

A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*

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INTRODUCTION

When Holly Jacobs first met her high school sweetheart, everything seemed perfect. She dated Ryan Seay throughout high

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school, and then on and off for a few years following graduation.¹ Yet when Jacobs broke up with Seay in 2009, her life changed forever. After the breakup, Jacobs claims Seay lashed out at her by posting sexually explicit pictures and videos of her online—alongside her full name, email, and where she worked.² Jacobs, who was working towards a doctorate at the time, had difficulty handling the negative backlash, calling damage control a “full time job.”³

Jacobs fought to escape the reputational and professional damage that followed her now-explicit online identity. She legally changed her name, left numerous jobs, and deactivated her social media and email accounts.⁴ In a twist to Jacobs’ story, Seay responded by claiming that Jacobs posted the pornographic pictures herself in an attempt to ruin his life.⁵ Whatever the truth, Jacobs, now Dr. Jacobs, aims to criminalize this phenomenon known as “revenge porn” in the United States and uses her website, EndRevengePorn.com, as a platform from which to spread her message.⁶

Dr. Jacobs’ situation unfortunately may be typical of victims of revenge porn. When private, sexually explicit content is shared on the Internet, the subjects of the photos and videos can be fired from their jobs and expelled from their schools.⁷ Many are harassed online and

1. See Melanie Michael, *Ex Claims Lover Falsely Accused Him of Posting Her Naked Pics*, WTSP 10 NEWS (Oct. 31, 2013, 11:12 PM), <http://www.wtsp.com/news/local/article/342864/8/Ex-claims-lover-falsely-accused-him-of-posting-her-naked-pics>; see also Michael E. Miller, *Revenge Porn Victim Holly Jacobs “Ruined My Life,” Ex Says*, MIAMI NEWTIMES NEWS (Oct. 17, 2013), <http://www.miaminewtimes.com/2013-10-17/news/revenge-porn-holly-jacobs-ryan-seay/> (stating that Jacobs and Seay began dating in 2005).

2. Holly Jacobs, *A Message from Our Founder, Dr. Holly Jacobs*, CYBER CIVIL RIGHTS INITIATIVE (Oct. 6, 2013), http://www.cybercivilrights.org/a_message_from_our_founder_dr_holly_jacobs (describing how Jacobs performed “damage control” for three years after the sexually explicit content was posted online).

3. *Id.*

4. See *About*, END REVENGE PORN, <http://www.endrevengeporn.org/welcome/> (last visited Sept. 6, 2014) (detailing Jacobs’ turmoil after the content was posted online).

5. Ryan Seay, *Words by Ryan Seay*, JACOBS VS. SEAY: JUST THE FACTS (2013), <http://jacobsvsseay.com/>; see also Ryan Seay, *Revenge Porn Accusations By Ex-Girlfriend Holly Jacobs ‘Ruined My Life,’* HUFFINGTON POST (Nov. 1, 2013, 11:07 AM), http://www.huffingtonpost.com/2013/11/01/ryan-seay-revenge-porn-holly-jacobs_n_4190713.html (discussing Seay’s side of the story in which he claims he was harassed and defamed by his ex-girlfriend). Seay has placed the blame on Holly, saying, “Holly is guilty of the exact same thing that she is accusing me of: taking these pics, splashing them internationally, and attaching my name to them. She has ruined my life.” *Id.*

6. *About*, *supra* note 4.

7. See *Your Weekly Constitutional: Revenge Porn*, PODOMATIC (Nov. 22, 2013), http://ywc.podomatic.com/entry/2013-11-22T13_24_26-08_00 (offering a discussion by

in person, receiving sexual propositions from strangers because of their perceived promiscuity.⁸

Throughout the country, revenge porn has had very real and damaging effects on individuals whose sexually explicit photographs and videos have been involuntarily circulated on the Internet.⁹ In response, victims may change their names and uproot their lives to escape reputational damage.¹⁰ Many victims of revenge porn may suffer mental and emotional trauma and incur sometimes-irreparable harm to their reputations.¹¹ At times, even those who speak out about revenge porn are targeted.¹² The ease of communication on the Internet allows revenge porn victims to be followed from school to school and job to job, haunted by a fleeting moment memorialized in the digital realm.¹³

Victims find little shelter under current United States law.¹⁴ The First Amendment of the United States Constitution generally protects pornography unless the material is deemed obscene.¹⁵ But, because revenge porn features unwilling and often unknowing individuals, and because it is often posted alongside identifying information—including the subject's name, age, and address—the

University of Miami Law Professor Mary Ann Frank of the pattern of harassment that follows revenge porn victims).

8. *Id.*

9. *Id.*

10. *About, supra* note 4.

11. *Id.*

12. *See, e.g.,* Anita Sarkeesian, *Image Based Harassment and Visual Misogyny*, FEMINIST FREQUENCY (July 1, 2012), <http://www.feministfrequency.com/2012/07/image-based-harassment-and-visual-misogyny/> (discussing how image-based harassment is used to target marginalized individuals who speak out against revenge porn).

13. The ramifications of revenge porn can be devastating. For example, Audrie Pott was a 15-year-old high school student in California. *See* Beth Stebhner, *Audrie Pott Suicide: Details of Online Chats Emerge a Year After Teen Killed Herself Following Alleged Assault and Cyberbullying*, N.Y. DAILY NEWS (Sept. 18, 2013, 2:13 PM), <http://www.nydailynews.com/news/national/new-details-revealed-audrie-pott-cyber-bullying-suicide-article-1.1459904>). One night, she went to a party, drank alcohol, and passed out. *Id.* Fellow classmates allegedly sexually assaulted Pott and took photographs of their actions. *Id.* Digital copies of the photos were passed around, and Pott was harassed the following week at school. *Id.* One week after the party, Pott committed suicide by hanging herself. *Id.*

14. Other countries have different perspectives regarding freedom of expression and have been able to outlaw revenge porn. For example, in January of 2014, Israel became the first country to outlaw revenge porn. *See* Sam Frizell, *Israel Bans 'Revenge Porn'*, TIME (Jan. 7, 2014), <http://world.time.com/2014/01/07/israel-bans-revenge-porn/>.

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

implications for privacy law are obvious. Recent scholarship has considered whether the First Amendment protects revenge porn;¹⁶ indeed, revenge porn is the latest arena where freedom of speech and invasion of privacy conflict.

Legislative attempts to define revenge porn by statute would face significant challenges. First, state legislation would be ineffective on a large scale because of the Internet's highly accessible nature.¹⁷ Second, legislation prohibiting revenge porn or limiting its scope threatens to violate the First Amendment.¹⁸ Third, detailed legislation runs a serious risk of becoming obsolete in a short period of time as the revenge porn genre continues to evolve and as technology advances.¹⁹ As technology progresses, novel forms of speech may arise and legislation designed for a current trend may set a bad precedent for another area of unprotected speech in the future.²⁰ Finally, legislators may attempt to err on the side of being overly inclusive in drafting revenge porn legislation, lest they fail to foresee some new version of revenge porn that may arise out of technological developments. However, overinclusion threatens to harm innovation,

16. See, e.g., Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/> (arguing that nonconsensual posting of pornographic photos should be considered obscenity and therefore unprotected by the First Amendment). *But see* Mark Bennett, *Revenge Porn: More Made-Up First Amendment Law*, DEFENDING PEOPLE (Oct. 23, 2013), <http://blog.bennettandbennett.com/2013/10/revenge-porn-more-made-up-first-amendment-law.html> (arguing that revenge porn does not fall into any unprotected category of speech under the First Amendment).

17. For example, new regulations, such as California's revenge porn statute (passed in October of 2013) will be ineffective to combat revenge porn on a grand scale as the Internet is accessible from everywhere. See 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/> (detailing the problems associated with California's revenge porn legislation).

18. The Supreme Court has carved out a limited number of exceptions to the First Amendment right to freedom of speech. This Comment argues that revenge porn does not fall into any of those exceptions. *Infra* Part II.A.

19. For example, revenge porn websites preceded smartphone applications such as Grindr—a dating application for gay, bisexual, and transgender men—and Tinder—a similar application for heterosexual men and women. See *generally* GRINDR, <http://grindr.com/> (last visited Sept. 6, 2014); TINDER, <http://www.gotinder.com/> (last visited Sept. 6, 2014). This Comment argues that detailed legislation aimed at targeting traditional revenge porn websites would risk becoming outdated by technologies like these applications, which may be used in a similar fashion. *Infra* Part II.A.

20. *Infra* Part II.A.

and may chill speech. A federal law banning revenge porn would have to account for these challenges.

Furthermore, although revenge porn causes reputational and emotional harm to the individual, the Internet largely has been considered part of the public domain and, therefore, free from overwhelming governmental interference.²¹ Tort claims such as publication of private facts, publication of private works, intentional infliction of emotional distress, and negligent infliction of emotional distress may grant some redress to victims.²² However, redress can be limited by issues such as an individual's fear of the publicity that comes with a lawsuit, a lack of financial resources to hire and retain legal counsel, or an attorney's unwillingness to sue an unknown content poster due to lack of financial certainty that such a suit would be worth that attorney's time.²³

In this context, this Comment proposes that private ordering may provide the best solution to the problems associated with revenge porn. Private ordering occurs when nongovernmental agencies agree to voluntary arrangements.²⁴ A number of nonlegal remedies have arisen, including changes to search engines and payment blocking, organized attacks by hacker groups, and doxxing.²⁵ These nonlegal solutions avoid legal issues of overbreadth and unconstitutionality while providing revenge porn victims with remedies to their problems. Rather than governmental legislation, a free-market

21. See, e.g., John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <http://homes.eff.org/~barlow/Declaration-Final.html> (arguing for a “hands off the internet” approach by the government because governments erect false boundaries, and cyberspace can be limitless).

22. *Infra* Part III.

23. This Comment will not address revenge porn issues concerning individuals less than eighteen years of age, as child pornography laws ban sexually explicit images of such individuals. The Supreme Court has held that child pornography is unprotected speech under the First Amendment because of the government's compelling interest in protecting children from sexual exploitation. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

24. *Compulsory Terms and Private Ordering*, THE BRIDGE, <http://cyber.law.harvard.edu/bridge/LegalProcess/compulsory.htm> (last visited Oct. 27, 2014) (defining private ordering as “the coming together of non-governmental parties in voluntary arrangements”).

25. See generally Emily Bazelon, *The Online Avengers: Are Antibullying Activists the Saviors of the Internet—or Just a Different Kind of Curse?*, N.Y. TIMES (Jan. 15, 2014), http://www.nytimes.com/2014/01/19/magazine/the-online-avengers.html?_r=0 (examining the recent trend of doxxing, wherein Internet users amass personal data regarding an online bully and expose the bully's identity).

approach²⁶ might help to run many of the current revenge porn sites out of business.²⁷ This Comment argues that as new trends develop, revenge porn will be overtaken by other trends, thereby making revenge porn obsolete.²⁸ This solution would permit revenge porn victims to receive the relief they need without requiring First Amendment sacrifices.

Part I of this Comment examines the history of revenge porn, detailing how the modern revenge porn phenomenon began and how the genre has been perpetuated by so-called copycat websites. Part II considers what protections current law provides revenge porn website owners and anonymous posters, including protections under the First Amendment and section 230 of the Communications Decency Act of 1996. Part III analyzes potential legal claims that could be brought against revenge porn website owners and revenge porn posters, discusses the viability of these claims, and concludes that these legal claims will ultimately be ineffective to combat the revenge porn genre. Finally, Part IV discusses the possible reforms available as long-term solutions to remedy this current trend and considers how private ordering may provide the best solution to those haunted by revenge porn.

I. THE HISTORY AND DEVELOPMENT OF REVENGE PORN

Revenge porn is hardly a new phenomenon. Rather, the idea of using sexually explicit content to blackmail another has probably been around since the invention of the camera.²⁹ Even Marilyn

26. A free market is a “market economy based on supply and demand with little or no government control.” *Free Market Definition*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/freemarket.asp> (last visited Sept. 6, 2014).

27. Although a number of revenge porn sites are currently running as of October 27, 2014, *see, e.g.*, ANONIB, <http://anonib.com/> (last visited Oct. 27, 2014); GFREVENGE.COM, <http://www.gfrevenge.com/main.htm?id=borders&> (last visited Oct. 27, 2013); MY EX, <http://MyEx.com/> (last visited Oct. 27, 2014), these sites are not stable and many revenge porn sites go under. *See, e.g.*, ANONIB, <http://anonib.com/> (last visited Oct. 27, 2014). It is possible that the solution to these sites lies in social norms, as these sites are forced to shut down when individuals no longer frequent the URL addresses.

28. For example, Juicy Campus was a popular anonymous gossip website, but it faded from the limelight after a few years. The website has since gone under. *See infra* Part IV.B.1.

29. *See generally* ANGUS MCLAREN, *SEXUAL BLACKMAIL: A MODERN HISTORY* (2002) (discussing the problem of attacks on one’s sexual reputation and the emergence of libel and slander laws as a pushback against blackmail).

