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A Remedy for Online Exposure: Recognizing the Public-Disclosure Tort in North Carolina

ABSTRACT

North Carolina is one of only a few jurisdictions that does not recognize the tort of public disclosure of private facts—a civil remedy that protects against the offensive and unauthorized publication of private information that is not of legitimate public concern. The absence of this tort has created a gap in privacy protection in the state that is increasingly problematic with the rise of revenge porn and other online injuries made possible by the widespread use of the Internet and online social networking sites. This Comment specifically explores how recognition of the tort of public disclosure of private facts in North Carolina would give victims of revenge porn a viable civil remedy and help close the state's existing privacy gap.

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INTRODUCTION

North Carolina's failure to recognize the tort of public disclosure of private facts[1] leaves a gap in privacy protection for North Carolina citizens.[2] This lack of protection is increasingly problematic with the rise of "revenge porn," a practice where sexually explicit images or videos are disclosed online without the consent of the pictured individual.[3]

The story of Holly Jacobs illustrates the growing problem of revenge porn. In 2009, Jacobs broke up with her boyfriend of several years.[4] During the course of the relationship, Jacobs sent her boyfriend intimate photos and videos, fully trusting that he would keep them private.[5] After their breakup, her then ex-boyfriend posted several of the photos and a video on the Internet without her permission, and these images quickly went viral.[6] He also posted Jacobs's full name, e-mail address, job title, and specific details of where she worked and how far along she was in her

1. This tort primarily addresses the harm that one suffers to his reputation when private information is unreasonably disclosed to the public. The tort offers valuable protection for the reputational harms not covered by defamation because of the veracity of the disclosed facts. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398 (1960) (noting that this tort is an "extension of defamation," remedying serious harm that would otherwise not be actionable).

2. Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988) (rejecting the public disclosure of private facts as a cause of action in North Carolina).

3. This terminology was used by the Criminal Court of the City of New York. *See* People v. Barber, No. 2013NY059761, 2014 N.Y. Misc. LEXIS 638, at *1 n.1 (N.Y. Crim. Ct. Feb. 18, 2014); *see also* Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 678–79 (2014) (providing alternative definitions and examples of revenge porn).

4. Beth Stebner, *"I'm Tired of Hiding": Revenge-Porn Victim Speaks Out Over Her Abuse After She Claims Ex Posted Explicit Photos of Her Online*, N.Y. DAILY NEWS (May 3, 2013, 12:05 PM), http://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147.

5. *Id.*

6. *Id.*

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Ph.D. program.[7] Jacobs spent the next three years trying to control the damage.[8] She hired lawyers to send her ex-boyfriend letters, pleaded with police and the FBI to press charges, and hired a specialist to help her take down the materials.[9] Because of the constant online harassment, she left her job and changed her name.[10]

Unfortunately, Jacobs is part of an ever-increasing group of victims who are continually subjected to humiliation and cyber-harassment after ex-partners publish and distribute their private images online.[11] For example, on February 11, 2014, almost seventy nude and sexual images of North Carolina high school students were published on Twitter and Instagram.[12] Many of these images were privately sent to a boyfriend or girlfriend, but were subsequently leaked to other students, who then posted them on Instagram.[13] These images quickly circulated online, and the State Bureau of Investigation is now looking into similar instances in nine North Carolina counties.[14] The people responsible for these disclosures may face criminal charges,[15] but, as this Comment explains, there are no civil

7. Holly Jacobs, *A Message from Our Founder: Dr. Holly Jacobs*, CYBER C.R. INITIATIVE (Oct. 6, 2013), http://www.cybercivilrights.org/a_message_from_our_founder_dr_holly_jacobs.

8. *Id.*

9. *Id.*

10. Stebner, *supra* note 4. After becoming a victim of revenge porn, Dr. Holly Jacobs founded the Cyber Civil Rights Initiative to raise awareness about revenge porn and to strive for its elimination. *See* Jacobs, *supra* note 7.

11. *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009) (describing the harm suffered by Cecilia Barnes after her ex-boyfriend posted nude photos of Barnes, along with her personal information, online); Lorelei Laird, *Striking Back at Revenge Porn: Victims Are Taking on Websites for Posting Photos They Didn't Consent To*, A.B.A. J., Nov. 2013, at 45, 45–46 (describing how victims like Holly Toups and Rebekah Wells have spoken out about suffering from involuntary pornography); Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?_r=0 (recounting the story of revenge-porn victim Marianna Taschinger).

12. *SBI Investigates 15 Instagram Accounts Linked to Nude Photos of Wake Co. Teens*, WSAV (last updated May 6, 2014, 10:53 AM), http://www.wsav.com/story/25307973/sbi-got-warrant-for-15-accounts-in-photo-probe.

13. *Rowan Co. Student Accused of Posting Nude Photo*, WNCN (last updated Mar. 14, 2014, 6:47 PM), http://www.wncn.com/story/24856133/rowan-county-student-accused-of-posting-nude-photo.

14. *Investigation into Nude Teen Photos Spreads to More NC Counties*, WFLA (Mar. 12, 2014, 12:08 PM), http://www.wfla.com/story/24829216/investigation-into-nude-teen-photos-spreads-to-more-nc-counties.

15. Police could bring second-degree sexual exploitation of a minor and cyberbullying charges. *See Rowan Co. Student*, *supra* note 13; *SBI Investigates*, *supra* note 12.

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remedies available in North Carolina to directly address the harm suffered by these victims.[16]

The experience shared by Jacobs and the North Carolina teenagers is increasingly common. Surveys later conducted by Jacobs reveal that "over half (53.3%) of heterosexual respondents had shared a nude photo with someone else, and nearly three-quarters (74.8%) of LGBT (lesbian, gay, bisexual, and transgender) respondents had done so."[17] Statistics reveal similar patterns among teenagers and young adults. One study revealed that 44% of teenage males viewed at least one nude photo of a female classmate.[18] The National Campaign to Prevent Teen and Unplanned Pregnancy found that 20% of teenagers between the ages of thirteen and nineteen had sent or posted sexual images or videos of themselves.[19] The rate for young adults between ages twenty and twenty-six is even higher, at 33%.[20]

The nonconsensual distribution of sexual images and videos is also on the rise. Revenge-porn sites are increasingly common, making it easy for individuals to post explicit images or videos on the web.[21] Jacobs's research found that 22.1% of heterosexual respondents, and 23.3% of LGBT respondents, had been the victims of some form of nonconsensual

16. As of the date of this publication, the North Carolina General Assembly is considering a bill that would address many of these concerns, but it is unclear whether that bill will ever become law. *See* H.B. 792, 2015 Gen. Assemb. (N.C. 2015), http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H792v2.pdf. In its current form, the bill would criminalize acts of revenge porn and would even provide a civil action for its victims. *See id.* (proposing amendments to N.C. GEN. STAT. § 14-190.5A (2013)). Passing this bill would be a large step in the right direction for filling the current gap in privacy protections in North Carolina, and serves as an indication that the precedent established by *Hall v. Post* should be reconsidered.

17. Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2027 (2014) (first citing E-mail from Holly Jacobs to Derek E. Bambauer (June 28, 2013); then citing Holly Jacobs, An Examination of Psychological Meaningfulness, Safety, and Availability as the Underlying Mechanisms Linking Job Features and Personal Characteristics to Work Engagement (June 5, 2013) (unpublished Ph.D. dissertation, Florida International University), http://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=2023&context=etd).

18. Alexandra Marks, *Charges Against "Sexting" Teenagers Highlight Legal Gaps*, CHRISTIAN SCI. MONITOR (Mar. 30, 2009), http://www.csmonitor.com/Innovation/Responsible-Tech/2009/0330/charges-against-sexting-teenagers-highlight-legal-gaps.

19. Julie Baumgardner, *Teen Pregnancy Prevention*, FIRST THINGS FIRST, http://firstthings.org/teen-pregnancy-prevention-1 (last visited Apr. 29, 2015).

20. *Id.*

21. Memphis Barker, *"Revenge Porn" Is No Longer a Niche Activity Which Victimises Only Celebrities—The Law Must Intervene*, INDEPENDENT (May 19, 2013), http://www.independent.co.uk/voices/comment/revenge-porn-is-no-longer-a-niche-activity-which-victimises-only-celebrities--the-law-must-intervene-8622574.html.

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distribution.[22] People increasingly share nude or sexually explicit photos or videos with their partners. And those partners increasingly break that trust by sharing the photos or videos online.

Victims of revenge porn are susceptible to a number of harms.[23] In some cases, victims have "lost jobs, been forced to change schools, changed their names, and have been subjected to real-life stalking and harassment because of the actions of those who posted and distributed their images."[24] Some victims have gone as far as committing suicide.[25] It is common for victims to also experience a lost sense of security, a loss of personal dignity, feelings of shame in their dealings with family and friends, and challenges in keeping or securing future romantic relationships.[26]

In most states,[27] victims of revenge porn can sue the individual who uploads sexually explicit content under the tort of public disclosure of

22. Bambauer, *supra* note 17, at 2027–28.

23. Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Edition*, CONCURRING OPINIONS (Feb. 1, 2013), http://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html.

24. *Id.*

25. *Id.*

26. *Id.*

27. Forty-one states and the District of Columbia recognize an invasion-of-privacy action for the public disclosure of private facts. *See, e.g.*, Doe v. Roe, 638 So. 2d 826, 828 (Ala. 1994); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1127 (Alaska 1989); Rutledge v. Phx. Newspapers, Inc., 715 P.2d 1243, 1245–46 (Ariz. Ct. App. 1986); Dunlap v. McCarty, 678 S.W.2d 361, 363–64 (Ark. 1984); Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647 (Cal. 1994); Lindemuth v. Jefferson Cty. Sch. Dist. R-1, 765 P.2d 1057, 1059 (Colo. App. 1988); Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317, 1329 (Conn. 1982); Barker v. Huang, 610 A.2d 1341, 1349 (Del. 1992); Wolf v. Regardie, 553 A.2d 1213, 1217 (D.C. 1989); Cape Publ'ns, Inc. v. Hitchner, 549 So. 2d 1374, 1377 (Fla. 1989); Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 493–94 (Ga. Ct. App. 1994); Mehau v. Reed, 869 P.2d 1320, 1330 (Haw. 1994); Baker v. Burlington N., Inc., 587 P.2d 829, 832–33 (Idaho 1978); Beverly v. Reinert, 606 N.E.2d 621, 624–25 (Ill. App. Ct. 1993); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 298 (Iowa 1979); Werner v. Kliewer, 710 P.2d 1250, 1256–57 (Kan. 1985); Wheeler v. P. Sorensen Mfg. Co., 415 S.W.2d 582, 584–85 (Ky. Ct. App. 1967); Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388–90 (La. 1979); Loe v. Town of Thomaston, 600 A.2d 1090, 1093 (Me. 1991); Arroyo v. Rosen, 648 A.2d 1074, 1080–81 (Md. Ct. Spec. App. 1994); Bratt v. Int'l Bus. Machs. Corp., 467 N.E.2d 126, 136–38 (Mass. 1984); Beaumont v. Brown, 257 N.W.2d 522, 531–32 (Mich. 1977), *overruled on other grounds by* Bradley v. Bd. of Educ., 565 N.W.2d 650 (Mich. 1997); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233 (Minn. 1998); Young v. Jackson, 572 So. 2d 378, 381–82 (Miss. 1990); Childs v. Williams, 825 S.W.2d 4, 7–8 (Mo. Ct. App. 1992); State Bd. of Dentistry v. Kandarian, 886 P.2d 954, 957–58 (Mont. 1995); Montesano v. Donrey Media Grp., 668 P.2d 1081, 1084–85 (Nev. 1983); Hamberger v. Eastman, 206 A.2d 239, 240–41 (N.H. 1964); Gallo v. Princeton

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private facts (the public-disclosure tort).[28] Because section 230 of the Communications Decency Act[29] immunizes web hosts and other interactive computer services from most third-party tort liability, the tort provides victims with a civil remedy against the uploader for the publication of their private, but true, information.[30] This remedy is not available to victims of revenge porn in North Carolina.

