law for some time.⁹⁶ It has traditionally been restricted to a few formal relationships, but there is no doctrinal basis for such a limitation. In fact, a litany of decisions involving explicit references to the tort of breach of confidentiality and breaches of implied duties of confidentiality⁹⁷ gives every indication that courts are open to a robust tort that applies to informal relationships—lovers and close friends, for example—that nevertheless maintain strong expectations of confidentiality. Therefore, the tort may be an effective tool in certain revenge porn cases. This Part defines and provides some historical background to the tort of breach of confidentiality and shows how practitioners could raise a successful breach of confidentiality claim. It then concludes by discussing the advantages of adding this claim to the arsenal of weapons against revenge porn.

1. Confidentiality Jurisprudence

The tort of breach of confidentiality holds liable those who, without consent, divulge information disclosed to them in a context that they knew or should have known included an expectation of confidentiality with respect to that information, thereby causing harm to the victim.⁹⁸ Based on current American and British case law, that context arises when information has “the

and-programs/tyler-clementi-institute (last visited Nov. 12, 2016). Two partners at the law firm K&L Gates, Elisa D’Amico and David Bateman, recently founded the Cyber Civil Rights Legal Project, an in-house pro bono initiative where K&L Gates attorneys represent victims of revenge porn for free. *See What is the Cyber Civil Rights Legal Project?*, CYBER C.R. LEGAL PROJECT, <https://www.cybercivilrightsproject.com> (last visited Nov. 12, 2016).

95. Richards & Solove, *supra* note 20, at 156–58 (describing how the tort was minimized in Samuel D. Warren and Louis D. Brandeis’s seminal article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and ignored by William L. Prosser in his 1960 article, *Privacy*, 48 CALIF. L. REV. 383 (1960), which listed only four privacy torts).

96. Vickery, *supra* note 20, at 1449–51 (collecting and analyzing cases and arguing that a tort for breach of confidence has emerged even when not explicitly acknowledged by the courts).

97. *See* Woodrow Hartzog, *Reviving Implied Confidentiality*, 89 IND. L.J. 763, 775–76 (2014); *see also generally* Vickery, *supra* note 20.

98. *See* Vickery, *supra* note 20 at 1428. Some of these elements are self-explanatory: “without consent” recognizes a common defense to tort liability; some demonstrable harm caused by the defendant’s actions generally is required for tort liability, as well. Lack of consent, harm, and causation are not difficult to prove in revenge porn cases.

necessary quality of confidence about it” and is disclosed “in circumstances importing an obligation of confidence.”⁹⁹ These are independent, but overlapping factors: disclosure in a context where the facts taken together suggest an expectation of confidentiality may also suggest that the information disclosed is of a confidential nature, and the nature of the information is taken into account to determine a confidential context.¹⁰⁰ This means that, as Helen Nissenbaum argued, context is key.¹⁰¹ This also means that the duty to maintain confidentiality need not be chained to a select few formal relationships.

Information with a “quality of confidence about it” is a broad category reaching far beyond the narrow confines of intimate facts.¹⁰² As Neil Richards and Dan Solove have found, information about health and medicine, sex and intimacy, and finance and money have all qualified.¹⁰³ So have photographs taken at private events, private communications, personal diaries, and information about children.¹⁰⁴ Indeed, because much information can take on a “quality of confidence” given the context in which it is disclosed, there are few formal limits on the types of information eligible for enforcement of confidentiality through tort law.¹⁰⁵ It simply must not be trivial nor in the public domain.¹⁰⁶ Woodrow Hartzog has shown that courts have internalized these and other considerations and have tended to find obligations of confidentiality where the information, if widely disseminated, could harm the victim and where information is intrinsically sensitive.¹⁰⁷ Sexually graphic or intimates images would undoubtedly qualify under several of these theories.

