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REVENGE PORN, STATE LAW, AND FREE SPEECH

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The ease of access to the Internet, coupled with the modern practice of sharing intimate digital photos between lovers, has given rise to a disturbing new trend known colloquially as "revenge porn"—that is, the nonconsensual posting of images that were originally given to another with the implied expectation of confidentiality. That act involves a deep personal betrayal and can inflict serious emotional damage on the person whose image has been shared, sometimes resulting in grave consequences to the victim. And once those images reach the Internet, they are often circulated widely; the victims retain no control over who may view or share them.

This Article explores the types of laws that victims could use to seek justice, and it identifies relevant hurdles to relief. Several state tort laws, such as invasion of privacy, false light portrayal, defamation, and intentional infliction of emotional distress, could be used to combat revenge porn. Contract law may also provide a remedy through breach-of-implied-agreement claims or the collateral doctrine of promissory estoppel. Some states have recently gone so far as to enact criminal statutes penalizing the practice of revenge porn, focusing on the victim's lack of consent. Of course, the mere existence of a criminal law does not guarantee its enforcement, and such laws do not offer victims the possibility of being awarded damages. Moreover, as of yet, there have been no successful prosecutions under these statutes, so we do not know how they will be construed or will fare in court.

There are obstacles that a revenge porn victim must overcome. A defendant's likely defense of consent could nullify such claims. In addition, the First Amendment Free Speech Clause will be said to impose an obstacle if a revenge porn victim seeks civil relief or if the government initiates a criminal prosecution. In fact, some would

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contend that no tort suit or prosecution could ever be successful. The argument would be that the First Amendment protects an individual against civil or criminal liability for publishing a lawfully obtained image honestly depicting the photographer's subject, regardless of how unflattering the photograph may be or the effect that publication may have on the subject.

This Article, however, explains why consent and First Amendment defenses should be unsuccessful. Ultimately, the Article maintains, the law must adapt to the "selfie" and "sexting" generation in order to provide meaningful relief to individuals whose well-intentioned—albeit ill-advised—attempts at flirtation achieve perpetual—and unwanted—fame and notoriety on the Internet. Intimate photographs are shared under circumstances giving rise to an implied agreement of confidentiality between the parties, and the Free Speech Clause does not shield a recipient against his broken promise not to share a photograph with others. Imposing tort and criminal liability on someone who breaches an agreement of confidentiality will not chill protected speech. It will only encourage people to keep their word.

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I. INTRODUCTION: THE PHENOMENON OF REVENGE PORN

Like an elephant, the Internet never forgets. Information potentially lives in "the cloud" forever.[1] That is good if you are looking for an obscure music video or film clip. That is bad if your high school posts your freshman-year class photo. That is horrible if someone posts a compromising picture of you. Internet images have the half-life of Tellurium-128.[2] It also is difficult, if not impossible, to delete information from the Internet, even with the consent of the party who posted it and the help of the site on which it sits, because the zeroes and ones may exist in a cache owned by a search engine such as Ask, Google, or Yahoo![3] Information also may reside in the server of a firm that collects and sells customer information.[4] In fact, some companies, such as Spokeo or DoubleClick, specialize in "data aggregation"—that is, the scouring of social media websites, such as Facebook, for personal information about users and the sale of that information to a company that uses it to offer you particular goods or services.[5] In an age when 2.8 billion people are connected to the Internet[6] and "you are what Google says you are,"[7] the permanence of unflattering information about us on the Internet poses a troubling prospect for us all.

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1. *See, e.g.*, Alex Kozinski, *The Dead Past*, 64 STAN. L. REV. ONLINE 117 (2012), http://www.stanfordlawreview.org/sites/default/files/online/topics/64-SLRO-117.pdf.

2. Tellurium-128 has the longest half-life of any known radioactive isotope, approximately 2.2 septillion years (2.2×10^{21} years). *See Isotope Data for Tellurium 128*, PHOTOGRAPHIC PERIODIC TABLE, http://periodictable.com/Isotopes/052.128/index2.p.full.dm.html (last visited Aug. 21, 2014).

3. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 234–35 n.1 (2007).

4. *See* Anton Troianovski, *Phone Firms Sell Data on Customers*, WALL ST. J., May 21, 2013, http://online.wsj.com/article/SB10001424127887323463704578497153556847658.html.

5. *See, e.g.*, LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID 21–24 (2011). For a recent White House report on the collection of data from private parties, see JOHN PODESTA ET AL., EXEC. OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUE (2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

6. *See Internet Usage Statistics*, INTERNET WORLD STATS, http://www.internetworldstats.com/stats.htm (last updated Dec. 31, 2013).

7. Megan Angelo, *You Are What Google Says You Are*, WIRED.COM (Feb. 11, 2009), http://www.wired.com/2009/02/you-are-what-go/.

The ability for someone to start life over, to reinvent or reboot oneself, offers us a valuable opportunity for a fresh start. It enables us to avoid being chained to our mistakes like Jacob Marley.[8] In order for that opportunity truly to be effective, however, we must be able to leave some of our past behind. Today, that is a difficult feat to accomplish in the United States, given the First Amendment[9] (although it soon may become less difficult in the European Union[10]). Information on the Internet is available for a far longer period than when only the spoken or written word could damage our

8. *See, e.g.*, Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 15, 18 (Saul Levmore & Martha C. Nussbaum eds., 2010) ("People want to have the option of 'starting over,' of reinventing themselves throughout their lives. . . . In the past, episodes of youthful experimentation and foolishness were eventually forgotten, giving us an opportunity to start anew, to change, and to grow. But with so much information online, it is harder to make these moments forgettable. People must now live with the digital baggage of their pasts."); Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1112 (2002) ("American society is and has been a society of extreme mobility, in every sense of the word: social, economic, geographical. Mobility has meant freedom; mobility has been an American value. People often moved from place to place; they shed an old life like a snake molting its skin. They took on new lives and new identities. They went from rags to riches, from log cabins to the White House. American culture and law put enormous emphasis on second chances." (footnotes omitted)).

9. For the argument that there should be a limited right to be forgotten under American law, see Robert Kirk Walker, *The Right to Be Forgotten*, 64 HASTINGS L.J. 257 (2012). For some baby steps in that direction, see *United States v. Ganias*, 755 F.3d 125 (2d Cir. 2014) (ruling that when the government copies a computer hard drive pursuant to a warrant-authorized search, it cannot indefinitely retain and later use copied information that is not responsive to the search warrant).

10. Over the past few years, the European Community has moved toward creation of a right to start over digitally, a right to be forgotten or at least to edit one's past. *See, e.g.*, *Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 9 COM (2012) 11 final (Jan. 25, 2012), *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf; Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012); Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, 36 HARV. J.L. & PUB. POL'Y 605 (2013); Paul M. Schwartz, *The E.U.-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966 (2013). On May 13, 2014, the European Court of Justice ruled that an individual can compel search engines such as Google to remove reputation-damaging information. *See* Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (May 13, 2014), http://curia.europa.eu/juris/liste.jsf?num=C-131/12. It remains to be seen whether that judgment will enable victims of revenge porn to demand that search engines remove unwanted photographs from their files accessible only from computers within the European Union or worldwide. That decision is in line with the law of the European Union in related fields. *See* Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1146 (2014) (noting that the European nations "do not extend the freedom of expression of hate speech, Holocaust denial, or even the selling of Nazi paraphernalia on Yahoo and eBay" (footnotes omitted)).

reputation or disclose our private affairs.[11] The permanence of information on the Internet carries a past insult or injury forward, potentially forever, making an original sin into an eternal one.[12]

American law has never recognized a "right to be forgotten" in part because, before the last few decades, no such right was ever necessary. Before the digitalization of photography and the advent of the Internet, the transaction costs of sharing information limited its distribution to those few recipients that average people chose themselves.[13] Only celebrities—presidents, movie stars, professional athletes, and the like—were at risk of having their everyday exploits and activities photographed and shown to the world.[14] But that day is gone forever. Scott McNealy of Sun Microsystems once stated that "[y]ou already have zero privacy. Get over it."[15] Many observers, regretfully, agree with him.[16] We may not yet reside in Marshall McLuhan's "global village"[17] (or in George Orwell's Hades-like version of it),[18] but the ubiquity of camera-equipped cell phones and

11. Judge (later Justice) Benjamin Cardozo once made that point in connection with the written word. "What gives the sting to writing is its permanence in form. The spoken word dissolves, but the written one abides and 'perpetuates the scandal.'" Ostrowe v. Lee, 175 N.E. 505, 506 (N.Y. 1931). Scandals recorded digitally can last even longer and be more widely available to future generations.

12. "[I]n today's world, foolish deeds are preserved forever on the Internet." SOLOVE, *supra* note 3, at 42. "Internet shaming creates an indelible blemish on a person's identity. Being shamed in cyberspace is akin to being marked for life. It's similar to being forced to wear a digital scarlet letter or being branded or tattooed. People acquire permanent digital baggage. They are unable to escape their past, which is forever etched into Google's memory." *Id.* at 94. That problem is exacerbated when an unflattering picture is the only information widely available. People who know someone well can measure the significance of a particular mistake against whatever else they know about that person's personality, character, and accomplishments. That is impossible if someone is defined across the Internet by one story or image. *See, e.g.*, JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 8–9 (2006) (inaccurate stereotypes are likely to stem from this, potentially ruining a person's reputation, just like what happened to Monica Lewinsky when it was discovered she sent the President a book about phone sex).

13. *See, e.g.*, Woodrow Hartzog & Evan Selinger, *Big Data in Small Hands*, 66 STAN. L. REV. ONLINE 81, 81 (2013).

14. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 859–62 (5th ed. 1984) (discussing common law right to discuss public figures and matters of public importance).

15. Solove, *supra* note 8, at 19–20.

16. *See, e.g.*, SIMSON GARFINKLE, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY (2000); CHARLES SYKES, THE END OF PRIVACY (1999); REG WHITAKER, THE END OF PRIVACY (2000).

17. *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (W. Terrence Gordon ed., Gingko Press 2003) (1964).

18. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Alfred A. Knopf 1987) (1948).

the ease of uploading photographs or videos onto the Internet means that now we all face the risk of being made into a celebrity, like it or not. What happens in Vegas may stay in Vegas, but not what appears on Facebook.[19]

Recently, women have found themselves in that predicament in a particularly infuriating and odious way.[20] As if trying to prove the maxim that "Men are pigs," a punch line that has launched a thousand sitcoms (and, some would say, defames our porcine friends), men have posted on the Internet photographs of naked former wives and girlfriends, sometimes in intimate positions or activities.[21] Recipients sometimes take the images with the consent of the subject, but perhaps 10 percent of these images are taken surreptitiously.[22] Far more often than not, however, the victims themselves are the photographers, taking what are colloquially known as "selfies."[23] Some would-be *Playboy* publishers have even

19. ANDREWS, *supra* note 5, at 5. For examples of average members of the public involuntarily made into "Internet stars" and the personal trauma that they suffered from their new status, see SOLOVE, *supra* note 3, at 1–2, 38–48.

20. Women are the principal—but not the exclusive—victims of revenge porn. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 353 (2014) (reporting the results of a survey that ninety percent of those victimized by revenge porn were female). I will use the feminine gender for pronouns in this essay unless the context dictates otherwise.

21. One website has described the phenomenon as follows:

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

Mary Anne Franks, *Revenge Porn: A Quick Guide*, ST. INNOVATION EXCHANGE, http://alicelaw.org/uploads/asset/asset_file/1979/Criminalizing_Revenge_Porn_Quick_Guide.pdf (last visited Aug. 21, 2014). *See also, e.g.*, Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. MAG. (July 21, 2013), http://nymag.com/news/features/sex/revenge-porn-2013-7/.

22. *See* Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 424 n.9 (2014). That conduct may violate so-called "Peeping Tom" statutes. Peeping Tom laws prohibit someone from peeping through doors, windows, or similar openings for the purpose of invading the privacy of the parties inside. The term originates from an English legend. A young man named Tom supposedly gawked at Lady Godiva as she rode naked on a horse in the city of Coventry to protest taxation. For his crime, the authorities blinded Tom.

23. Some commentators have estimated that perhaps 80 percent of revenge porn victims took "selfies." *See* Christina Jedra, *Millenials Deal with Consequences of 'Revenge Porn'*, USA TODAY, Oct. 5, 2013, http://www.usatoday.com/story/news/nation/2013/10/05/college-students-revenge-porn/2927337/; Heather Kelly, *New California 'Revenge Porn' Law May Miss Some*

gone so far as to identify the person in the photo and provide her online or real-life contact information.[24] That practice—posting intimate photographs of naked exes—is colloquially known as "involuntary pornography" or, more maliciously but perhaps more accurately, "revenge porn."[25]

Victims, CNN (Oct. 3, 2013), http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/.

24. The phenomenon began in 2010 with the launch of a now-defunct submission-based website called IsAnyoneUp by Hunter Moore. Moore supposedly came up with the idea when he repeatedly received nude photographs from a woman. Moore created the website, posted the images to it, and offered the web-browsing public the opportunity to post images. *See* Camille Dodero, *Hunter Moore Makes a Living Screwing You*, VILLAGE VOICE, Apr. 4, 2012, http://www.villagevoice.com/2012-04-04/news/revenge-porn-hunter-moore-is-anyone-up/; Dylan Love, *It Will Be Hard to Stop the Rise of Revenge Porn*, BUS. INSIDER (Feb. 8, 2013, 7:00 PM) http://www.businessinsider.com/revenge-porn-2013-2; Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web's Vilest Entrepreneur, Be Stopped?*, BETABEAT (Dec. 4, 2012), http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/. The federal government subsequently charged Moore with a violation of a federal statute designed to prevent computer hacking. *See infra* note 37.

25. Commentators have written extensively on this subject in the Blogosphere, *see, e.g.*, *infra* note 26, but books and academic or professional journals have only begun to discuss it. *See, e.g.*, Anupam Chander, *Youthful Indiscretion in an Internet Age*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION, *supra* note 8, at 124; DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Saul Levmore & Martha C. Nussbaum, *Introduction*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION, *supra* note 8, at 9; SOLOVE, *supra* note 3, at 98; Citron & Franks, *supra* note 20; David Gray et al., *Fighting Cybercrime After* United States v. Jones, 103 J. CRIM. L. & CRIMINOLOGY 745, 794 (2013); Levendowski, *supra* note 22; Casey Martinez, Note, *An Argument for States to Outlaw 'Revenge Porn' and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims*, 14 U. PITT. J. TECH. L. & POL'Y 236 (2014); Lorelei Laird, *Victims Are Taking On 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, ABA JOURNAL (Nov. 8, 2013), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/.

A closely related phenomenon is "sexting": the practice, often done by minors, of taking sexually suggestive or explicit text messages or images and transmitting them to someone else by a cell phone or over the Internet. *See* Sara Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 687 (2010); David Rosen, *Sexting: The Latest Innovation in Porn*, COUNTERPUNCH (Mar. 29, 2005), http://www.counterpunch.org/2009/03/25/sexting-the-latest-innovation-in-porn/ (describing sexting as "a post-modern form of flirting, a game of sexual show & tell"). The practice is not an isolated phenomenon. *See* Wastler, *supra*, at 691 n.26 (collecting news articles about the phenomenon). Studies have estimated that between 30 and upwards of 60 percent of teenagers have sent or received such a text message. *See* Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN. ST. L. REV. 135, 140–41 (2010). Aside from the revenge porn issues that sexting raises, there is the additional problem that, if a minor is the subject, persons involved in the transmission of the image could be prosecuted for the distribution of child pornography. *See, e.g.*, Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (granting a preliminary injunction against prosecuting a minor for sexting under the state's child pornography laws), *aff'd sub nom.* Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010); Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to*

Far from being a cyberspace practical joke, revenge porn has generated considerable outrage.[26] The posting of such images on a website has seriously harmed some victims by leading to a debilitating loss of self-esteem, crippling feelings of humiliation and shame, discharge from employment, verbal and physical harassment, and even stalking.[27] Those harms are multiplied if, to use the

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Juvenile Self-Sexual Exploitation, 15 VA. J. SOC. POL'Y & L. 1 (2007); Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357 (2010); Wastler, *supra*, at 693–701 (discussing statutory interpretation and constitutional issues raised by prosecuting a minor for sexting of selfies); Ellen Goodman, *Is 'Sexting' Same as Porn?*, BOS. GLOBE, Apr. 24, 2009, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/04/24/is_sexting_same_as_porn/; Chris Matyszczyk, *Teen Charged With Child Porn for Allegedly Tweeting Nude Selfies*, CNET (Feb. 9, 2014, 8:11 AM), http://www.cnet.com/news/teen-charged-with-child-porn-for-allegedly-tweeting-nude-selfies/; Karen Seidman, *Child Pornography Laws 'Too Harsh' to Deal With Minors Sexting Photos Without Consent, Experts Say*, NAT'L POST, Nov. 16, 2013, http://news.nationalpost.com/2013/11/16/child-pornography-laws-too-harsh-to-deal-with-minors-sexting-photos-without-consent-experts-say/.

Finally, there are a variety of other similar types of activities on the Internet, such as listing plaintiffs in medical malpractice lawsuits, identifying parties who violate express lane minimum occupancy rules, or identifying physicians who perform abortions. *See* Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc); SOLOVE, *supra* note 3, at 98–101. Those practices raise many of the same important tort law and First Amendment issues that are discussed in this Article. Those practices, however, are beyond the scope of this Article.