Monroe was a victim of an early form of revenge porn.³⁰ In 1949, Marilyn Monroe faced financial hardship and agreed to pose nude for photographer Tom Kelly for fifty dollars.³¹ Three years later, as Monroe's career began to take off, the nude images surfaced and threatened to destroy her budding career.³² Instead of turning to a legal remedy, against the advice of her producers, Monroe admitted that the photographs were of her, and gained sympathy from the public, who understood that Monroe had only posed for the photos during a time of dire financial need.³³ Monroe's fame allowed her to handle the nude photos in a way not practicable for a non-celebrity—precisely the kind of person who is typically the victim of modern revenge porn.³⁴

Modern victims of revenge porn face a different scenario than Monroe. More recently, a number of female celebrities' online accounts were hacked, and the hacker posted their nude photos online to a forum on the website 4chan.com.³⁵ The FBI stepped in to

30. See Margot A. Henriksen, *Marilyn Monroe*, AM. NAT'L BIOGRAPHY ONLINE (Feb. 2000), <http://www.anb.org/articles/18/18-00856.html>.

31. *Id.*

32. *Id.*

33. *Id.*

34. There have been a number of modern celebrities and political figures whose lives and careers have been affected by revenge porn. Kim Kardashian, for example, was propelled into the spotlight when a pornographic video featuring her was released online. See, e.g., Lorenzo Benet, *Kim Kardashian Sues Over Sex Tape*, PEOPLE (Feb. 21, 2007, 7:00 PM), <http://www.people.com/people/article/0,,20012494,00.html>. Kardashian subsequently sued Vivid Entertainment, a video production company, for publishing the sexually explicit content. *Id.* Although the suit settled out of court, Kardashian reportedly received five million dollars for the invasion of her privacy. See TMZ Staff, *Kim Drops Sex Tape Lawsuit, Gets a Big Load of Cash*, TMZ (Apr. 30, 2007, 12:51 PM), <http://www.tMZ.com/2007/04/30/kim-drops-sex-tape-lawsuit-gets-a-big-load-of-cash/#ixzz2tLMMP4kY>. Another famous example is former Congressman Anthony Weiner, who became a revenge porn victim when Weiner's sexting was released to the public. Michael Barbaro & Nick Corsasaniti, *Weiner Scandal Continues to Unfold*, N.Y. TIMES (July 24, 2013), http://www.nytimes.com/interactive/2013/07/24/nyregion/weiner-scandal-timeline.html?_r=0/#/time265_7705. Weiner sent photos of his genitals to a woman via his Twitter account. *Id.* These photos were later posted online. *Id.* Months later, Weiner again sent another batch of photos to a different woman using the alias "Carlos Danger." *Id.* These photos were released by the website "The Dirty." See *World Exclusive: Anthony Weiner Nude Penis Images, New York Don't Let America Down **WARNING GRAPHIC IMAGES***, THE DIRTY (July 26, 2013), <http://thedirty.com/2013/07/world-exclusive-anthony-weiner-nude-penis-images-new-york-dont-let-america-down-warning-graphic-images/>.

35. Mike Isaac, *Nude Photos of Jennifer Lawrence Are Latest Front in Online Privacy Debate*, N.Y. TIMES (Sept. 2, 2014), http://www.nytimes.com/2014/09/03/technology/trove-of-nude-photos-sparks-debate-over-online-behavior.html?_r=0.

address the issue,³⁶ and Google removed the photos from its search engine.³⁷ As the celebrity-hacking incident exhibits, the Internet presents an easily accessible platform on which sexually explicit content can be posted and accessed around the world.³⁸ What was once a localized problem has expanded into a national and global issue, as web access gives private content universal reach in a matter of seconds.³⁹

A. *Revenge Porn Defined*

This Comment defines revenge porn as the online publication of sexually explicit photographs or videos posted without the consent or knowledge of the subject of the content.⁴⁰ Some scholars have suggested rephrasing the term as “involuntary porn”⁴¹ or “nonconsensual pornography”⁴² to emphasize that subjects of the

36. Josh Margolin et al., *FBI Is ‘Addressing’ Massive Celebrity Photo Hack*, ABC NEWS (Sept. 1, 2014), <http://abcnews.go.com/Entertainment/fbi-addressing-massive-celebrity-photo-hack/story?id=25200140>.

37. A Google spokesperson claimed the search engine “removed tens of thousands of pictures—within hours of the requests being made—and . . . closed hundreds of accounts.” Megan Thomas, *Celeb Lawyer Takes on Google Over Hacked, Nude Photos*, CNN (Oct. 2, 2014), <http://www.cnn.com/2014/10/02/showbiz/celebrity-news-gossip/nude-celeb-photos-google-hack/> (detailing a recent lawsuit brought against Google).

38. One victim said that “because of the permanence of the [I]nternet, and lack of legislation” she felt that the “torture was never going to end.” Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don’t Want Anyone Else to Face This*, THE GUARDIAN (Nov. 19, 2013, 7:30 PM), <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

39. Despite its physical relocation, pornographic content can now follow victims from town to town. See Nina Bahadur, *Victims Of ‘Revenge Porn’ Open Up On Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014, 8:50 AM), http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html (stating that one user commented, “I had to quit my job and move back to my home province. I was being harassed at my job.”).

40. This definition encompasses just one of several types of revenge porn. Other types, including when one person posts pictures of himself or herself and blames another in order to get revenge against that individual, are beyond the scope of this Comment. See, e.g., *Revenge Porn*, WIKTIONARY, http://en.wiktionary.org/wiki/revenge_porn (last visited Oct. 31, 2014) (defining revenge porn as “[s]exually explicit media of a person distributed online without the consent of the pictured individual, typically by a former partner or hacker, and often with the intent to humiliate the subject and damage his/her reputation.”).

41. See *Your Weekly Constitutional: Revenge Porn*, *supra* note 7. “Involuntary porn” is the replacement term suggested by Professor Eric Goldman of Santa Clara University School of Law. *Id.*

42. *Id.* “Nonconsensual pornography” is Professor Frank’s suggested replacement phrase. See *id.*

pornographic photos and videos have not consented to the publication of their most intimate moments.⁴³

The sexually explicit photos or videos were likely originally taken by the victim in the privacy of her or his own home and then shared with a significant other. After a breakup, a disgruntled ex-lover might then share that content online in an effort to seek revenge against his or her ex-partner as a form of punishment.⁴⁴ Modern revenge porn occurs when content intended for one person's private enjoyment is shared with an unintended audience on public websites specifically dedicated to hosting sexually explicit content and commentary. This Comment addresses revenge porn that is specifically posted on websites dedicated to revenge porn, although in reality revenge porn can be spread through other mediums.⁴⁵

B. *The Modern Revenge Porn Phenomenon*

The modern revenge porn genre has its roots in amateur Internet pornography, which began to gain attention in 2000 when Italian researcher Sergio Messina noticed a trend among individuals sharing "self-produced erotica" in the form of photos and videos in global discussion groups.⁴⁶ Messina deemed the trend "realcore pornography"⁴⁷ to distinguish it from "hardcore pornography," which often involves explicit sexual acts conducted by paid actors rather

43. This Comment will continue to use the more commonly used term "revenge porn."

44. See, e.g., Bahadur, *supra* note 39 (citing a comment from a user who said that her ex-husband posted a pornographic video of her online). The user said, "When I was married, my then husband and I made a homemade porn. I thought it was a good idea at the time and I was very wrong. Not too long after we made said porn, I found out he had been cheating and I left him. I had completely forgot that we had even a video until a co-worker came to me and said he got a very interesting email from my ex (they were friends) and showed me the link. That f**king asshole uploaded the video to porn site. He sent the link to everyone we know, including family. I was completely mortified to find out he had done this." *Id.*

45. See *Your Weekly Constitutional: Revenge Porn*, *supra* note 7 (discussing the privacy aspects of revenge porn). This Comment acknowledges that there are many different forms of revenge porn, and there are also many mediums on which revenge porn can surface.

46. Luca Celada, *REALCORE Sergio Messina: The Margaret Mead of Internet Porn*, *ARTILLERY* (Jan./Feb. 2010), http://www.artillerymag.com/archives/v4i3_10/current/feature1.html (tracing Sergio Messina's research of "realcore" pornography). Messina traces the origins of modern revenge porn to "usergroups" with the heading "alt.sex." See *id.*

47. See generally *id.* (detailing Messina's work).

than individuals' real, unpaid sexual exploits.⁴⁸ Eight years later, in 2008, the website XTube.com, an aggregator of pornographic videos, began receiving more hits to the website when a number of revenge porn videos were submitted to the site; XTube.com subsequently began receiving two to three complaints a week about the content.⁴⁹

Perhaps the most well-known revenge porn website was IsAnyoneUp.com.⁵⁰ The site, boasting numerous anonymous submissions of mostly non-celebrities, was started in 2010 by Hunter Moore.⁵¹ The site quickly garnered momentum as more and more posters submitted photos and videos. Within thirteen months, according to Moore, it had over 300,000 unique viewers per day.⁵² As the site gained popularity, Moore sifted through hundreds of third-party submissions in an attempt to verify the ages of those depicted in the content by performing Facebook and Google searches.⁵³ The

48. See, e.g., Jennifer Lyon Bell, *Column: 'Dictionary of Porn: Hardcore,'* LOVE ACADEMY, <http://loveacademy.nl/?p=197> (last visited Oct. 31, 2014) (defining hardcore pornography as “[u]nsimulated sexual penetration and masturbation”).

49. Richard Morgan, *Revenge Porn: Jilted Lovers Are Posting Sex Tapes on the Web—and Their Exes Want Justice*, DETAILS, <http://www.details.com/sex-relationships/porn-and-perversions/200809/revenge-porn> (last visited Oct. 31, 2014) (stating that a director of operations for XTube received complaints from men and women who were the “subjects of video clips, screen grabs, or cell-phone photos uploaded to XTube”).

50. The site www.IsAnyoneUp.com is now defunct. *McGibney v. Moore*, DIGITAL MEDIA LAW PROJECT (Aug. 9, 2013), <http://www.dmlp.org/threats/mcgibney-v-moore> (detailing the specifics of the McGibney-Moore defamation suit and including links to all relevant court documents). In 2012, Moore sold his website to James McGibney, the founder of the website Bullyville.com. *Id.* A few months after the sale, Moore began publically tweeting defamatory comments about McGibney, targeting McGibney's business reputation and making threatening comments about McGibney's wife. McGibney sued for defamation, and won a settlement of over \$250,000. *Id.*

51. See Emily Zemler, *Naked & Famous: How A Risque New Website Pushes Boundaries and Buttons*, ALT. PRESS (Feb. 14, 2011), http://www.altpress.com/features/entry/naked_famous_how_a_risque_new_website_pushes_boundaries_and_buttons (“[Moore] started the site and added a submission form and within days had 20 to 30 emails.”).

52. Marlow Stern, *Hunter Moore, Creator of 'Revenge Porn' Website Is Anyone Up?, Is the Internet's Public Enemy No. 1*, THE DAILY BEAST (Mar. 13, 2012), <http://www.thedailybeast.com/articles/2012/03/13/hunter-moore-creator-of-revenge-porn-website-is-anyone-up-is-the-internet-s-public-enemy-no-1.html> (quoting Moore, who said that the site received “25 submissions on a ‘bad’ day, 250 on a ‘good’ one”).

53. See Camille Doder, *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/> (examining Moore's life and business model); see also Stern, *supra* note 52 (stating that Moore employed “two age-verification specialists to ensure that everyone pictured [was] 18 years or older”).

website's posts were often side-by-side with Moore's own comments on the content.⁵⁴

Moore agreed to many television and radio interviews in which he defended his website.⁵⁵ A number of Moore's critics argued that revenge porn affects women more often than it affects men; one commentator synthesized the gender disparity in the following comment:

[IsAnyoneUp.com is] particularly harmful because it exploits our culture's double-standard, hurting women much more than it hurts men, giving angry, psychotic, and/or abusive men opportunities to hurt women. Moore says that he is not hurting people, that they hurt themselves. He may not be doing the hurting, but he has created a forum for men to maximize the hurt that they can inflict upon their exes, amplifying the damage that they could do on their own (by, say, posting it on their own FB page, or emailing it to everyone in their email list). By allowing them to do it anonymously, its [sic] a space whose sole function is to broadcast damaging expressions of hate directed at specific individuals.⁵⁶

Inevitably, the subjects of the photographs or videos published on Moore's website learned of their online presence⁵⁷ and sent scores

54. See Stern, *supra* note 52 (describing how photos were branded with terms such as "SIF" (Secret Internet Fatty, a popular Web term indicating that the subject used creative angles to make themselves appear thinner) or "Gnargoyle" (denoting ugliness)).

55. See, e.g., *Revenge Porn's Last Frontier*, ON THE MEDIA (Dec. 2, 2011), <http://www.onthemedial.org/story/173718-revenge-porns-latest-frontier/>; see also Dr. Drew: *Revenge Porn?*, CNN (Apr. 23, 2012), <http://transcripts.cnn.com/TRANSCRIPTS/1204/23/ddhln.01.html> (stating that when confronted during the CNN interview by a woman who had topless photographs of her posted online by an ex-boyfriend, Moore responded, "I don't know how you can point your finger at me. You took the picture.").

56. See Beth from Chicago, Comment to *Revenge Porn's Last Frontier*, ON THE MEDIA (Dec. 8, 2011, 5:34 PM), <http://www.onthemedial.org/story/173718-revenge-porns-latest-frontier/>.