When determining whether a context included an obligation to keep confidences, American and British courts have almost always started at the relationship between the parties. But contrary to conventional wisdom, the duty is not restricted to a select few formal relationships. In the United States, relationships giving rise to a tort-based duty of confidence used to be limited and narrow: doctors owed duties of confidentiality to their patients¹⁰⁸ and

99. *Coco v. A. N. Clark (Eng'rs) Ltd.*, [1969] RPC 41 (UK), *quoted in* Richards & Solove, *supra* note 20, at 161–64.

100. *See* Hartzog, *supra* note 97, at 787–88.

101. In this respect, the law of confidentiality applies Helen Nissenbaum's theory of privacy as contextual integrity. *See generally* HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010).

102. Waldman, *supra* note 19, at 620. I criticized the conceptualization of privacy as intimacy as too limited and burdened by normative value judgments. *See generally id.*

103. Richards & Solove, *supra* note 20, at 162 (collecting cases).

104. *Id.*

105. *Id.*

106. *Id.*

107. Hartzog, *supra* note 97, at 785–90.

108. *Alberts v. Devine*, 479 N.E.2d 113, 120 (Mass. 1985) (“We hold today that a duty of confidentiality arises from the physician-patient relationship.”); *Doe v. Roe*, 93 Misc. 2d 201, 210–11 (N.Y. Sup. Ct. 1977) (holding that a physician and her husband, who co-wrote a book that included information a patient disclosed to the physician, had an implied duty to keep patient disclosures confidential); *see also* Vickery, *supra* note 20, at 1448–49.

banks owed a similar duty to their customers.¹⁰⁹ But courts have found implied duties of confidentiality in other, more informal non-contractual relationships: schools owe duties of confidentiality to their students,¹¹⁰ social workers owe duties of confidentiality to families with which they work,¹¹¹ employees owe a duty to their employers,¹¹² and car dealerships owe similar duties to their customers.¹¹³ Media interviewees promised confidentiality can claim tortious breach of confidentiality if their identities are disclosed.¹¹⁴ As can a party engaged in an ongoing, though undefined and non-contractual business relationship with another that included disclosure of confidential information.¹¹⁵ And one who shares an idea (for a television show, for example) with another in confidence can bring an action for breach of confidentiality against the recipient if he uses, shares, or implements the idea without the discloser's consent.¹¹⁶ None of these duties, the courts stated, are based in contract; they are all based on the social obligations individual owe others, generally. The very diversity of the relationships giving rise to a duty to maintain confidentiality belies the conventional wisdom of a limited, narrow tort.

As Richards and Solove found, British courts have found duties of confidentiality in informal relationships, as well. In addition to duties of confidence arising in lawyer–client, doctor–patient, employer–employee, banker–customer, and accountant–client relationships,¹¹⁷ British courts have recognized duties of confidentiality when artists share concept ideas¹¹⁸ and even when lovers and friends share personal information with each other. In *Stephens v. Avery*, for example, an individual told a reporter confidential details

109. *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961) (holding a bank manager liable for breach of bank's duty of confidence when he divulged details of the plaintiff's unsteady finances to the plaintiff's employer).

110. *Blair v. Union Free Sch. Dist. No. 6, Hauppauge*, 67 Misc. 2d 248, 253 (N.Y. Civ. Ct. 1971).

111. *Harley v. Druzba*, 169 A.D.2d 1001, 1002 (N.Y. App. Div. 1991).

112. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516 (4th Cir. 1999).

113. *King Motor Co. of Fort Lauderdale v. Jones*, 901 So. 2d 1017, 1020 (Fla. Dist. Ct. App. 2005).

114. *Virelli v. Goodson-Todman Enters.*, 142 A.D.2d 479, 485–86 (N.Y. App. Div. 1989).

115. *Coll. Watercolor Grp., Inc. v. William H. Newbauer, Inc.*, No. 72-5475, 1973 WL 19866, at *5 (Pa. Ct. Com. Pl. May 16, 1973) (“[I]nformation given defendants by plaintiff was imparted in confidence, and its use constitutes an improper breach of that confidence.” (citations omitted)).

