

# Nakedness and Publicity

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*ABSTRACT: Smartphones and similar technologies have allowed individuals to take pictures of naked medical patients, showering athletes, and sexual partners and place those pictures, without their subjects' permission, on the Internet. Illicit distribution of former partners' photographs, known as "revenge porn," has received the most attention. Many states have criminalized the practice, but their laws likely violate the First Amendment. Because these laws typically cannot be used against websites or other distributors, these laws cannot stop compromising images' online proliferation.*

*This Article is the first to argue that publicity rights provide a better remedy. These rights typically attach to celebrity features, such as Greta Garbo's face, which have market value, and therefore have been overlooked as a remedy for revenge porn. But, the profusion of Internet porn sites demonstrates there are interested eyeballs for almost anyone's naked body. Because these eyeballs can be leveraged into Internet advertising and promotional revenue, they create a financial interest that the right of publicity can protect.*

*In contrast to criminal sanctions, publicity rights offer an efficient private remedy for revenge porn as well as unconsented to naked photographs from the locker room or hospital. Unlike other forms of liability, publicity rights fall outside the Communications Decency Act's immunity and thus can be used against websites and subsequent image distribution.*

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## I. INTRODUCTION

In the late 1800s, Kodak introduced the handheld camera, the first capable of taking “action shots.”<sup>1</sup> Freed from cumbersome tripod-mounted studio cameras designed for portraiture, photographers could use handheld cameras to capture spontaneous, un-posed events hitherto impossible to record. The contemporaneous development of halftone printing plates allowed newspapers to reproduce and distribute these photographs. Together, these technologies transformed society’s sense of physical privacy as reporters began to shadow the everyday lives of the rich, famous, and socially prominent—and newspapers propagated their images across the

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1. Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1301 (2010) (“The new, so-called ‘Yellow Press’ was profiting through a kind of entertaining reportage featuring more scandal and gossip than before. And the rapid adoption of the portable camera had begun to make people uneasy about its ability to record daily life away from the seclusion of the photo studio.” (footnote omitted)).

country.<sup>2</sup> This disruption of privacy norms inspired Samuel Warren and Louis Brandeis to propose the first privacy torts,<sup>3</sup> or so the story goes.<sup>4</sup>

In today's world, the smart phone, along with the Internet, disrupts private spaces to a far greater degree than the handheld camera and halftone newspaper printing plate. Smartphones take naked pictures of hospital patients, showering and dressing athletes, and former lovers. The web can distribute these pictures with a speed and efficiency that—to put the matter mildly—surpasses the old Kodak and broadsheet newspaper.

Distributing intimate pictures of former sexual partners without their permission, a problem known as “revenge porn”, has received significant attention from legal academics.<sup>5</sup> The vast majority of states have outlawed the practice.<sup>6</sup> Revenge porn typically includes distribution of intimate self-portraits (“selfies”) by those to whom they are given and consensual intimate

2. Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 8 (1979) (“In *The Right to Privacy*, Warren and Brandeis echoed the general concern of their contemporaries that ‘recent inventions and business methods’ such as ‘instantaneous photographs and newspaper enterprise . . . and numerous mechanical devices’ threatened to collect and disseminate personal information about individuals to the world at large.” (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890))).

3. Warren & Brandeis, *supra* note 2, at 197.

4. Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1010 (1995) (“In his own classic article on the subject of privacy, Dean Prosser gave credence to the theory that the Warren and Brandeis article was motivated by Warren’s annoyance with the Boston newspaper coverage of parties hosted by his socialite wife and by publicity given to the wedding of a family member.”).

5. The academic literature on revenge pornography is large, with student-written commentary playing a leading role, perhaps reflecting the greater realization among younger people of revenge pornography’s pervasiveness and impact. *See, e.g.*, Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2026 (2014); Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 3 (2012); Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 676–77 (2014); Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 710 (2017); Amanda L. Cecil, Note, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2514–15 (2014); Alix Iris Cohen, Note, *Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech*, 70 U. MIAMI L. REV. 300, 303–04 (2015); Caroline Drinnon, Note, *When Fame Takes Away the Right to Privacy in One’s Body: Revenge Porn and Tort Remedies for Public Figures*, 24 WM. & MARY J. WOMEN & L. 209, 211 (2017); Kaitlan M. Folderauer, Note, *Not All Is Fair (Use) in Love and War: Copyright Law and Revenge Porn*, 44 U. BALT. L. REV. 321, 321–22 (2015); Layla Goldnick, Note, *Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for Its Victims*, 21 CARDOZO J.L. & GENDER 583, 585–86 (2015); Joseph J. Pangaro, Note, *Hell Hath No Fury: Why First Amendment Scrutiny Has Led to Ineffective Revenge Porn Laws, and How to Change the Analytical Argument to Overcome This Issue*, 88 TEMP. L. REV. 185, 186 (2015).