26. *See, e.g.*, SOLOVE, *supra* note 3, at 183–84; Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, SLATE (Sept. 25, 2013, 6:21 PM), http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html; The Editors, *Tackling the Menace of Revenge Porn*, BLOOMBERG VIEW (Oct. 13, 2013, 6:00 PM), http://www.bloomberg.com/news/2013-10-13/tackling-the-menace-of-revenge-porn.html; Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013), http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9; Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, TECH. & POL'Y L. BLOG (Feb. 9, 2013), http://blog.ericgoldman.org/archives/2013/02/what_should_we.htm; Neal Karlinsky et al., *FBI Investigates 'Revenge Porn' Website Founder*, ABC NEWS (May 22, 2012), http://abcnews.go.com/Technology/fbi-investigates-revenge-porn-website-founder/story?id=16405425#.ULVO1uOe_6B; Love, *supra* note 24; Amanda Marcotte, *How to Fight Revenge Porn? Make It a Crime*, SLATE (Sept. 24, 2013), http://www.slate.com/blogs/xx_factor/2013/09/24/revenge_porn_is_domestic_abuse_it_should_be_a_crime.html; Maureen O'Conner, *The Crusading Sisterhood of Revenge-Porn Victims*, N.Y. MAG (Aug. 29, 2013, 8:00 AM), http://nymag.com/thecut/2013/08/crusading-sisterhood-of-revenge-porn-victims.html.

27. 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?hp&_r=1& ("The effects can be devastating. Victims say they have lost jobs, been approached in stores by strangers who recognized their photographs, and watched close friendships and family relationships dissolve. Some have changed their names or altered their appearance. 'Sometimes I want to get into a fetal position and cry,' said [a victim] who added that she gave up her job at a restaurant and was stalked by a man who sat outside her house in a car."); *see also, e.g.*, Chander, *supra* note 25, at 126.

vernacular, the images "go viral" and are repeatedly circulated across the Internet and from cell phone to cell phone. Some young women have committed suicide after being victimized by the widespread distribution of their nude pictures or, in one case, being tormented by fellow high school students.[28]

Other victims have fought back.[29] Some have asked websites to remove offending photographs on the ground that victims have a copyright in the images, which the website violates by posting them without their consent.[30] Some websites have complied, but not all. In response, victims have filed damages actions against websites that have refused to delete the images.[31] Those lawsuits, however, have generally been unsuccessful.[32] The principal obstacle is section 230 of the Communications Decency Act of 1996,[33] which provides that a website cannot be treated as "the publisher or speaker" of material

28. *See California Moves to Ban "Revenge"/"Hate" Porn*, MR. CONSERVATIVE (June 6, 2013), http://www.mrconservative.com/2013/06/18520-california-moves-to-ban-revengehate-porn/. In April 2013, three boys sexually assaulted a 15-year-old girl at a party and later posted pictures of the attack on the Internet. The girl later committed suicide. "According to the family, it wasn't the sexual assault, but the later humiliation that drove her to take her life. The three boys were arrested, but that was too little, too late." *Id*.; Chander, *supra* note 25, at 126.

29. Holly Jacobs, a victim of revenge porn, founded an organization called "End Revenge Porn" to help end this practice, as well as a support group for other victims, "Women Against Revenge Porn." *See* END REVENGE PORN, http://www.endrevengeporn.org/ (last visited Aug. 21, 2014); WARP, http://www.womenagainstrevengeporn.com/ (last visited Aug. 21, 2014). Another online organization, Without My Consent, offers advice to revenge porn victims (and others). *See* WITHOUT MY CONSENT, http://www.withoutmyconsent.org/ (last visited Aug. 21, 2014). Reasoning that two can play this game, some women have responded in kind by allowing women to post critical reviews of men. *See* Solove, *supra* note 8, at 17 ("Another site, Don't Date Him Girl, invites women to post complaints about the men they have dated, along with real names and actual photographs."); Deborah Schoeneman, *What's He Really Like? Check the Lulu App*, N.Y. TIMES, Nov. 20, 2013, http://www.nytimes.com/2013/11/21/fashion/social-networking-App-allows-women-to-rate-men.html?_r=0 (describing "a new, female-friendly social networking app that lets women anonymously review men who are their Facebook friends").

30. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at scattered sections of Title 17 and 28 U.S.C. § 4001 (2006)).

31. *See, e.g.*, *Women Sue Revenge Porn Website*, CNN (Jan. 24, 2013), http://www.cnn.com/video/?/video/us/2013/01/25/pkg-revenge-porn-website.ktvt&iref=allsearch.; Laird, *supra* note 25; Jessica Roy, *Victims of Revenge Porn Mount Class Action Suit Against GoDaddy and Texxxan.com*, BETABEAT (Jun. 7, 2013, 11:29 PM), http://betabeat.com/2013/01/victims-of-revenge-porn-mount-class-action-suit-against-godaddy-and-texxxan-com/.

32. Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, JOLT DIG. (May 28, 2013), http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters.

33. Section 230 was part of the Communications Decency Act of 1996, which in turn was Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified, as amended, at 47 U.S.C. § 230 (2012)).

posted online by someone else.[34] Section 230 does not literally grant a website immunity for posting revenge porn, but it has that effect as a practical matter as long as the website does not edit or revise posted material.[35] Ironically, Congress enacted section 230 in order to encourage the free exchange of ideas over the Internet and to encourage websites voluntarily to monitor and *delete* obscene or offensive material, not to shelter items such as revenge porn.[36] Section 230 therefore serves as a classic example of the law of unintended consequences.[37]

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34. 47 U.S.C. § 230 (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

35. *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1099–1106 (9th Cir. 2009); Chi. Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008); Universal Commc'ns Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (collecting cases ruling that 47 U.S.C. § 230 was designed to avoid imposing liability on companies who serve as intermediaries for Internet speech); Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003); Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 984–85 (10th Cir. 2000); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); Gavra v. Google, Inc., No. 5-12-CV-06547-PSG, 2013 WL 3788241, at *2 (N.D. Cal. 2013) (dismissing defamation action against Google in reliance on section 230); SOLOVE, *supra* note 3, at 153–60. There are a few lower court decisions allowing claims to go forward against Internet service providers, but those cases involve odd fact patterns or are outliers. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165–70 (9th Cir. 2008) (en banc) (ruling that a website was not entitled to section 230 immunity because it drafted the roommate housing preference questionnaire and required answers to it); Levendowski, *supra* note 22, at 429–30.

36. *See, e.g.*, H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.); *see Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1163–64; Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003). The irony stems from Supreme Court decisions holding unconstitutional under the First Amendment Free Speech Clause provisions in the Communications Decency Act of 1996 defining "offensive" speech. *See* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 661 (2004); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 882 (1997). Those decisions have left in place the other sections of that statute enabling websites to avoid responsibility for posting the speech of others. *See, e.g.*, Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 174 (2006).

37. A few other types of statutes could be relevant here. The Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 (2012), makes it a crime (inter alia) to "hack" into someone else's computer in certain circumstances. The federal government has used that statute to charge a party who hacks into someone else's computer, copies intimate photographs, and posts them online. *See* Indictment, United States v. Moore, No. CR13-0917 (C.D. Cal. Dec. 20, 2013); *Notorious 'Revenge' Porn Site Operator Charged with Hacking*, FOX NEWS (Jan. 24, 2014), http://www.foxnews.com/us/2014/01/24/notorious-revenge-porn-site-operator-charged-with-hacking/; Jessica Roy, *Revenge-Porn King Hunter Moore Indicted on Federal Charges*, TIME (Jan. 23, 2014), http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/. For further discussion of the Hunter Moore story, see *supra* note 24. For discussions of the CFAA, see Paul J. Larkin, Jr., United States v. Nosal*: Rebooting the Computer Fraud and Abuse Act*, 8 SETON HALL CIR. REV. 257, 260 & n.11 (2012) (collecting commentaries). Hacking into someone else's computer has historically not been considered the most common way that revenge porn winds up on the Internet, so the CFAA may be of quite limited use. Nonetheless, the recent

By contrast, section 230 does not foreclose a tort action against the *individual* who posts revenge porn on a website,[38] and some victims have brought damages actions against those parties.[39] Such lawsuits, however, have met with mixed success.[40] Commentators have suggested that courts are likely to find unpersuasive invasion-of-privacy claims regarding photographs for which the subject knowingly and voluntarily posed and gave to a now-former partner.[41]

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high-profile theft and publication of nude photographs of several female celebrities, allegedly via hacking of their Apple "iCloud" accounts, has triggered an FBI investigation and could lead the Justice Department to seek charges under the CFAA. *See, e.g.*, Alan Duke, *FBI, Apple Investigate Nude Photo Leak Targeting Jennifer Lawrence, Others*, CNN (Sept. 2, 2014), http://www.cnn.com/2014/09/01/showbiz/jennifer-lawrence-photos/. In addition, federal and state laws criminalizing identity theft could be brought to bear against parties who publish identifying information about a victim. *See Alleged Revenge Porn Site Operator Heads to Trial*, YAHOO! NEWS (June 17, 2014), http://news.yahoo.com/alleged-revenge-porn-operator-heads-trial-222143331.html. Finally, some prosecutors have used the laws prohibiting extortion against individuals who post revenge porn photos and later demand a fee for them to be taken down from a website. *See id.*; *see also infra* note 48.

38. *See* 47 U.S.C. § 230(e) (2012) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section."). Finding the person who posted the photograph may take some sleuthing. For the story of how one man tracks purveyors of revenge porn as a cyber–Sherlock Holmes, see Kashmir Hill, *This Guy Hunts Down The Men Behind Revenge Porn Websites*, FORBES (Apr. 23, 2014), http://www.forbes.com/sites/kashmirhill/2014/04/23/this-guy-hunts-down-the-men-behind-revenge-porn-websites/.

39. *See, e.g.*, *Women Sue Revenge Porn Website*, *supra* note 31; Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, BETABEAT (May 1, 2013), http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case; *cf.* Lindsey Bever, *Fighting Back Against 'Revenge Porn'*, WASH. POST, Apr. 28, 2014, http://www.washingtonpost.com/news/morning-mix/wp/2014/04/28/fighting-back-against-revenge-porn/ (criminal prosecution).

40. *Compare, e.g.*, Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993) (ruling for defendant in a case involving the surreptitious recording by a former boyfriend of a woman's sexual activity, on the ground that Texas does not recognize a tort for the negligent infliction of emotional distress), *and* SOLOVE, *supra* note 3, at 119–20 (explaining that many plaintiffs in invasion-of-privacy lawsuits are unsuccessful), *with, e.g.*, Doe v. Hofstetter, Civil Action No. 11-cv-02209-DME-MJW, 2012 WL 2319052 (D. Colo. June 13, 2012) (ruling in plaintiff's favor); Taylor v. Franko, Civil No. 09-00002 JMS/RLP, 2011 WL 2746714 (D. Hawaii July 12, 2011) (same); Pohle v. Cheatham, 724 N.E.2d 655, 659–61 (Ind. Ct. App. 2000) (rejecting ex-husband's argument that his former wife's failure to seek the return of intimate pictures waived any later claim for invasion of privacy based on his publication of them); Sonia Azad, *Houston Woman Wins $500,000 in Revenge Porn Lawsuit*, ABC13 EYEWITNESS NEWS (Feb. 27, 2014), http://abc13.com/archive/9446283/.

41. *See, e.g.*, Martinez, *supra* note 25, at 238 ("[V]ictims who report or discuss these postings are often blamed and written off 'as stupid or slutty for taking the photos.'" (footnote and citation omitted)); Freddy Gray, *To Avoid Revenge Porn, Don't Let Someone Film You Having Sex*, THE SPECTATOR (Apr. 7, 2014, 3:02 PM), http://blogs.spectator.co.uk/culturehousedaily/2014/04/women-to-avoid-revenge-porn-stop-letting-men-film-you-having-sex/; Woodrow Hartzog, *How to Fight Revenge Porn*, ATLANTIC (May 10, 2013), http://www.theatlantic.com/technology/archive/2013/05/how-to-fight-revenge-porn/275759/.

In response, some legislators, believing perhaps that tort law is inadequate and seeking to up the ante on whoever posts such images, have sought to make the practice a crime. In 2004, New Jersey enacted a statute making it a crime to take or distribute a photograph of someone else, without his or her consent, when that person was involved in sexual activity or if her "intimate parts" were exposed.[42] Other states have passed similar legislation or are considering doing so.[43]

Criminalizing revenge porn could be a powerful deterrent, keeping future women from becoming potential victims. But a victim cannot file criminal charges against an ex-partner or compel the government to do so.[44] A criminal prosecution also does not offer past or future victims compensation for their injuries. Some victims may want to use a tort suit to recover damages or perhaps just to feel vindicated.

The provenance of revenge porn and victims' efforts to obtain relief from the injuries suffered through this practice highlight some of the opportunities and dangers of the Internet. On the one hand, the Internet democratizes political debate by allowing everyone to express a viewpoint to a wide audience, a privilege previously available only to newspaper or magazine publishers and radio or television station owners. On the other hand, the opportunity poses the risk that false, inflammatory, or tortious speech can circulate not only widely but also potentially forever, because the Internet does not have intermediaries—editors, publishers, and so forth—to screen out unfounded, undesirable, or juvenile speech. What is more, speakers can express themselves while remaining anonymous and therefore, unlike traditional media entities, unaccountable.[45] Congress likely did not foresee that problem in 1996 when it passed section 230 of the Communications Decency Act. Various commentators have criticized that law on the ground that it

42. *See infra* notes 143–47 and accompanying text.

43. *See infra* notes 145–57 and accompanying text; Trevor Hughes, *Aim, Shoot, Regret: States Move to Ban 'Revenge Porn'*, USA TODAY, May 8, 2014, http://www.usatoday.com/story/news/nation/2014/05/08/states-banning-revenge-porn/8770141/.

44. Prosecutors have discretion to select which cases to prosecute as long as they do not rely on an invidious or irrational factor, such as race. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996).

45. *See, e.g.*, Saul Levmore, *The Internet's Anonymity Problem*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION, *supra* note 8, at 51–65.

immunizes far more conduct—such as defamation, harassment, bullying, and the like—than Congress intended and that the statute should permit the same notice-and-takedown procedure currently available to copyright holders[46] or should impose liability on recalcitrant websites.[47] To date, however, Congress has not yet seen fit to accept any of those suggestions.

Yet, there may already be opportunities for relief under state law that victims have not fully exploited. That is the burden of this Article. The problem of revenge porn is not only an important one, but also is one that could not have arisen until the Internet came on stream. Like other technological developments that have the potential to benefit or harm residents of contemporary society (railroads, motor vehicles, aircraft, and pharmaceuticals come to mind), the Internet poses new challenges for tort, contract, and criminal law. The courts should consider whether the Internet's ability to inflict massive and permanent reputational and psychological harm on someone for a mistaken judgment—or worse, betrayal—requires that old doctrines be modified to account for this new harm. The states can shape tort, contract, and criminal law to accommodate new technologies and the new injuries they can inflict. Part II argues that state law ought to recognize a civil or criminal remedy for the betrayal of trust that discloses highly intimate information or images. Part II.A discusses contract law as a background to tort and criminal law. Part II.B analyzes state tort law. Part II.C summarizes the new state laws making revenge porn a crime. The conclusion of Part II is that state law can and should provide redress to victims. Part III then shows why the First Amendment Free Speech Clause does not foreclose recognizing a civil or criminal remedy for revenge porn.

46. *See* 17 U.S.C. § 512(c) (2012).

47. *See, e.g.*, Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J. L. & GENDER 383 (2009); Levmore & Nussbaum, *supra* note 45, at 51, 64–65; Solove, *supra* note 8, at 24–27; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293 (2011); Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, YALE L.J.F. (Sep. 9, 2007), http://www.yalelawjournal.org/forum/regulating-cyberbullies-through-notice-based-liability; Nancy Kim, *Imposing Tort Liability on Websites for Cyber-Harassment*, YALE L.J.F. (Dec. 15, 2008), http://www.yalelawjournal.org/forum/imposing-tort-liability-on-websites-for-cyber-harassment.

II. STATE LAW

Tort law is a natural starting point for someone seeking relief from revenge porn.[48] A tort action for damages is the traditional

48. Copyright law might be another potential source of relief. *See* Levendowski, *supra* note 22, at 439–46. Copyright law, however, tells a good news–bad news story.

The good news: The English common law appeared to recognize a nonstatutory right to copyright protection as long as a book was not "published to the world," although the matter is not free from doubt. *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834). Regardless of whether the common law recognized a cause of action, Parliament eventually did. *See* Statute of Anne, 8 Ann., c. 19 (1710). Of course, photography did not exist at common law, but once it came on stream Congress amended the copyright laws in order to protect photographs and films. *See, e.g.*, Act of March 3, 1865, ch. 126, 13 Stat. 540 (recognizing a copyright in a photograph); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56–58 (1884); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 854 (5th Cir. 1979) (recognizing copyright in an "obscene" film); Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 141–44 (S.D.N.Y. 1968) (ruling that the Zapruder film of the Kennedy assassination is protected by copyright); Jewelers' Circular Publ'g Co. v. Keystone Publ'g Co., 274 F. 932, 934–35 (S.D.N.Y. 1921) (Learned Hand, J.), *aff'd*, 281 F. 83 (2d Cir. 1922); *cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (commercial illustration protected). Copyright law still protects photographs and films today. *See* 17 U.S.C. §§ 101, 102(a)(5) (2006) ("photographs" are protected as being "pictoral, graphic, and sculptural works"); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 712–26 (2012) (discussing development of photograph protection). Finally, while copyright law may protect potentially obscene images, *see* Jartech, Inc. v. Clancy, 666 F.2d 403, 406 (9th Cir. 1982); *Mitchell Bros.*, 604 F.2d at 854–58, nudity is not per se obscene, *see* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (holding that "nudity alone is not enough to make material legally obscene" under *Miller v. California*, 413 U.S. 15 (1973)).