116. *Faris v. Enberg*, 158 Cal. Rptr. 704, 712 (Cal. Ct. App. 1979) (“An actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission.”).

117. See Richards & Solove, *supra* note 1, at 163–64 (collecting cases).

118. See generally *Talbot v. Gen. Television Corp.*, [1981] R.P.C. 1 (Vic) (finding duty to keep idea for a television show confidential).

about the plaintiff's sex life—particularly, that she had been involved in a same-sex affair with the victim of a brutal homicide.¹¹⁹ In *Barrymore v. News Group Newspapers*, the man having a sexual affair with Michael Barrymore disclosed details of their relationship, including letters Barrymore wrote, to a newspaper.¹²⁰ The courts held that both could be liable for breach of a duty of confidence springing from the close social relationship in which the information was disclosed.¹²¹ At this point, then, the formal relationship requirement of the duty of confidence appears to have been lost.¹²²

This more flexible approach, unmoored to specific and defined formal relationships, retains fidelity to the contextual nature of confidentiality and trust. Confidential contexts are fact-specific; formal relationships are just easy short hand heuristics that save judges or juries from doing the necessary work of contextual analysis. But the latter is neither difficult nor beyond the scope of a fact-finder's talents. In *Stevens*, there was evidence that the plaintiff's disclosures followed an explicit reminder that everything discussed is discussed in confidence, something to which the defendant, like many close friends, took indignant exception.¹²³ In *Barrymore*, the judge cited several factors that created a context giving rise to a duty of confidentiality. First, the relationship itself: "common sense dictates that, when people enter into a personal relationship of this nature, [i.e., a sexual affair,] they do not do so for the purpose of it subsequently being published in" a newspaper.¹²⁴ Second, the nature of the information: "To most people the details of their sexual lives are high on their list of those matters which they regard as confidential."¹²⁵ And third, the context of the particular information disclosed: the letters, like the affair itself, were kept secret from almost everyone.

Nor need we stop there. In arguing that a robust concept of implied confidentiality could protect individuals who share personal information with others, Hartzog referred to the work of Andrew McClurg, who noted that custom, common understanding, and objective factors like "closed doors and drawn curtains" can lead to the inference that information is imparted in confidence.¹²⁶ Practitioners can use these and other social cues of

119. *Stephens v. Avery*, [1988] Ch. 449, 451 (U.K.).

120. *Barrymore v. News Grp. Newspapers*, [1997] F.S.R. 600 (Ch.) (U.K.).

121. *Id.* at 602; *Stephens*, [1988] Ch. at 454.

122. See JOSHUA ROZENBERG, *PRIVACY AND THE PRESS* 15 (2004) ("The need for a formal relationship between two parties has become attenuated almost to the point of nonexistence.").

123. *Stephens*, [1988] Ch. at 451.

124. *Barrymore*, [1997] F.S.R. at 602.

125. *Id.* (quoting *Stephens*, [1988] Ch. at 454). Personal information, in addition to trade secrets, literary confidences, and other private information, has long been included in the type of information that can give rise to obligations of confidence. See Hartzog, *supra* note 97, at 787–88; Richards & Solove, *supra* note 20, at 162–63.

126. Hartzog, *supra* note 97, at 773 (quoting Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 917

confidentiality to create a narrative of confidential disclosure at trial. Beyond physical separation, which is but one cue of confidentiality, any fact that creates a reliable expectation that others either will not or know that they should not intrude can be used to paint a picture of a confidential context.¹²⁷ This includes a range of behaviors, from communicating via whispers and hushed voices, ensuring that no one else is within earshot, creating distance with others, and turning away from crowds, to the intimate nature of the information itself. These social cues, described at length in the sociologist Erving Goffman's analyses of human interaction in private and public places,¹²⁸ are also easily admitted into evidence through affidavits and witness testimony, supported by expert testimony from a social anthropologist or sociologist.