6. Forty states have enacted some form of revenge porn law. *41 States & DC Now Have Revenge Porn Laws*, CYBER C. R. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws> (last visited Mar. 13, 2019).

photography distributed by the individual who takes the picture.<sup>7</sup> But, laws criminalizing revenge porn offer victims an expensive, privacy-destroying, and arguably ineffective remedy.

A prominent model law<sup>8</sup> contains numerous difficult-to-prove *mens rea* requirements, suggesting that prosecution will be hard and time-consuming. These *mens rea* elements are not simply a legislative choice but also can be constitutionally required. For instance, the Vermont Supreme Court has ruled the First Amendment requires that, in order to be constitutional, these statutes' "intent requirement [must] require knowledge of both the fact of disclosing, and the fact of nonconsent."<sup>9</sup> Thus, the prosecution must prove knowledge of nonconsent, which often involves difficult evidentiary problems.

More important, this intent requirement allows people to legally reproduce these images if they don't know about the lack of consent when the pictures were taken, especially as section 230 of the Communications Decency Act protects third party distributors. Revenge porn statutes are useless in combatting images that have already "escaped" out into the Internet. In short, these statutes give victims a weak promise of delayed justice, creating piles of embarrassing public records and frustrating any hope for a quick, low-profile resolution—and fail to protect privacy.<sup>10</sup>

Even more troubling, current First Amendment precedent does not justify revenge pornography laws.<sup>11</sup> While some have argued for changes to Supreme Court precedent to expand the non-protected speech categories to include revenge porn,<sup>12</sup> these arguments cast too wide a net—a net that will

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7. Calvert, *supra* note 5, at 677 ("Revenge porn typically consists of sexually explicit photos or videos that are uploaded on the Internet by former paramours—spurned ones, in particular, as the word 'revenge' connotes—without permission of the individuals depicted in them and sometimes accompanied by identifying information, such as names, addresses and Facebook accounts."); Snehal Desai, *Smile for the Camera: The Revenge Pornography Dilemma, California's Approach, and Its Constitutionality*, 42 HASTINGS CONST. L.Q. 443, 467 (2015) ("[I]f a woman shares a nude picture with her significant other, she has not given this person free reign to distribute the picture and abuse the woman's autonomy and privacy with regards to the picture. If legislators could understand this, more victims might be better protected under a more expansive law including selfies.").

8. See DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 152–53 (2014) (proposing draft model law).

9. State v. VanBuren, 2018 VT 95, ¶ 62 (Vt. 2018).

10. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 349 (2014) ("While some existing criminal laws can be mobilized against revenge porn, on the whole, existing criminal laws simply do not effectively address the issue.").

11. There is currently a split among state appellate decisions. A Texas appellate court struck down the Texas revenge porn statute finding that it was an invalid content-based restriction because its overbroad language failed to meet strict scrutiny. *Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at \*8 (Tex. App. May 16, 2018). In contrast, the Vermont Supreme Court upheld a revenge porn statute, ruling that it survived strict scrutiny. *VanBuren*, 2018 VT 95, ¶ 22.

12. See, e.g., Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 662 (2016).

limit expression to which the First Amendment gives undoubted protection. Last, the Vermont Supreme Court, the only top state appellate court to review a revenge porn law, upheld Vermont's law, ruling that it met strict scrutiny.<sup>13</sup> This position conflicts with precedent, as discussed below.

This Article is the first to argue for the right of publicity as a remedy to revenge porn and its superiority over other remedies such as criminal law or copyright.<sup>14</sup> Publicity rights typically attach to personal attributes, like Greta Garbo's face or Michael Jackson's voice, which have market value.<sup>15</sup> While some states extend the right of publicity to non-celebrities, state law tends to do so only in instances in which non-celebrity images are used for commercial gain, such as advertising.<sup>16</sup>

But, the profusion of internet pornography—and the profitability of revenge porn sites—teach one thing: They show that, given the bewildering variety and eccentricity of sexual interest, each and every individual can attract some eyeballs. This truth probably proceeds as a corollary of the Internet meme “If It Exists There's A Porn Of It.” Whether, gentle reader, this truth comforts or disturbs, these eyeballs can be leveraged into Internet advertising and promotional revenue.<sup>17</sup> This potential revenue stream reflects a commercial interest that the right of publicity should protect. And courts have begun to recognize that monetizable web images and content creates a protectable financial interest.<sup>18</sup> Using publicity rights to protect naked bodies,

13. *VanBuren*, 2018 VT 95, ¶ 62.