With the rise of revenge porn, the time is ripe for North Carolina to reconsider the Supreme Court of North Carolina's 1988 decision in *Hall v. Post*, which withheld privacy protections from citizens offered by the public-disclosure tort.[31] This Comment makes the case for recognition of

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Univ., 656 A.2d 1267, 1276 (N.J. Super. Ct. App. Div. 1995); Moore v. Sun Publ'g Corp., 881 P.2d 735, 743 (N.M. Ct. App. 1994); Hobbs v. Lopez, 645 N.E.2d 1261, 1263 (Ohio Ct. App. 1994); Guinn v. Church of Christ, 775 P.2d 766, 782 (Okla. 1989); Anderson v. Fisher Broad. Cos., 712 P.2d 803, 807–09 (Or. 1986); Marks v. Bell Tel. Co. of Pa., 331 A.2d 424, 430–31 (Pa. 1975); Todd v. S.C. Farm Bureau Mut. Ins. Co., 278 S.E.2d 607, 610 (S.C. 1981); Dunn v. Moto Photo, Inc., 828 S.W.2d 747, 754–55 (Tenn. Ct. App. 1991); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473–74 (Tex. 1995); Lemnah v. Am. Breeders Serv., Inc., 482 A.2d 700, 703–04 (Vt. 1984); Hearst Corp. v. Hoppe, 580 P.2d 246, 253–54 (Wash. 1978); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 81–86 (W. Va. 1984); Hillman v. Columbia County, 474 N.W.2d 913, 919–20 (Wis. Ct. App. 1991).

The Rhode Island Supreme Court rejected the privacy tort in 1909. *See* Henry v. Cherry & Webb, 73 A. 97, 109 (1909), *superseded by statute*, Act of May 16, 1980, ch. 403, 1980 R.I. Pub. Laws 1565 (codified at R.I. GEN. LAWS § 9-1-28.1 (2012)). All four branches of the privacy tort are now codified in Rhode Island. *See* R.I. GEN. LAWS § 9-1-28.1.

Four states, North Dakota, South Dakota, Utah, and Wyoming, have suggested in related cases that they might recognize the tort of public disclosure of private facts. *See* Tehven v. Job Serv. N.D., 488 N.W.2d 48, 51 (N.D. 1992); Ward v. Shope, 286 N.W.2d 806, 808–09 (S.D. 1979); Cox v. Hatch, 761 P.2d 556, 563–64 (Utah 1988); Houghton v. Franscell, 870 P.2d 1050, 1055–56 (Wyo. 1994).

Only four states other than North Carolina, Indiana, Nebraska, New York, and Virginia, have expressly rejected an invasion of privacy action for the public disclosure of private facts. *See, e.g.*, Evans v. Sturgill, 430 F. Supp. 1209, 1213 (W.D. Va. 1977); Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997); Brunson v. Ranks Army Store, 73 N.W.2d 803, 806–07 (Neb. 1955); Howell v. N.Y. Post Co., 612 N.E.2d 699, 704 (N.Y. 1993) (acknowledging, however, that New York recognizes a right to privacy by statute).

28. *See* Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 434 n.60 (2014).

29. 47 U.S.C. § 230 (2012).

30. *Id.*; *see also* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010). Anupam Chander argues for increased use of the public-disclosure tort to combat the rise of revenge porn. *See* Anupam Chander, *Youthful Indiscretion in an Internet Age*, *in* THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 124, 129–33 (Saul Levmore & Martha C. Nussbaum eds., 2010).

31. Hall v. Post, 372 S.E.2d 711, 713 (N.C. 1988).

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this tort in four parts. Part I offers background, discussing *Hall v. Post* and the court's reasons for rejecting the public-disclosure tort. Part II illustrates North Carolina's gap in privacy protection and why recognition of the tort would help fill the gap. Part III recommends the manner in which North Carolina should adopt and apply the public-disclosure tort to address revenge porn and other digital injuries. Finally, Part IV addresses the First Amendment concerns associated with recognition of the tort.

I. *HALL V. POST* AND THE REJECTION OF PUBLIC DISCLOSURE OF PRIVATE FACTS

The Supreme Court of North Carolina rejected the public disclosure of private facts as a cause of action in its 1988 decision, *Hall v. Post*.[32] The plaintiffs in the case—Susie Hall and her adoptive mother, Mary Hall—sued the *Salisbury Post* for publishing two separate articles.[33] The first article concerned Lee and Aledith Gottschalk's search for Aledith's daughter, whom she had abandoned seventeen years prior.[34] The article described Aledith's former marriage to a carnival barker, the birth of their daughter, and the abandonment of the child.[35]

After the *Salisbury Post* published the first article, the Gottschalks received calls at their motel informing them that the child described was plaintiff Susie Hall, and providing her whereabouts.[36] The *Salisbury Post* subsequently published a second article identifying the child as Susie Hall and her adoptive mother as Mary Hall.[37] This article also described the details and emotions of a telephone conversation between the Gottschalks and Susie Hall.[38] The Halls alleged that the second publication had caused them to flee their home to avoid public attention and to seek and receive psychiatric treatment for the emotional and mental distress caused by the incident.[39]

Without specifically addressing the facts of the case, the court continued the trend it had set when it rejected the tort of false light a few years earlier[40] by similarly rejecting public disclosure of private facts.[41]

32. *Id.* at 714.
33. *Id.* at 712.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. Renwick v. News & Observer Publ'g Co., 312 S.E.2d 405, 413 (N.C. 1984).
41. *Hall*, 372 S.E.2d at 717.

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The court outlined two primary reasons for rejecting the cause of action. First, it found the public disclosure of private facts to be "constitutionally suspect" because it added to the tension between tort law and the First Amendment.[42] Second, it believed recognition of public disclosure of private facts would duplicate other causes of action, such as the intentional infliction of emotional distress.[43]

Justice Frye, in a concurring opinion, argued that the plaintiffs should not recover for public disclosure of private facts because the information was of legitimate public concern, but he disagreed with the court's decision to totally deny recognition of the tort.[44] Justice Frye acknowledged that courts have struggled with the tension between the freedom of the press to disseminate information to the public and an individual's right to privacy.[45] Nonetheless, he emphasized that "neither the constitutional right of freedom of the press nor the right to be free from publicity [were] absolute."[46] Justice Frye concluded that the resolution of the conflicting rights lies in the "application of a 'newsworthiness' or 'public interest' standard in determining what publications are constitutionally privileged and what publications are actionable."[47]

The Supreme Court of North Carolina's decision not to recognize the public-disclosure tort was exceptional.[48] The court granted far more

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42. *Id.* at 716.

43. *Id.*

44. *Id.* at 717–18 (Frye, J., concurring). Justice Frye wrote:

> I do not accept the notion that the tension already existing between the first amendment and the law of torts requires the non-recognition of a legitimate claim by a non-public figure against a media defendant for wrongfully publishing highly offensive private facts which are not of legitimate concern to the public.

Id. at 717.

45. *Id.* at 719 (first citing Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); then citing Gilbert v. Med. Econ. Co., 665 F.2d 305 (10th Cir. 1981); then citing Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975); then citing Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971), *overruled on other grounds by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 560 (Cal. 2004); and then citing Deaton v. Delta Democrat Publ'g Co., 326 So. 2d 471 (Miss. 1976)).

46. *Id.* at 719.

47. *Id.* at 720 (quoting Hall v. Post, 355 S.E.2d 819, 824 (N.C. Ct. App. 1987), *rev'd*, 372 S.E.2d 711 (N.C. 1988)).

48. *See, e.g.*, Brunson v. Ranks Army Store, 73 N.W.2d 803, 806 (Neb. 1955) (deferring to the legislature to decide whether a private-facts claim should be recognized); Arrington v. N.Y. Times Co., 434 N.E.2d 1319, 1323 (N.Y. 1982) (noting that, assuming privacy actions were recognized, the publication of the plaintiff's photograph in an article about middle-class African Americans did not support a claim because "an inability to vindicate a personal predelection [sic] for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow

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sweeping protection to truthful speech than the Supreme Court of the United States has held the Constitution to require.[49] In fact, one year after *Hall*, the Supreme Court of the United States cautioned against such sweeping decisions: "We continue to believe that the sensitivity and significance of the interests presented in clashes between the First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."[50] Unfortunately, the court's decision in *Hall* was sweeping, leaving North Carolina with a rule that was as unnecessary as it was unprecedented. Only four other states have declined to recognize the public-disclosure tort.[51]

A lot has changed since the state's highest court rejected the public-disclosure tort.[52] Today, twenty-first-century technologies magnify the harm suffered by victims of these public disclosures. Technology has made the publication of personal information easier and more commonplace, and has exacerbated the emotional, reputational, economic, and professional injuries associated with the unwanted publication of private information.