These cues also exist online.¹²⁹ Privacy settings and passwords are just two of the most obvious cues of confidentiality expectations.¹³⁰ Practitioners can go further. Ephemeral messaging services like SnapChat allow images sent across the system to disappear.¹³¹ Certain platforms neither gather nor aggregate and sell user data. So-called "just-in-time" privacy notifications allow individuals to opt-in to a certain amount of data sharing.¹³² Together, these and similar tools help create expectations of privacy and confidentiality among users because they create social norms under which all users operate. Practitioners can use them to tell a persuasive narrative that images were exchanged in a context that one could reasonably trust was confidential.

2. Applying Confidentiality Law to Revenge Porn

Applying these principles to two revenge porn cases illustrates the powerful role the tort of breach of confidentiality can play. Recall Kate M., whose name has been changed to protect her privacy. Kate broke up with her then-boyfriend when she came out as bisexual in 2013. Kate described herself as "pretty private." Her Facebook profile never mentioned whether or with whom she was in a relationship and she declined to post pictures. During her

(2006)).

127. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, *supra* note 50 at 113 (1959).

128. *Id.* at 112–32 (discussing the "back stage" of social interaction); *see also generally* GOFFMAN, *STRATEGIC INTERACTION*, *supra* note 50.

129. Admittedly, not always perfectly. *See* James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1160–64 (2009) (discussing the privacy risks related to social cues through online networks).

130. *See* Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 42–43 (2007).

131. *But see* Complaint, *In re* Snapchat, Inc., No. 132 3078 (May 8, 2014), <https://www.ftc.gov/system/files/documents/cases/140508snapchatcmpt.pdf> (alleging that Snapchat did not fulfill many of its privacy promises, including image deletion).

132. FED. TRADE COMM'N, *MOBILE PRIVACY DISCLOSURES: BUILDING TRUST THROUGH TRANSPARENCY* 15 (2013), <https://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201-mobileprivacyreport.pdf>.

relationship, she exchanged nude and semi-nude images for several months. Kate told me it was “fun, and to be honest, it got him off my back about sex.” After the relationship ended, Kate’s ex posted several of those intimate pictures on a meet-up website along with her name, address, and a request for a rough role play “rape” fantasy. Over a three-week period, several men tried breaking into her home. She approached lawyers, but none of them knew what to do.¹³³

Kate M.’s boyfriend breached a duty of confidentiality. Most of the time, the intimate images, which depicted Kate in various stages of undress, were shared over SnapChat, which deletes images shared and notifies users when a recipient takes a screenshot of something sent. Once, Kate shared a photo over iMessage, Apple’s instant messaging tool, but said, “this is just for us[,] del from yur phone,” immediately after sending the image.¹³⁴ Like in *Stephens*, where an individual shared personal information only after explicitly stating that it is being told in confidence, Kate shared an image with an explicit request for confidentiality. Otherwise, she used a platform with strong norms of discretion. Kate never consented for her ex-boyfriend to post the images online, and the nature of the information—nude images—was highly personal. The harm was all too real: as a result of Kate’s emotional distress and the prospect of men trying to break into her home to rape her, she had to move thousands of miles away.

Steven’s story is a little different. Steven P. is an openly gay 24-year-old professional living in Boston. He is single and is one of millions of users of Grindr, a mobile geolocation app that, like Tinder, allows individuals to meet others nearby. He has met several people through Grindr, some of whom, he says, “have become my closest friends in this town. I moved here not knowing anybody.” One man “seemed nice enough” and “very friendly and cool, so I sent him a few pictures. I remember one was naked, the other, from the waist up, both included my face.” In our discussion, he pre-empted any pushback that would blame him for what happened: “It’s ridiculous to suggest that it was my fault: . . . If you don’t share photos, you can’t really participate. I think we all do it expecting that the guy on the other end can be trusted to be discrete.” Steven also noted that he only sent his pictures after the other man sent his, noting explicitly that “that was how it worked.”¹³⁵ He went on: “I think