The bad news: Federal law preempts any state common-law copyright action. Copyright Act of 1976, Pub. L. No. 94-553, § 301, 90 Stat. 2541 (codified, as amended, at 17 U.S.C. § 101 (2006)); *see* Ralph S. Brown, Jr., *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. Rev. 1010 (1977). A victim of revenge porn therefore is unlikely to prevail on a common-law copyright theory; her only remedy would rest on federal law. The Digital Millennium Copyright Act of 1998 created a "notice and takedown" procedure to enable copyright holders to demand that internet service providers take down copyrighted images whose publication is unlawful. *See* 17 U.S.C. § 512(c) (2012). But that remedy forces the subject of revenge porn to find every website and ask it for relief. If the person who posted the image repeatedly posts it at websites that deal exclusively with revenge porn, the subject is forced to play a game of "Whack-a-Mole" and snuff out every instance of publication. Statutory damages are available under the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (codified as amended at 17 U.S.C. § 504(c) (2012)), but if the website owner is "judgment proof," damages are ineffective. *See* Laird, *supra* note 25 ("'The general rule is that these people are not wealthy,' [attorney John] Morgan says. 'They're young men and they think it's funny.'"). Some websites are overseas and do not recognize United States copyright law, leaving a victim with no copyright remedy. *See* Levendowski, *supra* note 22, at 443–45; Laird, *supra* note 25; Martinez, *supra* note 25, at 247. The No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (codified at 18 U.S.C. § 2319 (2012)), authorizes up to ten years' imprisonment for certain copyright violations, but the victim cannot force the Justice Department to prosecute the responsible party. Finally, there is the risk, known as the "Streisand effect," that seeking relief may increase awareness of the privacy violation. *See* Levendowski, *supra* note 22, at 444 & n.120.

vehicle for relief in American law,[49] and the common law historically has allowed an injured party to recover not only for physical injuries or economic losses, but also for assaults on one's reputation or the invasion of one's privacy.[50] At least four different torts—namely, invasion of privacy, "false light" portrayal, defamation, and intentional infliction of emotional distress—might allow a party to seek damages for injury to her good name and standing in the community.[51] Other commentators also have recommended that tort law can and should provide a remedy for a breach of an express or implied assurance of confidentiality in connection with otherwise private information.[52]

There may also be another avenue of relief under federal law. Under section 5(a) of the Federal Trade Commission Act, the FTC has the authority to seek civil relief against parties who use "[u]nfair methods of competition in or affecting commerce" or "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2012). On January 29, 2015, the FTC announced that it had entered into a settlement agreement with Craig Brittain over activities related to his revenge porn website. According to the FTC's press release, the FTC's complaint alleged that Brittain had violated section 5 because "he used deception to acquire and post intimate images of women, then referred them to another website he controlled, where they were told they could have the pictures removed if they paid hundreds of dollars." FTC, "Website Operator Banned from the 'Revenge Porn' Business After FTC Charges He Unfairly Posted Nude Photos" (Jan. 29, 2015), http://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges. Under the terms of the settlement agreement, Brittain must "permanently delete all of the images and other personal information he received during the time he operated the site," he is "prohibited from publicly sharing intimate videos or photographs of people without their affirmative express consent," and he is "prohibited from misrepresenting how he will use any personal information he collects online." *Id*. Revenge porn victims may be able to petition the FTC to pursue the same relief against other parties who engage in that conduct.

49. *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971) ("[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

50. *See, e.g.*, KEETON ET AL., *supra* note 14, § 113, at 797–802; *id.* § 117, at 856–66; DANIEL J. SOLOVE, UNDERSTANDING PRIVACY (2010).

51. Each tort requires publication of defamatory or embarrassing material. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977); KEETON ET AL., *supra* note 14, § 113, at 797–802 (discussing publication requirement for defamation); *id.* § 117, at 856–66 (same, for privacy claim).

52. *See, e.g.*, Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 BUFF. L. REV. 1 (1995); G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385 (1995); Jessica Litman, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 1283, 1308–11 (2000); Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationships Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887 (2006); Neal M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123 (2007); Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982). *Contra* Steven A. Bibas, *A Contractual Approach to Data Privacy*, 17 HARV. J. L. & PUB. POL'Y 591, 606–11 (1994) (arguing in favor of express privacy contracts). Of course, not everyone agrees with that proposition. *See, e.g.*, Dianne L. Zimmerman, *Requiem for a*

Yet, before discussing the availability of a tort action, it would be worthwhile to discuss a different common law doctrine: contract law. Although it may seem odd at first blush to consider whether a victim of revenge porn can seek relief in contract law, in fact, contract law principles offer a helpful background to a discussion of tort law.

A. State Contract Law: Express or Implied Agreements and Promissory Estoppel

Contract law seeks to promote voluntary, mutually beneficial exchanges of goods or services by providing a remedy for broken promises.[53] Contract law recognizes that tacit agreements, promises, or assurances can bind the promisor.[54] According to the *Restatement (Second) of Contracts*, "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[55] A promise can be oral or written, express or implied; the legal effect is the same.[56]

An important decision in this regard is the Minnesota Supreme Court's ruling in *Cohen v. Cowles Media Co.*[57] Dan Cohen was associated with a particular gubernatorial candidate, and he wanted to provide information to the Minneapolis Star & Tribune newspaper about a rival. Cohen wished to remain anonymous and gave the

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Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 CORNELL L. REV. 291 (1983).

53. *See, e.g.*, Edwards v. Kearzey, 96 U.S. 595 (1897); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1106 (9th Cir. 2009).

54. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981); *id.* § 2 cmt. a ("Like 'contract' however, the word 'promise' is commonly and quite properly also used to refer to the complex of human relations which results from the promisor's words or acts of assurance, including the justified expectations of the promisee and any moral or legal duty which arises to make good the assurance by performance. The performance may be specified either in terms describing the action of the promisor or in terms of the result which that action or inaction is to bring about."); *id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

55. *Id.* § 2.

56. *Id.* § 4 ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."); *id.* § 4 cmt. a ("Express and implied contracts. Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.").

57. 457 N.W.2d 159 (Minn. 1990), *rev'd on free speech grounds*, 501 U.S. 663 (1991).

newspaper information in return for its assurance of confidentiality. After receiving the information, however, the newspaper identified Cohen as the source. Cohen lost his job and sued the newspaper for damages.[58]

The Minnesota Supreme Court ruled that Cohen could not establish a breach-of-contract claim. As the court explained, "The law . . . does not create a contract where the parties intended none," and the law does not "consider binding every exchange of promises."[59] A journalist's promise to a source that her identity will remain secret is more a "moral commitment" or an "'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation" than it is "a legally binding contract."[60] It would be artificial to treat such an arrangement as a contract, the court concluded, because doing so places "an unwanted legal rigidity on a special ethical relationship."[61] The court nonetheless concluded that Cohen could state a claim under the common law of promissory estoppel:

> The doctrine of promissory estoppel implies a contract in law where none exists in fact. According to the doctrine, well-established in this state, a promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise.[62]

Despite approving that theory, the Minnesota Supreme Court ruled against Cohen on the ground that allowing him to recover damages would violate the First Amendment Free Speech Clause. That court therefore entered judgment in the media defendant's favor.[63] The Supreme Court of the United States later reversed that judgment, and its decision is discussed below. For now, however, the important point is that the Minnesota Supreme Court's decision allows a plaintiff to recover damages under a promissory estoppel theory for a broken promise of confidentiality.

The United States Court of Appeals for the Ninth Circuit endorsed a similar theory in *Barnes v. Yahoo!, Inc.*[64] In that case, a

58. 457 N.W.2d at 200–02.
59. *Id.* at 203.
60. *Id.*
61. *Id.*
62. *Id.* at 203–04.
63. *Id.* at 205.
64. 570 F.3d 1096 (9th Cir. 2009).

victim of revenge porn sued Yahoo! for damages for its failure to remove compromising pictures of her that a Yahoo! employee had agreed to remove from its website. The Ninth Circuit ruled that Yahoo! could not be sued in tort because, under the Telecommunications Act of 1996,[65] Yahoo! could not be deemed "the publisher or speaker of any information provided by another information content provider."[66] The court suggested, however, that a plaintiff might be able to bring an action against a company like Yahoo! under section 90 of the *Restatement (Second) of Contracts*,[67] which recognizes a cause of action for promissory estoppel, a theory that the Telecommunications Act of 1996 would not foreclose.[68] Under "the so-called 'promissory nature' of contract" law, the courts enforce private bargains "because the parties manifest, ex ante, their mutual desire that each be able to call upon a judicial remedy if the other should breach."[69] Enforcing such an agreement would not trespass on the interests that the federal telecommunications laws seek to protect, the *Barnes* court reasoned, because contract law deals with bilateral agreement, not unilateral actions. "In a promissory estoppel case, as in any other contract case, the duty the defendant allegedly violated springs from a contract—an enforceable promise—not from any non-contractual conduct or capacity of the defendant."[70]

Cowles Media and *Barnes* are important decisions. Aware of need to make a tradeoff between privacy and free speech interests, each court treated the promissory estoppel doctrine, a cousin to contract law, in a flexible manner as extending beyond an ordinary commercial relationship. Each court also was willing to allow a plaintiff to obtain relief for the breach of an informal assurance of

65. 47 U.S.C. § 230 (2012).
66. *Barnes*, 570 F.3d at 1105–06.
67. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) provides as follows:
§ 90 Promise Reasonably Inducing Action or Forbearance
(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
68. *See Barnes*, 570 F.3d at 1107.
69. *Id.* at 1106.
70. *Id.* at 1107.

confidentiality. And each court made it clear that, even though a plaintiff could not maintain an ordinary contract action, given the unusual nature of the agreement at stake, all was not lost, because a related state–common law doctrine was available to provide relief for someone who was the victim of a broken promise. Those points will become more significant after viewing this issue from the perspective of tort law.

B. State Tort Law: Privacy-Related Torts

1. The Available Tort Theories

Samuel Warren and Louis Brandeis wrote the classic article on privacy in 1890, describing it as a right of autonomy, "the right 'to be let alone.'"[71] In the century-plus since then, privacy has taken on so many additional characteristics that the term has become all but indefinable.[72] The contemporary concept of "privacy" has an expansive, protean, and (perhaps therefore) indistinct boundary.[73] There is agreement that, whatever its confines, privacy is valuable both inherently[74] and instrumentally.[75] Beyond that, however, the

71. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

72. *See, e.g.*, ARTHUR R. MILLER, THE ASSAULT ON PRIVACY 25 (1971) (lamenting that the concept of "privacy is difficult to define because it is exasperatingly vague and evanescent").

73. The literature on the subject is enormous. For a sample of government and private publications discussing the historical, theoretical, practical, and comparative aspects of the subject, see, for example, FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012); SEC'Y'S ADVISORY COMM. ON AUTOMATED DATA SYS., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS & THE RIGHTS OF CITIZENS (1973); HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE (2010); ALAN F. WESTIN, PRIVACY AND FREEDOM (1967); Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1 (2007); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968); Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Symposium, *Privacy and Technology*, 126 HARV. L. REV. 1880 (2012); Symposium, *Privacy and Big Data: Making Ends Meet*, 66 STAN. L. REV. ONLINE 25 (2013); James Q. Whitman, *Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

74. *See, e.g.*, SOLOVE, *supra* note 3, at 1–38.

75. *See, e.g.*, Fried, *supra* note 73, at 477–78 ("It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust

concept may have as many meanings as there are authors attempting to define it.[76]

The law deals with the concrete problems of real people, however, so it must generate some usable definition of a term like "privacy" if the law is to serve its social ordering function. The common law did just that. Tort scholar William Prosser offered the first practical definition of "privacy." In his view, tort law protects four separate interests that fall under that generic label: (1) intrusion into a person's seclusion, (2) public disclosure of embarrassing facts, (3) publicity that places an individual in a "false light" to the public, and (4) appropriation of a person's likeness.[77] The *Restatement (Second) of Torts*, for which Prosser was the reporter, adopted that four-part framework.[78]

The posting of revenge porn directly trespasses on the second and third interests Prosser identified.[79] It discloses photographs that

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and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.").

76. *See, e.g.*, SOLOVE, *supra* note 51, at 1–38. The Supreme Court has not done a better job than the academy in this regard. The Court has decided a fairly sizeable number of cases by invoking or adverting to "privacy" without explaining from whence that term comes in the Constitution or how it can be defined objectively. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (the Due Process Clause and same-sex intimate activities); Whalen v. Roe, 429 U.S. 589 (1977) (the Due Process Clause and medical information); Roe v. Wade, 410 U.S. 113 (1973) (the Due Process Clause and abortion); Katz v. United States, 389 U.S. 347 (1969) (the Fourth Amendment and law enforcement searches); Griswold v. Connecticut, 381 U.S. 479 (1965) (the Due Process Clause and regulation of contraceptives); *id.* at 509 (Black, J., dissenting) (stating that privacy is "a broad, abstract, and ambiguous concept").

77. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

78. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652A(2) (1977) ("The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) appropriation of the other's name or likeness, as stated in § 652(C); or (c) unreasonable publicity given to the other's private life, as stated in § 652(D); or (d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.").

79. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."); *id.* § 652E ("One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.").

The other two privacy tort theories would not apply to revenge porn. The essence of revenge porn is publication of intimate photographs however acquired, not a trespass or the intrusion into a zone of privacy. *See, e.g.*, Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968) (intrusion into the home); Newcomb Hotel Co. v. Corbett, 108 S.E. 309 (Ga. Ct. App. 1921) (intrusion into a hotel). The first prong of the Prosser and Restatement typology therefore

are inherently embarrassing and places a person in a "false light" by giving a degrading or distorted image of the person involved, one falsely suggestive of promiscuity.[80]

In addition to the four tort theories that Prosser recognized, there may also be two other tort claims available to a revenge porn victim. One is defamation. The essence of defamation is "the idea of disgrace"—that is, the defendant, either through the written or spoken word, has besmirched the plaintiff's good name and reputation.[81] The argument would be that revenge porn damages both interests by intentionally misportraying the victim as libertine. The other theory is the intentional infliction of emotional distress.[82] That tort affords relief not for the minor incivilities that (unfortunately) are part of everyday life—the law expects us to be made of sterner

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does not apply. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmts. b & c (1977). An ex-partner posts revenge porn to humiliate the subject, not to make a profit or benefit in some other tangible way. Accordingly, the privacy tort for appropriation of a person's likeness also would not apply. It requires proof of some benefit to the person making the publication, and the psychic pleasure from vengeance would not qualify. *See id.* § 652C cmts. b & c.

80. *See, e.g.*, Solano v. Playgirl, Inc., 292 F.3d 1078, 1082–84 (9th Cir. 2002) (plaintiff stated a claim for a "false light" privacy violation when magazine placed a partially nude photograph of him on the cover and suggested that he had posed nude for the magazine); Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1134–40 (7th Cir. 1986) (ruling that plaintiff could state a "false light" defamation claim for magazine's publication of naked photos of her obtained by virtue of a forged consent form); Lerman v. Flynt Distrib. Co., 745 F.2d 123, 134–41 (2d Cir. 1984) (ruling that magazine's use of plaintiff's name next to the picture of a nude woman stated a "false light" privacy claim, but holding in defendant's favor on First Amendment grounds); Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1089–93 (5th Cir. 1984) (upholding "false light" defamation judgment for plaintiffs for magazine's publication of stolen naked photos given to the magazine under a forged consent form). *Contra* Time, Inc. v. Hill, 385 U.S. 374 (1967) (reversing a jury award of damages for portraying hostages in a false light).

81. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."); KEETON ET AL., *supra* note 14, at 773 ("Defamation is . . . that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, good-will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." (footnotes omitted)).

82. *See* Daniel Zharkovsky, Note, *"If Man Will Strike, Strike Through the Mask": Striking Through Section 230 Defenses Using the Tort of Intentional Infliction of Emotional Distress*, 44 COLUM. J.L. & SOC. PROBS. 193 (2010) (arguing that the Communications Decency Act does not bar such a tort case brought against an internet service provider); *cf.* Catherine E. Smith, *Intentional Infliction of Emotional Distress: An Old Arrow Targets the Head of the New Hate Hydra*, 80 DENVER U. L. REV. 1 (2002) (arguing in favor of using that tort to respond to cyber-harassment).

stuff—but for truly "outrageous conduct, of a kind especially calculated to cause serious mental and emotional disturbance."[83]

A victim of revenge porn should be able to satisfy the elements of each of those last two torts. Posting a photograph on the Internet would constitute "publication."[84] Moreover, a reasonable person would find extremely offensive the nonconsensual online posting of intimate photographs of a former wife or girlfriend, especially when done for the purpose of revenge.[85] Mark Twain eloquently described the injury that can result from the disclosure of intimate information when he wrote about the unconsented-to publication of a love letter:

> The frankest and freest and privatest part of the human mind and heart is a love letter; the writer gets his limitless freedom of statement and expression from his sense that no stranger is going to see what he is writing. Sometimes there is a breach-of-promise case by and by; and when he sees his letter in print it makes him cruelly uncomfortable and he

83. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 879 (1939). The *Restatement (Second) of Torts* defines the tort of "outrageous conduct causing severe emotional distress" as follows:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1977).