In 1988, when *Hall* was decided, publications were made by professional media sources, and news was spread primarily by word of mouth, telephone, newspaper, or television. News or publishing intermediaries "played an important social role in balancing the newsworthiness of information against the privacy interests of third parties who were identified."[53] Today, Internet technologies have provided a

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freely"); Donahue v. Warner Bros. Pictures Distrib. Corp., 272 P.2d 177, 184 (Utah 1954) (declining to extend a statutory provision for commercial misappropriation to allow a claim of misappropriation of an entertainer's life story in a movie). The Supreme Court of Rhode Island rejected the privacy tort in 1909. *See* Henry v. Cherry & Webb, 73 A. 97, 109 (R.I. 1909). However, as mentioned above, that decision was superseded by a statute that granted a cause of action for all four branches of the privacy tort. *See* R.I. GEN. LAWS § 9-1-28.1 (2012); *see also* Lucy Noble Inman, Note, Hall v. Post*: North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts*, 67 N.C. L. REV. 1474, 1487 n.131 (1989).

49. *See* Fla. Star v. B.J.F., 491 U.S. 524, 530 (1989) (expressly resolving government sanctions of true information only as it arose "in a discrete factual context").

50. *Id.* at 533.

51. *See* Evans v. Sturgill, 430 F. Supp. 1209, 1213 (W.D. Va. 1977); Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997); *Brunson*, 73 N.W.2d at 806–07 (deferring to the legislature to decide whether a private-facts claim should be recognized); Howell v. N.Y. Post Co., 612 N.E.2d 699, 704 (N.Y. 1993) (acknowledging, however, that New York recognizes a statutory right to privacy); *see also supra* note 27.

52. In 1995, only about 10% of adults used the Internet. Kathryn Zickuhr & Aaron Smith, *Digital Differences*, PEW RES. CTR. (Apr. 13, 2012), http://www.pewinternet.org/2012/04/13/digital-differences/.

53. *Id.*

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"technological megaphone" that individuals can use to "broadcast their story [and those of others] to the world."[54]

Use of technology and social media is growing. Internet use among American adults from 1995 to 2014 has increased from 14% to 87%.[55] Today, Facebook has over 1.44 billion monthly active users and 936 million daily active users, with 161 million daily active users in the United States and Canada alone.[56] Facebook users have uploaded over 250 billion photos, and average 4.5 billion "likes" each day.[57] There are 302 million monthly active Twitter users, with 500 million Tweets sent per day.[58] Further, a majority of Americans now own smartphones that provide instant access to the Internet and social media.[59]

The growth of revenge porn in the United States is directly related to the growth in technology and the use of social media. This has, in turn, created a need for legal remedies to address digital injuries. The public-disclosure tort provides a civil remedy to address these injuries.[60]

II. NORTH CAROLINA'S GAP IN PRIVACY PROTECTION

The Court's decision in *Hall v. Post* has created a gap in privacy protection in North Carolina that is increasingly problematic with the rise of revenge porn and other digital injuries. This Part highlights the gap in protection by examining how the various civil remedies available to citizens of North Carolina fail to adequately redress the publication of private images commonly associated with revenge porn.

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54. *Id.*

55. *Internet Use Over Time*, PEW RES. CTR., http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time/ (last visited May 11, 2015).

56. Craig Smith, *By the Numbers: 200+ Amazing Facebook User Statistics*, DMR (last updated May 11, 2015), http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats/#.VDV03fl4pcQ.

57. *Id.*

58. *About*, TWITTER, https://about.twitter.com/company (last visited May 11, 2015). From 2011 to 2013 alone, Twitter acquired 280 million active users—an increase of 40%. TJ McCue, *Twitter Ranked Fastest Growing Social Platform in the World*, FORBES (Jan. 29, 2013, 4:01 AM), http://www.forbes.com/sites/tjmccue/2013/01/29/twitter-ranked-fastest-growing-social-platform-in-the-world/.

59. Aaron Smith, *Nearly Half of American Adults Are Smartphone Owners*, PEW RES. CTR. (Mar. 1, 2012), http://www.pewinternet.org/Reports/2012/Smartphone-Update-2012.aspx.

60. *See* Chander, *supra* note 30, at 129–33 (arguing that the public-disclosure tort is the best legal remedy to address the rise of revenge porn).

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A. Privacy Torts

Privacy torts could provide revenge-porn victims with valuable civil remedies against the individual who publishes their private images, but privacy torts are not fully recognized in North Carolina.[61]

Privacy torts grew out of Samuel Warren and Louis Brandeis's famous 1890 article, *The Right to Privacy*.[62] Warren and Brandeis believed that privacy had become more essential to individuals because the press of their day was subjecting individuals to "mental pain and distress, far greater than could be inflicted by mere bodily injury."[63] By synthesizing cases in which relief had been granted "on the basis of defamation, or the invasion of some property right, or a breach of confidence or an implied contract,"[64] they concluded that these decisions were based on a distinct right to privacy, deserving of its own "separate recognition."[65] They wanted the law to adapt to the needs of society, recognizing that the strength of our legal system lies in its adaptability, capacity for growth, and ability "to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong."[66]

In subsequent decades, courts were divided over recognition of Warren and Brandeis's right to privacy. With the publication of the *Restatement of Torts* in 1939, however, the momentum substantially shifted in favor of recognizing privacy rights.[67]

After Warren and Brandeis introduced the vague notion of the right to privacy, William Prosser organized the idea into a classification of four torts.[68] Prosser asserted that the four privacy torts—intrusion, false light, appropriation, and public disclosure of private facts—shared very little

61. *See* Burgess v. Busby, 544 S.E.2d 4, 11 (N.C. Ct. App. 2001) (indicating that North Carolina does not recognize a cause of action for invasion of privacy by disclosure of private facts or false light); *accord* Broughton v. McClatchy Newspapers, Inc., 588 S.E.2d 20, 27 (N.C. Ct. App. 2003).

62. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

63. *Id.* at 196.

64. Prosser, *supra* note 1, at 384 (citations omitted) (discussing Warren and Brandeis's article).

65. *Id.*

66. Warren & Brandeis, *supra* note 62, at 213 n.1.

67. *See* RESTATEMENT OF TORTS § 867 (AM. LAW INST. 1939).

68. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 149 (2007).

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apart from an interference with a plaintiff's right "to be let alone," because each tort protected a different interest of the plaintiff.[69]

North Carolina narrowly recognizes only two of the four privacy torts: appropriation and intrusion upon seclusion.[70] Neither of these two privacy torts is adequate to address the injuries of revenge-porn victims in the state.

1. Intrusion Upon Seclusion

Intrusion is ill suited for addressing most injuries resulting from revenge porn.[71] The claim of intrusion protects against the acquisition of private information when one intrudes "upon the solitude or seclusion of another or his private affairs or concerns" if the intrusion is "highly offensive to a reasonable person."[72] Intrusion protects against the invasion of one's private, physical space and from methods of wiretapping and eavesdropping.[73] The plaintiff's interest protected by intrusion, Prosser argued, was primarily a "mental one" that had been useful for filling the gaps between trespass, nuisance, intentional infliction of emotional distress, and other constitutional remedies.[74]

The classic case of intrusion involves the "Peeping Tom," who records or views someone in a private place without that person's knowledge. In *Hamberger v. Eastman*,[75] for example, the court concluded that a couple had a valid intrusion claim against their landlord for his installation of a hidden recording device in their bedroom.[76]

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69. Prosser, *supra* note 1, at 389. This phrase was originally coined by Judge Cooley and used by Warren and Brandeis in *The Right to Privacy*. *See* Warren & Brandeis, *supra* note 62, at 95.

70. *See* Miller v. Brooks, 472 S.E.2d 350, 354 (N.C. Ct. App. 1996) (acknowledging that North Carolina has recognized the privacy torts of appropriation and intrusion upon seclusion). *But see Hall*, 372 S.E.2d at 713 (rejecting the tort of public disclosure of private facts in 1988); Renwick v. News & Observer Publ'g Co., 312 S.E.2d 405 (N.C. 1984) (rejecting the false-light tort in 1984).

71. *See* Broughton v. McClatchy Newspapers, Inc., 588 S.E.2d 20, 27–28 (N.C. Ct. App. 2003) (indicating that there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion).

72. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

73. Prosser, *supra* note 1, at 389–92.

74. *Id.* at 392.

75. Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964).

76. *Id.* at 241–42; *see also* Wolfson v. Lewis, 924 F. Supp. 1413, 1431 (E.D. Pa. 1996) (finding media surveillance of a couple's activities in their home to be actionable under an intrusion tort theory); Rhodes v. Graham, 37 S.W.2d 46, 47 (Ky. 1931) (holding that wiretapping a person's phone gives rise to a tort action because it violates his right "to the privacy of his home as against the unwarranted invasion of others").

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Intrusion, by definition, does not protect anyone who consents to the initial acquisition of his or her private information, even if that information is later disclosed to the public without the person's consent. This presents a legal barrier for most revenge-porn victims, the majority of whom consensually give private images to a boyfriend or girlfriend, trusting that those images will be kept private. Victims of revenge porn are injured when those images are subsequently disclosed to a broader audience without their permission. Thus, intrusion does not protect revenge-porn victims like Holly Jacobs, and it would not protect the North Carolina teenagers harmed by the recent disclosure of their private images if those teenagers initially gave those images to a boyfriend or girlfriend in trust.[77]

2. Appropriation of One's Name or Likeness

Because of North Carolina's narrow interpretation of the appropriation tort, it, too, is ill suited as a remedy for victims of revenge porn. In Prosser's view, appropriation was unlike the other three privacy torts in that it protected the plaintiff's proprietary interest in his or her identity—a plaintiff's "name or likeness."[78] As appropriation has developed, courts have taken two distinct views on what the tort protects.[79] The first view, which was also adopted by Prosser, is that appropriation protects a property right.[80] This view has been more widely adopted.[81] The second view is that appropriation protects against embarrassment or loss of dignity.[82]

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77. Intrusion could be a remedy for any of the North Carolina teenagers whose accounts were hacked and who had not disclosed images to someone in trust. *But see Rowan Co. Student*, *supra* note 13 (highlighting that some of the victims initially shared these images with boyfriends or girlfriends before they were disclosed on Instagram and Twitter).

78. Prosser, *supra* note 1, at 406.

79. *See* Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 663–70 (1991) (contrasting the "property" and "dignity" rationales that underlie the tort of appropriation).

80. Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 223–24 (1999). Some states have adopted a new tort known as the "right of publicity" to redress violations of property rights to one's name or likeness. *See* 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.63, at 544–45 (2d ed. 2014) ("Simplistically put, while the appropriation branch of the right of privacy is invaded by an injury to the psyche, the right of publicity is infringed by an injury to the pocketbook.").

81. *See* Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 109–14 (2003) (arguing that Prosser's characterization of appropriation as vindicating property interests obscured the dignitary interests that the tort protected, noting that "[m]odern courts are prone to subsuming the privacy claim under the label of publicity").

82. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 986–89 (1964).