133. Telephone interview with “Kate M.”, *supra* note 33.

134. *Id.*

135. Telephone interview with “Steven P.”, *supra* note 34. James Grimmelmann has noted that online social networks allow social interaction to occur in public, for everyone to see, to foster norms of reciprocity that encourage individuals to share. See Grimmelmann, *supra* note 129, at 1156 (Social network “sites also piggyback on the deeply wired human impulse to reciprocate. People reciprocate because it helps them solve collective-action problems, because participation in a gift culture demands that gifts be returned or passed along, because it’s disrespectful to spurn social advances, because there’s a natural psychological instinct to mirror what one’s conversational partner is doing, and because we learn how to conduct ourselves by imitating others. Facebook’s design encourages reciprocal behavior by making the gesture-and-

the tit-for-tat exchange makes people trust the other person . . . it's not one of you being vulnerable to the other; it's both." Steve never met the other man "for whatever reason."¹³⁶ The next day, the images were posted online.

The relationship between Steven and the man he texted on Grindr is different than the long-term relationship between Kate and her ex-boyfriend. But the context of Steven's disclosure is filled with indicia of expectations of confidentiality: the norms of the platform favor confidentiality and discretion, the images sent were highly personal and were only sent after a good faith gesture of trust, and the entire interaction happened on a platform that is sequestered from general online social interaction. Similar facts were important to the court in *Barrymore*. In that case, Michael Barrymore went out of his way to conduct a clandestine same-sex affair and the court found that the nature of the relationship, coupled with the work the men had done to keep the affair secret, suggested that all information was disclosed with strong expectations of confidentiality.

Notably, these stories would end differently under a public disclosure of private facts claim. Both Kate and Steven shared their images with others, a fact often, though not always, fatal to a traditional invasion of privacy lawsuit.¹³⁷ But to accept that status quo reduces privacy to mere secrecy¹³⁸ and makes it impossible for many victims of online harassment to obtain justice. The tort of breach of confidentiality not only opens a new path, but also reinforces the norm that privacy can exist in public.

3. Benefits of the Approach

Granted, neither Steven's nor Kate's breach of confidentiality claim would be a slam dunk. It is clear that the law has to evolve to respond to the epidemic of revenge porn and other forms of cyberharassment.¹³⁹ But this type of incremental modernization is precisely the type of evolution for which the common law of torts is perfectly suited. Given a modern problem that, to date, lacks a solution, the common law can, and should, adjust, just like it has in the past.¹⁴⁰ Doing so would not only continue to fulfill the goals of the

return cycle visible and salient.").

136. Telephone interview with "Steven P.," *supra* note 34.

137. See, e.g., *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 770 (N.Y. 1970) ("Information about the plaintiff which was already known to others could hardly be regarded as private . . ."); *Killilea v. Sears, Roebuck & Co.*, 499 N.E.2d 1291, 1295 (Ohio Ct. App. 1985) ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that . . . the plaintiff leaves open to the public . . ."). But see, e.g., *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 491 (Mo. Ct. App. 1990) (voluntarily attending a social gathering at a hospital with media in attendance did not vitiate privacy interest in family's decision to use in vitro fertilization).

138. That is why Daniel Solove called it the "secrecy paradigm." SOLOVE, *supra* note 16, at 143.

139. Hartzog, *supra* note 97, at 772–73 (calling for courts to recognize implied duties of confidentiality, especially given extensive online social sharing of personal information and data).

140. There are countless examples of the common law of torts adapting to the changing

common law, but offer several other advantages, as well.