84. Recently, a German court saw no need for publication in a potential revenge porn case. A person in a relationship had intimate images of his former partner. The court ruled that the person with the images had to delete the photographs once the relationship ended, even if he had no intent to publish them. *See* Philip Oltermann, *'Revenge Porn' Victims Receive Boost From German Court Ruling*, GUARDIAN (May 22, 2014), http://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling. American courts have not gone that far and may never.

85. *See, e.g.*, Vassiliades v. Garfinckle's, Inc., 492 A.2d 580, 588 (D.C. 1985) (ruling that the public disclosure of before and after photographs of someone who had a face lift can be actionable); KEETON ET AL., *supra* note 14, at 857 ("The ordinary reasonable person does not take offense at mention in a newspaper of the fact that he has returned home from a visit, or gone camping in the woods, or given a party at his house for his friends. It is quite a different matter when the details of sexual relations are spread before the public eye, or there is highly personal portrayal of his intimate private characteristics or conduct." (footnotes omitted)); *supra* notes 26–28 (collecting cases); *cf.* Lewis v. LeGrow, 670 N.W.2d 675, 685 (Mich. App. 2003) ("There is a vast difference between knowingly exposing oneself to one's partner during consensual sex and having that intimate event secretly photographed, and thus, captured and preserved for all time." (citation and internal punctuation omitted)).

> perceives that he never would have unbosomed himself to that large and honest degree if he had known that he was writing for the public.[86]

The stories told by victims of revenge porn establish that this practice causes precisely the type of emotional harm for which those last two torts—defamation and intentional infliction of emotional distress—seek to provide compensation.[87] Given that revenge porn involves the posting of a photograph on the Internet, which is available worldwide, not just to a newspaper's readership in a local community, revenge porn likely would have an even more distressing impact on a victim.[88] In sum, the online posting of revenge porn would seem to be an eminently suitable example of outrageous conduct for which one or more of the above tort theories should provide relief.

2. The Likely Defense

Nonetheless, it might be difficult for a victim of revenge porn ultimately to prevail under any of the above theories. Consent would

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86. MARK TWAIN, THE AUTOBIOGRAPHY OF MARK TWAIN xxxv (Charles Neider ed. 1990); *cf.* Richards & Solove, *supra* note 52, at 126 ("The law of confidentiality in England also has attributes that the American privacy torts lack. In America, the prevailing belief is that people assume the risk of betrayal when they share secrets with each other. But in England, spouses, ex-spouses, friends, and nearly anyone else can be liable for divulging confidences. As one English court noted, 'when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement.'" (footnotes omitted)).

87. *See supra* notes 26–28.

88. The effect might be especially harmful to a woman. *See* Mollie Brunworth, *How Women Are Ruining Their Reputations Online: Privacy in the Internet Age*, 5 CHARLESTON L. REV. 581, 597–98, 603 (2011) ("From a gendered perspective, a double standard still persists where women are judged more harshly for their sexual behavior than their male counterparts. . . . When a woman makes the morning trek back to the dorm after the previous night's hookup, it's dubbed the 'walk of shame.' For men, it's the 'stride of pride.'" (footnotes and citation omitted)); Chander, *supra* note 25, at 129 (arguing that the public disclosure of nude photographs is more damaging to women than men because women are more often the victims of this practice and society has allowed men more sexual latitude than women, a form of "Boys will be boys" mentality). The *Restatement (Second) of Torts* also offers an instructive hypothetical:

> A is invited to a swimming party at an exclusive resort. B gives her a bathing suit which he knows will dissolve in water. It does dissolve while she is swimming, leaving her naked in the presence of men and women whom she has just met. A suffers extreme embarrassment, shame, and humiliation. B is subject to liability to A for her emotional distress.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. D, illus. 3 (1977). The illustration is not identical to the revenge porn scenario, because the woman above never appeared naked until after her swim suit disintegrated. The hypothetical does make the point, however, that the unexpected, nonconsensual disclosure of one's naked body to the world can be humiliating.

be a complete defense to a claimed invasion of privacy or intentional tort.[89] That would defeat any such theory here, a defendant would argue, because the victim originally consented to having the picture taken—by definition if it was a "selfie." Moreover, we always take the risk that once we disclose a secret to another that he will betray our confidence. As Benjamin Franklin warned, "Three can keep a secret if two of them are dead."[90] Truth also is a defense to a claim of defamation,[91] as well as to a claim that the publication depicted the victim in a false light.[92] Pictures don't lie, the argument would go; they merely represent what the photographer saw through the viewfinder. While the pictures may be unflattering and the photographer's state of mind may have been malicious, the argument would conclude, photographs truthfully reveal exactly who the victim was and how she appeared to the camera.[93]

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89. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652F cmt. b (1977) ("[C]onsent to any publication, either of matter that is personally defamatory or of matter that invades privacy, creates an absolute privilege so long as the publication does not exceed the scope of the consent."); KEETON ET AL., *supra* note 14, at 867 ("It is reasonably clear that consent to particular conduct will prevent that conduct from constituting an actual invasion. It may be given expressly or by conduct, such as posing for a picture with knowledge of the purposes for which it is to be used, or industrially seeking publicity of the same kind" (footnotes omitted)); SOLOVE, *supra* note 50, at 102. A plaintiff could argue that she gave consent only to the taking and keeping of the picture. That argument is a reasonable one, but that theory is better addressed through a separate tort for betrayal.

90. BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/b/benjaminfr162078.html (last visited Aug. 21, 2014). Literature makes that point best. *See* WILLIAM CONGREVE, LOVE FOR LOVE 48 (Malcolm Kelsall ed. 1999) (1695) ("O fie, miss, you must not kiss and tell."); WILLIAM SHAKESPEARE, ALL'S WELL THAT ENDS WELL act 1, sc. 1, lines 61–62 (Arthur E. Cage, ed., Yale University Press 1926) ("Love all, trust a few, do wrong to none."). Supreme Court Fourth Amendment decisions could be read to support that conclusion. *See infra* notes 136–41 and accompanying text.

91. *See, e.g.*, Zimmerman, *supra* note 52, at 306–20. The common law placed on the defendant the burden of proving the truth of a statement. *See, e.g.*, KEETON ET AL., *supra* note 14, at 841 ("Out of a tender regard for reputations, the [common] law presumes in the first instance that all defamation is false, and the defendant has the burden of pleading and proving its truth." (footnote omitted)); *see id.* at 839–40. Since the Supreme Court's decision in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), it now generally is the plaintiff's burden to establish that a statement is false. *See, e.g.*, KEETON ET AL., *supra* note 14, at 839–40.

92. *See, e.g.*, Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253 n.5 (1974) (reversing a jury award of damages for a "false light" claim against a photographer on the ground that the photograph accurately represented what was photographed).

93. *See* Levendowski, *supra* note 22, at 436–37 (concluding that courts may be reluctant to find that a person has a privacy claim for any image consensually taken and distributed); *cf.* Richard A. Posner, *The Right of Privacy* 12 GA. L. REV. 392, 395 (1978) (arguing that the right to control information about us is tantamount to "a right to misrepresent one's character"); Harvey L. Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253, 260 (1990) ("While no doubt persons embarrassed by publicity [of an aspect

The possible inadequacy of traditional tort law principles to provide relief for a victim of revenge porn, however, should not end the analysis. Contemporary tort law is the result of a centuries-long process of judicial and legislative adaptation of the common law to meet new and expanding societal needs.[94] Tort law historically has enabled private parties to invoke the judicial process to seek compensation for injuries suffered due to the fault of another through means other than a breach of contract.[95] Early at common law, the law of torts was concerned simply with maintaining the peace of the community by bribing the victims of injurious conduct—such as assault or battery, which were treated as a form of trespass[96]—not to retaliate against a responsible party.[97] The interests protected by tort law have expanded over time. They now range over the entire

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of their private lives] would prefer 'to be let alone,' their interest in presenting a false or incomplete image to others is not one that seems very compelling.").

94. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 253–54 (1952) ("The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."); Second Employers' Liability Cases, 223 U.S. 1, 49–51 (1912) (upholding congressional repeal of the fellow-servant rule); St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 295–96 (1908) (holding an employer liable to injuries caused by its violation of a legislatively-imposed safety requirement must bear the costs of an accident); JOHN G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 194 (2d ed. 1985) ("Understandably the law's primary concern is with protecting individuals' interests of substance by assuring recovery for personal injury and property damage. But man does not live on bread alone. Increasing sophistication has, with the advance of civilization, fostered demands for extending legal protection to non-material interests of personality like self-respect, reputation, and privacy."); KEETON ET AL., *supra* note 14, at 572–73; William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

95. *See, e.g.*, FLEMING, *supra* note 94, at 1; KEETON ET AL., *supra* note 14, at 1–7. As Oliver Wendell Holmes put it, "[t]he business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not." OLIVER WENDELL HOLMES, THE COMMON LAW 54 (1881).

96. *See, e.g.*, KEETON ET AL., *supra* note 14, at 29–30.

97. *See, e.g.*, FLEMING, *supra* note 94, at 2 ("The law of torts was . . . for quite a long time little more than a shadow in the wake of criminal law, concerned with the grosser delicts which almost always have consisted in some form of *intentional* aggression rather than accidental harm." (emphasis in original)); HOLMES, *supra* note 95, at 73–74; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 422–23, 455, 458–65 (5th ed. 1956).

landscape of personal, professional, and business concerns and allow injured parties to recover, for example, for physical injuries due to automobile accidents, economic loss suffered by a business due to unfair means of competition, and psychological harms suffered by tortious actions damaging a person's privacy or reputation.[98] Revenge porn is just a new way of damaging interests already deemed worthy of protection by contemporary tort law.

At the end of the day, the question is not whether tort law currently offers relief for revenge porn; the question is whether it should. The answer is "Yes."

3. The Importance of Betrayal

American privacy law has not generally focused on recovery for breach of a promise of confidentiality. The reason is three-fold: the breach of an assurance of confidentiality sounds more in contract than tort, Prosser did not identify that conduct as one of the four interests a privacy-invasion tort would protect, and the Supreme Court has expansively construed the First Amendment Free Speech Clause to enable publication of most information that has been lawfully obtained and that relates to a matter of public interest.[99] Recently, however, several scholars have argued that tort law should protect a person's interest in being able to share private thoughts, words, or actions with an intimate partner without the fear that they will later be disclosed to the world. Their argument is that tort law should protect against a later nonconsensual disclosure of any information or photographs exchanged between intimate partners. Those scholars have added that the First Amendment does not foreclose tort relief for what lawyers would call the breach of an

98. *See, e.g.*, Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 252–54 (1974) (upholding a jury award of damages against a journalist and his employer for a "false light" privacy claim); RESTATEMENT (SECOND) OF TORTS § 558 (1977) (defamation); *id.* at §§ 652A(c) & 652D (unreasonable publicity given to someone's private life); FLEMING, *supra* note 94, at 195–214 (discussing common law of defamation and invasion of privacy); KEETON ET AL., *supra* note 14, at 771–869 (same). The torts of defamation and invasion of privacy are related, but different. "The former [serves] to protect a person's interest in a good reputation," while "[t]he latter is to protect a person's interest in being let alone and is available when there has been publicity of a kind that is highly offensive." KEETON ET AL., *supra* note 14, at 864.

99. *See, e.g.*, McClurg, *supra* note 52, at 896–908.

implied-in-fact contract not to reveal confidential information to others—and for what a wronged party would call betrayal.[100]

Start by considering the competing interests. The privacy and reputational interests to be protected clearly are legitimate. More than thirty states provide a remedy for the public disclosure of a private matter that is highly offensive to a reasonable person.[101] Revenge porn also does not contribute to political debate or to any issue of public interest; on the contrary, revenge porn is highly offensive, even sleazy. Finally, it would be difficult to argue that revenge porn is a legitimate, let alone necessary, mode of self-expression. One need not subscribe to the belief that revenge should be left to the Almighty[102] in order to conclude that revenge porn is a shoddy form of speech that contributes nothing to the community's discussion of any issue of public importance and that expresses little more than a mean-spirited mindset and desire to inflict reputational harm on a former intimate partner. In fact, it is only the victim's trust in her partner not to display the photograph to the world that could keep her from being able to prevail under a standard invasion of privacy theory. Yet, that fact also shows us what should be the critical issue in any debate over the use of tort law to compensate victims of revenge porn: betrayal.

Betrayal is the key to the proper legal analysis of revenge porn. The essence of revenge porn is the Internet-posting of nude photographs of a former intimate partner for the purpose of subjecting her to public humiliation. That conduct is accomplished, however, through a betrayal of the trust that the victim had in her partner that he would never publicize the photographs. Online posting of the same surreptitiously taken photograph would certainly constitute the offensive publication of private details of an individual's life for which the *Restatement (Second) of Torts* would provide a damages remedy.[103] The only difference between that

100. *See, e.g.*, *id.* at 908–39; Richards & Solove, *supra* note 52, at 156–58; Vickery, *supra* note 52.

101. *See* Chander, *supra* note 25, at 129–30.

102. *See Romans* 12:19 ("Beloved, never avenge yourselves, but leave room for the wrath of God; for it is written, 'Vengeance is mine, I will repay, says the Lord.'").

103. *See* Lewis v. LeGrow, 670 N.W.2d 675 (Mich. App. 2003) (upholding verdict for plaintiffs for defendant surreptitiously filming his sexual encounters with them). Witness the uproar when someone surreptitiously took videotapes of then-ESPN sportscaster Erin Andrews. *See* Nancy Dillon, *ESPN Beauty Erin Andrews Wants Maximum Sentence for Her Convicted Stalker Michael Barrett*, N.Y. DAILY NEWS, Dec. 15, 2009, http://www.nydailynews.com

scenario and the one characteristic of revenge porn is that the person who published the photograph violated a tacit agreement between the parties over what could be done with it. Taken, yes; possessed, yes; publicized, no. The breach of that assurance of confidentiality is what tort law should protect. As Professor Daniel Solove has explained:

> [D]isclosure and breach of confidentiality cause different kinds of injuries. Both involve revealing a person's secrets, but breaches of confidentiality also violate trust in a specific relationship. The harm from a breach of confidentiality, then, is not simply that information has been disclosed, but that the victim has been betrayed.[104]

Tort law protection is necessary both to remedy the damage done to a victim and to eliminate a risk that parties may feel reluctant to find intimacy with someone else. As Professor Andrew McClurg has explained:

> We all face the outside world wearing a mask that hides part of who and what we are. We withhold fears, dreams, regrets, sorrows, fantasies, jealousies, gripes, passions, pride, grief, and many other thoughts and emotions, some of them beautiful and some of them ugly. Part of intimacy is finding someone with whom we feel safe and comfortable taking off the mask and being and revealing our true selves. Intimacy will remain unattainable so long as intimate partners feel compelled to withhold private facts or aspects about themselves, measuring everything they say or do out of fear that it might be revealed to others.[105]

Professor Jeff Rosen agrees:

> If individuals cannot form relationships of trust without fear that their confidences will be betrayed, the uncertainty about whether or not their most intimate moments are being

/entertainment/gossip/espn-beauty-erin-andrews-maximum-sentence-convicted-stalker-michael-barrett-article-1.433554.

104. SOLOVE, *supra* note 50, at 138. Of course, some parties have mistakenly publicized such photos to a large number of people other than an intended recipient. *See* Zayda Rivera, *Alison Pill Recalls Mistakenly Tweeting Topless Photo: 'It Was a Dumb Thing To Do'*, N.Y. DAILY NEWS, Sept. 5, 2013, http://www.nydailynews.com/entertainment/gossip/alison-pill-recalls-mistakenly-tweeting-topless-photo-article-1.1446789. In those cases, there would be no act of betrayal, so tort law would not provide a remedy if an unintended recipient posted a photograph online.

105. McClurg, *supra* note 52, at 914 (footnotes omitted).

> recorded for future exposure will make intimacy impossible; and without intimacy, there will be no opportunity to develop the autonomous, inner-directed self that defies social expectations rather than conforms to them.[106]

The agreement between the parties almost never would be express, let alone written. But a contract need not be written to be valid and may be implied from the course of dealings between two parties.[107] In virtually every case involving sexual partners, there likely would have been an oral or tacit agreement not to publicize the intimate details of their relationship, and either type of assurance is entitled to the same binding legal effect as a written nondisclosure agreement. To be sure, the absence of a written agreement may make it more difficult for a plaintiff to prove that she has been betrayed by a former partner. But it should not deny her the opportunity to make that showing.

It also would be unreasonable to conclude that the victim of revenge porn cannot claim to retain a privacy or confidentiality interest in photographs voluntarily turned over to someone else. Why? Because it is a mistake to treat privacy as an all-or-nothing decision—that is, to treat information as private or confidential only if no one else is aware of it. As Harvard Professor Charles Fried has explained, "Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves."[108] Society and the law do not force that binary choice on us to avoid opening ourselves to the world. Our consent to disclose private information to a select group of parties is not tantamount to a disclosure to the public at large.[109] The law

106. Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117, 2123–24 (2001).

107. *See supra* Part II.A; McClurg, *supra* note 52, at 916.

108. Fried, *supra* note 73, at 482; *see also, e.g.*, WESTIN, *supra* note 73, at 7 ("Privacy is the claim of individuals, groups, or institutions to determine for themselves, when, how, and to what extent information about them is communicated to others."); McClurg, *supra* note 52, at 928; SOLOVE, *supra* note 50, at 24–29, 136–48.