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North Carolina has adopted a narrow interpretation of the first view,[83] allowing recovery only in situations where the defendant uses the plaintiff's name or likeness for advertising or commercial purposes.[84] Thus, any disclosures of sexual photographs that are not made for advertising or commercial purposes would not fall within North Carolina's definition of appropriation. This approach is problematic for victims of revenge porn, whose images or videos are typically published to cause harm or embarrassment, not for some advertising or commercial use.[85]

B. Other Common-Law Remedies

North Carolina common law provides some narrow categorical protections against the disclosure of confidential medical information through medical-malpractice actions;[86] and, where a fiduciary duty exists, North Carolina allows plaintiffs to recover for the breach of a fiduciary duty.[87] These categorical protections, however, do nothing for revenge-porn victims, because their injuries do not involve the disclosure of medical information or the existence of a fiduciary duty.

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83. The *Restatement (Second) of Torts* takes a broader approach to appropriation, allowing for recovery where the defendant appropriates the plaintiff's name or likeness for her own "use or benefit." RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

84. *See* Flake v. Greensboro News Co., 195 S.E. 55, 64 (N.C. 1938) (concluding that the unauthorized use of one's photograph in connection with an advertisement or other commercial purpose gives rise to a cause of action for appropriation); Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings, 676 S.E.2d 79, 89 (N.C. Ct. App. 2009) (noting that the defendant must show that the misappropriation was made for commercial purposes (citing Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc., No. 05C5488, 2006 U.S. Dist. LEXIS 29082, at *11 (N.D. Ill. May 10, 2006), *aff'd*, 471 F.3d 745 (7th Cir. 2006))).

85. *See* William K. Smith, *Saving Face: Adopting a Right of Publicity to Protect North Carolinians in an Increasingly Digital World*, 92 N.C. L. REV. 2065, 2098 n.227 (2014) (discussing how this lack of protection is increasingly problematic as cyberbullying and revenge porn become more commonplace).

86. *See* N.C. GEN. STAT. § 8-53 (2013) ("Confidential information obtained in medical records shall be furnished only on the authorization of the patient. . . ."); *see also* Watts v. Cumberland Cty. Hosp. Sys., Inc. 330 S.E.2d 242, 249 (N.C. Ct. App. 1985) (citing Mazza v. Huffaker, 300 S.E.2d 833, 837–38 (N.C. Ct. App. 1983)), *rev'd in part on other grounds*, 345 S.E.2d 201 (N.C. 1986).

87. *See* White v. Consol. Planning, Inc., 603 S.E.2d 147, 155–56 (N.C. Ct. App. 2004) (explaining that breach of fiduciary duty is a recognized tort in North Carolina that requires the existence of a fiduciary relationship (citing Abbitt v. Gregory, 160 S.E. 896, 906 (N.C. 1931))).

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North Carolina recognizes defamation as a cause of action, but the tort covers only the publication of false information, not true facts.[88] Since images or videos of victims of revenge porn are true images, defamation is not an appropriate claim. Defamation protects an important reputational interest, but it does not protect the vast amounts of true, private information that, when disclosed to the public, can be extremely harmful as well.

Contrary to the Supreme Court of North Carolina's assessment in *Hall*, intentional infliction of emotional distress (IIED)[89] does not serve as an adequate proxy for public disclosure of private facts for victims of revenge porn. To state a prima facie cause of action for IIED in North Carolina, a plaintiff must prove three elements: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another.[90]

North Carolina's interpretation of these elements makes it difficult for revenge-porn victims to find relief under the tort of IIED. First, the revenge-porn victim must prove that the defendant's publication of the media constitutes "extreme and outrageous conduct."[91] In North Carolina, conduct is extreme and outrageous when it exceeds all bounds usually tolerated by a decent society[92] or shocks the conscience.[93] Liability does not extend to mere insults, indignities, or threats.[94] Comparably, public disclosure of private facts generally requires only proof that the defendant (1) published private facts (2) that would be highly offensive to a reasonable person. The conduct threshold for IIED is therefore higher than

88. Holleman v. Aiken, 668 S.E.2d 579, 587–88 (N.C. Ct. App. 2008) (noting that a statement's truth is an absolute defense to a libel claim (citing Martin Marietta Corp. v. Wake Stone Corp., 432 S.E.2d 428, 433 (N.C. Ct. App. 1993), *aff'd per curiam*, 453 S.E.2d 146 (N.C. 1995))).

89. *See* Shreve v. Duke Power Co., 354 S.E.2d 357, 359 (N.C. Ct. App. 1987) (defining IIED under North Carolina law).

90. Dickens v. Puryear, 276 S.E.2d 325, 335 (N.C. 1981).

91. *See, e.g.*, Ausley v. Bishop, 515 S.E.2d 72, 79 (N.C. Ct. App. 1999) (explaining that the claimant's burden in demonstrating extreme and outrageous conduct is high); *Shreve*, 354 S.E.2d at 359–60 (finding that the defendant's conduct did not rise to the level of extreme and outrageous).

92. *See, e.g.*, Guthrie v. Conroy, 567 S.E.2d 403, 408 (N.C. Ct. App. 2002); Phillips v. Rest. Mgmt. of Carolina, L.P., 552 S.E.2d 686, 693 (N.C. Ct. App. 2001) (citing *Shreve*, 354 S.E.2d at 359).

93. *See, e.g.*, Dunn v. Mosley, No. 4:10-CV-28-FL, 2011 U.S. Dist. LEXIS 65279, at *16 (E.D.N.C. June 16, 2011) (citing Russ v. Causey, 732 F. Supp. 2d 589, 607 (E.D.N.C. 2010), *aff'd in part*, 468 F. App'x 267 (4th Cir. 2012)).

94. *See, e.g.*, McEntire v. Johnson, No. 1:12cv327, 2013 U.S. Dist. LEXIS 151482, at *7–8 (W.D.N.C. Sept. 20, 2013) (citing *Guthrie*, 567 S.E.2d at 408–09).

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the public-disclosure tort, making it more difficult for a victim of revenge porn to recover under IIED.

In addition, a plaintiff must prove that the extreme and outrageous conduct caused her "severe emotional distress."[95] In North Carolina, this is defined as "neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."[96] Temporary fright, disappointment, or regret will not satisfy this element, nor will feelings of fear, embarrassment, and humiliation.[97] Therefore, even if a victim can prove extreme and outrageous conduct, she may fail to meet the high threshold of proving severe emotional distress. Many victims of revenge porn may suffer only from embarrassment and humiliation, which would not satisfy this element. Conversely, disclosure of private information can cause other types of harm—such as financial or professional harm—that may not be adequately addressed by IIED.[98] The efficacy of public disclosure of private facts is that it specifically deters the disclosure of private information; IIED is not specifically designed to deter this behavior.

Moreover, no public figure can recover for IIED that arises out of a publication without proving falsity.[99] Thus, no matter how offensive or harmful the disclosure, a public figure will never recover for IIED if the information disclosed is true, which will nearly always be the case for victims of revenge porn.

The common-law remedies available to victims of revenge porn are inadequate in North Carolina, and the state's limited recognition of privacy torts leaves victims with no common-law remedy to address their injuries.

95. Waddle v. Sparks, 414 S.E.2d 22, 27 (N.C. 1992) (quoting *Dickens*, 276 S.E.2d at 335).

96. *Id.* (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 395 S.E.2d 85, 97 (N.C. 1990)).

97. Payne v. Whole Foods Mkt. Grp., Inc., 812 F. Supp. 2d 705, 710 (E.D.N.C. 2011) (quoting Kaplan v. Prolife Action League of Greensboro, 431 S.E.2d 828, 837–38 (N.C. Ct. App. 1993)), *aff'd*, 471 F. App'x 186 (4th Cir. 2012).

98. *See* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1815–16 (2010) (discussing the financial and economic damages that can result from the unwanted disclosure of private information).

99. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

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C. Other Statutory Remedies

Civil remedies available by statute in North Carolina also fall short of addressing injuries caused by revenge porn.[100] North Carolina's categorical approach to addressing issues related to individual privacy leaves gaps in protection for revenge-porn victims.

Several federal and state statutes limit disclosure of personal data. Federal statutes restrict disclosure of information from school records,[101] cable company records,[102] video rental or sale records,[103] driving records,[104] and health records.[105] In addition, the Fair Credit Reporting Act places limitations on consumer reporting agencies' disclosures of consumer reports.[106]

Many states also provide statutory privacy protections against the disclosure of personal information. Thirty states have statutes that prohibit the disclosure of identifying information concerning victims of sexual crimes.[107] Forty-one states restrict the disclosure of identifying information regarding an individual's HIV or AIDS status.[108] North Carolina does not have statutes addressing the victims of sexual crimes or disclosure of information regarding HIV or AIDS. North Carolina does, however, have a statute that protects against the disclosure of some personal information where the person has previously objected to the disclosure of that information.[109]

North Carolina applies what one author has called the "Stratified Model" to statutory privacy protections,[110] basing the degree of protection

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100. *But see supra* note 16 (discussing proposed legislation that would cover many of the injuries associated with revenge porn).

101. Family Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232g(b) (2012).

102. Cable Communication Policy Act of 1984, 47 U.S.C. § 551(c).

103. Video Privacy Protection Act of 1988, 18 U.S.C. §§ 2710–2711.

104. Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725.

105. Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.).

106. Fair Credit Reporting Act, 15 U.S.C. § 1681b(b)(3).

107. For a full list of these statutes, see Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 433 n.40 (1996).

108. *See id.* at 434 n.41.

109. N.C. GEN. STAT. § 75-66 (2013).

110. *See* Bruce D. Goldstein, Comment, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185, 1191–92 (1992).

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on the content of the information.[111] As such, North Carolina limits the disclosure of information obtained through the collection of taxes on controlled substances[112] and privileged patient medical records.[113] North Carolina also prohibits employment discrimination against anyone testing positive for AIDS,[114] and the disclosure of "trade secrets."[115] Indeed, these categorical protections are important, but they protect only against disclosures by government agencies and only the types of information listed in the statutes, leaving a wide gap that does not protect against the disclosure of nude or sexual images.

On the criminal side, North Carolina provides little protection against the public disclosure of private information. North Carolina has surprisingly robust—some argue, unconstitutional[116]—protections against cyberbullying,[117] where students are prohibited from making even true statements, if those statements might provoke a third party to "stalk or harass a school employee."[118] North Carolina's cyberbullying statutes, however, only protect teachers and students, and there is no evidence of any prosecutions under these statutes. North Carolina does prohibit identity theft,[119] but the law's focus is on punishing the conduct of stealing one's identity, not deterring those who may have disclosed personal information to the identity thief. Further, criminal laws generally focus on vindicating the state's interests in deterring crime,[120] not on making "the injured person whole."[121]

In sum, although North Carolina has many common-law and statutory remedies, there is no legal protection that directly addresses the harm that

111. *Id.* at 1191.