57. DMCA takedown notices alert a website that some copyright-protected material may be on its website and notify the website that the individual sending the notice owns the copyrights to that material. See *What Is a DMCA Takedown?*, DMCA: PROTECT YOUR CONTENT, <http://www.dmca.com/solutions/view.aspx?id=aa18445c-9d91-44b3-9718-49da3eb208a2> (last visited Sept. 7, 2014) (providing a list of takedown conditions); see also *infra* Part III.C. Moore publicly tweeted about the claims against him, acknowledging that he knew of the court proceedings. See *McGibney v. Moore*, *supra* note 50. Courts entered default judgments in a number of defamation claims because Moore apparently declined to defend himself. See, e.g., Damon Poeter, *Revenge Porn King Hunter Moore Ordered to Pay \$250K for Defamation*, PC MAG (Mar. 11, 2013, 5:16 PM), <http://www.pcmag.com/article2/0,2817,2416476,00.asp> (detailing the court order).

of Digital Millennium Copyright Act (“DMCA”)⁵⁸ takedown notices to Moore.⁵⁹

Charlotte Laws sent Moore numerous takedown notices in 2013.⁶⁰ Laws was first exposed to the world of revenge porn when nude photos of her daughter appeared on Moore’s site.⁶¹ Moore refused to comply with the takedown notices.⁶² Laws contends that she emailed Moore to ask him to remove the photo of her daughter in accordance with the DMCA.⁶³ When Moore refused, Laws contacted local law enforcement, then the FBI.⁶⁴ Eventually, because of the attention she was bringing to this issue, Laws herself purportedly became a target, and noticed at least one hacker in an unmarked white car parked outside of her home, attempting to access her digital information.⁶⁵ Laws received help from the group Anonymous, an international group of hackers, who subsequently crashed Moore’s servers in an effort to hold Moore “accountable for his actions.”⁶⁶

Moore was arrested in January of 2014 on charges of hacking email accounts, stealing nude photographs, and posting those images online under the Computer Fraud and Abuse Act, a federal computer hacking law.⁶⁷ In a Grand Jury indictment filed in the United States

58. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

59. See Amanda Holpuch, *Hunter Moore of IsAnyoneUp.com Announces New Revenge Porn Website*, GUARDIAN (Dec. 6, 2012, 7:00PM), <http://www.theguardian.com/culture/us-news-blog/2012/dec/06/hunter-moore-isanyoneup-revenge-porn-website> (stating that Moore received DMCA takedown notices).

60. Charlotte Laws, *I’ve Been Called the “Erin Brockovich” of Revenge Porn, and for the First Time Ever, Here Is My Entire Uncensored Story of Death Threats, Anonymous and the FBI*, XO JANE (Nov. 21, 2013, 11:00 AM), <http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn> (detailing Laws’s experience in attempting to get the pornographic photo of her daughter off of the Internet).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Jessica Roy, *Anonymous Hunts Hunter Moore to Hold Him ‘Accountable’ for His Revenge Porn Empire*, BETABEAT (Dec. 2, 2012, 4:50 PM), <http://betabeat.com/2012/12/anonymous-launches-ophunthunter-to-destroy-hunter-moore-and-his-revenge-porn-empire/> (detailing Anonymous’ hack into Moore’s servers).

67. See *2 Men Charged with Hacking Email to Post Nude Pics*, ASSOCIATED PRESS (Jan. 23, 2014, 9:58 PM), <http://news.yahoo.com/2-men-charged-hacking-email-post-nude-pics-005735222.html> (describing Moore’s arrest); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2012).

District Court for the Central District of California in October of 2013, the government alleged that Moore hired co-defendant Charles Evens to hack into revenge porn victims' computers and that Moore "would send payments to defendant Evens using Paypal or directly from his bank account in exchange for the nude pictures . . . and would post the victims' nude pictures on his website, IsAnyoneUp.com, without the victim's authorization."⁶⁸ In a press release, the United States Attorney's Office for the Central District of California stated that if Moore was convicted under the charges, he could "face up to five years in federal prison."⁶⁹ Moore was released to his parents' custody on bail of \$100,000 while he awaited trial, originally set to begin in September of 2014.⁷⁰ In a karmic turn for the self-crowned "King of Revenge Porn," Moore's release was under the condition that he "stay off the [I]nternet."⁷¹

Although the founder of modern revenge porn may no longer be engaging in that conduct, some argue that Moore's arrest only leaves room for the next "most hated man on the [I]nternet" to take his place.⁷² Moore's website has since been bought. However, in the time since IsAnyoneUp.com went under, a number of copycat sites have followed in Moore's digital footsteps, perpetuating the revenge porn genre.⁷³ One of these websites is MyEx.com,⁷⁴ whose tagline is: "Get

68. Indictment at 3, United States v. Moore, No. CR13-0917 (C.D. Cal. Dec. 30, 2013), available at <http://cdn3.sbnation.com/assets/3902317/revenge-porn-moore-evens-indictment.pdf>.

69. Press Release, United States Attorney's Office, Cent. Dist. of Cal., Two California Men Arrested for Email Hacking Scheme That Yielded Nude Photos That Were Posted on 'Revenge Porn' Website, (Jan. 23, 2014), available at <http://www.justice.gov/usao/cac/Pressroom/2014/008.html>.

70. Ian McDonald, 'King of Revenge Porn' Released to Parents, Now Grounded with No Internet, FOX NEWS 40 (Feb. 24, 2014), <http://fox40.com/2014/01/24/king-of-revenge-porn-released-to-parents-now-grounded-with-no-internet/> (stating that a federal judge prohibited Moore from having Internet access). As of the date of publication, Moore's trial had been delayed and is currently scheduled to begin in March of 2015. Veronica Rocha, 'Revenge Porn' Conviction Is a Legal First, SCI-TECH TODAY (Dec. 6, 2014), http://www.sci-tech-today.com/story.xhtml?story_id=020002G0IWD4#.

71. *Id.*

72. See, e.g., Caitlin Dewey, *Hunter Moore Is in Jail, but That Just Means Some Other Despicable Character Is "The Most-Hated Man on the Internet" Now*, WASH. POST (Jan. 24, 2014), <http://www.washingtonpost.com/blogs/style-blog/wp/2014/01/24/hunter-moore-is-in-jail-but-that-just-means-some-other-despicable-character-is-the-most-hated-man-on-the-internet-now/> (arguing that despite Moore's "despicable" behavior, his activities were legal).

73. See, e.g., ADULT ANONYMOUS UPLOAD, <http://anonib.com/> (last visited Oct. 16, 2014); GF REVENGE, <http://www.girlfriendrevenge.com> (last visited Oct. 16, 2014); MY

Revenge.”⁷⁵ MyEx.com allows anonymous posters to submit photos of their exes along with information such as their names, ages, locations, and alleged sexual proclivities. For instance, one poster’s submission is entitled “She likes money.”⁷⁶ The anonymous poster uploaded ten photos, nine of which are sexually explicit, and left the following comment: “Anonymous 7291 says: Well shell [sic] have a baby by you and then find another one to have a baby with.”⁷⁷ MyEx.com is just one of many websites that allow anonymous posters to submit sexually explicit content along with identifying information about the subject.⁷⁸

Websites like MyEx.com may have learned from Moore’s mistakes. Rather than hiring staff to filter out submissions of child pornography, MyEx.com simply presents a forum for anonymous posters to upload content and write commentary. MyEx.com does not contain any commentary on the submissions by the website owners, unlike the commentary that Moore posted on IsAnyoneUp.com.⁷⁹ Further, MyEx.com has its own “FAQ” section answering commonly asked questions such as, “How do I have a post of me removed?” and “How do I find out who posted these pictures?”⁸⁰

EX, <http://MyEx.com/> (last visited Oct. 16, 2014). Although these sites are currently running, they are not stable, and many revenge porn sites go under. *See, e.g.*, <http://yougotposted.com/> (last visited Oct. 16, 2014) (re-directing users to the National Conference of State Legislatures’ website displaying “State ‘Revenge Porn’ Legislation”).

74. MY EX: GET REVENGE, <http://MyEx.com> (last visited Sept. 7, 2014).

75. *Id.*

76. Source intentionally omitted and on file with the North Carolina Law Review. The author has omitted the source to avoid contributing to the violation of the woman’s privacy by generating views of the nonconsensual photographs.

77. *Id.*

78. For additional examples of similar sites, see *supra* note 73.

79. Although the IsAnyoneUp.com website is now defunct, articles published about the website during 2011 mention the comments Moore left on sexually explicit photographs and videos. *See* Danny Gold, *The Man Who Makes Money Publishing Your Nude Pics*, THE AWL (Nov. 10, 2011), <http://www.theawl.com/2011/11/the-man-who-makes-money-publishing-your-nude-pics> (“Moore uploads those photos and attaches identifying screen-grabs from the person’s Facebook, Tumblr or Twitter accounts—whatever’s available. He sometimes adds a pithy caption and a reaction gif at the end, usually from a television show or meme.”).

80. *See* FAQ, MY EX: GET REVENGE, <http://www.MyEx.com/faq/> (last visited Oct. 31, 2014) (listing and answering four frequently asked questions: “1. What if I was a minor when the pictures were taken? We have a zero tolerance policy, contact us immediately to have it removed. 2. How do I find out who posted these pictures? We do not keep any records of the people who post. No emails, IP addresses, or info. 3. How do I have a post of me removed? Click the link in the post that says remove my name & follow the instructions. 4. What if I own these images not the person who posted them? Send us the

Most importantly, the revenge porn website ostensibly allows individuals to easily remove their photos by clicking a link entitled “Remove Name.”⁸¹ MyEx.com has altered its removal policy over the last year. The “Remove Name” link once prompted revenge porn victims to pay \$499.⁸² In return, the site promised to delete their record from the site “within 24 to 72 hours, [r]emove MyEx.com search results from Google within 72 hours, [and] [r]emove MyEx.com search results from Yahoo and Bing usually within 7 days.”⁸³ Recently, the site has revised its removal policy to allow individuals to submit removal requests for a number of reasons.⁸⁴ For example, one can submit a DMCA takedown request, a minor removal request, or a general removal request.⁸⁵

Victims of revenge porn can expect little recourse from the websites themselves. MyEx.com’s frequently asked questions section might seem to place the website in a more responsible light than Moore’s IsAnyoneUp.com model. However, the site takes a hands-off approach to tracking posters: “We do not keep any records of the people who post. No emails, IP addresses, or info.”⁸⁶

If revenge porn victims fail to get the content removed from a website like MyEx.com, they may hope to retain legal counsel. As discussed below, however, constitutional and legislative protections granted to revenge porn websites and revenge porn posters may hinder victims’ efforts to seek recourse.

II. CONSTITUTIONAL AND LEGISLATIVE PROTECTIONS FOR REVENGE PORN

A number of constitutional amendments and federal laws currently help protect revenge porn from legal regulation. Among

copyright registration number that you received from the copy right [sic] office after you registered the photos. If you do not have a copy right [sic] registration number we will ignore your emails.”).

81. See MY EX: GET REVENGE, *supra* note 74 .

82. A snapshot of MyEx.com as it looked on November 1, 2013 is available through an Internet archive. *Delete This Record Now!*, MY EX: GET REVENGE (Nov. 1, 2013), available at <http://web.archive.org/web/20131114075501/http://myex.com/post-removal/juliet-ailene-murph/7947/>.

83. *Id.*

84. *Removal Policy*, MY EX: GET REVENGE, <http://www.myex.com/removal-policy/> (last visited Oct. 31, 2014).

85. *Id.*

86. See *supra* note 80.

these are the First Amendment and section 230 of the Communications Decency Act. This Part of this Comment analyzes both of these constitutional and legislative devices and concludes that under current federal law, revenge porn is a protected genre.

A. *The First Amendment*

The First Amendment of the United States Constitution protects a fundamental right of freedom of speech.⁸⁷ In just forty-five words, the First Amendment outlines an essential right of the American democracy: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁸⁸

The Supreme Court has developed protective devices to ensure that Americans have significant safeguards. There are three major theories as to why freedom of speech is so essential to our culture. The first is self-fulfillment, which is the idea that we realize ourselves by our expression and that expression is unique in terms of human fulfillment.⁸⁹ The second is truth and the marketplace of ideas, or the belief that if we let everything into the marketplace the best idea will come to the fore.⁹⁰ The third is self-governance, or the idea that in order to contribute to an active public discourse and best govern ourselves we need all the information about a politician or political issue.⁹¹ Our society values minority ideas and contrarian beliefs because permitting this speech allows us to test our ideas against others’ and determine their worth. An expansive marketplace is also essential to promote tolerance of varying beliefs, especially political

87. U.S. CONST. amend. I.

88. *Id.*

89. *See* *Whitney v. California*, 274 U.S. 357, 375 (1927) (“[T]he greatest menace to freedom is an inert people . . . public discussion is a political duty; and . . . this should be a fundamental principle of the American government.”).

90. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

91. *See* Alexander Micklejohn, *Freedom to Hear and to Judge*, 10 LAW. GUILD REV. 26, 27–28 (1950) (arguing that “we the people” means voters who govern themselves and require information to make informed decisions when we vote); *see also* CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 6 (2007) (arguing that we need a set of common experiences to work towards some goal to be able to speak with the other side and that shared experiences allow us a place in the middle to have that conversation).

and religious beliefs.⁹² Many individuals disagree about the level of protection that the First Amendment should grant to Internet pornography. Some argue that pornography can be construed as a form of speech, while others consider it a violation of privacy and a form of female objectification.⁹³

There are a few ways in which courts analyze First Amendment issues. The first is a categorical approach, which looks at the type of speech the government is attempting to regulate and determines whether that speech falls into a category of unprotected speech.⁹⁴ The second is a balancing approach, in which courts weigh competing interests against one another.⁹⁵ Critics argue that this second approach is troublesome because it is inherently subjective, and requires decisions to be made on a case-by-case basis, resulting in sometimes-uneven decisions and, at times, possibly conflicting First Amendment doctrine.⁹⁶ A third approach examines the forum in which the speech occurred to determine what level of freedom of speech or expression protection should be granted to the speaker in that particular forum.⁹⁷ This Comment addresses each category in turn.

92. The marketplace-of-ideas theory has received criticism because it assumes a level playing field for all ideas. Some argue that this is incorrect, as some marketplace voices are louder than others due to disparities of power, poverty, access, opportunity, and education. *See, e.g.*, Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647–48 (1967). Moreover, we often surround ourselves with people who have similar ways of thinking, which keeps the marketplace from working properly. *Id.*

93. *See* Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, 41–43 (1984); *see also* Wendy McElroy, *A Feminist Defense of Pornography*, 17 FREE INQUIRY MAG., Fall 1997, at 14, 14–15 (2004) (analyzing three different perspectives feminists have on pornography). *But see* Nadine Strossen, *A Feminist Critique of “The” Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1110 (1993).

94. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 382 (2009)

95. *Id.* at 381.

96. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (arguing that balancing “tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation”); *see also* Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that a balancing method permits judges to decide cases based on their political preferences).

97. Blocher, *supra* note 94, at 390.

1. The Categorical Approach: Obscene Speech and Defamation

A few categories of speech are not granted protection under the First Amendment.⁹⁸ Obscene speech and defamatory speech are among the unprotected areas of speech.⁹⁹ Elements of the revenge porn phenomenon may fall into both of these categories.

Obscenity does not receive First Amendment protection, as it is considered “utterly without redeeming social value,”¹⁰⁰ even when exhibited solely to adults.¹⁰¹ However, adults do have a right to possess and enjoy obscenity in their homes.¹⁰²

As Justice Potter Stewart famously remarked about obscenity, “I know it when I see it.”¹⁰³ That nebulous characterization has since been refined, and the Supreme Court has articulated a more concrete, three-part obscenity test to determine whether some material is obscene and therefore unprotected by the First Amendment.¹⁰⁴ The material in question must meet the following elements: (1) “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest”; (2) “whether the work depicts and describes, in a patently offensive way, sexual conduct specifically defined by the applicable

98. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding that certain categories of speech do not receive First Amendment protection).

99. *Id.* at 571–72 (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene”)

100. *Roth v. United States*, 354 U.S. 476, 484, 487 (1957) (“[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . Sex, a great and mysterious motive in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.”).

101. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973) (holding that exhibition of obscene materials in places of public accommodation, even to consenting adults, can be prohibited, as “there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby,” because “[r]ights and interests ‘other than those of the advocates are involved’”).

102. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that a person has a constitutional right to view obscene materials in his own home; therefore, a restriction on this right is valid only if it is necessary to promote a compelling state interest and the restriction is narrowly tailored to promote that interest).

103. *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (holding that a French film, *The Lovers*, was not obscene and therefore protected by the First Amendment).

104. *Miller v. California*, 413 U.S. 15, 24 (1973).

state law”]; and (3) “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁰⁵

Note that nudity alone is not enough to meet the contemporary community standards burden,¹⁰⁶ even if the nudity depicts an individual’s buttocks.¹⁰⁷ However, a number of state interests *can* justify banning the sale and display of obscene materials, even to consenting adults.¹⁰⁸ These state interests include maintaining the quality of life in the community¹⁰⁹ and reducing crime and uplifting the moral fabric of society, among others.¹¹⁰

Some scholars argue that revenge porn should be categorically banned like other unprotected areas of speech, such as obscenity.¹¹¹ This argument relies on historical precedent, as traditionally the First Amendment has not protected nude depictions of individuals.¹¹² Those that argue for the criminalization of nonconsensual pornography believe that it can be outlawed without interfering with First Amendment protections.¹¹³ It is unlikely that revenge porn will be considered obscene for the purposes of labeling it an unprotected category of speech under the First Amendment because, as discussed below, the Supreme Court is reticent to expand on the limited number of exceptions of types of speech that are unprotected by the First Amendment.

105. *Id.*

106. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (holding that the film *Carnal Knowledge* is not obscene as nothing in the film was patently offensive and therefore the material failed to meet the *Miller* obscenity test).

107. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 217 (1975) (striking down a city ordinance banning nudity in drive-through movies).

108. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993) (involving a store that was selling obscene material that was confiscated by local police and all contents destroyed).

109. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (holding that a city may prohibit the location of an adult movie store via zoning regulations as a time, place, or manner restriction).

110. *Id.* at 50–53 (stating that the city’s ordinance aided in preventing the secondary effects of increased neighborhood crime).

111. *See, e.g., Volokh, supra* note 16 (“I think courts can rightly conclude that as a categorical matter such nude pictures indeed lack First Amendment value.”).

112. *Id.* (“Historically and traditionally, such depictions would likely have been seen as unprotected obscenity (likely alongside many consensual depictions of nudity). And while the Court has narrowed the obscenity exception—in cases that have not had occasion to deal with nonconsensual depictions—in a way that generally excludes mere nudity (as opposed to sexual conduct or “lewd exhibition of the genitals”), the fact remains that historically such depictions would not have been seen as constitutionally protected.”).

113. *Id.*

The Supreme Court's stance on obscenity was reaffirmed in a 2010 case, *United States v. Stevens*,¹¹⁴ which concerned obscene speech in the form of "animal crush" fetish videos.¹¹⁵ The Court held that 18 U.S.C. § 48, a federal statute that criminalized the portrayal of certain depictions of animal cruelty, was substantially overbroad and invalid under the First Amendment.¹¹⁶ In the majority opinion, Chief Justice Roberts noted that the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits."¹¹⁷

An argument could be made that revenge porn should be considered obscene, regardless of the Court's ruling in *Stevens*, as revenge porn depicts sexual activity without the consent of the individual or individuals involved, which arguably appeals to the prurient interest. Further, revenge porn may be considered offensive sexual conduct given the noted lack of consent and potentially secretive nature of the exposure of the photographs and videos. The lack of consent may also contribute to an argument that there is no artistic or scientific value to revenge porn.

Despite these arguments, the Supreme Court's ruling in *Stevens* shows that the Court is unwilling to expand upon the obscene category of speech, even in situations as extreme as those involving animal crush videos. Therefore, it is unlikely that the Court would deem revenge porn a categorical violation of the First Amendment.

Defamation is yet another unprotected category of speech under the First Amendment.¹¹⁸ This claim requires a plaintiff to prove that a defendant published a defamatory statement concerning the plaintiff and that the statement caused the plaintiff to suffer actual damages.¹¹⁹ Publication does not require anything more than the defendant telling the defamatory statement to at least one person other than the plaintiff.¹²⁰ States can determine their own standards for defamatory falsehoods about private individuals on matters of public concern (that is, issues in which the public has a legitimate interest) and the

114. *United States v. Stevens*, 559 U.S. 460, 465–66 (2010).

115. Animal "crush videos" depict semi-nude women physically crushing small animals, typically using their high heels to harm the animals. *Id.*

116. *Id.* at 482.

117. *Id.* at 470.

118. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

119. *Id.*

120. *See M&R Inv. Co. v. Mandarino*, 748 P.2d 488, 491 (1987).

private plaintiff may recover damages if the statement was false and negligent.¹²¹ The defamation test is altered if a person is a public or political figure,¹²² in that a public or political figure will bear the burden of typically showing by clear and convincing evidence that a false statement was made about them with either actual malice or reckless disregard.¹²³ It is important to distinguish between statements made as facts and those made as opinions. Factually false statements—in other words, lies—cannot be prohibited by statute¹²⁴; moreover, statements of opinion are also protected speech under the First Amendment.¹²⁵ Further, actual malice requires that the defendant have subjective awareness of probable falsity.¹²⁶ This relatively high barrier prevents a chilling effect on speech and allows more speech into the marketplace.¹²⁷

A defamation claim may prove inapt as a remedy for revenge porn victims for a number of reasons. First, because reputation is not a tangible quality, monetary damages are often insufficient—and may not ever be sufficient in a revenge porn victim's case—to repair a reputation damaged by defamation.¹²⁸ As such, broad laws protecting defamation necessarily prevent some qualified individuals from entering into the political realm for fear of the inevitable intrusion

121. *Id.*

122. *Sullivan*, 376 U.S. at 279–80 (rejecting a defamation claim for lack of actual malice). In *Sullivan*, the defendants ran an advertisement that included some incorrect information about a recent civil rights demonstration. *Id.* at 256–57. The plaintiff, a local police commissioner, claimed that the advertisement's mistakes reflected badly upon his personal character. *Id.* at 258. The Court held that the defendants' incorrect statements were inconsequential, as the overall gist of the advertisement represented true facts. *Id.* at 271, 279–80.

123. *Id.* (stating that failure to investigate alone does not constitute actual malice).

124. *See, e.g., United States v. Alvarez*, 567 U.S. ___, slip op. at 3 (2012) (holding that the Stolen Valor Act violated the First Amendment as it constituted a content-based restriction on free speech).

125. *See, e.g., Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 381–82 (S.D.N.Y. 1998) (holding that a quote from a New York Post article that described the plaintiff as a "fat, failed, former sheriff's deputy" was a hyperbole, and therefore was a protected opinion under the First Amendment).

126. *See St. Amant v. Thompson*, 390 U.S. 727, 730–33 (1968) (holding that a public official must prove actual malice). The Court defined actual malice as whether the plaintiff has shown "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Id.* at 731.

127. *See id.*

128. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 261–63, 267–68 (2010).

upon their private lives by the American media and the lack of repercussions for defamatory statements made against those individuals.¹²⁹

Further, defamation is a more difficult claim to substantiate if it is based on the pornographic photo or video that the subject presumably willingly took. Unless the photographs or videos on the revenge porn site have been digitally altered, they are presumably true. In other words, unless the sexually explicit content on the site is false, that content will not be considered defamatory.¹³⁰ Often, the revenge porn truly depicts what the individual looks like, as it was taken by the individual herself or himself. As such, it is unlikely that a revenge porn victim would be able to succeed in a defamation claim.

2. The Balancing Approach: Profanity and Pornography

Anonymous postings on revenge porn sites often include profane language that is protected under the First Amendment. The Court has held that profanity enjoys First Amendment protection except in limited situations, such as in broadcast media and in schools.¹³¹ In these situations, courts will often weigh the competing interests in a balancing test.¹³² Despite this balancing test, a regulation targeting profanity is only valid if the profanity contains fighting words or the regulation is necessary to protect a captive audience or minors.¹³³

As for pornography, the First Amendment may protect the “porn” of revenge porn unless the depiction is obscene which, as discussed, is a difficult burden to meet. There are a few limited circumstances in which courts have permitted the government to ban

129. See *Jones v. Dirty World Entm't Recordings L.L.C.*, No. 13-5946 (6th Cir. June 16, 2014).

130. See *MacElree v. Philadelphia Newspapers*, 674 A.2d 1050, 1053 (Pa. 1996) (holding that if a statement cannot be proven true or false, it is likely an opinion, and therefore cannot form the basis of a defamation claim).

131. See *Cohen v. California*, 403 U.S. 15, 18 (1971) (holding that offensive language is protected by the First Amendment and that profanity can only be regulated if it is in the form of fighting words or it is necessary to protect minors or a captive audience).

132. Competing interests can include protecting against fraud, reducing crime, maintaining quality of life, and uplifting moral tone of society. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–59 (1973). Other interests include avoiding political corruption/appearance of corruption, see *Buckley v. Valeo*, 424 U.S. 1, 26–29 (1976), protecting students against vulgar and lewd speech, see *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685–86 (1986), and protecting residential property and preserving peace and security, see *Frisby v. Shultz*, 487 U.S. 474, 485–88 (1988).

133. *Cohen*, 403 U.S. at 21 (“[W]e are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.”(citation omitted)).

or restrict access to pornographic content. For instance, pornography can be subject to government control in an attempt to limit minors' access to it, as the government has a substantially overriding interest in protecting minors.¹³⁴ The government may also use its zoning powers to proscribe places where pornographic businesses operate by targeting the secondary effects of those businesses.¹³⁵ Many of those who argue that pornography should be prohibited argue that it is a form of sexual discrimination against women and that it causes harmful attitudes and actions towards women in society.¹³⁶

An argument might be made that revenge porn is distinct from traditional pornography because, although both revenge porn and traditional pornography involve the depiction of sexual acts, revenge porn involves the nonconsensual exposure of those sexual acts. That is, although the taking of pornographic photographs or videos is presumably initially consensual,¹³⁷ the subject has not consented to the sharing of those photographs or videos.¹³⁸ Therefore, it may be possible to argue that revenge porn is not a subset of pornography, but rather a departure.