109. *See* Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 493–94 (Ga. Ct. App. 1994) (ruling that a person's disclosure of his medical condition to family, friends, and support group does not forfeit a claim of privacy when the defendant disclosed the condition to the public at large); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005) (arguing that social network theory can justify treating as private information disclosed to a discrete number of people). The rules governing athletic contests make that point by analogy. Football players consent to be blocked or tackled by opposing players, not spectators who decide

recognizes that we enter into a variety of arrangements based on an assumption of trust and protects exchanges between confidants.[110] We assume that statements made in confidence to a spouse, a physician, a lawyer, or a member of the clergy will be held in confidence.[111] The law gives effect to that understanding through the doctrine of privileges[112] and by recognizing a tort claim for the disclosure of information in violation of an express or implied assurance of confidentiality.[113] We also assume that letters given to the postal service will not be opened and read, a custom supported by

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to join in the game. *See* Laird, *supra* note 25 ("Just as a boxer hasn't consented to be punched outside the ring, someone who sends a naughty picture to a lover has not consented to have that picture distributed online.").

110. *See, e.g.*, Richards & Solove, *supra* note 52; Solove, *supra* note 8, at 20; Strahilevitz, *supra* note 109.

111. *See, e.g.*, SOLOVE, *supra* note 3, at 174; Gilles, *supra* note 52, at 17; *id.* at 17 n.85 (collecting cases).

112. *See, e.g.*, Jaffee v. Redmond, 518 U.S. 1 (1996) (recognizing psychotherapist-patient privilege under Fed. R. Evid. 501); Upjohn Co. v. United States, 449 U.S. 383 (1981) (same, for attorney-client privilege); Trammel v. United States, 445 U.S. 40 (1980) (same, for spousal privilege); Richards & Solove, *supra* note 52, at 134–35 (explaining that the common law protected confidential relationships through evidentiary privileges); *see also, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399 (1998) (ruling that the attorney-client privilege protects confidential communications between a represented party and his lawyer even after the client's death).

113. For example, several courts have held that a physician has an implied duty of confidentiality to a patient and that disclosures breaching that duty can be the subject of a damages action. *See, e.g.*, Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793, 797 (N.D. Ohio 1965); Horne v. Patton, 287 So. 2d 824, 831–32 (Ala. 1974); Bryson v. Tillinghast, 749 P.2d 110, 113 (Okla. 1988); McCormick v. Eng., 494 S.E.2d 431, 435 (S.C. Ct. App. 1997) (collecting cases). State courts also have recognized that a bank owes the same duty to its depositors. *See, e.g.*, Burrows v. Super. Ct., 529 P.2d 590, 593 (Cal. 1974) (a bank has an implied obligation with a depositor not to disclose account information); Rubenstein v. S. Denver Nat'l Bank, 762 P.2d 755, 756–57 (Colo. App. 1988) (collecting cases); Barnett Bank of W. Fl. v. W. Richard Hooper, 498 So. 2d 923, 925 (Fla. 1986) (a bank generally owes a duty of confidentiality to a depositor); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 288–90 (Idaho 1961) (ruling that a depositor can sue his bank for the unconsented-to disclosure of her financial information based on an implied promise of confidentiality); Ind. Nat'l Bank v. Chapman, 482 N.E.2d 474, 480 (Ind. Ct. App. 1985) (a bank has an implied obligation with a depositor not to disclose account information); Suburban Trust Co. v. Waller, 408 A.2d 758, 762–64 (Md. App. Spec. App. 1979) (same); Richfield Bank & Trust Co. v. Sjogren, 244 N.W.2d 648, 651 (Minn. 1976) (same); McGuire v. Shubert, 722 A.2d 1087, 1090–91 (Pa. Super. Ct. 1998) (same); Tournier v. Nat'l Provincial & Union Bank of Eng., 1 K.B. 461 (1923) (same); Edward L. Raymond Jr., Annotation, *Bank's Liability Under State Law for Disclosing Financial Information Concerning Depositor or Customer*, 81 A.L.R. 4TH 377 (1990); SOLOVE, *supra* note 50, at 139–40; Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 529 (2006). *See generally* Richards & Solove, *supra* note 52, at 135–38 (explaining that the common law protected confidential relationships through the recognition of confidential relationships such as principal-agent, trustee-beneficiary, and parent-child).

Anglo-American law for more than three centuries.[114] Codes of ethics[115] and modern-day statutes[116] supply additional protection for certain types of communications that traditionally were governed by the common law. The result is that case law and statutes now impose a duty of confidentiality on various parties and offer a tort remedy for a material breach of that duty.[117]

As discussed above, contract law recognizes that tacit agreements, promises, or assurances can bind the promisor.[118] A promise can be oral or written, express or implied; the legal effect is the same.[119] While contract and tort law generally are distinct legal

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114. *See Ex parte Jackson*, 96 U.S. 727 (1877) (ruling that the Fourth Amendment prohibits the federal government from opening a person's mail without a search warrant); Richards & Solove, *supra* note 52, at 140–45; Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1899 (1981) ("Nineteenth century public opinion regarded the 'sanctity of the mails' as absolute in the same way it esteemed the inviolability of the home." (footnote omitted)). For examples of statutes protecting the confidentiality of such communications, see The Post Office (Revenues) Act 1710, 9 Ann., c. 11, § 41; Act of Mar. 3, 1825, ch. 64 § 22, 4 Stat. 102 (codified as amended at 18 U.S.C. § 1702 (2012)).

115. *See, e.g.*, Oath of Hippocrates, *in* DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 350 (2d ed. 2006) ("Whatever, in connection with my professional service, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret."); MODEL PROF'L RESPONSIBILITY CODE Canon 4, EC 4-1, 4-4, 4-6 (1980).

116. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552(a) (2006); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(1) (2006); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2006); Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320d-2 (2006).

117. As two privacy scholars have put it:

> A plaintiff can establish a breach of confidence action by proving the existence and breach of a duty of confidentiality. Courts have found the existence of such a duty by looking to the nature of the relationship between the parties, by reference to the law of fiduciaries, or by finding an implied contract of confidentiality. Most commonly, the breach of confidentiality tort applies to physicians. Courts have also applied it to banks, hospitals, insurance companies, psychiatrists, social workers, accountants, school officials, attorneys, and employees. Some courts have held that liability under the breach of confidentiality tort also extends to "a third party who induces a breach of a trustee's duty of loyalty, or participates in such a breach, or knowingly accepts any benefit from such a breach."

Richards & Solove, *supra* note 52, at 157–58 (footnotes omitted).

118. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."); *id.* § 2 cmt. a ("Like 'contract,' however, the word "promise" is commonly and quite properly also used to refer to the complex of human relations which results from the promisor's words or acts of assurance, including the justified expectations of the promisee and any moral or legal duty which arises to make good the assurance by performance. The performance may be specified either in terms describing the action of the promisor or in terms of the result which that action or inaction is to bring about."); *id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

119. *See supra* note 56.

doctrines addressed to different interests,[120] Professors Prosser and Keeton have argued that it may be possible for a party to recover damages in tort for losses suffered by a broken promise.[121] To be sure, a breach-of-confidentiality tort is less robust in the United States than it is in the English Commonwealth of Nations.[122] But courts have recognized a breach-of-confidentiality tort for some plaintiffs, and it is a reasonable way to deal with the competing privacy and free speech interests.[123] Accordingly, it would be sensible for tort law to offer the victims of revenge porn redress for an invasion of privacy if the victim can prove a broken implicit promise of confidentiality.[124]

Judicial recognition of a tort hinging on proof of betrayal is consistent with the historical development of tort law. As the Supreme Court has noted, "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."[125] The ability to remain flexible to accommodate

120. *See* KEETON ET AL., *supra* note 14, § 1, at 5–6 (noting that "[c]ontract liability is imposed by the law for the protection of a single, limited interest, that of having the promises of others performed," while tort liability "is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legal-recognized interests").

121. Promises induce reliance, and broken promises can force a party to suffer harm from her reliance on the promisor's word.

> When one makes a promise—a commitment as to what he will do or not do in the future—this generally induces reasonable reliance thereon, and reliance damage apart from benefit of the bargain damage is likely to result. Some courts are likely to hold that there is a duty to exercise reasonable care, even if the promise is not enforceable as such under contract law, to prevent foreseeable harm to the promisee (as well as to third parties) from reasonable reliance on the promisor to carry out the promise as made. This is not a duty to perform but rather a duty to prevent reliance damage. Since the loss suffered is the result of reliance on a manifested intention, it might be preferable to regard the recovery when justified as a type of contractual recovery, especially when the claim is by a promisee and not by a third party. But contractual liability can be regarded as limited to the type of case where promises are found to be enforceable, and the damage results from the breach of an enforceable promise.

Id. § 92, at 658.

122. *See, e.g.*, SOLOVE, *supra* note 3, at 188; Gilles, *supra* note 52, at 9–14; Richards & Solove, *supra* note 52, at 158–81.

123. *See, e.g.*, SOLOVE, *supra* note 3, at 190–91.

124. Ironically, Professors Richards and Solove have explained that Prosser could have incorporated a breach of confidentiality into his four-part typology of privacy set forth in his 1960 article, his treatise, and the *Restatement (Second) of Torts*, for which he served as reporter. For whatever reason, Prosser chose not to take privacy law in that direction. *See* Richards & Solove, *supra* note 52, at 151–57.

125. Jaffee v. Redmond, 518 U.S. 1, 8 (1996) (quoting Funk v. United States, 290 U.S. 371, 383 (1933)).

evolving personal and social interests is the very strength of the common law.[126] Over centuries, Anglo-American tort law has evolved from the simple needs of a rural, agricultural society to the complex demands of an urban, industrial enterprise; from the limited need to protect individuals against physical assaults from neighbors and other known parties to the desire to protect large classes of people from new, potentially hazardous, mass-distributed products over which they have no productive control; from the interest in supporting the macroeconomic benefits of the industrial revolution to the desire to prevent the entire cost of defective products from being borne by the victims of misfortune; and from the ancient concern with protecting only a party's ability to earn sustenance to the modern-day recognition that the law ought to safeguard more than physical injuries and economic losses. To accommodate those goals, the courts have recognized that tort law must be adaptable to be able to protect new interests from harm.[127]

The problem here is one that deserves tort law protection. Like any new invention, the World Wide Web offers unforeseen opportunities, but also creates unanticipated problems. The birth of the Kodak portable camera gave everyone the opportunity to record on celluloid whatever the lens could capture.[128] The ability of today's ubiquitous cell phones to take still photographs or moving pictures gives everyone the opportunity to play Matthew Brady or Steven Spielberg. The ease by which photographs and films can be uploaded

126. *See, e.g.*, Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 234–35 (1995) ("[I]n our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'" (quoting Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 339 (1940))); Paul Oskar Kristeller, *"Creativity" and "Tradition"*, 44 J. HIST. IDEAS 105, 112 (1983) ("We should realize from the beginning that a completely stable or rigid tradition that never admits change is humanly impossible and has never existed.").

127. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (recognizing legitimacy of defamation claims); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900–02 (Cal. 1962) (endorsing strict liability for defective products); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring) (concluding that manufacturers should be held strictly liable in tort for defective products); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (Cardozo, J.) (eliminating requirement of proof of privity of contract in order to recover for injuries caused by a defective product); *see also* FLEMING, *supra* note 94, at 3–6; G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1980).

128. Some have said that it was a photographer's use of a camera to take photographs at his daughter's wedding that so troubled Samuel Warren that he contacted his friend and classmate Louis Brandeis, and together they wrote the seminal article on privacy, Warren & Brandeis, *supra* note 71. *See* ANDREWS, *supra* note 5, at 49–51. The story, however, likely is apocryphal. *See* SOLOVE, *supra* note 3, at 109.

to YouTube, Facebook, or other Internet sites allows millions of people to view those images on numerous occasions and for an indefinite time. The boorish practice of revenge porn inflicts harm on its victims without any corresponding social benefit. Providing redress in damages for such conduct is entirely reasonable and directly furthers the mission of tort law.

The Ninth Circuit's opinion in *Barnes v. Yahoo!, Inc.*[129] favorably viewed promissory estoppel principles, rather than tort law, as the basis for relief, but its rationale fits the latter theory too. *Barnes* would allow a plaintiff to perfect the claim, already recognized by tort law, for an invasion of privacy by proving a breach of that implied agreement of confidentiality or, in a word, betrayal. As explained above, a plaintiff would need to show that there was an express or implied agreement between the parties that a photograph be only for the recipient's possession and use or, at least, certainly would not be broadcast to the world via the Internet. *Barnes* clearly was aware of the harms that revenge porn can inflict on a victim—in the court's words, the case involved "a dangerous, cruel, and highly indecent use of the internet for the apparent purpose of revenge"[130]—and believed that common law promissory estoppel principles could fill the gap left by federal law by enabling a victim to sue whoever posted the photographs. The name given to the critical link in a plaintiff's proof, however, is immaterial; what counts is the rationale. The rationale of *Barnes* fits whatever label is applied to a revenge porn claim.[131]

4. The Potential Influence of Fourth Amendment Theory

There is one more defense to consider. An opponent of a remedy for revenge porn would argue that whatever we tell someone else is presumptively his to do with as he pleases. Indeed, insofar as we

129. 570 F.3d 1096 (9th Cir. 2009).

130. *Id.* at 1098.

131. It is a separate question whether bringing a damages action is a wise decision. Some victims of defamation or the invasion of privacy may prefer not to seek relief in court in order to avoid the increased publication of the comments or photographs that would follow from the public acts of filing and litigating a lawsuit. Oftentimes, the defendants cannot pay a large judgment. *See* Laird, *supra* note 25 ("'The general rule is that these people are not wealthy,' [attorney John] Morgan says. 'They're young men and they think it's funny.'"). Yet, plaintiffs will bring such lawsuits to seek vindication, to inflict the cost of litigation on an offender, or in the hope of obtaining an apology. *See* SOLOVE, *supra* note 3, at 119–22.

define our reasonable expectations of privacy by current legal doctrine, especially by what the Supreme Court has defined as the law, we have little to complain about if someone betrays our trust. The Court has made it clear that "'[t]he risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.'"[132] If so, it follows that we have no reasonable expectation of privacy in anything that we give to a third party, whether it is a briefcase or an intimate photograph, because we always assume the risk of betrayal.[133] For example, the Fourth Amendment[134] may protect our "reasonable expectation of privacy,"[135] but only for as long as information in fact remains

132. Hoffa v. United States, 385 U.S. 293, 303 (1966) (quoting Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)).

133. *See, e.g.*, *id.* at 301–02 (the Fourth Amendment does not prohibit the government's use of unidentified informants).

134. The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

135. Justice Harlan coined the phrase "reasonable expectation of privacy" in his concurring opinion in *Katz v. United States*. *See* 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *Katz* is the leading case for the proposition that the Fourth Amendment protects people and their privacy, not places. Charles Katz used a public outdoor telephone booth to engage in an activity familiar to all March Madness fans: gambling on sporting events. Unbeknownst to Katz, the FBI had attached an electronic listening and recording device to the exterior of the phone booth, taped his conversations, and used them against him at a trial for violating the federal gambling laws. Walking back from prior law that had limited a Fourth Amendment "search" to a government trespass, the Supreme Court reversed, ruling that the government had unlawfully violated Katz's privacy interest in the content of his conversations. The Court wrote that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area'" and that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Id.* at 350. As the Court reasoned, the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." *Id.* Eschewing its prior use of the term "constitutionally protected area" to define the scope of the Fourth Amendment, *see, e.g.*, *Hoffa*, 385 U.S. at 301–02; Silverman v. United States, 365 U.S. 505, 510 (1961), the Court wrote that asking whether an outdoor public phone booth was "a 'constitutionally protected area'" was a mistake, because "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. On the one hand, the Court reasoned, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," while, on the other hand, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351–52. Katz was visible when he used the telephone, the Court noted, but that fact was irrelevant because what he could reasonably have thought was that he was secure against not "the intruding eye," but "the uninvited ear." *Id.* at 352.

private. We lose whatever expectation we may have had in whatever we voluntarily reveal to a third party.[136] Why should tort law give someone a remedy for betrayal by a *private party* when there is no remedy for betrayal by the *government*, the setting where it matters the most?

That is a fair argument. Communal expectations influence the legal protection that society is willing to recognize as reasonable. That is precisely why some observers, such as U.S. Ninth Circuit Chief Judge Alex Kozinski, have argued that we need to do a better job of protecting our privacy if we expect the law to do the same.[137] By publicly using cell phones to broadcast our discussions to whoever can hear what we say, and by exposing our private thoughts to the world at large by posting them on Facebook or blasting them via Twitter, we are slowly forfeiting our ability to argue persuasively that we are entitled to protect as private certain aspects of our lives. That modern-day version of the injunction "Physician, heal thyself!" is salutary. Judge Kozinski is right to warn us to avoid becoming accomplices to our own versions of *EDtv* if we want to lay claim to legal protection for unflattering aspects of whatever we do or say.[138]

Katz held the promise of being a watershed decision in Fourth Amendment law. As it turned out, however, the Court did not go very far down that road. Four years later in *United States v. White*, 401 U.S. 745 (1971), the Court held that a person who invites someone into his or her home assumes the risk of being betrayed and being electronically recorded. *White* effectively limited *Katz* to the use of telephones. As Professor Anthony Amsterdam once wrote: "I can conceive of no rational system of concerns and values that restricts the government's power to rifle my drawers or tap my telephone but not its power to infiltrate my home or my life with a legion of spies." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 365 (1974). Yet, that is precisely where *White* left Fourth Amendment law.