112. N.C. GEN. STAT. § 105-113.112.

113. *Id.* § 130A-12.

114. *Id.* § 130A-148(i).

115. *Id.* § 132-1.2; *see also id.* § 66-152 (defining trade secrets).

116. *See* James L. Seay III, Comment, *Salvaging the North Carolina Teacher-Cyberbullying Statute*, 37 CAMPBELL L. REV. 391, 397–411 (2015) (arguing that portions of the state's cyberbullying statutes violate the First and Fourteenth Amendments); Olivia A. Weil, Note, *Preserving the Schoolhouse Gates: An Analytical Framework For Curtailing Cyberbullying Without Eroding Students' Constitutional Rights*, 11 AVE MARIA L. REV. 541, 559 (2013) (acknowledging that the law is subject to attacks grounded in the overbreadth and vagueness doctrines).

117. N.C. GEN. STAT. §§ 14-458.1 to .2.

118. *Id.* § 14-458.2(b)(2).

119. Although North Carolina does not specifically punish the disclosure of information to an identity thief, the offender could be charged with identity theft in certain circumstances. *See id.* § 14-113.20.

120. DAN B. DOBBS ET AL., THE LAW OF TORTS § 4, at 6 (2d ed. 2011).

121. Teschendorf v. State Farm Ins. Cos., 717 N.W.2d 258, 273 (Wis. 2006).

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results from revenge porn in a way that fully replaces the public-disclosure tort.

III. BRINGING THE PUBLIC-DISCLOSURE TORT ONLINE IN NORTH CAROLINA

Recognizing a cause of action for the public disclosure of private facts in North Carolina will offer victims of revenge porn a civil remedy for the unauthorized publication of their private images. Of the four privacy torts, the public-disclosure tort most closely addresses "the interest that motivated Warren and Brandeis to write their article," because it targets the unwanted disclosure of private information.[122] Warren and Brandeis were primarily concerned with the press invading the private lives of individuals and publishing private information with newspapers and new technology, such as "instantaneous photographs" and "mechanical devices," to feed what they perceived to be society's "prurient taste."[123] They argued that the common law's "beautiful capacity for growth" allowed judges to respond to gaps in legal protection,[124] and, as the "press [was] overstepping in every direction the obvious bound of propriety and of decency," Warren and Brandeis believed that the common law should provide a remedy to protect individuals' privacy interests.[125]

Recognizing the public-disclosure tort would give victims of revenge porn a civil remedy for the harm caused by those disclosures. North Carolina can either judicially[126] or legislatively[127] bring the public-disclosure tort back to life. Either way, the essence of the tort should provide that a plaintiff states a prima facie cause of action for the public disclosure of private facts if she proves each of the following elements:

122. Diane Leenheer Zimmerman, *The "New" Privacy and the "Old": Is Applying the Tort Law of Privacy Like Putting High-Button Shoes on the Internet?*, 17 COMM. L. & POL'Y 107, 112 (2012) [hereinafter Zimmerman, *New Privacy*].

123. Warren & Brandeis, *supra* note 62, at 195–96.

124. *Id.* at 195.

125. *Id.* at 196–97.

126. Given the opportunity, the Supreme Court of North Carolina can reverse the *Hall* decision and recognize the tort of public disclosure of private facts. The court could justify this decision by acknowledging the increasing need for privacy protection in the digital age to address injuries from actions like publishing revenge porn—a need that was not foreseen in 1988 when *Hall* was decided.

127. A second method to bring the public-disclosure tort to life in North Carolina is for the General Assembly to draft a civil statute granting the same protection.

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(1) The defendant published information about the plaintiff;

(2) Before this disclosure, the information was private (i.e., not known to the public);

(3) The publication of this information would be highly offensive to a reasonable person; and

(4) The information published was not of legitimate public concern.[128]

When broken down, the tort requires proof of four distinct elements: (1) publicity, (2) private facts, (3) offensiveness, and (4) lack of a legitimate public concern.[129] Each of these elements leaves some room for interpretation and flexibility,[130] making public disclosure of private facts adaptable to changes in social norms and useful for addressing harms in the digital age. This Part explains each of the elements and provides recommendations on how North Carolina should interpret and apply these elements to injuries like revenge porn in the digital age.

A. Publicity

First, the plaintiff must prove that the defendant published private information about the plaintiff. To address this element, North Carolina should adopt a flexible approach that accounts for the rapid dissemination of information made possible by the Internet. North Carolina ought to avoid the traditional view of "publicity," which forecloses recovery in cases where information is disclosed to a small group of people, when that information is disclosed online.

Most states require the plaintiff to show that her private information was communicated to the "public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[131] In these states, it is not necessary for everyone in that

128. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

129. *See id.* § 652D cmts. b, d (addressing both private matters and matters of legitimate public concern).

130. *See* Jaime A. Madell, Note, *The Poster's Plight: Bringing the Public Disclosure Tort Online*, 66 N.Y.U. ANN. SURV. AM. L. 895, 916 (2011).

131. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (explaining the publicity element of the public-disclosure tort).

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broad audience to recognize the person involved or to understand the significance of the disclosure.[132]

Traditionally, the publicity element was not satisfied when information was disclosed to a single person, or even to a small group.[133] However, at least one court has found the use of e-mail to send sexually explicit photographs to a small number of family and friends to raise an issue of material fact as to whether the publicity element had been satisfied, acknowledging that the publicity element may be satisfied even when communicated to a small group if the information is sent over the Internet, because of the ease with which that information can be further disseminated.[134] That court's approach is effective in the digital age because it acknowledges how publications are more easily made on the Internet. To address the "publicity" element in the digital age, courts should examine how easily the information can be further disseminated. Under this approach, information shared online, even to a small group, will likely satisfy the "publicity" element because it is so easily shared.

It is now almost universally recognized that publication can be made through any medium. This includes, but is not limited to, oral communications,[135] radio broadcasts,[136] movies,[137] television,[138] and photographs.[139] Because courts have found these types of mediums sufficient to satisfy the publication element, any disclosures made by mass media, online social-networking sites, blogs, or mass e-mail should also be sufficient, since they can reach large audiences instantaneously.

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132. *See, e.g.*, Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc., 492 A.2d 580, 588 (D.C. 1985) (noting that the plaintiff was harmed when her image was broadcast on television in connection with her plastic surgery, even though her name was not mentioned and many viewers likely did not recognize her).

133. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

134. Peterson v. Moldofsky, No. 07-2603-EFM, 2009 U.S. Dist. LEXIS 90633, at *5–7 (D. Kan. Sept. 29, 2009).

135. *See, e.g.*, Steinbuch v. Cutler, 463 F. Supp. 2d 1, 3 (D.D.C. 2006) (applying District of Columbia law); Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 884–85 (S.D. Ga. 1983) (applying Georgia law).

136. *See, e.g.*, Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845, 845–46 (N.D. Cal. 1939); Wilson v. Grant, 687 A.2d 1009, 1015 (N.J. Super. Ct. App. Div. 1996).

137. *See, e.g.*, Tyne v. Time Warner Entm't Co., 204 F. Supp. 2d 1338, 1341 (M.D. Fla. 2002) (applying Florida law), *aff'd*, 425 F.3d 1363 (11th Cir. 2005).

138. *See, e.g.*, Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1123–24 (N.D. Cal. 2002) (applying California law).

139. *See, e.g.*, McCabe v. Vill. Voice, Inc., 550 F. Supp. 525, 529 (E.D. Pa. 1982) (applying Pennsylvania law); Daily Times Democrat v. Graham, 162 So. 2d 474, 477 (Ala. 1964); Zieve v. Hairston, 598 S.E.2d 25, 30 (Ga. Ct. App. 2004).

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B. Private Facts

Second, a plaintiff must prove that information published by the defendant constitutes "private facts." For this element, North Carolina should adopt an approach that recognizes that information is often disclosed to several trusted confidants with the expectation that the information will not be disseminated further. Instead of viewing information disclosed to trusted individuals as now being public and therefore insufficient to meet the standard of "private facts," courts ought to examine whether the information has been shared beyond these boundaries before finding that the information qualifies as "public."

The public-disclosure tort is designed to protect information that is truly private.[140] Thus, there is no liability where the defendant merely gives further publicity to information that is already in the public record.[141] For example, publicity about the plaintiff's date of birth, fact of marriage, military record, or a pleading filed in a lawsuit is not a private fact as a matter of law and is not actionable.[142]

The Supreme Court of the United States validated the constitutionality of the public-records exception in 1975 in *Cox Broadcasting Corp. v. Cohn*.[143] That case involved the father of a deceased rape victim who sued a broadcasting company because its reporter disclosed his daughter's name during a report of the alleged rapist's trial.[144] The Court held that a state may not constitutionally impose sanctions for the accurate publication of a rape victim's name obtained from the official court records when the records are maintained in connection with a criminal prosecution and are open to public inspection.[145] In doing so, the Court reinforced the public-records exception and emphasized that it does not matter whether the information is easily obtainable.[146] However, "if the record is one not open to public inspection, [such as] income tax returns, it is not [considered] public, and there is an invasion of privacy when it is made so."[147]

The tort of public disclosure of private facts is premised on the idea that there are certain phases of a person's life that he or she only wants revealed to those entrusted with that information.[148] A few facts that have

140. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).
141. *Id.*
142. *Id.* § 652D cmt. b.
143. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 476 (1975).
144. *Id.* at 474.
145. *Id.* at 495.
146. *Id.* at 496.
147. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.
148. *Id.*

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been deemed private for purposes of this tort include financial information,[149] debts,[150] intimate parts of anatomy,[151] sexual habits,[152] and gender corrective surgery.[153]

When addressing this element, the court should first address the public-records exception, as outlined in *Cox Broadcasting*. Information that is available in the public record should not satisfy the element of "private facts." Second, the court should examine whether the information is being disclosed beyond "existing networks of information flow."[154] Courts must not view "private facts" as a binary, all-or-nothing concept. Rather, courts ought to recognize degrees of privacy, a concept known as "limited privacy,"[155] and not equate what is "secret" with what is

149. *See, e.g.*, Yee Keung Siu v. Pius Lee, No. A116191, 2007 WL 2956360, at *7 (Cal. Ct. App. Oct. 11, 2007) (holding that the disclosure of "highly sensitive private financial information" amounted to a public disclosure of private facts); Mason v. Williams Disc. Ctr., Inc., 639 S.W.2d 836, 838–39 (Mo. Ct. App. 1982) (holding that a "no checks" sign regarding the plaintiffs "interfered with [their] right to be let alone").