A robust tort of breach of confidentiality would both encourage and regulate disclosure: it would foster candid disclosures to friends and loved ones who can provide support and help us realize the psychological and social benefits of sharing; it would also regulate wider dissemination of that information, which could cause particularized and social harm.¹⁴¹ Protecting confidential contexts also recognizes that we all, to some extent, trust others and entrust information—from purchasing habits to our most intimate secrets—to many third parties.¹⁴² That kind of sharing is both necessary and beneficial to society: we want people to feel comfortable sharing with others so they can, among other things, create the strong, stable relationships that flow from information sharing.¹⁴³ Relationships with counselors, teachers, mentors, and friends, for example, would all strengthen in a world where confidential disclosures are protected against release.

Importantly, too, the breach of confidentiality tort addresses the core wrong of revenge porn and other invasions of privacy, many of which are breaches of trust.¹⁴⁴ That may have little impact on a practitioner searching for additional weapons to attack revenge porn cases, but it should have powerful expressive effects.¹⁴⁵ If we start talking about revenge porn and other

needs of society. The transition from not allowing recovery for emotional distress to permitting it even without a connected physical injury is a particularly noticeable evolution. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 604 (1990) (discussing the evolution of the common law to protect norms of civility that have become important in modern society). Compare *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 354 (N.Y. 1896) (denying recovery for fright when no immediate personal injury resulted from a horse carriage stopping just short of the plaintiff), with *Battalla v. State*, 176 N.E.2d 729, 731–32 (N.Y. 1961) (allowing recovery for emotional distress even without attendant showing of physical injury).

141. Strahilevitz, *supra* note 71, at 927 (making a similar argument about the tort of public disclosure of private facts).

142. See, e.g., FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 19–58 (2015) (discussing, among other things, the great volume of important personal information entrusted to third party intermediaries).

143. See Strahilevitz, *supra* note 71, at 923–24 & nn.7–8 (citing various studies indicating that the exchange of personal information promotes intimacy and friendship).

144. See Waldman, *supra* note 19, at 629–30.

145. Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407 (2009) (“Law has an important expressive character beyond its coercive one. Law creates a public set of meanings and shared understandings between the state and the public. It clarifies, and draws attention to, the behavior it prohibits. Law’s expressed meaning serves mutually reinforcing purposes. Law educates the public about what is socially harmful. This legitimates harms, allowing the harmed party to see herself as harmed. It signals appropriate behavior. In drawing attention to socially appropriate behavior, law permits individuals to take these social meanings into account when deciding on their actions. Because law creates and shapes social mores, it has an important cultural impact that differs from its more direct coercive effects.” (footnotes omitted)); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1009–10 (1995); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998); Sunstein, *supra* note

invasions of privacy as breaches of trust, we begin to realize that failure to protect privacy or do anything to stop cyberharassment results in far more damage than the already devastating personal, emotional, and professional repercussions of revenge porn. Social solidarity is the ultimate victim.¹⁴⁶

4. Limitations

Doctrinally, the tort of breach of confidentiality seems like a more powerful tool than public disclosure of private facts to address incidents of invasions of privacy, generally, and revenge porn, in particular. As discussed above,¹⁴⁷ the latter requires relatively wide dissemination,¹⁴⁸ an element that should not be necessary, though is often present anyway, in revenge porn cases. It also requires that the information disseminated be “a private” matter, something courts often confuse with secrecy.¹⁴⁹ And its “highly offensive” and not newsworthy requirements further serve to narrow the public disclosure tort. The breach of confidentiality tort appears to have few such limitations: it presumes sharing and, as evident from *Avery*, *Barrymore*, and other cases,¹⁵⁰ an individual is not released of his obligation of confidentiality even where the subject of the information is of public interest.¹⁵¹

The lack of a newsworthiness exception has moved some commentators to suggest that the breach of confidentiality tort is inconsistent with the First Amendment’s guarantee of free speech. For example, Susan Gilles has argued that the tort has a chilling effect on speech: because of its lack of clarity, potential speakers cannot know when, if at all, they are subject to its requirements, thus raising barriers to speech.¹⁵² In the leading work on the tort, Alan Vickery went so far as to include a newsworthiness requirement in his formulation of the tort’s elements.¹⁵³

Admittedly, the law of confidentiality is, as Dan Solove and Neil Richards stated, “in First Amendment limbo.”¹⁵⁴ But the tort is not inconsistent with free speech and First Amendment values. In fact, in social situations like those in which individuals share intimate photos with each other, the First Amendment should not even apply. Solove and Richards have argued that the way to determine which forms of civil liability are subject to First Amendment

41, at 2022.