136. *See* Goodman, *supra* note 25 ("Once you hit the send button, you've lost control."); *cf.* United States v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979). *Miller* involved a party's bank records, and *Smith* involved the telephone numbers that someone dials. In each case, the Court concluded that once someone allows a third party to have access to personal information—such as a bank, as in *Miller*, or the telephone company, as in *Smith*—that person forfeits any privacy interest that he may have had in that information. *Cf.* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984) ("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").

137. *See* Kozinski, *supra* note 1, at 123–24. Professor Geoffrey Stone has also noted that members of the Facebook generation may be slowly losing the ability to claim that someone else has invaded their privacy. *See* Geoffrey R. Stone, *Privacy, the First Amendment, and the Internet*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION, *supra* note 8, at 193–94.

138. The film EDTV (Universal Pictures 1999) depicted what life would be like for someone who agreed to have his life broadcast 24/7/365.

But it does not follow that tort law cannot offer a remedy to a victim of betrayal. To start with, the Fourth Amendment only establishes a minimum limitation on what a government agent may do to a private party—forbidding "unreasonable searches and seizures"—absent some other positive law. It does not exhaust the available restrictions that the law can and should impose on how members of the public should treat each other.[139] Indeed, the Fourth Amendment does not apply to private actions at all,[140] so there is no reason to use it as the exclusive set of rules governing interpersonal conduct. Moreover, tort law can reject the binary choice that the Fourth Amendment presents by recognizing a privacy interest in information that is shared among a small number of people, but is not in the public domain.[141] Finally, the Fourth Amendment is ultimately beside the point because it does not prevent parties from contracting to keep certain aspects of their lives confidential. Someone who is the victim of a breach of that contract should be able to obtain legal redress. Here, the remedy is for the harm caused by the invasion of privacy accomplished by virtue of betrayal. Tort law awards damages for an invasion of privacy, and contract law allows a party to recover for the breach of an implied-in-law contract. Here, tort law just combines the two theories into one. The Fourth Amendment may not prohibit the government from taking advantage of our weaknesses, but that hardly means that society, via the courts, cannot use tort law as a means of deterring us from injuring others through a broken promise. Accordingly, the rationale underlying the Supreme Court's Fourth Amendment decisions does not militate against recognizing liability for revenge porn.

C. State Criminal Law: Revenge Porn Statutes

Several states have decided to address this problem by making revenge porn a crime.[142] New Jersey went first. Early in 2004, New

139. *See, e.g.*, Lewis v. LeGrow, 670 N.W.2d 675, 684–85 (Mich. App. 2003) (rejecting argument that state privacy statute should be limited to interests protected by the Fourth Amendment).

140. *See, e.g.*, Walter v. United States, 447 U.S. 649, 656 (1980); Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

141. *See, e.g.*, SOLOVE, *supra* note 3, at 162–63; Strahilevitz, *supra* note 109.

142. *See, e.g.*, Stacy Teicher Khadaroo, *Revenge Porn: With Arizona, 10 States Now Outlaw Such Postings*, CHRISTIAN SCI. MONITOR, May 1, 2014, http://www.csmonitor.com/USA

Jersey enacted a statute making it a crime to take or distribute photographs of someone else without her consent if the photographs expose her "intimate parts" or depict her being involved in sexual activity.[143] New Jersey prosecutors have used that law infrequently,[144] but did bring a charge under it in *State v. Parsons.*[145] Parsons was briefly involved with a woman, J.B., whom he had met through an online dating service. Although their relationship was not intimate, they exchanged "clothed" and "unclothed" photographs of each other with the understanding that neither one would share them with anyone else. The relationship ended after two months, and J.B. and Parsons each reacted angrily. Parsons ultimately sent the nude photos of J.B. to her employer, a public school, saying that she was unfit to be a teacher.[146] The New Jersey trial and appellate divisions rejected Parsons' argument that his conduct was not a crime, ruling that the unpermitted disclosure of nude photos of J.B. violated the statute.[147] Under the New Jersey courts' ruling in *Parsons*, posting revenge porn on the Internet would be a crime under New Jersey law.

/Politics/2014/0501/Revenge-porn-With-Arizona-10-states-now-outlaw-such-postings; *State 'Revenge Porn' Legislation*, NAT'L CONF. OF STATE LEGISLATORS, http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx (last updated Sept. 2, 2014). Other states also are considering remedial legislation. *See* NAT'L CONF. OF STATE LEGISLATORS, *supra*.

Some foreign nations have criminalized the distribution of revenge porn. *See, e.g.*, An Act Defining and Penalizing the Crime of Photo and Video Voyeurism, Prescribing Penalties Therefor, and for Other Purposes, Rep. Act No. 9995, 14th Cong. 3d Regular Sess. (July 27, 2009) (Phil.), *available at* http://www.lawphil.net/statutes/repacts/ra2010/ra_9995_2010.html; Oliver Milman, *Sexting: Victoria Makes It An Offence to Send Explicit Images Without Consent*, GUARDIAN, Dec. 11, 2013, http://www.theguardian.com/world/2013/dec/12/sexting-victoria-makes-it-an-offence; Yifa Yaakov, *Israeli Law Makes Revenge Porn a Sex Crime*, TIMES OF ISRAEL, Jan. 6, 2014, http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/. In 2010, a man was convicted in New Zealand for posting revenge porn on Facebook. *See* Tsoulis-Reay, *supra* note 21.

143. *See* N.J. STAT. ANN. § 2C:14-9 (West 2013).

144. The best known prosecution was the conviction of Dharun Ravi for using a webcam to secretly videotape intimate pictures of his college roommate Tyler Clementi having sex with another man. Clementi committed suicide after the images were circulated. *See, e.g.*, Ian Parker, *The Story of a Suicide: Two College Roommates, a Webcam, and a Tragedy*, NEW YORKER (Feb. 6, 2012), http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker?currentPage=all; Kate Zernike, *Jail Term Ends After 20 Days for Ex-Rutgers Student*, N.Y. TIMES, June 19, 2012, http://www.nytimes.com/2012/06/20/nyregion/dharun-ravi-ex-rutgers-student-who-spied-leaves-jail.html?_r=0. That case involved surreptitious videotaping, so it does not directly bear on revenge porn.

145. 2011 WL 6089210 (N.J. Super. Ct. App. Div. Dec. 8, 2011).

146. *Id.* at *1.

147. *Id.* at *2.

California followed almost a decade later. In the autumn of 2013, California adopted a more narrowly defined statute, one that prohibits the posting of revenge porn under certain circumstances. The new statute makes it a crime to record and distribute "the intimate body part or parts" of someone else "under circumstances where the parties agree or understand that the image shall remain private" and the subject of the images suffers "serious emotional distress" as a result.[148] In 2014, Arizona, Colorado, Georgia, Hawaii, Idaho, Maryland, Utah, Virginia, and Wisconsin enacted their own revenge porn legislation.[149] The bills differ in several respects, but each one makes it a crime to publish nude images, or images depicting someone in sexual activity, if the person making the disclosure knows or should have known that the subject of the image did not consent to the disclosure.[150] Because the focus on those laws

148. CAL. PENAL CODE § 647(a), (j) (West 2012). Some commentators argued that loopholes in the original version of that California law weakened its deterrent effect because, for example, the statute did not apply to individuals who took "selfies." *See, e.g.*, Julia Dahl, *"Revenge Porn" Law in California a Good First Step, But Flawed, Experts Say*, CBS NEWS (Oct. 3, 2013, 11:54 AM), http://www.cbsnews.com/8301-504083_162-57605761-504083/revenge-porn-law-in-california-a-good-first-step-but-flawed-experts-say/; Eric Goldman, *California's New Law Shows It's Not Easy To Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:03 PM), http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/; Kelly, *supra* note 23; Jessica Roy, *California's New Anti-Revenge Porn Bill Won't Protect Most Victims*, TIME (Oct. 3, 2013), http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/. California recently addressed that issue. On September 30, 2014, Governor Jerry Brown signed an amendment to the Revenge Porn statute that expanded it to penalize the distribution of an image, rather than the taking and subsequent distribution of the image. S.B. 1255, 2013–14 Sess. (Cal. 2014), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1255. The result is that "selfies" would now be included within the scope of the law.

149. *See* H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014), *available at* http://www.azleg.gov/legtext/51leg/2r/laws/0268.pdf; H.B. 14-1378, 2014 Gen. Assemb., Reg. Sess. (Colo. 2014), *available at* http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont3/B8622059E18D26C687257C9A005794F0?Open&file=1378_enr.pdf; H.B. 838 2013–2014 Gen. Assemb., Reg. Sess. (Ga. 2014), *available at* http://www.legis.ga.gov/Legislation/20132014/143392.pdf; H.B. 1750, 27th Leg. (Haw. 2014), *available at* http://www.capitol.hawaii.gov/session2014/bills/HB1750.htm; H.B. 563, 62d Leg., 2d Reg. Sess. (Idaho 2014), *available at* http://www.legislature.idaho.gov/legislation/2014/H0563.pdf; H.B. 43, 2014 Gen. Assemb. (Md. 2014), *available at* http://mgaleg.maryland.gov/2014RS/bills/hb/hb0043E.pdf; H.B. 71, 2014 Gen. Sess. (Utah 2014), *available at* http://le.utah.gov/~2014/bills/hbillenr/HB0071.pdf; H.B. 326, 2014 Sess. § 1 (Va. 2014) (codified at VA. CODE ANN. §§ 18.2–386.2 (2014)); S.B. 367, 2013 Leg., 101st Reg. Sess. (Wis. 2014), *available at* https://docs.legis.wisconsin.gov/2013/related/acts/243.pdf.

150. The Colorado, Maryland, Utah, and Virginia statutes require the state to prove that the responsible party acted with the intent to harass the subject of the photograph and to inflict serious emotional distress on that person. *See* Colo. H.B. 14-1378 § 1; Utah H.B. 71; Va. H.B. 326 § 1. The other laws do not have that requirement. The Georgia statute requires the

is on the unpermitted disclosure of an image, not on the original act of taking it, the statutes should reach "selfies" sent from one partner to another.

In sum, a fair number of states have made revenge porn a crime whenever the subject has not consented to publication. Those statutes therefore parallel the tort remedy described above. The new criminal laws speak in terms of consent, rather than betrayal, but the proof required is the same.

It may not be long before someone is prosecuted under one of the new criminal laws. The principal constitutional challenge to those statutes will be whether they violate the First Amendment Free Speech Clause.[151] The next section discusses that issue.

III. THE FIRST AMENDMENT FREE SPEECH CLAUSE

The Internet serves as a forum for publication or exchange of ideas, expression, or images. Parties who post images on the Internet will claim an entitlement to the same First Amendment protection

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prosecution to prove that the posting "serves no legitimate purpose to the depicted person." Ga. H.B. 838 § 1. The other statutes do not require such proof. The Hawaii statute requires the actual consent of the subject of the image. *See* Haw. H.B. 1750 § 1. The other laws appear to allow a person to publish an image if he or she reasonably believes that the subject has consented. The Colorado law creates a damages cause of action for the subject. *See* Colo. H.B. 14-1378 § 1(4). The other statutes do not. The Idaho statute allows the prosecution to prove that the photographer intentionally published an image with knowledge that the image was intended to remain private, or did that act with reckless disregard for knowledge that the image was intended to remain private. *See* Idaho H.B. 563. The Utah statute requires proof of actual emotional distress or harm. *See* Utah H.B. 71. The Wisconsin statute requires proof that the person making the disclosure knows that the subject does not consent. *See* Wis. S.B. 367 §§ 1–4 (2014).

151. There are additional issues that will arise in connection with criminal prosecutions for revenge porn. One is whether the relevant state law is sufficiently clear that it can withstand challenge on the ground that it is void for vagueness. For a discussion of the void-for-vagueness doctrine and its application to the criminal law, see, for example, Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 760–61 (2012); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (discussing the historical development of the void-for-vagueness doctrine). Insofar as a criminal statute requires the government to prove that a person posted images with the intent to harass, injure, or extort the subject, the statute should be able to withstand challenge. The Supreme Court has often written that the inclusion of a mens rea element in a criminal law helps to avoid unconstitutional vagueness. *See, e.g.*, Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 526 (1994); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 & n.14 (1982) (collecting cases). Tort actions receive less rigorous scrutiny than penal sanctions. *See Flipside*, 455 U.S. at 498–99 & n.13 (collecting cases). Accordingly, any criminal statute that survives a vagueness challenge can serve as a model for a tort action.

that the owner of a bookstore or a movie theater receives.[152] They will argue that the government cannot criminalize as legally "obscene" simple depictions of nudity,[153] nor can the government prohibit the publication of "indecent" photographs on the Internet.[154] State tort law permitting recovery for the online posting of nude photographs raises the same First Amendment issues because an award of damages also can have the same censorious or deterrent effect.[155] The result, a defendant will argue, is that revenge porn is constitutionally protected speech despite its offensive character.[156]

The Free Speech Clause has proved to be a formidable barrier to attempts to use the tort or criminal laws to prevent disclosure of offensive communications, on the Internet or elsewhere.[157] A victim or a prosecutor would face a well-fortified barricade. As explained

152. *See, e.g.*, Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004) (holding unconstitutional under the Free Speech Clause provisions of the Child Online Protection Act (COPA), Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (1994 ed. Supp. II)), that required online service providers to prevent minors from accessing "material that is harmful to minors"); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (holding unconstitutional under the Free Speech Clause provisions of the Communications Decency Act, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. §§ 223(a) & 223(d) (2006)), that prohibited use of the Internet to transmit "indecent images" or to send "patently offensive messages" minors); *cf.* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126–31 (1989) (holding unconstitutional a congressional ban on so-called "dial-a-porn" "indecent" telecommunications). *But see, e.g.*, Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564 (2002) (rejecting argument that COPA's use of "community standards" to determine what is "harmful to minors" violates the First Amendment).

153. *See supra* note 48.

154. *See infra* note 157.

155. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) ("[T]he application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."); *see also, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

156. *See, e.g.*, Gloria Goodale, *California Outlaws 'Revenge Porn.' Not Everyone Thinks That's a Good Idea*, CHRISTIAN SCI. MONITOR, Oct. 2, 2013, http://www.csmonitor.com/USA /Justice/2013/1002/California-outlaws-revenge-porn.-Not-everyone-thinks-that-s-a-good-idea. -video; Fuchs, *supra* note 26 (quoting former state court judge Andrew Napolitano, stating that the First Amendment protects a person from liability for publishing freely given intimate photos); Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, WIRED (Oct. 28, 2013, 9:30 AM), http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/; *cf.* Jerry Brito, *Are Laws Against "Revenge Porn" a Good Idea?*, REASON.COM (Oct. 21, 2013), http://reason.com/archives/2013/10/21/are-laws-against-revenge-porn-a-good-ide (questioning the wisdom of anti-revenge porn laws).

157. *See* Tex. v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *id.* (collecting cases); *supra* note 153.

below, however, they can break through that barricade in some instances.[158]

A. First Amendment Precedent

Defendants likely would rely heavily on several Supreme Court rulings that the government cannot hold someone liable for the publication of true information. For example, in *Florida Star v. B.J.F.*, the Court held that the First Amendment protects a newspaper for publishing the name of a rape victim that the paper lawfully acquired from a police report placed in the department's pressroom.[159] In *Bartnicki v. Vopper*, the Court held that the First Amendment protects the right of a newspaper to publish the transcript of a wiretap in which the newspaper had played no role even though the wiretap itself was illegal.[160] Defendants in revenge porn cases would maintain that cases such as *Florida Star* and *Bartnicki* disallow a state from imposing civil or criminal liability on the publication of truthful information regardless of the nature or strength of the privacy interest that the state seeks to protect.

Defendants also would rely on *Hustler Magazine, Inc. v. Falwell*,[161] which involved the publication of offensive material depicting the plaintiff as part of a parody. Falwell, a well-known minister and public figure, sued *Hustler* magazine over a liquor advertisement that parodied him. The ad, which "clearly played on the sexual double entendre of the general subject of 'first times,'" referred to the first time that Falwell allegedly sampled a particular liquor, but also implied that Falwell had engaged in a drunken

158. Others agree. *See, e.g.*, Eugene Volokh, *Florida "Revenge Porn" Bill*, THE VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/ ("I do think that a suitably clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there's good reason to think that the subject did not consent to publication of such pictures, would likely be upheld by the courts. . . . [N]onconsensual depictions of nudity could be prohibited.").

159. 491 U.S. 524 (1989). *Florida Star* was the most recent in a series of cases dealing with the media's disclosure of such information. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (ruling that newspapers cannot be prosecuted for disclosing the name of a juvenile offender that the papers lawfully obtained by listening to the police band and interviewing witnesses); Okla. Publ'g Co. v. Dist. Ct. of Okla., 430 U.S. 308 (1977) (ruling that a newspaper cannot be held liable for publishing the events that transpired during a closed-door juvenile proceeding when the judge allowed media to sit in the courtroom); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (ruling that a television station cannot be held liable in tort for reporting the name of a rape victim that had been disclosed in court at trial).

160. 532 U.S. 514 (2001).