134. *Ginsberg v. New York*, 390 U.S. 629, 643 (1968) (holding that the government may constitutionally prohibit minors from accessing certain sexually explicit material).

135. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (striking down a city ordinance banning nudity in drive-through movies).

136. *See* Catharine A. MacKinnon, *Not a Moral Issue*, 2 *YALE L. & POL'Y REV.* 321, 322–24 (1984) (“Obscenity is a moral idea; pornography is a political practice. . . . The two concepts represent two entirely different things.”). Professor MacKinnon argues that while “[o]bscenity as such probably does little harm; pornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population.” *Id.*; *see also* Heather S. Dixon, *A Temporary Ban on Pornography: A First Amendment-Friendly Stride Toward Gender Equality*, 20 *S. CAL. REV. L. & SOC. JUST.* 433, 437 (2011) (arguing that pornography harms all women, including pornographic actresses). Ms. Dixon emphasizes how the pervasive nature of the Internet has exacerbated the gender disparity linked to pornography, saying,

[t]he emergence of the internet as the predominant medium for the distribution and consumption of pornography has only increased the harm to women. Pornography's message is now more widespread, the harms of its production process occur more frequently, and it is difficult to monitor the extent to which porn actresses involved in its production have actually consented to such involvement.

Id.

137. Much of the content on revenge porn websites appears in so-called “selfie” form and therefore seems to be willingly taken by the subject. *See infra* Part III.D.

138. *See infra* Part III.D.

However, despite that argument, this Comment argues that because of similarities in the actual content of revenge porn and pornography, courts likely will view revenge porn as an extension of pornography. By this extension, therefore, the First Amendment would seem to protect revenge porn posters. If this argument is successful, revenge porn may be slightly easier to categorize than pornography because of the way in which it is posted—namely, the content is submitted by typically anonymous users who are sharing sexually explicit content of unknowing and unwilling subjects.

3. The Public Forum Approach: The Internet and Government Regulation of the Internet

A public forum is a place that permits expressive activity either by tradition or by designation.¹³⁹ If the Internet is considered a public forum, expressive activity that occurs on the Internet will be given more protection under the First Amendment. Although it may be difficult to argue that the Internet is a traditional public forum as it has not “immemorially been held in trust for the use of the public,”¹⁴⁰ one might argue that the Internet has “been used for purposes of assembly, thoughts between citizens, and discussing public questions.”¹⁴¹ In analyzing whether the Internet may qualify as a public forum, it is important to note from the outset that the Internet is not government property.¹⁴² As such, it will not fall under the traditional public forum doctrine; however, the government has taken significant steps towards regulating portions of the Internet.¹⁴³ It must

139. See, e.g., *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

140. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (quoting *Hague*, 307 U.S. at 515).

141. *Id.* For example, political activists often take to the Internet in the form of digital protests. See Robert Muggah & Gustavo Diniz, *A New Era of Digital Protest*, HUFFINGTON POST (Oct. 15, 2013, 11:03 AM), http://www.huffingtonpost.com/robert-muggah/a-new-era-of-digital-protest_b_4089763.html; see also *Internet Protests: The Digital Demo*, ECONOMIST (June 29, 2013), <http://www.economist.com/news/international/21580190-technology-makes-protests-more-likely-not-yet-more-effective-digital-demo>.

142. Government property—such as streets, sidewalks, and parks—has long been considered a public forum for the purposes of free speech. See *Hague*, 307 U.S. at 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

143. For instance, the U.S. Department of Commerce has had an ongoing contract with a California non-profit, Internet Corporation for Assigned Names and Numbers

also be noted that individual servers on the Internet may be exempt from a public forum qualification, as large portions of the Internet are dedicated to commercial speech, which has traditionally been granted less protection than other forms of speech¹⁴⁴ under the First Amendment.¹⁴⁵ When considering the Internet's multi-dimensional functionality, and the large number of individuals who are able to express their opinions on various outlets on the Internet, there is a strong argument that it functions as a public forum, despite its nontraditional form.

If the Internet is considered a public forum, the government may not be permitted to regulate Internet speech on the basis of content, depending upon the particular category of expression.¹⁴⁶ As discussed below, in considering whether the government may be permitted to regulate revenge porn on the Internet, public forum considerations take into account the time, place, and manner of the regulation.

Some background may be helpful when considering government regulation of revenge porn on the Internet. If a government regulation is not aimed directly at speech itself but rather affects it indirectly, it will be considered a time, place, or manner restriction.¹⁴⁷ If a regulation of speech is content neutral, the following three-part test is applied: (1) the regulation must serve a significant governmental interest; (2) the regulation must be narrowly tailored to

("ICANN"), to control the assignment of Internet domain names. See Craig Timberg, *U.S. to Relinquish Remaining Control over the Internet*, WASH. POST (Mar. 14, 2014), http://www.washingtonpost.com/business/technology/us-to-relinquish-remaining-control-over-the-internet/2014/03/14/0c7472d0-abb5-11e3-adbc-888c8010c799_story.html.

144. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 883 (2010) (noting that "[p]olitical speech is 'indispensable to decisionmaking in a democracy'" (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978))).

145. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that purely commercial advertisements were not protected by the First Amendment). But see *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (holding that the public interest can be served by commercial speech, as some commercial expression may provide "indispensable" information; as such, the Court granted commercial speech a limited amount of First Amendment protection).

146. See, e.g., *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992).

147. A time, place, or manner restriction on speech is permitted if it is content neutral, narrowly tailored, serves a significant government interest, and leaves open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

achieve that objective; and (3) the regulation must leave open adequate alternative channels for communication.¹⁴⁸

Regulation of communications on the Internet receives the relatively strict scrutiny given to the regulation of printed material.¹⁴⁹ Unlike the broadcast spectrum, which is a scarce resource (and for which the Court has allowed the government to engage in a more extensive time, place, and manner regulation than for print media), the Internet is hardly a scarce resource. Therefore, any time, place, or manner regulation on the Internet must be closely linked to the achievement of an important government interest. For example, in *Reno v. ACLU*,¹⁵⁰ the Court held that allowing minors access to “offensive” non-obscene material could not be outlawed if the effect would be to seriously restrict the rights of adults to such materials.¹⁵¹

Many argue that the government should not be permitted to regulate the Internet, as a digital landscape is a different form of property than traditional government-created boundaries in the physical world.¹⁵² Cyberspace is transnational and any rules created would necessarily be culture-specific. That is to say that many countries have different cultural norms, and Internet regulation would be difficult to impose on countries with differing perspectives. For example, the community standard element of the *Miller* obscenity test¹⁵³ would be difficult to apply in an Internet forum, as community standards necessarily vary depending upon where a community is located and what societal values persist in that area. Further, local standards may prove more or less protective than national standards. It would therefore be difficult for federal legislation to provide a one-size-fits-all solution for revenge porn sites.

148. See *United States v. Grace*, 461 U.S. 171, 177 (1983).

149. *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997) (holding that Congress cannot prohibit sending over Internet “indecent” material that depicts sex in a “patently offensive” way). *Reno* distinguishes the Internet from broadcasting, holding that the Internet is not as “invasive” as radio or TV. *Id.* at 869. Further, the Internet is not a “scarce” commodity. *Id.* at 870. The Court stated that prior Supreme Court case law failed to provide any “basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Id.*

150. *Id.*

151. *Id.* at 874.

152. See, e.g., Barlow, *supra* note 21 (arguing for a “hands off the internet” approach by the government because governments erect false boundaries, and cyberspace can be boundless).

153. *Supra* Part II.A.1.

There have been a number of cases concerning Internet pornography and its First Amendment value. For instance, indecency standards targeting obscene speech on the Internet were struck down in *Reno v. ACLU*.¹⁵⁴ Similarly, the Court struck down a section of the Child Online Protection Act (“COPA”) that fined those who communicated material “harmful to minors” on the Internet in *Ashcroft v. ACLU*.¹⁵⁵ *Ashcroft v. Free Speech Coalition*¹⁵⁶ held that the government may not, however, ban virtual child pornography.¹⁵⁷ As for anonymous speech on the Internet, although some question the value of speech without accountability, the Supreme Court has recognized a qualified right to speak anonymously with political literature.¹⁵⁸

It is clear that the existing framework is inexact. The Supreme Court has yet to rule on whether the Internet should be considered a public forum, and it is unclear whether the Court will ever consider the issue directly. Internet regulations are a difficult area, as many legal inferences are pulled from speech made in an offline world. Because the Internet regulations in place are imprecise, this Comment argues in Part IV that nonlegal solutions are required to protect victims of revenge porn.¹⁵⁹ Protections provided to revenge porn website administrators and posters of revenge porn, including section 230 of the Communications Decency Act (“CDA”),¹⁶⁰ may obstruct victims’ efforts to have the sexually explicit content removed from the Internet.

B. Section 230 of the Communications Decency Act

Revenge porn website administrators may seek protection under section 230 of the Communications Decency Act.¹⁶¹ section 230 states that “[n]o provider or user of an interactive computer service shall be

154. *Reno*, 521 U.S. at 874 (noting that although protecting minors is an important objective, that objective cannot be achieved by restricting the free expression rights of adults, unless the defender of the statute shows that there is no less restrictive alternative available).

155. 535 U.S. 564, 566 (2002) (holding that the community standards provision of the COPA did not render it unconstitutional).

156. 535 U.S. 234 (2002).

157. *Id.* at 256.

158. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (holding that an Ohio statute banning anonymous speech was unconstitutional).

159. *See infra* Part IV.

160. 47 U.S.C. § 230 (2012).

161. *Id.*

treated as the publisher or speaker of any information provided by another information content provider.”¹⁶² In effect, it protects website owners from liability for content posted by third parties.

In analyzing whether a website is immune from liability under section 230, courts apply a three-pronged test: (1) the defendant must be a “provider or user” of an “interactive computer service”; (2) the cause of action asserted by the plaintiff must “treat” the defendant “as the publisher or speaker” of the harmful information at issue; and (3) the information must be “provided by another information content provider,” that is, the defendant must not be the “information content provider” of the harmful information at issue.¹⁶³ One of the earliest cases involving section 230 succinctly defines the protection granted, noting that section 230 “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”¹⁶⁴

As a result of section 230, courts have been reluctant to find website operators liable for claims such as negligence¹⁶⁵ and defamation.¹⁶⁶ However, if the website owners themselves interact with content provided by users of the website, they may be held liable as information content providers.¹⁶⁷ For example, a 2008 case held the website Roommates.com liable in a housing discrimination suit because—despite the website’s claim for protection under section 230—the website required users to enter information regarding their

162. *Id.*

163. *Zeran v. Amer. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (testing the protection granted by section 230 for service providers).

164. *Id.*

165. *See, e.g., Doe v. MySpace*, 528 F.3d 413, 422 (5th Cir. 2008) (holding that a social networking site was immune from liability for failing to institute safety measures to protect minors). In *Doe*, the plaintiffs’ daughter had lied about her age and communicated over MySpace with a man who later sexually assaulted her. *Id.* at 416. In the court’s view, the Does’s allegations were “merely another way of claiming that MySpace was liable for publishing the communications.” *Id.* at 420.

166. *Barrett v. Rosenthal*, 146 P.3d 510, 517, 529 (2006) (holding that an individual Internet user received immunity from liability for republication of defamatory statement on a listserv).

167. *MCW, Inc. v. badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *9–10 (N.D. Tex. Apr. 19, 2004) (rejecting the defendant’s motion to dismiss on the grounds of section 230 immunity). The court held that the plaintiff’s allegations that the defendants wrote disparaging report titles and headings rendered them information content providers. *Id.* The website, www.badbusinessbureau.com, allows users to upload “reports” containing complaints about businesses they have dealt with. *Id.*

gender, sexual orientation, and marital status.¹⁶⁸ The court held that “[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.”¹⁶⁹

Revenge porn website owners may be more than simply proxies through which users share revenge porn if they sift through content for child pornography, as Moore admitted to doing when he operated his website.¹⁷⁰ Such interaction with the content seems to place some doubt on whether Moore and others like him could use section 230 as a defense because by interacting with the content, they have inserted themselves into the process. However, it is unlikely that every revenge porn website would be liable because of the extensive nature of the protection granted under section 230. Likewise, as noted previously, copycat websites seem to have learned from Moore’s mistakes,¹⁷¹ and, going forward, likely will not require anonymous posters to insert information about themselves before accepting a submission.

III. CAUSES OF ACTION AGAINST REVENGE PORN WEBSITE OWNERS AND SUBMITTERS

A number of legal claims potentially could be brought against owners of revenge porn websites and submitters of the pornographic content. These claims include publication of private facts, intentional infliction of emotional distress, and copyright infringement.

However, while these claims may provide protection in some instances, there are significant flaws with each legal claim that continue to leave victims vulnerable. Additionally, victims may not have the resources to hire a lawyer; the poster may not have assets to make it worth the lawyer’s time; and victims may fear bringing publicity to content they are attempting to get removed or be intimidated by the difficulties in getting one sexually explicit picture

168. *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1166 (9th Cir. 2008).