150. *See, e.g.*, Challen v. Town & Country Charge, 545 F. Supp. 1014, 1016 (N.D. Ill. 1982) (applying Ohio and Illinois law); Trammell v. Citizens News Co., 148 S.W.2d 708, 709 (Ky. 1941).

151. *See, e.g.*, Banks v. King Features Syndicate, Inc., 30 F. Supp. 352, 353 (S.D.N.Y. 1939) (holding that publishing x-rays of a woman's pelvic region violated her right to privacy); Green v. Chi. Tribune Co., 675 N.E.2d 249, 251 (Ill. App. Ct. 1996) (alleging that a newspaper published a mother's statements to her dead son and photographs showing her son's body in the hospital); *see also* Briceño v. Sprint Spectrum, L.P., 911 So. 2d 176, 178, 181 (Fla. Dist. Ct. App. 2005) (deciding that the plaintiff's claim "that Sprint employees asked for her password and, upon accessing her e-mail account, obtained and disseminated personal photographs of her body to third persons via the internet" was arbitrable under a cellular telephone service agreement).

152. *See, e.g.*, Nat'l Bonding Agency v. Demeson, 648 S.W.2d 748, 749 n.1 (Tex. App. 1983), *abrogated on other grounds by* Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994); *see also* Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 827 (C.D. Cal. 1998). In *Michaels*, the court found that a famous rock star's and actress's privacy rights were violated by the distribution of videos of the couple engaging in sexual intercourse, even though the actress routinely portrayed sexy characters, and even though another tape of her having sex with her husband had previously been distributed. *Id.* Similarly, the degree to which the rock star opened his life to the public did not extend to the publicizing of his sexual acts. *Id.*

153. *See, e.g.*, Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771 (Ct. App. 1983).

154. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 535 (2006) [hereinafter Solove, *Taxonomy*]; *see also* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 974 (2005) (arguing that an individual has a reasonable expectation of privacy where there is a low risk that the information will spread beyond the individual's social network).

155. Strahilevitz, *supra* note 154, at 939.

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"private."[156] *Multimedia WMAZ, Inc. v. Kubach*[157] illustrates the concept of "limited privacy." Kubach was an HIV-positive man who had disclosed his HIV diagnosis to his family and to "friends, medical personnel and members of his AIDS support group."[158] He agreed to appear on a local television broadcast to discuss AIDS, and as a condition for doing the interview, he was assured that his face would not be visible on television.[159] Kubach sued the station upon discovering that his face was visible to viewers during the interview, and the station's defense was that Kubach had previously disclosed to others that he was HIV-positive.[160] The court disagreed, finding that Kubach had disclosed this information to people who "cared about him . . . or because they also had AIDS."[161]

Courts in North Carolina should adopt this approach of "limited privacy." The ultimate question in this analysis is whether information is confined within expected boundaries of privacy. In the case of Kubach, this meant that information was confined to those he trusted and was therefore still private. The concept of limited privacy allows victims of revenge porn a greater chance at recovery. Such victims initially share their information with one individual, but, to them, the information is still private. They have a reasonable expectation that it will not be shared beyond the trusted individual. Without that reasonable expectation of privacy, they would not have shared the information in the first place. Under this approach, if the trusted individual subsequently disclosed the information, he or she would be disclosing "private facts" under the public-disclosure tort.

C. Offensiveness

The third element that a plaintiff must prove is that the disclosure of private information would be highly offensive to a reasonable person. For this element, North Carolina should recognize the severity and permanence of harm associated with publications made online, effectively lowering the burden of proof for online injuries.

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156. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001) ("But the claim of a right of privacy is not 'so much one of total secrecy as it is of the right to *define* one's circle of intimacy—to choose who shall see beneath the quotidian mask.'" (quoting Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647 (1994))).

157. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491 (Ga. Ct. App. 1994).

158. *Id.* at 494.

159. *Id*. at 493.

160. *Id*.

161. *Id*. at 494.

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To satisfy the "offensiveness" element in most states, the plaintiff must show that the disclosure of his or her "private facts" would be offensive and objectionable to a reasonable person.[162] The disclosure must be the type that would bring shame or humiliation to a person of ordinary sensibilities, not the hypersensitive.[163] What qualifies as highly offensive is ultimately a normative judgment made by the jury based on the customs and values of society.[164]

Because of the permanency and embarrassment of having nude or sexual images or videos shared online, courts in North Carolina should presume offensiveness when the disclosure involves nude or sexual images of the plaintiff.[165] This burden shifting would give victims of harmful online disclosures a greater chance to recover.[166] As information-privacy and cyber-law scholar Danielle Citron argues, this would not be novel, because the law already takes a similar approach in the defamation context: defamation "has recognized that the longevity of damaging information deepens its destructive power."[167] To this end, defamation law gives greater protection to defamation in writing (libel claims) than to defamation through the spoken word (slander claims).[168]

D. Legitimate Public Concern or Newsworthiness

For the fourth element, the plaintiff must prove that the information disclosed was "not of legitimate public concern" or "newsworthy."[169] This element serves as an internal protection against legal action that might infringe on the First Amendment.[170] Here, courts must carefully balance the defendant's First Amendment rights with the plaintiff's right to

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162. *See, e.g.*, Taus v. Loftus, 151 P.3d 1185, 1207 (Cal. 2007); Ramsey v. Ga. Gazette Publ'g Co., 297 S.E.2d 94, 96 (Ga. Ct. App. 1982); Nation v. State, Dep't of Corr., 158 P.3d 953, 964 (Idaho 2007); Franklin Collection Serv., Inc. v. Kyle, 955 So. 2d 284, 291 (Miss. 2007).

163. *See, e.g.*, Cape Publ'ns, Inc. v. Bridges, 423 So. 2d 426, 427 (Fla. Dist. Ct. App. 1982); Smith v. Stewart, 660 S.E.2d 822, 834 (Ga. Ct. App. 2008).

164. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (AM. LAW INST. 1977).

165. *See* Citron, *supra* note 98, at 1851 (recommending that courts employ this type of approach to address injuries that occur online).

166. *Id.* at 1850.

167. *Id*. at 1851.

168. *Id.*

169. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d.

170. *See* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 300 n.34 (1983) [hereinafter Zimmerman, *Requiem*] (citing Pavesich v. New England Life Ins. Co., 50 S.E. 68, 74 (Ga. 1905)).

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privacy.[171] This balancing allows courts to protect the "free flow of ideas and opinions on matters of public interest and concern,"[172] while also protecting important privacy interests.

Courts and commentators have adopted a number of approaches for analyzing newsworthiness.[173] This Subpart briefly explains each approach, concluding with a recommendation that North Carolina adopt the "California approach," which involves a factor-balancing test with three distinct factors for determining newsworthiness.[174]

1. Defer-to-the-Media Approach

The first approach adopted by some courts to analyze newsworthiness is to defer to the media to determine what is newsworthy.[175] This approach, also known as the "leave it to the press" model, presumes that information published by the media is inherently newsworthy.[176] This method relies on media self-censorship and consumer demand to limit what is deemed newsworthy. Courts that have adopted this formulation make no distinction between news as information and news as entertainment.[177] This

171. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975); Gilbert v. Med. Econ. Co., 665 F.2d 305, 307 (10th Cir. 1981); Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975).

172. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1998); *see also* Hall v. Post, 372 S.E.2d 711, 720 (N.C. 1988) (Frye, J., concurring) (explaining that the chilling effect is minimized if the question of whether the published matter is of a legitimate public concern is initially a question of law for the trial court).

173. *See* Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 157–64 (1997) (describing five approaches used by courts to address the issue of newsworthiness). Daniel Solove offers a different categorization in his article on the public-disclosure tort and the First Amendment. *See* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1001 (2003) [hereinafter Solove, *Virtues*] (presenting three approaches: (1) deferring to the media; (2) focusing on the status of the individual; and (3) examining the nature of the information).

174. California's test for newsworthiness involves balancing three factors: (1) the social value of the information, (2) the extent of the intrusion into private areas, and (3) the extent to which the complaining party has voluntarily placed himself in the public eye. *See* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 43 (Cal. 1971), *overruled on other grounds by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 560 (Cal. 2004).

175. *See, e.g.*, Wagner v. Fawcett Publ'ns, 307 F.2d 409, 410–11 (7th Cir. 1962); Jenkins v. Dell Publ'g Co., 251 F.2d 447, 451–52 (3d Cir. 1958); Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 960–61 (D. Minn. 1948).

176. Zimmerman, *Requiem*, *supra* note 170, at 353.

177. *See, e.g.*, *Jenkins*, 251 F.2d at 451–52 (holding that there is no need to determine whether publication is for entertainment or information in order to render it "newsworthy");

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approach effectively swallows the entire cause of action.[178] "Public concern" becomes synonymous with "public interest," leaving very few areas of an individual's private life off limits.[179]

This model is also ill suited for the digital age because it does not address the many disclosures made by non-media defendants. Any individual with an Internet connection can publish information online, and many of the most harmful disclosures are made by non-media individuals.

Because almost all items are considered newsworthy, the primary advantage of this approach is that it does not risk infringing on the First Amendment. However, it does so at the expense of protecting privacy. Indeed, the only real difference between a jurisdiction that recognizes this approach and a jurisdiction, like North Carolina, that does not recognize the public-disclosure tort is formal recognition of the tort.[180]

Moving forward, North Carolina should refrain from adopting this problematic deference to the media. Not only is this approach ineffective at defining what information is of public concern and addressing online disclosures, but it also undermines the viability of the public-disclosure tort,[181] making it nearly impossible for victims of revenge porn to find protection.

2. Restatement *Approach*

A second model for analyzing newsworthiness is outlined in the *Restatement (Second) of Torts*. The *Restatement* model states that "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern," information ceases to be newsworthy.[182] This approach was first articulated by the United States Court of Appeals for the Ninth Circuit in *Virgil v. Time*.[183] In *Virgil*, the Ninth Circuit emphasized that newsworthiness should be a question of fact for the jury[184] and should be based on the localities' community mores.[185]

McNutt v. N.M. State Tribune Co., 538 P.2d 804, 809 (N.M. Ct. App. 1975) (holding that it is unnecessary to distinguish between entertainment and information).

178. *See* Solove, *Virtues*, *supra* note 173, at 1003.

179. *Id.*

180. *See* Dendy, *supra* note 173, at 158.

181. Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 172–73 (2010) (describing why the newsworthiness defense has all but swallowed the public-disclosure tort).

182. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (AM. LAW INST. 1977).