146. See DURKHEIM, *supra* note 23, at 23–26.

147. See *supra* Part III.A.

148. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

149. See SOLOVE, *supra* note 16, at 42–47, 143–49.

150. See *supra* notes 114–20 and accompanying text.

151. See Vickery, *supra* note 20, at 1456.

152. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 82 (1995).

153. Vickery, *supra* note 20, at 1466–67.

154. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1672 (2009).

limitations is to look at the nature of government power. “When the government uses tort law to establish substantive rules of social conduct that all members of society must follow”—like negligence and defamation—and in doing so restricts speech, the First Amendment applies. But when the government merely stands behind obligations that individuals create for themselves—like confidentiality in social contexts—it is not government power restricting speech. Rather, individuals are deciding for themselves that the social benefits of easy interaction, exchange, intimacy, and love that emanate from confidentiality expectations are more important to them than their freedom to speak as they please.¹⁵⁵ Intimate photos are most likely to be shared within this organic, bottom-up development of an obligation of confidentiality. Only an exaggerated First Amendment would impede that everyday social interaction.

Another limitation to consider is the application of the tort itself. In the United States, the tort of breach of confidentiality has most commonly been applied to formal relationships. Indeed, to determine if information was disclosed in a confidential context, an element of the tort, courts will often just look to the relationship and stop there.¹⁵⁶ This history may scare practitioners away.

It is true that the law must evolve. But it can only do so after lawyers start bringing breach of confidentiality cases, allowing judges to take the incremental steps for which the common law of torts is both famous and uniquely suited. For example, general duty of care for all lawful visitors has, in many jurisdictions, replaced the different status-based duties owed to licensees and invitees on one’s property.¹⁵⁷ Similarly, proximate cause’s foreseeability requirement evolved over time, as common law courts realized the absurdity of holding people responsible for everything that could possibly go wrong.¹⁵⁸ Indeed, as Warren and Brandeis argued, without the evolution of tort law, we would not even have a law of privacy.¹⁵⁹ Leading practitioners may find themselves at the forefront of a new, modern evolution of tort law, but only if they try.

IV. CONCLUSION

Practitioners need a variety of weapons to combat the epidemic of revenge porn. Until it becomes a federal crime, attorneys will need to get

155. *Id.* at 1686–90.

156. *See supra* notes 102–07 and accompanying text.

157. *Heins v. Webster Cty.*, 552 N.W.2d 51, 57 (Neb. 1996).

158. *Overseas Tankship Ltd. v. Morts Dock & Eng’g Co. (The Wagon Mound Case)*, [1961] A.C. 388 (U.K.) (holding that negligent defendants can only be held liable for the foreseeable consequences of their actions).

159. Brandeis & Warren, *supra* note 95, at 193 (noting how the law has evolved from protecting only “physical interference with life and property” to “the right to enjoy life” and that “the term ‘property’ has grown to comprise every form of possession—intangible, as well as tangible”).

creative and marshal several civil litigation weapons to help their clients obtain justice. Some traditional tools, including the tort of public disclosure of private facts or copyright's protection in creative works, offer practitioners potential, yet incomplete approaches. They also miss the mark by ignoring the core wrong of revenge porn. As an additional weapon in the practitioner's civil arsenal, the tort of breach of confidentiality captures conduct that public disclosure of private facts and copyright law cannot. It also recognizes that revenge porn does violence to trust, an essential value in any society. By leveraging the power of the breach of confidentiality tort, practitioners can both help revenge porn victims and be at the vanguard of the next generation of changes to the common law.