169. *Id.*

170. *See supra* Part I.B.

171. *See supra* notes 79–86 and accompanying text.

or video or set of pictures or videos taken down on numerous sites, as a poster may submit content on more than one website.¹⁷²

A. *Public Disclosure of Private Facts*

Public disclosure of private facts protects the unreasonable disclosure of private facts of an embarrassing nature.¹⁷³ This claim requires a public disclosure of private facts that are highly offensive to a reasonable person (an objective standard) and that the subject matter must not be of legitimate public concern.¹⁷⁴ Although a right to privacy is not explicitly enumerated within the Constitution, courts have read a right to privacy into the Constitution.¹⁷⁵ Of the claims discussed in this Comment, public disclosure of private facts is perhaps the most likely to succeed in a suit in which the revenge porn victim sues the poster of the content at issue.

A revenge porn victim must show that the posting of sexually explicit content on a public revenge porn site is a public disclosure. The victim may argue that the posting will reach a sufficient number of individuals so that it is likely to reach the public, as revenge porn websites are not password-protected and are accessible to any individual with access to the Internet. Next, the victim must show that the private facts, photos, or videos were truthful, as they were photographs or videos of a subject in a sexually explicit context. The victim must argue that the sexually explicit content is not part of the public record, as the pornographic photograph or video most likely took place in the subject's home or in another private setting. The victim must then show that the disclosure of the photograph or video

172. See *Your Weekly Constitutional: Revenge Porn*, *supra* note 7 (including a discussion by Professor Frank of the problems in applying current legal claims to revenge porn litigation).

173. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (1993) (“In tort law the term ‘right of privacy’ covers several distinct wrongs . . . [including] [p]ublicizing personal facts that while true and not misleading are so intimate that their disclosure to the public is deeply embarrassing to the person thus exposed and is perceived as gratuitous by the community.”).

174. See *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 667–68 (1984). Note that a state cannot impose sanctions for publication of information contained in public court records. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (holding that a Georgia statute prohibiting the release of a rape victim's name was unconstitutional when the name was already on the public record).

175. See *Griswold v. Connecticut*, 381 U.S. 479, 481–85 (1965) (holding that the Ninth Amendment protects a right to privacy). See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (discussing how the right to privacy evolved from the common law guarantees of life, liberty, and property);

without his or her knowledge or consent is highly offensive to a person of reasonable sensibilities, as a reasonable person would not publically post nude photographs of others without consent.

Lastly, in considering whether the revenge porn is of any legitimate public concern, it is essential to examine the newsworthiness and social value of the revenge porn material, the depth of the website's intrusion into ostensibly private affairs, and the extent to which the poster or the website administrator voluntarily acceded to a position of public notoriety.¹⁷⁶ If, on the other hand, the public has a significant interest in the revenge porn, it may outweigh the revenge porn victim's interests in succeeding under a claim of publication of private facts. The typical revenge porn victim is a private individual. As such, the victim's nude photos and videos are unlikely to be considered newsworthy or a matter of legitimate public concern.

Despite the likelihood of success for a revenge porn victim under a claim of publication of private facts, this claim will only work if the victim already knows the identity of the anonymous poster. A victim will be unlikely to prevail on this claim against a site administrator because of the protections granted to the site by section 230 of the CDA.¹⁷⁷ Therefore, this cause of action does not provide adequate protection for a revenge porn victim.

B. Intrusion

A revenge porn victim may wish to bring an intrusion claim against a website administrator or an anonymous poster because of the intrusive nature of exposing sexually explicit content on the Internet.¹⁷⁸ An intrusion cause of action requires three elements to be met: (1) the defendant intentionally intruded either physically or non-physically; (2) into the victim's solitude and seclusion; and (3) the defendant's intrusion is highly offensive to a reasonable person.¹⁷⁹

Taking each element in turn, an argument could be made that a revenge porn poster or website administrator did intentionally

176. *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 772 (1983).

177. *See supra* Part II.B.

178. One revenge porn victim successfully alleged a claim of intrusion against an ex-boyfriend who posted nude photos of the victim on Facebook. *See Liamsithisack v. Bruce*, Case No. 1-12-CV-233490 (Santa Clara Super. Ct. 2014). The jury in that case awarded the plaintiff \$250,000 in damages. *Id.*

179. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

intrude on a victim by exposing nude photographs or videos of that individual online, as nudity is a highly personal matter. It is important to note that the revenge porn website administrator or poster may not claim a defense under the First Amendment, as courts have roundly rejected any attempts to use the First Amendment as support for a license to trespass.¹⁸⁰ The intrusion would be a non-physical intrusion if the poster or website administrator was given the photos by the victim or through an anonymous posting. Conversely, the intrusion might be considered physical if the sexually explicit content was obtained by hacking into the victim's computer or phone.

Although it may be a more difficult argument that the revenge porn poster or website administrator's intrusion was into a place, conversation, or matter in which the victim had an actual, subjective expectation of seclusion or solitude, a revenge porn victim has several arguments which may support this element of an intrusion claim. For instance, nudity is a highly personal and typically private matter. Therefore, generally speaking, an individual may have an expectation that nude photos would be kept private. Although the poster or administrator may argue that by taking photographs, the victim was projecting his or her nudity into a more public setting (as digital photos are easily circulated), a victim may respond by pointing to the nature of how the photos were initially shared. In the most common case, a victim will send the sexually explicit content to a then-boyfriend or girlfriend through a text message or a private email.¹⁸¹ The private way in which the content was shared—through a direct message, and not through any method of social media, for example—may aid the victim in her or his claim that the individual had an actual, subjective expectation of seclusion or solitude.

Lastly, this Comment considers whether a poster's or website administrator's intrusion was highly offensive to an objective, reasonable person with a reasonable expectation of privacy. The victim might argue that his or her expectation was objectively reasonable because in a typical relationship with a boyfriend or girlfriend, there are private matters that are understood to be personal and are not to be shared. In these cases, the victim has a strong argument that nude photos shared between the couple would

180. The First Amendment does not give license to photographers "to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

181. *See supra* Part I.

be considered personal. It is likely, therefore, that a revenge porn victim could succeed in bringing a claim of intrusion against an individual who posted sexually explicit content depicting the victim to a revenge porn website.

C. Intentional Infliction of Emotional Distress

A revenge porn victim may claim that the revenge porn posting caused them to suffer intentionally inflicted emotional distress. A claim of intentional infliction of emotional distress (“IIED”) requires the victim to demonstrate that the defendant engaged in extreme and outrageous behavior that produced serious emotional consequences.¹⁸² A claim for IIED requires (1) an intentional or reckless act that is (2) extreme and outrageous and (3) causes severe emotional distress.¹⁸³ Despite these requirements, if the act at issue is speech, and the speech still has some value, an IIED claim will fail.¹⁸⁴

In order to establish recklessness, the plaintiff must prove that the defendant knew or should have known of the risk (because it was obvious) but failed to take precautions against it.¹⁸⁵ The act must be so outrageous as to go beyond all bounds of decency in a civilized society.¹⁸⁶ In order to be severe, the jury will have to conclude that the plaintiff suffered long-lasting emotional problems.¹⁸⁷ Such problems

182. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 55–56 (1988) (holding that a *Hustler* magazine advertisement that alluded that a famous minister lost his virginity to his mother was a parody, thereby rejecting Falwell’s claims of defamation and IIED); *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (rejecting an IIED claim for speech that occurred on a public sidewalk about a public issue). In *Snyder*, U.S. Marine Lance Corporal Matthew A. Snyder was killed in a non-combat-related vehicle accident in Iraq. *Id.* at 1213. The defendant picketed Snyder’s funeral with anti-gay signs and protestors. *Id.* Snyder’s father brought suit. *Id.* at 1214. The Court held that an IIED claim fails if the act was done on a public sidewalk and was about a public issue, even if the speech is “outrageous.” *Id.* at 1219.

183. DAN B. DOBBS, *THE LAW OF TORTS* § 303, at 826 (2000).

184. See *Hustler*, 485 U.S. at 56 (holding that a public figure may not recover damages for intentional infliction of emotional distress without first proving that the statements were made with actual malice).

185. *RESTATEMENT (SECOND) OF TORTS* § 46 cmt. i (1965).

186. *Id.* § 46 cmt. d (1965) (stating that conduct is extreme and outrageous “only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community”).

187. See *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 618–19 (Tex. 1999).

can include a victim's fright, horror, grief, shame, humiliation, embarrassment, anger, worry, or nausea.¹⁸⁸

An IIED claim may be a viable option for victims of revenge porn if the victim can identify the individual who posted the content to the site. However, there are several problems that a victim will face in bringing this claim. First, like a claim for publication of private facts, this tort claim may fall short if the victim is unaware of the anonymous poster's identity.¹⁸⁹ Second, a poster may argue that posting of sexually explicit content online is not extreme and outrageous considering the number of pornographic sites on the Internet. Third, a poster may argue that if the victim took the photograph or video herself or himself, it was the victim—not the poster—who acted recklessly. Therefore, this claim may be insufficient in aiding revenge porn victims.

D. Copyright Infringement

Copyright law is a constitutionally guaranteed right¹⁹⁰ that aims to provide protection for authors as the creators of their original work so they may better protect their livelihoods and in turn be more likely to create products that will benefit public welfare.¹⁹¹ According to the 1976 Copyright Act, “[c]opyright in a work protected under this title vests initially in the author or authors of the work.”¹⁹² Section 102(a)(5) of the 1976 Copyright Act grants copyright protection to “pictorial, graphic, and sculptural works.”¹⁹³ Further, section 101 defines “pictorial, graphic, and sculptural” works to include photographs,¹⁹⁴ which, without further clarification, would likely include those posted to revenge porn sites. Copyright protection

188. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 56 (5th ed. 1984) (“[M]edical science has recognized long since that not only fright and shock, but also grief, anxiety, rage and shame, are in themselves ‘physical’ injuries, in the sense that they produce well marked changes in the body, and symptoms that are readily visible to the professional eye.”).

189. See *supra* notes 175–78 and accompanying text.

190. U.S. CONST. art. 1, § 8, cl. 8 (“The Congress shall have Power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

191. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260–62 (11th Cir. 2001) (explaining historical role of copyright to incentivize authors to work by protecting their works and guarding against censorship).

192. 17 U.S.C. § 201(a) (2012).

193. *Id.* § 102(a)(5).

194. *Id.* § 101.

exists the moment an original work is fixed in a tangible medium for more than a transitory duration.¹⁹⁵ In other words, copyright protection is given to the photographer or videographer the moment that the sexually explicit content is captured on film.¹⁹⁶ The photographer, not the subject of the pornographic content, retains the rights to that content.¹⁹⁷ This fact presents problems for revenge porn victims who allowed another to take the photograph or video.

Revenge porn sites, on the other hand, include many selfie photographs.¹⁹⁸ The selfie trend allows the subject of the photograph and the photographer to remain one and the same, and therefore, the subject may retain all copyright rights to the photograph or video in question. Thus, revenge porn victims who took the sexually explicit photograph or video themselves will have the copyright right to that content, despite sending it to other individuals who subsequently posted that content to a public site.

If a revenge porn victim finds a selfie or other content to which he or she owns the copyright on a revenge porn site (and he or she has not transferred copyright ownership to that site or to another), then the Digital Millennium Copyright Act (“DMCA”) permits that individual to send the website a takedown notice to have that content removed.¹⁹⁹ Congress passed the DMCA in 1998 to address technological innovations on the Internet and how the Internet affected copyright rights.²⁰⁰ The DMCA provides for secondary

195. *Id.* §§ 101, 102(a); *see also* *Cartoon Network L.P., L.L.L.P v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (holding that programming data stored in Cablevision’s buffers were not properly fixed, and therefore not applicable for copyright protection); *Williams v. Artic*, 685 F.2d 870, 874 (3d Cir. 1982) (holding that the fixed requirement for copyright is met whenever the work is sufficiently permanent or stable to permit it to be reproduced for more than a transitory period).

196. *See* Ken Kaminesky, *Interview with Carolyn E. Wright*, KEN KAMINESKY TRAVEL PHOTOGRAPHY BLOG, <http://blog.kenkaminesky.com/photography-copyright-and-the-law/> (last visited Oct. 27, 2014) (“In general, when the shutter is released, the photographer who pressed the button owns the copyright.”). Exceptions can occur if the photograph is taken as a “work for hire.” *See* 17 U.S.C. § 201. In those instances, the photograph’s copyright is retained by the employer. *Id.*

197. Kaminesky, *supra* note 196.

198. Selfies are “photograph[s] that one has taken of oneself, typically . . . with a smartphone or webcam and shared via social media.” *Selfie*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited Sept. 7, 2014) (noting that the term is also spelled as “selfy” in some contexts).

199. 17 U.S.C. § 512(c).