161. 485 U.S. 46 (1988).

incestuous relationship with his mother in an outhouse.[162] Falwell sued, claiming that he was the victim of defamation, an invasion of his privacy, and intentional infliction of emotional distress due to the way in which he was portrayed in the ad. At the end of trial, the district court granted *Hustler* a directed verdict on Falwell's privacy claim, and the jury rejected his claim of defamation but returned a verdict in his favor on his emotional distress claim.[163] After the district court and court of appeals upheld the verdict on that ground, Hustler sought review in the Supreme Court. As the Court saw it, the case presented "a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress."[164] The question was "whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most."[165] The Court answered, "No."

The Court saw the *Falwell* case as another example of potentially offensive public speech uttered about a public figure.[166] The Court found no reason not to apply the *New York Times Co. v. Sullivan*[167] constitutional standard for libel to Falwell's claim for intentional infliction of emotional distress.[168] The Court refused to exempt Falwell's emotional distress claim from the defamation standard adopted in *Sullivan* because each case involved the same basic pattern: allegedly offensive statements about a person involved in public affairs.[169] The two scenarios were the same, the Court concluded, so there was no reason for different legal rules to apply to each one. The Court also was troubled by the consequence of refusing to apply the *Sullivan* standard to political satire: "Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject."[170] Unwilling to

162. *Id.* at 48.
163. *Id.* at 48–49.
164. *Id.* at 50.
165. *Id.*
166. *See id.* at 50–52.
167. 376 U.S. 254 (1964).
168. *See Falwell*, 485 U.S. at 50–52.
169. *See id.* at 52–53.
170. *Id.* at 53; *see id.* at 53–56.

take the risk of cheapening the debate over public figures or issues, the Court held that Falwell could not recover for the intentional infliction of emotional distress unless he could satisfy the *Sullivan* test, used when a public figure brings an action for defamation.[171] Given the jury's rejection of his claim for defamation, the Court reasoned, Falwell could not prevail on his emotional distress claim.[172]

The argument from *Falwell* would go as follows: The gravamen of a plaintiff's revenge-porn claim is that someone published images of her naked or that revealed intimate details of her life, an action that constituted outrageous conduct or that placed her in a false light by mischaracterizing her as promiscuous. Regardless of what the claim may be, the defendant's argument would go, First Amendment law denies a plaintiff the right to recover. A plaintiff should not be able to recharacterize an invasion of privacy or "false light" defamation claim as an entirely different tort, subject to different rules, simply because of her mistaken judgment about the possibility that a former partner would publish photographs that she freely and knowingly allowed him to possess. The term "revenge porn" may sound nefarious, and the conduct involved may be offensive, but the law should not compensate someone for the consequences of a voluntary decision that, viewed in hindsight, was ill-considered. Since the plaintiff was not coerced into posing for a photographer or taking a photograph of herself, the law should not interfere in her decision, however much she may now regret it.

The Supreme Court's precedents, however, do not reach that far. In *Cantrell v. Forest City Publishing Co.*,[173] the Court upheld a judgment in a plaintiff's favor on a "false light" privacy claim. The claim was based on a magazine story that, given the jury's verdict, mistakenly depicted the plaintiff and her family in the period after the plaintiff's husband's death. The Court sustained the judgment in her favor. What is important about *Cantrell* is the nature of the inaccuracies in the story.[174] The plaintiff's theory was that those

171. *See id.* at 56.

172. *See id.* at 57.

173. Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974). In *Time, Inc. v. Hill*, 385 U.S. 374, 390–91 (1967), the Court had reserved the question whether the government can penalize the publication of truthful but private information unrelated to public affairs. The *Cantrell* decision answered that question in the affirmative.

174. The Supreme Court described the story as follows:

errors made her the object of "pity and ridicule" in her community. By contrast, a revenge porn photograph is likely to leave a viewer with a far more damaging impression—namely, that the victim is a trollop. Neither *B.J.F.* nor *Bartnicki* cited *Cantrell*, much less overruled it. Moreover, *B.J.F.* and *Bartnicki* cannot be read as protecting the disclosure of any and all true information. That interpretation would permit the disclosure of material protected by the copyright laws, even though the First Amendment does not nullify the Copyright Clause.[175] It even would permit a media outlet to steal information and publish material with impunity. The First Amendment, however, does not reach that far.[176] In fact, in *B.J.F.* and *Bartnicki* the Court went out of its way to make clear that the holding in each case did not protect such conduct,[177] and *Bartnicki*

> Eszterhas' story appeared as the lead feature in the August 4, 1968, edition of the Plain Dealer Sunday Magazine. The article stressed the family's abject poverty; the children's old, ill-fitting clothes and the deteriorating condition of their home were detailed in both the text and accompanying photographs. As he had done in his original, prize-winning article on the Silver Bridge disaster, Eszterhas used the Cantrell family to illustrate the impact of the bridge collapse on the lives of the people in the Point Pleasant area.
>
> It is conceded that the story contained a number of inaccuracies and false statements. Most conspicuously, although Mrs. Cantrell was not present at any time during the reporter's visit to her home, Eszterhas wrote, "Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of non-expression she wore at the funeral. She is a proud woman. Her world has changed. She says that after it happened, the people in town offered to help them out with money and they refused to take it." Other significant misrepresentations were contained in details of Eszterhas' descriptions of the poverty in which the Cantrells were living and the dirty and dilapidated conditions of the Cantrell home.
>
> The case went to the jury on a so-called "false light" theory of invasion of privacy. In essence, the theory of the case was that by publishing the false feature story about the Cantrells and thereby making them the objects of pity and ridicule, the respondents damaged Mrs. Cantrell and her son William by causing them to suffer outrage, mental distress, shame, and humiliation.

Cantrell, 419 U.S. at 247–48 (footnotes omitted).

175. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555–60 (1985); PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 16 (2003).

176. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (ruling that the First Amendment does not prohibit a state damages award for the unconsented-to broadcast of an entertainer's entire performance).

177. *See* Bartnicki v. Vopper, 532 U.S. 514, 525 (2001) ("[T]hree factual matters . . . distinguish most of the cases that have arisen under [the federal wiretap laws]. First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Third, the subject matter of the conversation was a matter of public concern." (citations omitted)); Florida Star v. B.J.F., 491 U.S. 524, 532–33 (1989) ("Our cases have carefully eschewed reaching this ultimate

also reaffirmed the Court's earlier decision in *Branzburg v. Hayes*,[178] which rejected that proposition.[179] The Free Speech Clause, as construed by the Supreme Court, does not foreclose any and all remedies for an invasion of privacy.[180]

The *Falwell* case protects a speaker's right to make scandalous or even "outrageous" statements about a public figure or matter of public importance,[181] and that principle applies to speech in the form of spoken words or images, as it did in *Falwell* itself.[182] The Court's holding, however, does not foreclose a plaintiff from initiating the tort action described above, seeking damages from revenge porn. The Court carefully limited its holding in *Falwell* to cases involving a public figure.[183] The typical victim of revenge porn would be a private individual, not a public official or a public figure. That difference is important. As the Supreme Court explained in *Gertz v. Robert Welch, Inc.*[184] and reiterated in *Falwell*, the public has a strong interest in a robust discussion of matters of public importance.[185] Moreover, a public official or figure has a far stronger

question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.").

178. 408 U.S. 665 (1972).

179. *See Bartnicki*, 532 U.S. at 532 n.19 ("Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully. 'It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.'" (quoting *Branzburg*, 408 U.S. at 691)); *see also, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (upholding CIA prepublication agreements over First Amendment challenge). *Snepp* is discussed *infra* at notes 195–200 and accompanying text.

180. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975) ("Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable. The public's right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members." (footnote omitted)).

181. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988).

182. *See id.* at 48–49.

183. *See id.* at 56 ("We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.").

184. 418 U.S. 323 (1974).

185. *See Falwell*, 485 U.S. at 50–56.

opportunity to rebut a disparaging claim than a private party because the former enjoys far greater access to the broadcast and print media than the latter.[186] Because private parties are more vulnerable to defamatory claims than are public officials or figures, the Court reasoned in *Gertz*, the state has a correspondingly stronger interest in protecting private parties through tort law.[187] Finally, a person who enters public life or who participates in the public debate assumes a risk of increased public scrutiny and strenuous challenge to his or her opinions.[188] The Court therefore has given the states greater leeway to define their tort law standards to protect private parties than public officials or figures.[189]

Falwell did not change that rule. Falwell was a public figure, so the Court had no occasion to decide what rule would apply to an emotional distress claim brought by a private figure. *Falwell* stands for the proposition that a public official or public figure cannot use the tort of intentional infliction of emotional distress to escape First Amendment limitations on his or her ability to recover damages for defamation. That is, *Falwell* makes it clear that a party who, under *Sullivan*, must prove "malice" in order to recover for defamation cannot simply relabel that claim as one for the intentional infliction of emotional distress and thereby avoid the difficult burden of proof that would govern a claim for libel or slander. Otherwise, any public official or figure, or any state, could make an end run around *Sullivan* through a creative description of a tort and defeat the public's interest in "[t]he sort of robust public debate encouraged by the First Amendment."[190]

That concern is not present, however, if a state provides a private party with a properly limited tort remedy for revenge porn. The state has a legitimate interest in affording an individual protection against the destruction of her reputation due to a reasonable, albeit mistaken, judgment about someone else's

186. *See Gertz*, 418 U.S. at 344–45.

187. *See id.* at 344.

188. *See id.* at 344–45.

189. *See id.* at 346–47 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." (footnote omitted)).

190. *Falwell*, 485 U.S. at 51.

reliability.[191] The Supreme Court recognized in *Gertz* that "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."[192] Invasions of privacy may involve the disclosure of true facts, rather than falsehoods, but the state has an equally legitimate interest in affording individuals the opportunity to avoid being tarred for all time by a mistaken judgment. Each tort "'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'"[193] If state law requires a plaintiff to prove that she or he was betrayed by the person who published revenge porn, tort law would be able to remedy the harms that speech causes without punishing an innocent party or chilling constitutionally protected third-party speech. A properly defined tort—that is, one that places on the plaintiff the burden of proving the betrayal of an express or tacit agreement not to publish such photographs—would provide compensation to deserving victims without trespassing on anyone's constitutionally protected conduct.

The enforcement of generally applicable laws against an individual speaker or even the professional media does not infringe on the First Amendment even if those laws have an incidental effect on the individual or media organization's ability to gather and report news or express constitutionally protected speech.[194] Among those generally applicable laws is the law of contracts. Everyone enjoys the right to freedom of speech, but no one, not even those of us who publish books, articles, or Internet blogs, can refuse to perform our end of a contract by claiming that doing so would stifle our ability to engage in the free expression of ideas. If we freely enter into a contract to limit our freedom to publish, we can be held to what we have agreed, and the courts can provide the aggrieved party with an appropriate remedy even if that remedy infringes on the rights that

191. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."); Stone, *supra* note 137, at 174, 190 ("The ability of individuals to engage in private conduct without having it broadcast to the world, the capacity of individuals to make mistakes without being haunted by them forever, and the freedom to live one's life without having to answer publicly for every choice, are unquestionably legitimate personal and societal interests." (footnote omitted)).

192. *Gertz*, 418 U.S. at 341.

193. *Id.* (quoting *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring)).

194. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991); Branzburg v. Hayes, 408 U.S. 665, 682–84 (1972).

we otherwise would have under the First Amendment. That is the lesson of *Snepp v. United States*.[195]

Frank Snepp was an agent for the Central Intelligence Agency. Like every other CIA employee, Snepp signed an agreement as a condition of his employment in which he promised to submit for pre-publication review any book that he wrote, during or after his tenure as a government employee, relating to his work for the government.[196] Snepp was in Vietnam in the period before the United States withdrew its troops as part of the agreement to end the Vietnam War, and he wrote a book entitled *Decent Interval* that was critical of the government's withdrawal. The government sued Snepp for breaching the terms of his pre-publication agreement, and he defended in part on the ground that the agreement violated the First Amendment.[197] The Supreme Court squarely rejected Snepp's claim for two separate reasons. First, the Court noted that Snepp had voluntarily entered into that agreement when he accepted a position with the CIA, and that the agreement was a reasonable exercise of the government's authority to protect classified information.[198] Second, the Court reasoned that, even in the absence of any such agreement, the government would have had a compelling interest in protecting the secrecy of whatever information Snepp acquired by virtue of his government employment that was "important to" the national security.[199] The Court in *Snepp* therefore held that the

195. 444 U.S. 507 (1980); *see also, e.g.*, Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975); United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (both upholding similar CIA pre-publication agreements over First Amendment challenges); Joshua B. Bolten, Comment, *Enforcing the CIA's Secrecy Agreement Through Postpublication Civil Action:* United States v. Snepp, 32 STAN. L. REV. 409 (1980).

196. The relevant portions of the agreement can be found in the court of appeals' opinion. United States v. Snepp, 595 F.2d 926, 930 nn.1–2 (4th Cir. 1979), *rev'd*, 444 U.S. 507 (1980).

197. *Snepp*, 444 U.S. at 507–10.

198. "When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree with the Court of Appeals that Snepp's agreement is an entirely appropriate exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'" *Id.* at 509 n.3 (citation omitted); *cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31–37 (1984) (ruling that the First Amendment does not grant a party to litigation the right to publish material obtained during pretrial discovery but placed under a protective order).

199. "Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. . . . The Government has a compelling interest in protecting both the secrecy of

government could sue Snepp for breaching his pre-publication contract even though doing so would otherwise infringe on his First Amendment right to publish.[200]

It could be argued that *Snepp* was an unusual, if not extraordinary, case that led to a very limited, if not unique, decision. The argument would have been that the government has a stronger interest in regulating the disclosure of information that a government employee learns due solely to his status as a government employee than it has in regulating the conduct of private parties. Atop that, the argument would go, the government has a compelling interest in protecting against the disclosure of highly classified information vital to the nation's defense—information that only a minute number of officials have access to use—the disclosure of which could irreparably harm the nation in ways that only trained professionals can fully understand. Moreover, whatever the law might be with respect to disclosure by government officials or private parties, the argument would continue, the First Amendment affords professional media outlets greater protection than it gives to individuals, because the media plays a vital role in the dissemination of information about matters of public interest. Accordingly, the argument would conclude, *Snepp* should not be read to permit the government to obtain relief against a media organization for its disclosure of truthful information.

That argument might seem facially reasonable, but the law has not developed along those lines. The Supreme Court has made it clear that the same general, neutral laws that apply to private parties and businesses—such as the labor, antitrust, or environmental laws—also apply to media defendants.[201] A newspaper cannot refuse to honor an agreement to purchase paper or ink on the ground that the First Amendment trumps contract law principles requiring each party to honor its contractual obligations. Similarly, a media defendant can be held liable when it publishes information in violation of a promise

information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest." *Snepp*, 444 U.S. at 509 n.3 (citations and internal punctuation omitted).

200. The Court decided that the appropriate remedy was to impose a constructive trust awarding the government all proceeds from the sale of Snepp's book. *See id.* at 510–16.

201. *See infra* notes 205–09 and accompanying text.

of confidentiality similar to the one that Frank Snepp signed. That is the lesson of *Cohen v. Cowles Media Co.*[202]

As noted above, Dan Cohen gave a newspaper information about a particular candidate for state office in return for its assurance that its source would remain confidential. The newspaper later identified Cohen as the source, however, and he sued for a breach of promise, seeking damages for having lost his job due to the disclosure. The Minnesota Supreme Court ruled that Cohen could state a claim under the common law of promissory estoppel,[203] but nonetheless ruled against him on the ground that allowing him to recover damages would violate the First Amendment Free Speech Clause.[204] The Supreme Court reversed.

The Court held that the First Amendment does not bar a claim brought under common law principles of promissory estoppel seeking damages for a breach of a promise of confidentiality.[205] The Court saw no reason to create a special First Amendment exemption for the media from that common law doctrine. In the past the Court had made it clear that media are subject to generally applicable, content-neutral statutes, such as the copyright laws,[206] the labor laws,[207] the antitrust laws,[208] and the tax laws.[209] Those statutes, the Court noted, can be applied to the media in the same manner that they govern everyone else.[210] The same is true, the Court held, of state laws governing promissory estoppel. That body of law does not single out the media or any particular type of speech for special unfavorable treatment. The state law applies to everyone and "simply requires those making promises to keep them."[211] Holding someone

202. 501 U.S. 663 (1991).

203. Cohen v. Cowles Media Co., 457 N.W.2d 199, 203–04 (Minn. 1990), *rev'd on other grounds*, 501 U.S. 663 (1991).

204. *Id.* at 205.

205. Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

206. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576–79 (1977) (ruling that the First Amendment does not give the media a right to violate the copyright laws).

207. *See, e.g.*, Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 192–93 (1946); Associated Press v. NLRB, 301 U.S. 103 (1937) (ruling that the First Amendment does not protect the media against application of the labor laws).

208. *See, e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969); *Associated Press*, 301 U.S. 103 (same, the anti-trust laws).

209. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r, 460 U.S. 575, 581–83 (1983); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (same, the tax laws).

210. *See Cowles Media*, 501 U.S. at 669–70.