183. Virgil v. Time, Inc., 527 F.2d 1122, 1128–30 (9th Cir. 1975).

184. *Id.*

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One unique aspect of this approach is the "decency limitation,"[186] which allows the jury to hold defendants liable for disclosures that it finds newsworthy if the disclosure is "so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."[187]

The *Restatement* approach strikes an effective balance between privacy and the First Amendment through strict judicial scrutiny on the one hand and jury determinations of newsworthiness and decency on the other. Adopting a community-mores standard[188] protects the First Amendment by broadly defining what information is newsworthy. The decency limitation, also based on community norms, is "not so vague that it will cause a 'chilling effect'" on the First Amendment.[189] And the judge takes "special care"[190] to scrutinize the evidence to determine whether the defendant should prevail as a matter of law.[191]

3. Nexus Approach

A third model that courts use to analyze newsworthiness joins a "nexus" component to the Restatement test. The United States Court of Appeals for the Fifth Circuit first articulated this approach in *Campbell v. Seabury Press*.[192] This approach extends greater protection to privacy by adding a requirement that the information disclosed have a close nexus to a matter of legitimate concern.[193]

The nexus approach involves a closer examination of the information disclosed and its purported concern to the public. It acknowledges that "not all aspects of the person's life, and not everything the person says or does, is thereby rendered newsworthy."[194] This approach recognizes the need to strike a balance between free speech and individual privacy, highlighting that there are areas of one's life that may not bear any logical relationship with some matter of legitimate public concern.

185. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g.

186. *Virgil*, 527 F.2d at 1130.

187. Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940).

188. This approach is similar to the United States Supreme Court's First Amendment test for obscenity used in *Miller v. California*, 413 U.S. 15, 26 (1973).

189. Dendy, *supra* note 173, at 165.

190. *Virgil*, 527 F.2d at 1130.

191. Dendy, *supra* note 173, at 162.

192. Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (per curiam). The Tenth Circuit has also adopted this approach. *See* Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) (explaining that a "newsworthy publication must have some substantial relevance to a matter of legitimate public interest").

193. *See, e.g.*, Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989).

194. Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 484 (Cal. 1998).

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4. Status-of-the-Plaintiff Approach

A fourth approach used by some courts to examine newsworthiness is to focus on the status of the plaintiff.[195] Under this model, what is of legitimate public concern turns on whether the plaintiff qualifies as a public figure or a private person.[196] As in the defamation context, a plaintiff who is a public figure loses at least part of his or her privacy,[197] but there is some disagreement over the extent of this loss. Some earlier cases held that a public figure had no right to privacy at all,[198] while more recent cases suggest that there must be at least some rational relationship between the information disclosed about the public figure and his or her public life.[199] The rationale behind this rule is that public figures have greater access to media outlets to advocate on their own behalf,[200] and the public has a greater interest in information that concerns those who have thrust themselves into the public eye,[201] or voluntarily entered the public discourse.[202]

The value in the status-of-the-plaintiff approach is that there is often a logical connection between the plaintiff's status as a public figure or a private person and whether the information disclosed is of public concern. For example, information about public officials allows constituents to be informed voters and hold elected officials accountable. Information about a private person is less likely to be of legitimate public concern unless it relates to the community at large.

This approach also has several flaws. One problem is that it treats all information about public officials or public figures as being of public concern.[203] It is hard to argue that the social security numbers of public

195. Solove, *Virtues*, *supra* note 173, at 1008.

196. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmts. e–g (AM. LAW INST. 1977).

197. *Id.*; *see also* O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941); Cason v. Baskin, 30 So. 2d 635 (Fla. 1947).

198. *See, e.g.*, Carlisle v. Fawcett Publ'ns, Inc., 20 Cal. Rptr. 405, 414 (Ct. App. 1962); Werner v. Times-Mirror Co., 14 Cal. Rptr. 208, 212 (Ct. App. 1961).

199. *See, e.g.*, Virgil v. Sports Illustrated, 424 F. Supp. 1286 (S.D. Cal. 1976).

200. *See* Ali v. Daily News Publ'g Co., 540 F. Supp. 142, 144 (D.V.I. 1982); Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758, 763 (Ky. 1990); RESTATEMENT (SECOND) OF TORTS § 580A cmt. b.

201. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (explaining that one who voluntarily places himself in the public eye—a voluntary public figure—cannot complain when he is given publicity, even if the publicity is unfavorable).

202. *See id.* § 652D cmt. g (explaining that an involuntary public figure receives less protection than a private person).

203. *See* Solove, *Virtues*, *supra* note 173, at 1010.

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officials are of public concern.[204] It is also difficult to contend that private, sexual photos of a public figure are of legitimate public concern, especially when the public figure has not previously disclosed them to the public.[205] Another issue with this approach is that it lumps all public officials and public figures into the same category. Public figures and public officials are different, but defamation law treats them the same. Furthermore, although the law of defamation makes no distinction, not all public officials are the same and not all public figures are the same.[206]

5. Nature-of-the-Information Approach

The fifth approach for determining newsworthiness focuses on the nature of the information that is being disclosed.[207] Under this narrow approach, only information that contributes to "democratic self-governance" is deemed to be of public concern.[208] The nature-of-the-information approach gives the most protection to privacy: disclosures that do not aid in political discussion or debate are not of public concern.[209] Some argue that this approach overprotects privacy interests at the expense of free speech because speech that is not related to political matters may still be of public concern.[210] Because the First Amendment protects more than just political speech, this approach is too restrictive. But the opposite approach—viewing all speech as newsworthy, regardless of its content—would be too broad.

6. California's Approach

California has developed yet another test for newsworthiness, incorporating many of the best models described above. This test involves balancing (1) the social value of the information, (2) the depth of the intrusion into ostensibly private affairs, and (3) the extent to which the

204. *See id.*

205. Some may argue with this contention, but even public figures should have privacy rights in their own personal photographs. The recent publication of several celebrities' nude photos illustrates the need for protection. *See* Josh Margolin et al., *FBI Is "Addressing" Massive Celebrity Photo Hack*, ABC NEWS (Sept. 1, 2014, 6:40 PM), http://abcnews.go.com/Entertainment/fbi-addressing-massive-celebrity-photo-hack/story?id=25200140.

206. Solove, *Virtues*, *supra* note 173, at 1009–10.

207. *Id.* at 1010–11.

208. *Id.* at 1010.

209. *See id.*

210. *See id.* at 1011–12 (discussing the flaws of this approach); *see also* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1092–93 (2000) (discussing the value of speech on "daily matters").

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complaining party has voluntarily placed himself in the public eye.[211] The plaintiff has the burden of proving that the information is not newsworthy.[212]

Even if information is deemed newsworthy by the three-factor test, it still may not qualify as newsworthy under California's decency limitation.[213] To satisfy the decency limitation in California, the plaintiff must prove that the defendant disclosed the information with "reckless disregard for the fact that reasonable men would find the invasion highly offensive."[214] This additional fault requirement is intended to prevent any "chilling effect" on the First Amendment.[215] Finally, the California approach tips the scales in favor of the First Amendment if there is an even balance between a newsworthy disclosure and the decency limitation.[216]

California's approach does the best job of balancing the interests of privacy and free speech and providing clear instructions to the jury. The three-factor analysis allows the courts to examine the nuances involved in privacy injuries. Moreover, the decency limitation and the principle of balancing in favor of free speech in cases of evenly weighted interests provide a built-in protection of First Amendment freedoms.

7. California's Factor-Balancing as a Recommended Approach

North Carolina should adopt California's factor-balancing approach because it adequately protects both privacy and free speech without sacrificing either interest. California law in this area is also one of the most developed. Interest balancing is common in First Amendment jurisprudence,[217] and judicial consideration of multiple factors provides for

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211. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 43 (Cal. 1971), *overruled on other grounds by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 560 (Cal. 2004).

212. Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 768–70 (Ct. App. 1983).

213. *Briscoe*, 483 P.2d at 42–43.

214. *Id.* at 44.

215. *Id.* at 43.

216. *Id.*

217. In *Dennis v. United States*, 341 U.S. 494 (1951), Justice Frankfurter's concurring opinion suggested that balancing was not simply the best way, but the *only* way to evaluate First Amendment claims:

> Our judgment is thus solicited on a conflict of interests of the utmost concern to the well-being of the country. . . . If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds.

Id. at 519 (Frankfurter, J., concurring). Justice Frankfurter recognized that balancing tests better reflected the complexities of the free-speech doctrine:

> Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic

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a nuanced approach that is adaptable to changes in the digital age.

Under the three-factor test, North Carolina courts should first analyze the "social value" of the information published.[218] Courts should give information that contributes to "democratic self-governance" the most protection because one of the primary purposes of the First Amendment is to promote "uninhibited, robust, and wide-open [debate] . . . on government and public officials."[219] Similarly, as the Supreme Court of the United States highlighted in the context of obscenity, information that has "literary, artistic, political, or scientific value" should receive protection.[220] Information that furthers one of these interests is more likely to be of public concern because it furthers legitimate communal interests.

On the other side of the spectrum, intimate information pertaining to health and sex should receive the least amount of protection unless it relates to one of the interests discussed above.[221] For example, a newspaper that published a photograph of the plaintiff nude in a bathtub was not newsworthy, since the publication imparted no legitimate information to the public.[222] Similarly, a picture of a high-school athlete whose genitalia was accidentally exposed while playing soccer,[223] or a recording of two individuals having sex,[224] should receive less First Amendment protection. Giving privacy protection to these areas safeguards human dignity and decent behavior, which are indispensable attributes of civil society.[225]

For the second and third factors, North Carolina courts should analyze the depth of the intrusion into ostensibly private affairs and the extent to which the plaintiff voluntarily assumed a position of public notoriety. This

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> society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

Id. at 524–25.

218. *Briscoe*, 483 P.2d at 34.

219. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

220. Miller v. California, 413 U.S. 15, 24 (1973) (explaining the three-part test for identifying obscenity).

221. Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 56–57 (1974) (noting that there is no First Amendment right to "satisfy public curiosity and publish lurid gossip about private lives").

222. McCabe v. Vill. Voice, Inc., 550 F. Supp. 525 (E.D. Pa. 1982) (applying Pennsylvania law).

223. McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 903 (Tex. App. 1991).

224. Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).

225. Solove, *Taxonomy*, *supra* note 154, at 537.

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involves "a comparison between the information revealed and the nature of the activity or event that brought the plaintiff to public attention."[226]

Courts should pull from the law of defamation to conduct this examination. The plaintiff will fall into one of four categories: (1) a public official, (2) an all-purpose public figure, (3) a limited public figure, or (4) a private person. Public officials are those "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[227] An all-purpose public figure is one who has "achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."[228] A limited public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[229] Anyone who does not fall into one of these three categories is de facto classified as a private person.