200. *See* *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“Congress enacted the DMCA in 1998 to . . . update domestic copyright law for the online world.”).

liability on the Internet but limits liability for service providers if the service providers: (1) do not know or have reason to know of the infringing activity; (2) do not have control over customer posts; (3) have devised, publicized, and implemented a policy for terminating repeat infringing customers; and (4) do not undercut technological protection measures (such as encryption).²⁰¹

Although service providers receive limited liability, website owners are required to comply with notice-and-take-down provisions when the notice-and-take-down complies substantially with statutory requirements.²⁰² For the takedown notices to be adequate and comply with the statute's requirements, the notices must be very specific. The notices must be written, signed, identify the work being infringed, identify the infringing work, include the contact information of the complaining party, and include a statement that all information contained therein is accurate and that, under penalty of perjury, the complaining party is authorized to act on behalf of the right holder.²⁰³

Therefore, revenge porn victims could send DMCA takedown notices to revenge porn website operators, challenging their copyrighted material posted on the website if the subjects are the creators of the photography or video.²⁰⁴ Although some scholars are calling for a total change in copyright law,²⁰⁵ as the law currently stands, a copyright claim and DMCA takedown notice may only work in a limited number of situations. For instance, a revenge porn victim must first know that she or he can make a copyright claim and send a DMCA takedown notice if she or he owns the copyright to the photograph or video in question. Likewise, a revenge porn site would need to comply with a properly written and submitted takedown request. If Hunter Moore is any indication of the typical revenge porn

201. See 17 U.S.C. § 512(a), (c)(1)(A)(i)–(ii), (i)(1)(B).

202. See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27–28 (2d Cir. 2012) (holding that there is a standard to apply when determining safe harbor protection of DMCA). The Second Circuit's interpretation of the "right and ability" to control makes it more likely that a service provider like YouTube will not be excluded from the safe harbor because it possesses a right and ability to control under 17 U.S.C § 512(c)(1)(B). See *id.* at 38.

203. 17 U.S.C. § 512(c)(3).

204. Many victims did so with Hunter Moore's website, but he refused to comply with their takedown notices. See Laws, *supra* note 60.

205. See, e.g., Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2031–32 (2014) (arguing for a change in copyright law to create "a right for identifiable people captured in intimate media to block unauthorized distribution and display of those images or video").

website owner, these takedown requests might largely be ignored.²⁰⁶ Copyright law therefore does not provide sufficient protection to revenge porn victims.

IV. POSSIBLE REFORMS AND PRIVATE ORDERING

Revenge porn victims like Dr. Holly Jacobs are pushing for legislative reform in a number of ways. Such reform methods include petitions to criminalize revenge porn nationally²⁰⁷ and globally,²⁰⁸ and encouragement of victims to speak up and to join support groups.²⁰⁹ This Comment suggests a number of ways revenge porn victims may find help when they find their sexually explicit content posted publically online. Specifically, this Comment argues that despite suggestions for changes to federal and state laws, the most effective resolutions for revenge porn victims are private-ordering solutions.²¹⁰

A. *Changes to Federal Law and State Legislative Action*

One suggested reform includes changes to federal copyright law to make the subject of the photograph or video the owner of the rights rather than the photographer.²¹¹ Many copyright scholars are critical of such a fundamental change, arguing that it would unnecessarily alter the way copyright law functions and improperly turn copyright law remedies upside down.²¹² Such a change in copyright law might be messy and difficult to apply, as it would go against decades of precedent. It also threatens to clog the courts, as such a change would permit many more individuals access to a

206. See *supra* notes 57–64 and accompanying text.

207. See *Petition*, END REVENGE PORN, <http://www.endrevengeporn.org/welcome/> (last visited Sept. 7, 2014) (petitioning for the criminalization of revenge porn).

208. See *Global Petition*, END REVENGE PORN, <http://www.endrevengeporn.org/non-u-s-petition/> (last visited Sept. 7, 2014) (asking for non-U.S. citizens to sign a petition to ban revenge porn around the world).

209. *Victims Speak Up!*, END REVENGE PORN, <http://www.endrevengeporn.org/victims-speak-up-2/> (last visited Sept. 1, 2014) (encouraging revenge porn victims to submit contact information if they are willing to testify for a revenge porn bill).

210. See *infra* Part IV.B.

211. See Bambauer, *supra* note 205, at 2059 (“[The new law] would curtail the distribution and display rights enjoyed by the copyright owner of intimate media: exercise of those rights would be subject to the consent of each subject of that media . . .”).

212. See, e.g., Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346, 2357–60 (2014) (“Bambauer proposes a right with a different justification from copyright, owned by someone other than the ordinary copyright owner, infringed by different acts, with different defenses, and with different remedies.”).

photograph or video's copyright. Additionally, as a new law, it will likely provide the courts with little guidance in its interpretation.

A strong counterargument might be made that because the consequences of revenge porn are so far-reaching, it warrants an exception to section 230. Some suggest that section 230 should be amended to limit protection to websites who permit third parties to post revenge porn content on their sites.²¹³ After all, as discussed above, revenge porn has the capability to ruin revenge porn victims' lives,²¹⁴ and if section 230 ever warranted an exception, there is a strong argument that revenge porn is it.

Despite these arguments, a criminal law amendment may remove much of section 230's power. If an exception is granted into section 230 for revenge porn, in a few years' time, another fad may arise²¹⁵ and legislatures will be urged to amend section 230 to add yet another exception.²¹⁶ Similar to the Supreme Court's unwillingness to create additional categorical exceptions to the First Amendment,²¹⁷ Congress should be unwilling to draft exceptions to section 230, as they will weaken the protections the law provides to Internet servers and websites.

Some states, like California, have taken matters into their own hands and have passed legislation to combat revenge porn.²¹⁸

213. See, e.g., Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013), <http://www.concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html> ("Congress should instead adopt a narrow amendment to Section 230, excluding from its safe harbor provisions websites designed to facilitate illegal conduct.").

214. See *supra* Part I.

215. See *infra* Part IV.B.1 for a discussion of Juicy Campus, an anonymous gossip website that was popular around 2008, which later became obsolete.

216. A number of European countries have "Right to be Forgotten" laws, which allow Internet users to have content depicting them in a unfavorable light removed from the web. See generally Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. (ONLINE) 88 (2012). It is unlikely that such laws would be successful in the United States, as the concept contradicts the First Amendment right to freedom of speech and expression. See John Hendel, *In Europe, a Right to Be Forgotten Trumps the Memory of the Internet*, THE ATLANTIC (Feb. 2, 2011, 11:16 AM), <http://www.theatlantic.com/technology/archive/2011/02/in-europe-a-right-to-be-forgotten-trumps-the-memory-of-the-internet/70643/> (pointing out that Americans have a different value set than Europeans and that "the implicit right to privacy always fell flat when running against the Supreme Court's fidelity to the First Amendment").

217. See *supra* Part II.A.1.

218. As of October 2014, thirteen states had passed revenge porn laws: Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Maryland, New York,

California passed revenge porn legislation, Senate Bill No. 255,²¹⁹ on October 1, 2013, that was then signed into law by Governor Jerry Brown.²²⁰ The new law aids potential victims of revenge porn by making it a misdemeanor to post such graphic images or video “with the intent to cause serious emotional distress.”²²¹ Defendants who violate the law could land in jail for up to six months or be fined up to \$1,000.²²²

This new California law has received criticism for its limited scope of protection.²²³ Critics argue that because the law does not protect against the posting of selfies, and the majority of revenge porn photographs are selfies, a large number of individuals who submit revenge porn posts may remain protected.²²⁴ Other critics believe that the law’s language is too vague to be an effective deterrent.²²⁵ Further, some argue that the law, if challenged, may be struck down as unconstitutional.²²⁶ The California revenge porn statute is a content-

Pennsylvania, Utah, Virginia, and Wisconsin. See *State ‘Revenge Porn’ Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx> (last updated Oct. 1, 2014). For the specific pieces of legislation introduced in these states, see H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014); H.B. 14-1378, 2014 Leg., Reg. Sess. (Colo. 2014); H.B. 838, 2014 Leg., Reg. Sess. (Ga. 2014); H.B. 563, 62d Leg., 2d Reg. Sess. (Idaho); S.B. 793, 216th Leg., Reg. Sess. (N.J. 2014); H.B. 71, 2014 Leg., Gen. Sess. (Utah 2014); H.B. 2107, 2014 Gen. Assemb., Reg. Sess. (Pa. 2014); H.B. 326, 2014 Gen. Assemb., Reg. Sess. (Va. 2014); S.B. 367 2013 Leg., Gen. Sess. (Wis. 2013); H.B. 396, 2013 Leg., Reg. Sess. (Md. 2013); H.B. 12, 23rd Leg., 1st Sess. (Alaska 2003).

219. S.B. 255, 2013 Leg., Reg. Sess. (Cal. 2013) (“[A]ny person who photographs or records by any means the image . . . of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently, distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.”).

220. *Id.*; Heather Kelly, *New California ‘Revenge Porn’ Law May Miss Some Victims*, CNN (Oct. 3, 2013), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/>.

221. S.B. 255, 2013 Leg., Reg. Sess. (Cal. 2013).

222. *Id.*

223. See Eric Goldman, *California’s New Law Shows It’s Not Easy to Regulate Revenge Porn* (*Forbes Cross-Post*), TECH. & MKTG. LAW BLOG (Oct. 16, 2013), http://blog.ericgoldman.org/archives/2013/10/californias_new_1.htm (examining the California law and discussing its limited power).

224. *Id.*

225. See *id.* (“In sum, California’s new revenge porn law only governs one category of involuntary porn.”).

226. Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, DEFENDING PEOPLE (Oct. 14, 2013), <http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional.html> (arguing that until the Supreme

based restriction of speech because it distinguishes between “intimate” and “non-intimate” body parts.²²⁷ As discussed in Part II.A.1, if a state is restricting a form of speech based on the speech’s content, that speech must fit within a category of unprotected speech.²²⁸ There are a limited number of categories of unprotected speech that may apply in the context of revenge porn. As such, in defense of the law’s constitutionality, California would have to prove that revenge porn is considered obscene, defamatory, or perhaps that it may incite some to violence. As discussed, revenge porn is unlikely to be considered obscene or defamatory.²²⁹ Moreover, it seems unlikely that revenge porn will incite violence, as the photographs were originally taken by the subject herself or himself.

B. *Private-Ordering Solutions*

As detailed above, federal and state legislation aim to punish posters or websites after the harmful content is published. But such legislation may be held unconstitutional if challenged in court. Instead of turning to legal remedies, private ordering may provide the best solution to eliminating revenge porn websites. There are a number of possible private-ordering remedies available, including host-site shutdowns, changing trends, changes to search engines, payment blocking for removal sites, and organized attacks and doxxing by hacker groups.

1. Host-Site Shutdowns and Changing Trends

A host-site shutdown may provide a solution for revenge porn victims. Host sites that act as servers for the revenge porn sites may consider shutting down specific revenge porn sites.²³⁰

Court amends its current categories of unprotected speech to include revenge porn, state laws like California’s current law should be struck down as unconstitutional).

227. S.B. 255, 2013 Leg., Reg. Sess. (Cal. 2013) (“Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.”).

228. *See supra* Part II.A.1.

229. *See supra* Part II.A.1.

230. Web-hosting sites provide a server platform from which other websites can connect to the Internet. *See generally* James Bruce, *The Various Forms of Website Hosting Explained [Technology Explained]*, MAKE USE OF (Feb. 6, 2011), <http://www.makeuseof.com/tag/website-hosting-technology-explained/>.

For instance, in February of 2013, a revenge porn site Texxxan.com was shut down by its host site.²³¹ The pornographic website was hosted by GoDaddy.com, who cited copyright infringement as the reason for the removal of the site.²³² The removal came after a threatened class-action lawsuit brought by a number of women whose photos and videos had been posted on the website, and wrongful appropriation of names and likenesses, among other claims.²³³ The plaintiffs sued the website for invasion of privacy under Texas law, as well as public disclosure of private facts.²³⁴ In April 2013, a federal court issued an injunction prohibiting Texxxan.com's administrators from both relaunching the website and from sharing the site's content with other websites.²³⁵ Although Texxxan.com is just one of many revenge porn websites, it is possible that pressure from the community or from a class-action lawsuit could prompt other host sites to shut down the domain names for other sites as well.

Shifting trends may also aid in the elimination of revenge porn. As the generation of Internet users who frequent revenge porn sites age and mature, social norms and standards on the Internet will necessarily evolve with them. It would not be the first time an online trend came and went in a period of a few years.

231. See, e.g., 'Revenge Porn' Website Featuring Women's Half-Naked Photos That Is Facing Lawsuit Gets Shut Down by Host Site, DAILY MAIL (Feb. 5, 2013, 5:11 PM), <http://www.dailymail.co.uk/news/article-2274099/Revenge-porn-website-texxxan-com-featuring-womens-half-naked-photos-sued-gets-shut-host-site.html> (detailing the shutdown of Texxxan.com).

232. *Id.*

233. *Id.* ("[M]ore than two-dozen women [were] named as plaintiffs in a petition for damages and class-action certification filed last week in district court in Orange County, Texas."); see also Plaintiffs' First Amended Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction at 1-4, *Toups v. GoDaddy*, No. D130018-C (Tex. Dist. Ct. Jan. 18, 2013), available in redacted form at <http://www.scribd.com/doc/124992526/Texxxan-com-Lawsuit-Press-Release-and-Amended-Complaint>.