211. *Id.* at 671.

to his assurances, the Court concluded, does not infringe on anyone's freedom of expression. "The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed."[212] In addition, application of state promissory estoppel law would not deter third parties from engaging in protected forms of expression. Any deterrent effect would be "no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them."[213]

Cowles Media shows that recognition of a tort claim or criminal charge requiring proof of betrayal would not infringe on legitimate First Amendment interests. *Cowles Media* allows parties to contract away their First Amendment rights, treating the First Amendment as a freedom rather than as a set of handcuffs.[214] *Cowles Media* also reveals that the Free Speech Clause does not bar a court from treating as confidential discussions between parties that occur in a relationship that society recognizes as privileged—for instance, between a lawyer and her client or between a physician and her patient—even when neither party makes or receives an explicit assurance of confidentiality. Society presumes that the parties to

212. *Id.*

213. *Id.* at 672. Members of the academy, while sometimes critical of the Supreme Court's decision in *Cowles Media*, have nonetheless recognized that it allows parties to contract away or waive their First Amendment rights. *See, e.g.*, Jerome A. Barron, Cohen v. Cowles Media *and Its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419 (1994); Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media, 35 GA. L. REV. 1087 (2001); Gilles, *supra* note 52, at 71; McClurg, *supra* note 52, at 909; Richards & Solove, *supra* note 53, at 179–80; Stone, *supra* note 137, at 179 (all explaining that *Cowles Media* allows parties to contract away their First Amendment rights); 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, 1057 (2000) ("The Supreme Court explicitly held in *Cohen v. Cowles Media* that contracts not to speak are enforceable with no First Amendment problems. Enforcing people's own bargains, the Court concluded (I think correctly), doesn't violate those people's rights, even if they change their minds after the bargain is struck." (footnote omitted)).

214. *See* Volokh, *supra* note 213, at 1057–58 ("And such protection ought not be limited to express contracts, but should also cover implied contracts (though, as will be discussed below, there are limits to this theory). In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality. This explains much of why it's proper for the government to impose confidentiality requirements on lawyers, doctors, psychotherapists, and others: When these professionals say 'I'll be your advisor,' they are implicitly promising that they'll be confidential advisors, at least so long as they do not explicitly disclaim any such implicit promise." (footnotes omitted)).

those relationships intend to exchange information in confidence even when they do not have an express written or oral agreement to that effect. Not every exchange, of course, qualifies for such protection. We do not expect that what we tell a police officer or a journalist will remain secret any more than we expect that what we say in a letter to the editor of the New York Times will never be disclosed to the world. But, as noted above, it would be a mistake to treat every disclosure as public simply because we made it to a trusted party. If so, then it surely would be permissible for contract law to treat certain revelations as being made only to those certain other parties in a special relationship with the speaker.[215]

It should be irrelevant that *Cowles Media* involved a state law claim resting on promissory estoppel principles whereas a revenge porn claim would sound in tort. In *Cowles Media*, the Supreme Court did not suggest that there was a unique feature of promissory estoppel law that allows a plaintiff to overcome a First Amendment defense, a factor that is not present elsewhere in contract or tort law. What was critical in *Cowles Media* was the neutral character of the state-law claim. Minnesota's promissory estoppel law, like its workers' compensation laws, applied to media and non-media defendants alike.[216] Promissory estoppel law also did not seek to censor speech. It only gave a remedy to parties injured by a broken promise, a promise that a person was free not to make.[217] As long as

215. *Id.* at 1059 ("[T]he implicit contract theory could uphold laws that by default prevent lawyers, doctors, psychiatrists, sellers of medical supplies, and possibly sellers of videos and books from communicating information about their customers; but it wouldn't uphold laws that by default prevent reporters (who are notorious for communicating embarrassing things, not keeping them confidential) from revealing what was said to them, prevent consumers from reviewing products, or prevent sellers of groceries or shoes from communicating who bought what from them. I doubt that most of us expect that someone selling us our food is implicitly promising to keep quiet about what they sold us." (footnote omitted)).

216. *See Cowles Media*, 501 U.S. at 669–70 ("This case . . . [is controlled] . . . by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . It is, therefore, beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." (citations and internal punctuation omitted)).

217. *See id.* at 671–72 ("Respondents and *amici* argue that permitting Cohen to maintain a cause of action for promissory estoppel will inhibit truthful reporting because news organizations will have legal incentives not to disclose a confidential source's identity even when that person's identity is itself newsworthy. . . . But if this is the case, it is no more than the incidental, and

the application of state civil or criminal law does not have a censorious effect beyond what a party voluntarily accepted, the label used to describe the state cause of action for a breach of a promise of confidentiality is immaterial. Accordingly, a tort remedy or criminal charge for revenge porn requiring proof of betrayal is not materially different from the promissory estoppel claim upheld over a First Amendment challenge in *Cowles Media*. No one must accept an agreement not to publish intimate images, and, if someone does, a tort or criminal remedy for betrayal only seeks to enforce a promise willingly made.

B. First Amendment Theory

The same conclusion follows from the application of general free speech principles. The fundamental mission of the First Amendment is to prevent the government from censoring the free communication and exchange of ideas because it finds their content objectionable.[218] That interest is particularly important when speech is necessary to or concerns the democratic process, members of our government, candidates for public office, or matters of public interest.[219] Yet, the Free Speech Clause also extends beyond political expression. It embraces speech done for the purpose of artistic expression, public or private entertainment, or personal self-fulfillment[220] however "trivial, despicable, crass, and repulsive" that

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constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them.").

218. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

219. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (citations and internal punctuation omitted)); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26, 154–55 (1965).

220. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012) (holding unconstitutional the Stolen Valor Act of 2005, 18 U.S.C. § 704 (2006), which makes it a crime falsely to claim to have received a decoration or medal of the armed forces); Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729 (2011) (ruling that the First Amendment protects the sale of violent video games); Snyder v. Phelps, 131 S. Ct. 1207 (2011) (ruling that the First Amendment protects the right to engage in hateful protests directed at the funeral of a servicemember); United States v. Stevens, 559 U.S. 460 (2010) (ruling that the First Amendment protects at least some depictions of acts of animal cruelty); *see generally Brown*, 131 S. Ct. at 2733 ("The Free Speech Clause exists

speech may be.[221] The theory is that we should not exclude viewpoints from attaining currency in the "marketplace of ideas"[222] and that we should not keep individuals, in the exercise of their own autonomy, from expressing divergent or minority beliefs, because "one man's vulgarity is another's lyric."[223]

Revenge porn implicates two basic free speech questions, questions that the Supreme Court and scholars have grappled with for more than a century: Is revenge porn a type of "speech" that the First Amendment protects? If revenge porn is protected speech, what protection should it receive? Those questions may be difficult to answer as a matter of free speech theory.[224] For example, the Supreme Court has recognized that certain forms of speech—child pornography, fraud, incitement to criminal activity, obscenity, defamation, threats, and speech integral to criminal conduct (such as an agreement to commit murder)—are not protected.[225] The Court also has held that some types of speech, most prominently commercial speech—that is, the offers and inducements to engage in commerce—are entitled to First Amendment protection,[226] but not to

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principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.").

221. SOLOVE, *supra* note 3, at 125.

222. *Abrams*, 250 U.S. at 630.

223. Cohen v. California, 403 U.S. 15, 24–25 (1971); *see, e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994) (discussing autonomy justification for free speech); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Stone, *supra* note 137, at 174 ("[T]he First Amendment generally forbids restrictions of speech in public discourse on the ground that it is offensive, unsettling, insulting, demeaning, annoying, snarling, bilious, rude, abusive, or nasty.").

224. The First Amendment protects political tracts, photographs, films, and a host of other media of expression. *See, e.g.*, *Brown*, 131 S. Ct. 2729 (video games); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (advertising); United States v. Playboy Entm't Grp. Inc., 529 U.S. 803 (2000) (cable programming); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (information on beer labels); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 789 (1985) (Brennan, J., dissenting) (credit reports); Jenkins v. Georgia, 418 U.S. 153 (1974) (films). The difficult issue is whether the *content* of revenge porn is protected, not the medium used.

225. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations, 413 U.S. 376 (1973) (speech encouraging unlawful discrimination); Watts v. United States, 394 U.S. 705 (1969) (knowingly and willfully threatening the life of the President); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (defamation); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (speech integral to criminal conduct); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (taunts or "fighting words"); *see also* United States v. Alvarez, 132 S. Ct. 2537, 2544, 2546–47 (2012) (plurality opinion) (including perjury and impersonating a government official with the above list).

226. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (promotional advertising entitled to First Amendment protection); Va. State Bd. of

the same degree as other forms of speech.[227] Does revenge porn fit into either category?

Here the argument would be that revenge porn should receive at most *de minimis* First Amendment protection. Revenge porn exists merely to humiliate its victim; it does not inform public debate, nor is it a form of artistic self-expression. Professor Solove was right to note that "[d]isclosures made for spite, or to shame others, or simply to entertain, should not be treated the same as disclosures made to educate or inform."[228] Revenge porn also is not a legitimate form of self-expression because that rationale cannot be used to justify the intentional infliction of injury on someone else. Finally, it would be risible for anyone to claim that affording damages for this utterance would deter parties from engaging in political speech, or any other kind of legitimate expression. As such, it would belittle the First Amendment to afford revenge porn anything more than *de minimis* protection.

Nonetheless, a plaintiff might have a difficult time persuading the Supreme Court to exclude revenge porn entirely from protected "speech." In 2010 the Court refused to treat the visual depiction of horrific forms of animal cruelty as categorically unprotected speech. In *United States v. Stevens*,[229] the Court was forced to decide

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Pharmacy v. Va. Citizens Consumer Council Inc., 425 U.S. 748 (1976) (bans on advertising the price of prescription drugs is unconstitutional); *see also, e.g.*, Connick v. Meyers, 461 U.S. 138, 146–49 (1983) (employee speech that does not relate to "any matter of political, social, or other concern to the community" receives lesser First Amendment protection).

227. Commercial speech enjoys only a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). The reason is that the government has a considerable interest in regulating the terms of commercial transactions and the speech accompanying them. *See, e.g.*, United States v. Edge Broad. Co., 509 U.S. 418, 426 (1983) (lotteries and related advertising); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986) (gambling and related advertising); *Ohralik*, 436 U.S. at 456 (identifying a securities prospectus, a corporate proxy statement, published price and shipping cost details among competitors, and employers' threats of retaliation for conduct protected by the labor laws as examples of speech that the government may regulate); *id*. at 457–68 (ruling that a state bar may sanction a lawyer for making a prohibited in-person solicitation of a hospitalized client). Moreover, commercial speech is more readily verifiable by the speaker, *Va. State Bd. of Pharmacy*, 425 U.S. at 772, and regulation is unlikely to deter worthwhile commercial speech due to the financial interest motivating the speaker, *see, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977); *Cent. Hudson*, 447 U.S. at 564 n.6.

228. SOLOVE, *supra* note 3, at 74. The new revenge porn criminal statutes do not invariably criminalize conduct protected by the First Amendment. If they apply only under circumstances where the parties agree or understand that an image shall remain private, those laws should withstand a free speech challenge.

229. 559 U.S. 460 (2010).

whether a federal law prohibiting the interstate distribution of depictions of animal cruelty could withstand a First Amendment challenge. The relevant statute, section 48 of Title 18,[230] made it a crime to create, sell, or possess so-called "crush videos"—namely, videotape depictions of the intentional torture and killing of defenseless small animals such as dogs, often by women barefoot or wearing high heels, accompanied by the helpless squeals of the animals.[231] The Court found "startling and dangerous" the government's argument that the courts could and should engage in what the Court described as a "highly manipulable" categorical balancing test directing the courts to weigh the pros and cons of particular types of speech.[232] *Stevens* therefore protected information that barely makes any material contribution to any conceivable legitimate interest, let alone an important matter of legitimate public or private concern. The upshot is that the Court is unlikely to place revenge porn entirely out of bounds.

Yet, there would be no need to resolve that question. The reason is that here, as in *Cowles Media*, tort liability would not rest on any basis that threatens government censorship because of the messages or ideas contained in a photograph. A tort or criminal offense protects only against the publication of private aspects of a person's life that a reasonable person would find offensive and that breached an implicit promise of confidentiality. Accordingly, a *Playboy* model could not recover damages for the magazine's use of her photos because they were taken with the clear understanding that they would be published.[233] Limiting recovery in that manner—to instances in which a plaintiff can prove that an offensive publication betrayed a promise—would not jeopardize legitimate free speech concerns. Here, as in *Cowles Media*, tort liability would simply encourage people to keep their word.

Professor Susan Gilles has argued that the Supreme Court would be unlikely to uphold a breach-of-confidentiality tort remedy because it targets a particular type of speech.[234] In her view, the Court rejected the free speech defense in *Cowles Media* for three reasons:

230. 18 U.S.C. § 48 (2012).
231. *Stevens*, 559 U.S. at 465–66; H.R. REP. NO. 106-397, at 2–3 (1999).
232. *Stevens*, 559 U.S. at 465–66, 469–72.
233. *See, e.g.*, KEETON ET AL., *supra* note 14, at 867 (quoted *supra* at note 89).
234. *See* Gilles, *supra* note 52, at 71–83.

common law promissory estoppel principles do not target the media; that doctrine does not apply to a particular type of message; and promissory estoppel law is not aimed at "speech" in any form or, said the other way, the doctrine applies to all types of agreements not to engage in a particular activity, whether it is construction, commerce, or communication, while a breach-of-confidentiality tort is, by design, limited to speech.[235] In my opinion, she has misread the Court's decision in *Cowles Media*. Those factors may describe facts of the *Cowles Media* case, but Justice White's opinion for the Court did not demand that all three be present in order for a claim to go forward.[236]

Cowles Media involved a straightforward quid pro quo: In return for the information Cohen possessed, Cowles Media traded its free-speech right to identify him in any story it would publish. What was critical to the Supreme Court's ruling in that case was that Cowles Media freely entered into that agreement. Treating a breach of that promise as an occasion for affording relief under state law, the Court reasoned, no more infringes free speech principles than affording a remedy for broken promises having nothing to do with speech. First Amendment theory does not require that the law imprison individual or media defendants in their rights; they are free to exercise or trade them if they find it to their advantage to receive something else in return.[237] Indeed, denying a plaintiff the opportunity to recover for a broken promise of confidentiality would elevate media defendants above everyone else in society who discloses confidential information, and the First Amendment does not entitled media defendants to occupy such a privileged status.[238]

Cowles Media therefore allows the state to establish a tort or criminal remedy for the betrayal involved in the publication of revenge porn. The event that would trigger liability is the broadcasting of a photograph in violation of an express or implied agreement not to do precisely that. Imposing liability simply holds a defendant to his word.[239] A revenge porn tort or criminal offense

235. *See id.* at 70.

236. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 668–72 (1991).

237. That interpretation of *Cowles Media* also is consistent with *Snepp*, which did not rely on any of the factors cited by Professor Gilles. *See* Snepp v. United States, 444 U.S. 507, 509 n.2 (1980).

238. *See supra* notes 206–11 and accompanying text.

239. *See Cowles Media*, 501 U.S. at 669–70.

focuses on the injury arising from a breach of an express or implied agreement to keep that speech confidential. The risk of injury arises only because the parties communicate in a context where confidentiality is either stated or assumed. Take away that understanding and there is no tort and no crime.

In this regard, imposing liability for revenge porn is not materially different from allowing a party to recover damages for her spouse's, her attorney's, her physician's, or her minister's breach of the confidentiality of their communications. The protection that tort or criminal law would provide in those settings would not censor anyone from speaking about a matter of public importance. That protection is limited to communications exchanged in a specific relationship between the parties that assumes confidences exchanged will be kept secret. American law recognizes that protecting the confidentiality of those relationships is important, and it would refuse to allow the government to demand that a lawyer, for example, breach his duty of confidentiality to his or her client even when doing so would be necessary to prove a defendant's guilt in a criminal case. If so, it would be reasonable to conclude that a confidential relationship is both a legitimate and sufficiently desirable one that tort and criminal law should protect.[240] Finally, it would be an odd rule of law that a party cannot waive his or her free speech rights. The Constitution permits each of us to waive various constitutional rights, such as the Sixth Amendment right to a speedy and public trial.[241] *Cowles Media*—and *Snepp*—merely add the Free Speech Clause to that list.

To be sure, the First Amendment protects the interests of listeners as well as speakers. A defendant in a revenge porn lawsuit doubtless would argue that he should not be held liable for broadcasting a photograph because liability would deprive third

240. *Cf.*, *e.g.*, Branzburg v. Hayes, 408 U.S. 665, 692 (1972) ("[W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the conduct of his source, or the evidence thereof, on the theory that it is better to write about crime than to do something about it.").

241. *See*, *e.g.*, Gilmore v. Utah, 429 U.S. 1012 (1976) (ruling that a condemned prisoner can waive any federal constitutional claims that he could raise to challenge his conviction or sentence); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (ruling that a person can waive his or her Fourth Amendment rights); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (noting that a defendant can waive his or her Fifth Amendment right to a fair trial and Sixth Amendment rights to a jury trial and to confront his or her accusers); Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (ruling that a person can waive the Sixth Amendment right to be represented by counsel).

parties of the opportunity to see the images. But that argument is quite unpersuasive. There is no reason to be overly paternalistic and forbid someone from giving up his free speech rights for something that he valued more than expression, even for the sake of third parties. After all, if he *kept* his word and did not disclose a photograph, third parties would not have the benefit of seeing his former spouse or girlfriend. All that third parties are denied is one more photograph of a naked woman on the Internet. Given the number of images already available, the marginal loss to third parties is infinitesimal.

IV. CONCLUSION

Justice Holmes once said that "hard cases" can "make bad law."[242] Sometimes, bad practices can make good law. Revenge porn certainly is an example of malicious conduct that injures the welfare of someone who mistakenly trusted an intimate partner. Allowing a victim of revenge porn to recover damages for publication that breaches an implicit promise of confidentiality is faithful to tort law principles and will not punish or chill the legitimate expression of free speech.

242. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).