A plaintiff who qualifies as a private person will receive the most privacy protection, and information disclosed about a private person is the least likely to be deemed newsworthy. A plaintiff who qualifies as a public official or public figure, whether all-purpose or limited, will receive less privacy protection than a private person because information about him is most likely to be of public concern. Most important in this analysis is how the status of the plaintiff is relevant to the information disclosed.

Courts should then examine whether there is some nexus between the matter ostensibly of public concern and the plaintiff's private information.[230] Not all information disclosed about a public official or public figure should be of public concern. Information related to the character or qualifications of a public official, or information related to the public figure's public life, should be of public concern. But certain information—social security numbers or private photos, for example—should not qualify as a public concern.[231] Similarly, not all information about a public figure is related to that individual's public life. A court should ask whether there is a close nexus between the information disclosed and the individual's public life. If there is not a close nexus, the court should give the same protection that it would give to a private person. A plaintiff who qualifies as a private person should receive the greatest

226. Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 484 (Cal. 1998).

227. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

228. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).

229. *Id.*

230. *Shulman*, 955 P.2d at 484.

231. *See* Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 841–42 (C.D. Cal. 1998) (finding that the broadcast of a video recording of sexual relations between a famous actress and a rock star was not a matter of legitimate public concern).

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amount of protection, because his or her information is the least likely to be of public concern.[232]

Courts should examine each of these factors where it is appropriate, and give each factor its necessary weight based on the context of each unique case. No one factor is dispositive in this analysis, and courts should balance the factors against the defendant's right to free speech. In sum, while this element accounts for the public's right to know about information of public concern, applied correctly, it should leave room to protect the plaintiff's private life.[233]

Adopting the public-disclosure tort in this manner will provide a much-needed civil remedy for victims of revenge porn in North Carolina. For example, a teenager involved in the recent North Carolina incident of disclosure could bring a claim against the individual who published his or her image on Instagram. The teenager would be able to prove all of the elements required by the tort and would likely recover damages against the publisher.

IV. OVERCOMING FIRST AMENDMENT CONCERNS

Those who criticize the public-disclosure tort typically raise concerns about its effect on free speech protected by the First Amendment.[234] Despite scholarly criticism, the public-disclosure tort has continued to expand across the nation,[235] and many scholars defend the tort for its ability to specifically address the harms caused by the disclosure of private

232. RESTATEMENT (SECOND) OF TORTS § 580B cmt. a (AM. LAW INST. 1977) (explaining that a plaintiff who is a private person does not have to prove the same level of fault as a public official or a public figure in the context of defamation).

233. *See* Hall v. Post, 372 S.E.2d 711, 719 (N.C. 1988) (Frye, J., concurring).

234. *See, e.g.*, Erwin Chemerinsky, *Protecting Truthful Speech: Narrowing the Tort of Public Disclosure of Private Facts*, 11 CHAP. L. REV. 423 (2008) (arguing that civil liability for disclosure is objectionable under the First Amendment because truthful speech should not be censured); Richard A. Epstein, *A Taste for Privacy? Evolution and the Emergence of a Naturalistic Ethic*, 9 J. LEGAL STUD. 665 (1980) (arguing that erasing the disclosure tort might be best because of its constitutional problems and because it gives courts the function of deciding the weight and significance of true information about a plaintiff); Zimmerman, *Requiem*, *supra* note 170, at 291 (arguing that the disclosure tort should be ended, as its constitutional problems are overwhelming, and that if it does continue, the meaning of private information and newsworthiness would have to be severely limited).

235. Jared A. Wilkerson, *Battle for the Disclosure Tort*, 49 CAL. W. L. REV. 231, 266–67 (2013) (noting the continued expansion of the public-disclosure tort, despite related scholarly criticism); John A. Jurata, Jr., Comment, *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 509 n.132, 510 n.139 (1999) (noting that from 1993 to 1999 alone, at least twenty-one plaintiffs prevailed, while only eighteen had prevailed prior to 1980).

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information.[236] Although the public-disclosure tort does implicate First Amendment issues, North Carolina courts are capable of balancing First Amendment interests against the interests of privacy.[237] Accordingly, North Carolina should not be deterred from adopting the public-disclosure tort for fear of First Amendment concerns.

Prior to the 1960s, tort-based lawsuits were considered private state actions that did not implicate First Amendment scrutiny.[238] In 1964, the United States Supreme Court's decision in *New York Times Co. v. Sullivan*[239] changed this, and tort law that placed restrictions on speech became subject to constitutional scrutiny.[240] Not long after *New York Times*, the Supreme Court decided a line of cases that held that imposing civil liability for speech would require a heightened standard of constitutional scrutiny.[241]

In *Time, Inc. v. Hill*,[242] the Supreme Court applied constitutional scrutiny to the false-light tort.[243] About a decade later, the Court first addressed the public-disclosure tort in *Cox Broadcasting Corp. v. Cohn*.[244] In *Cox Broadcasting*, the Court simply reiterated that it is unconstitutional to find liability for truthful speech by the press where the information is part of the public record.[245] The Court declined to hold that the public disclosure of private facts required proof of falsity, or that tort liability for truthful speech is per se unconstitutional.[246] With several opportunities to declare the public-disclosure tort unconstitutional, the Court has declined to

236. Solove, *Virtues*, *supra* note 173, at 1025–28 (describing how the public-disclosure tort can adapt to the digital age); Zimmerman, *New Privacy*, *supra* note 122, at 114 (arguing that the balance struck between privacy torts and the First Amendment is sufficient to address complicated privacy problems in the digital age).

237. *See Hall*, 372 S.E.2d at 719 ("I do not believe that the media should be given a license to pry into the private lives of ordinary citizens and spread before the public highly offensive but very private facts without any degree of accountability. Such is not required by either the federal or state constitutions.") (Frye, J., concurring).

238. *See* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1658 (2009).

239. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

240. *Id.* at 277.

241. *See* Solove & Richards, *supra* note 238, at 1658–60 (discussing these cases).

242. Time, Inc. v. Hill, 385 U.S. 374 (1967).

243. *Id.* at 390–91 (holding that the "actual malice" standard in *Sullivan* also applied to the tort of false light, requiring the plaintiff to prove that the defendant acted with "actual malice" by either knowingly making a false statement or acting recklessly with regard to the truth).

244. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495–96 (1975).

245. *Id.*

246. *Id.*; *see also* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1197 (2005).

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do so, making it clear that each ruling has only applied to the specific facts of each case.[247]

If anything, the Supreme Court has expanded its protection of privacy interests. In *Bartnicki v. Vopper*,[248] the Court recognized the possibility that privacy could trump newsworthiness concerns in certain contexts.[249] The Court partially struck down a provision in the Electronic Communications Privacy Act that made individuals liable for disclosing information that they knew was obtained by an illegal wiretap.[250] Justice Breyer, in a concurring opinion, emphasized that the laws must strike a "reasonable balance between their speech-restricting and speech-enhancing consequences."[251] At the outset, the Court acknowledged that the case presented a conflict between two "interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."[252] The Court emphasized that "the fear of public disclosure of private conversations might well have a chilling effect on private speech," acknowledging that privacy laws also protect First Amendment freedoms.[253]

The Court implicitly endorsed the balancing of free speech and privacy interests, reiterating that information of public concern tips the scales in favor of free speech.[254] A common criticism of the balancing between these two interests is that the Constitution protects speech, not privacy.[255] But Justice Breyer asserts in *Bartnicki* that the conflict posed between speech and privacy is a conflict between two rights of constitutional stature.[256] Given these two competing interests, Justice

247. *See* Chemerinsky, *supra* note 234, at 653–56 (describing the Supreme Court's narrow decision addressing disclosure of private, true information).

248. Bartnicki v. Vopper, 532 U.S. 514 (2001).

249. *Id.* at 532; *see also* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1045–48 (2009).

250. *Bartnicki*, 532 U.S. at 533–35.

251. *Id.* at 536 (Breyer, J., concurring).

252. *Id.* at 517 (majority opinion).

253. *Id.* at 533.

254. *Id.* at 534 ("In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance."). In a concurring opinion, Justice Breyer emphasized that the information published was of "unusual public concern" because there was a threat of potential harm to others. *Id.* at 535–36 (Breyer, J., concurring).

255. *See* Solove, *Virtues*, *supra* note 173, at 994–95.

256. *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring); *see also* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1150 (2002) (noting the conflict between speech and privacy as outlined in *Bartnicki*). In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court

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Breyer asserted, the Court must strike "the proper fit."[257]

As the California approach demonstrates, striking "the proper fit" is a product of strict judicial scrutiny of the evidence as a matter of law and jury determinations based on an application of three factors. North Carolina courts should empower the jury to analyze the newsworthiness of a disclosure by examining the three factors, while giving the court the discretion, as a matter of law, to decide how those three factors are balanced against the defendant's First Amendment rights.[258] Moreover, requiring the plaintiff to prove reckless disregard as to the offensiveness of the publication provides additional protection to free speech. As the California courts have done, when the two interests are evenly balanced, the court should tip the scales in favor of the First Amendment to preserve breathing room for free speech.

Indeed, North Carolina courts already must navigate the First Amendment analysis in many areas where speech is involved, including in the defamation and IIED contexts. The vast majority of states that recognize the public-disclosure tort confront the First Amendment analysis on a case-by-case basis rather than reject the tort entirely.[259] Courts need not decline recognition for fear of constitutional scrutiny; rather, they should carefully balance the First Amendment and privacy interests to find the proper fit in each case.

CONCLUSION

Adopting the public-disclosure tort in North Carolina will not only fill existing privacy gaps, it will also deter harmful disclosures of private information in the future. This tort offers the North Carolina teenagers who were recently harmed by the publication of their private photographs a meaningful remedy.[260] As these types of injuries arising from the public disclosure of true, but private, facts increase in the digital age, the tort of

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recognized that the "right to privacy" based on substantive due process also encompassed the "individual interest in avoiding disclosure of personal matters." *Id.* at 598–99.

257. *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997)).

258. *See* Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 488 (Cal. 1998) (finding published information newsworthy as a matter of law); Hall v. Post, 372 S.E.2d 711, 720 (N.C. 1988) (Frye, J., concurring) ("[T]he chilling effect is minimized if the question of whether the published material is of legitimate concern to the public is initially a question of law for the trial court.").

259. *See supra* note 27 (listing each state's stance on the tort).

260. *See supra* notes 12–15 and accompanying text.

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public disclosure of private facts provides the best way to control the spread of these injuries.

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