234. Plaintiff's Original Petition for Damages and Class Action Certification, *supra* note 233, at 4-6.

235. Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, JOLT DIGEST: HARV. J.L. & TECH., <http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters> (2013) (discussing claims against revenge porn posters).

For example, in 2008, the online gossip website JuicyCampus.com was at the height of its popularity.²³⁶ The site invited students from more than five hundred colleges and universities in the United States to post anonymous comments on forums with dedicated subjects—such as “Sorority Rankings” or “Hottest Black Guys.”²³⁷ Like modern revenge porn sites, the anonymous commentary often included personal identifying information about the individual being discussed in the comment such as full name, dorm hall, and class schedule. Many observers were concerned about JuicyCampus.com and called for legislation to remove the site and other sites like it.²³⁸ But, less than a year later, changing trends proved that JuicyCampus.com was merely a popular fad that was coming to an end.²³⁹ By February 2009, the website had permanently shut down, citing a lack of sufficient financial support.²⁴⁰

Lack of financing was the publicly cited cause for Juicy Campus’ shut down, but it is also possible that changing trends contributed to decreased traffic to the website. As the site became less popular, fewer visitors accessed the site, and this lack of interest eventually led to the demise of the site.

236. See Sunny Hostin, *Online Campus Gossips Won’t Show Their Faces*, CNN (Apr. 11, 2008, 4:11 PM), <http://www.cnn.com/2008/CRIME/03/17/sunny.juicy/> (“Thousands of students from across the country have written to request that their campus be added.”).

237. *Id.*

238. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 117 (2009) (opposing “blanket grants of immunity” given to websites like Juicy Campus by section 230 of the CDA); see also Daniel Solove, *Does the Roomates.com Case Affect CDA § 230 Immunity for JuicyCampus?*, CONCURRING OPINIONS (Apr. 5, 2008) http://www.concurringopinions.com/archives/2008/04/fair_housing_co.html (“Unfortunately, courts are interpreting Section 230 so broadly as to provide too much immunity, eliminating the incentive to foster a balance between speech and privacy. The way courts are using Section 230 exalts free speech to the detriment of privacy and reputation. As a result, a host of websites have arisen that encourage others to post gossip and rumors as well as to engage in online shaming. These websites thrive under Section 230’s broad immunity.”).

239. *Lawsuits, Weak Economy Kill JuicyCampus.com*, FOX NEWS (Feb. 9, 2009), <http://www.foxnews.com/story/2009/02/05/lawsuits-weak-economy-kill-juicycampuscom/> (citing the economic downturn as the reason for the site’s shut down).

240. Matt Ivester, *A Juicy Shutdown*, OFFICIAL JUICYCAMPUS BLOG (Feb. 4, 2009), <http://juicycampus.blogspot.com/search/label/Announcements> (“In these historically difficult economic times, online ad revenue has plummeted and venture capital funding has dissolved. JuicyCampus’ exponential growth outpaced our ability to muster the resources needed to survive this economic downturn, and as a result, we are closing down the site as of Feb. 5, 2009.”).

A similar fate may await the revenge porn genre—it may be just a passing trend. After all, Generation Y (1977–1994) is the first generation that is growing up in a time where a phenomenon like revenge porn has been possible.²⁴¹ The next generation of Internet users may learn from previous mistakes; revenge porn could be a distant memory in a few years' time. There are two important counterarguments to this claim: (1) as discussed, the concept of blackmailing individuals with sexually explicit content has been around since the days of Marilyn Monroe;²⁴² and (2) the permanent nature of material posted to the Internet will necessarily prevent revenge porn from fading into the distant memory of the collective conscious.

While at first glance these counterarguments may seem like insurmountable obstacles for revenge porn victims, these two factors may aid in a shift in public policy. For instance, during the September 2014 celebrity nude photo hacking incident,²⁴³ celebrities and average Internet users alike voiced their concern with the misogynistic undertones of the hack.²⁴⁴ Public outrage prompted Google to take action and delete thousands of nude photos.²⁴⁵ As the celebrity hacking incident illustrates, much of the outcry related to the privacy invasion committed by the hackers, rather than the celebrities' behavior. If cultural norms shift such that the public develops a “no tolerance” policy for the harassment of women and men through sexually explicit blackmailing, it is possible that the revenge porn

241. *What Generation Am I*, RESEARCH MANIACS, <http://researchmaniacs.com/FAQ/WhatGenerationAmI.html> (“There was a huge boom in technology and the Internet during Generation Y. Generation Y thinks anything is possible, and the world is a smaller place for them due to Internet and communication. America is not the only place in the world. Like Generation X, they have seen it all, but they want to do something about it. They are smart and want to get educated in this competitive world. This generation got the ambition their parents lacked.”).

242. *See supra* Part I.

243. *See supra* Part I.

244. *See, e.g.*, Quinn Keaney, *Emma Watson's Feminist Response to the Nude Photo Scandal & 4 More Celebs Who Nailed It*, BUSTLE (Sept. 5, 2014), <http://www.bustle.com/articles/38215-emma-watsons-feminist-response-to-the-nude-photo-scandal-4-more-celebs-who-nailed-it>; Sally Kohn, *Don't Click on Celebrity Nude Photos, ISIS Videos*, CNN (Sept. 26, 2014), <http://www.cnn.com/2014/09/25/opinion/kohn-nude-photos/> (arguing that viewing the leaked celebrity photographs, like viewing videos posted by terrorist groups, only empowers those who posted the socially reprehensible material).

245. Emma Brant, *Google Deletes 'Tens of Thousands' of Celeb Nude Pics*, BBC (Oct. 3, 2014), <http://www.bbc.co.uk/newsbeat/29473557>.

phenomenon will dissipate on its own, without aid from the legislature.

2. Search Engines Algorithms and Payment Blocking

The issue Dr. Jacobs faced when she became a victim of revenge porn was that no matter where she went, the digital trace of revenge porn followed her.²⁴⁶ However, a simple change in a popular search engine's algorithm or input formula²⁴⁷ could eliminate the issue of revenge porn attached to an individual's name. Such a change would remove revenge porn from the top search results, effectively burying the content in the black hole of the Internet.

For instance, mug shot websites often plague individuals who have been arrested, preventing them from obtaining new jobs despite having served their time and having their records expunged.²⁴⁸ Mug shot websites capitalized on freely available mug shots from police departments around the country,²⁴⁹ obtaining the photographs through Freedom of Information Act ("FOIA") requests.²⁵⁰ Mug shot websites would then post the photographs under the guise of arming the community with knowledge and charge those who wished to have their mug shot taken down.²⁵¹ A journalist for The New York Times investigated these sites and contacted the payment companies (Visa and PayPal) who processed payments for the removal of these

246. See *supra* text accompanying notes 3–4.

247. Google's search algorithm uses over 200 specific "signals" to better identify a user's search term. See generally *Algorithms*, GOOGLE INSIDE SEARCH, <http://www.google.com/intl/en/insidesearch/howsearchworks/algorithms.html> ("Algorithms are the computer processes and formulas that take your questions and turn them into answers. Today Google's algorithms rely on more than 200 unique signals or 'clues' that make it possible to guess what you might really be looking for. These signals include things like the terms on websites, the freshness of content, your region and PageRank.").

248. David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?page-wanted=all&_r=0 (describing how a mug shot of Maxwell Birnbaum from a 2012 arrest haunted his digital identity). Birnbaum has gone through counseling, drug tests, and a pretrial diversion program to clean his record. *Id.* Birnbaum's mug shot was posted to a number of for-profit websites, and these websites appeared as top searches when Birnbaum's name was typed into a search engine. *Id.*

249. *Id.* (detailing how, after questioned by the reporter, Google changed its search algorithm, Paypal "discontinue[d] support for mug-shot removal payments," and Visa began "investigat[ing] the business practices of the sites.").

250. See 5 U.S.C. § 552(a)(2)(D) (2012).

251. See Segal, *supra* note 248.

photographs.²⁵² Shortly after The New York Times published this article, Google changed its search bar algorithm to make it more difficult to link an individual to his mug shot posted to these websites.²⁵³

This solution may be translatable to revenge porn website images or videos linked to an individual's name. Dr. Jacobs had trouble finding a job, as she was plagued by revenge porn content online.²⁵⁴ If major search engines like Google and Bing alter their search engine algorithms, the sexually explicit content that haunted Dr. Jacobs and others like her might become a non-issue. Burying search results can be an effective measure of hiding unwanted content.²⁵⁵

As for the payment-blocking route, as noted previously, sites like MyEx.com once included removal links beside each anonymous post; these links originally lead to another website, Reputation.com, which offered to remove the content for \$499.²⁵⁶ Although it is unclear exactly why that revenge porn site altered its removal system, it is possible that payment companies for the revenge porn removal may choose to terminate all payments to sites like MyEx.com. Without this removal revenue, revenge porn sites may be forced to shut down as revenue dries up.

3. Organized Attacks and Doxxing by Hacker Groups

Another solution is organized attacks on revenge porn sites by hacker groups. The international group Anonymous came to Charlotte Laws's aid when she spoke out about her daughter's nude photographs on IsAnyoneUp.com.²⁵⁷ Anonymous crashed Moore's servers on at least one occasion.²⁵⁸ Later, the same group crashed Moore's servers before he was scheduled to have a live interview with

252. *Id.*

253. *Id.*

254. *See supra* notes 3–4 and accompanying text.

255. Peter O'Dowd, *The Business of Burying Internet Search Results*, NPR: ALL TECH CONSIDERED (Oct. 18, 2010), <http://www.npr.org/templates/story/story.php?storyId=130646918>.

256. *See supra* notes 81–83 and accompanying text.

257. *See* Part I.B.

258. *See* Jessica Roy, *Anonymous Temporarily Takes Down HunterMoore.TV Right Before Live BBC Interview*, BETABEAT (Dec. 5, 2012, 1:49 PM), <http://betabeat.com/2012/12/anonymous-temporarily-takes-down-huntermoore-tv-right-before-live-bbc-interview/> (“Anonymous also launched a DDOS attack against Mr. Moore's site, taking it down intermittently.”).

the BBC.²⁵⁹ Hacking has thus been a powerful tool against individuals who have benefitted financially from revenge porn.

Depending on the nature of the hacking, however, it may be illegal.²⁶⁰ A number of federal laws prohibit hacking, and this Comment does not advocate illegal conduct. Regardless of its legality, because hacking often involves an invasion of privacy—albeit not as intimately as in the revenge porn context—attempts to regulate revenge porn through hacking would undermine, rather than advance, individual privacy concerns. For this reason, this Comment merely recognizes that organized attacks have served, and may continue to serve, as one possible solution for the privacy problems associated with revenge porn sites.

Another potential solution that has sprung up is the concept of “doxxing,” in which Internet users band together and search the web for personal documents of an online bully in order to “out” the bully by exposing his or her identity.²⁶¹ Doxxing differs from hacker groups in that the information sought typically is publically available and simply aggregated by a collection of Internet users.²⁶² In other words, it is distinguishable from attacks by groups like Anonymous because “it’s like hacking, but legal.”²⁶³ Doxxing provides benefits for victims of revenge porn without the negative drawbacks of hacking and may aid victims in gathering information about their anonymous posters or about website administrators. Doxxing may then allow a victim to sue a poster directly, using one of the above-mentioned claims such as IIED or publication of private facts. While this solution may not be beneficial if a victim knows the identity of the poster already, it may be helpful in that the victim can then use the information obtained from doxxing as leverage in persuading that poster to remove the content from the revenge porn site.

259. *Id.*

260. See 18 U.S.C. § 1029(a)(1), (c)(1)(A)(i) (2012) (“Whoever . . . knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices . . . [may be subject to] a fine under this title or imprisonment for not more than 10 years, or both.”).

261. Bazelon, *supra* note 25.

262. See *id.*

263. Christine Pelisek, *Doxxing: It’s Like Hacking, but Legal*, THE DAILY BEAST (Mar. 13, 2013), <http://www.thedailybeast.com/articles/2013/03/13/doxxing-it-s-like-hacking-but-legal.html> (describing doxxing as “the act of obtaining and posting private information about a person by scouring the Internet” and observing that it is “surprisingly easy to do . . . [i]n many cases, it’s not even illegal.”).

CONCLUSION

Revenge porn is, at least for now, an ongoing Internet phenomenon. Individuals who may find their sexually explicit content posted on a revenge porn website have several causes of action to which they may turn for redress. Despite this, there is no guarantee that a revenge porn victim will be successful in asserting any of those claims. It appears to be prohibitively difficult to craft legislation that specifically targets revenge porn without inadvertently impinging intellectual property rights or free speech. This Comment identified the possible repercussions of reforming current law in reaction to revenge porn. The impact of revenge porn reforms could be far-reaching and lower the protections granted by section 230 and the First Amendment.

Instead, this Comment advocates that nonlegal remedies may be the most effective tools to address revenge porn. Websites that display revenge porn cannot succeed if there is no market for that content. In other words, the market itself may drive out the Hunter Moores of the world by driving out revenge porn as a genre. Thus, the social norms that tacitly permit individuals to share sexually explicit content must also now strongly protect the interests of those who have shared that content. As communities grow and mature, and as individuals become more socially conscious online, one hopes that revenge porn sites fade in popularity and from the public eye.

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