14. Beyond state criminal law, commentators have also looked to copyright law, federal criminal law, the privacy torts, and infliction of emotional distress. *See* Bambauer, *supra* note 5, at 2030–31 (copyright law); Folderauer, *supra* note 5, at 322 (copyright law); Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), <https://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html> (federal criminal law); Cecil, *supra* note 5, at 2529–31 (the privacy torts and infliction of emotional distress). Some have suggested novel legal protections. *See* Peter W. Cooper, Comment, *The Right to Be Virtually Clothed*, 91 WASH. L. REV. 817, 833 (2016) (describing a “right to delete” for individuals to remove nonconsensual images that have been posted online).

15. Paula B. Mays, *Protection of a Persona, Image, and Likeness: The Emergence of the Right of Publicity*, 89 J. PAT. & TRADEMARK OFF. SOC'Y 819, 820 (2007) (finding courts will “preclude the exploitation of a famous person's image, likeness, or name or to find means to compensate a celebrity whose image may have been used without permission”).

16. Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, ¶ 16 (2001) (“Though a plaintiff's celebrity status may be a relevant issue in determining the marketability of his or her personal information, it is not generally considered to be a prerequisite for a claim under the right of publicity.”); Ellen S. Bass, Comment, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights*, 42 U.S.F. L. REV. 799, 818–19 (2008) (“[M]any courts clearly apply the right of publicity to protect the rights of non-celebrities.”).

17. MICHAEL DAEHN, INTERNET MARKETING FOR NEWBIES 26 (2010) (“You can monetize the ‘eyeballs’ you have viewing your site's content by selling advertising to other people.”).

18. *See infra* notes 185–90 and accompanying text.

therefore, proceeds from recognized principles in the law that a judge could apply today.

The right of publicity offers a more effective, quicker, and private resolution to unconsented publications of naked images. Damages and fees could provide attorneys with incentives for private legal representation. Publicity rights can protect victims not only of revenge porn but also unauthorized naked photographs. These types of photographs emerge from the locker room, hospital, or any other context in which privacy torts or other remedies are inapplicable or impracticable. In addition, publicity rights offer a way around the Communication Decency Act § 230's immunity which currently protects website owners from liability.<sup>19</sup> Last, the criminal revenge pornography statutes, if constitutional at all, typically only punish the original poster of the image; once the image is "out" on the Internet, these criminal laws are powerless.

Using copyright or other types of intellectual property as a tool against all types of revenge porn would require significant legislative reform as commentators recognize.<sup>20</sup> In contrast, courts could use publicity rights *now* to counter revenge pornography since courts already recognize that personal images used for commercial purposes implicate publicity rights. Courts must make the next step and recognize that a naked online image has commercial value.

The Article proceeds as follows. First, it examines current legal remedies for revenge porn. Revenge pornography—defined as either distribution of gifted selfies or consensual photographs taken by another person who has copyright and then distributes them—falls between the cracks of existing legal frameworks.

Second, the Article looks at state revenge porn laws and concludes that many of them either violate the First Amendment or present procedural burdens for effective redress. Further, the section responds to those who seek to introduce new limitations on First Amendment protections.

Third, the Article examines how publicity rights regimes can provide efficient and quick redress. They give protection for all nude photographs, including medical and locker room photos. While publicity rights do not offer criminal law's unique social sanction, they offer a superior legal response in every other way.

Finally, using publicity rights to protect our naked selves proceeds from our theoretical understandings of privacy. Legal scholars have recognized that privacy promotes a certain kind of freedom, creating a zone where we can

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19. See *infra* notes 211–14.

20. See Bambauer, *supra* note 5, at 2030–31; Cooper, *supra* note 14, at 833; Derek Bambauer, *Beating Revenge Porn with Copyright*, HARV. BLOGS (Jan. 25, 2013), available at <https://web.archive.org/web/20180723170654/https://blogs.harvard.edu/infolaw/2013/0125/beating-revenge-porn-with-copyright>.

escape societal judgment and scrutiny.<sup>21</sup> Drawing that line around naked bodies is logical and defensible. Privacy critics point out that privacy rights give one person the ability to silence another, *e.g.*, these matters are private, you may not speak of them.<sup>22</sup> However, drawing the line around peoples' naked bodies hardly diminishes public discourse. After all, before the advent of smart phones, the fact that this area was off-limits did not prevent the United States from creating thriving political, social, and artistic cultures. More important, people can still describe in words the bodies they have seen, preserving whatever value this information has to public discourse. This Article proposes a return to the status quo using tools already within the law.

## II. UNAUTHORIZED NAKED PHOTOGRAPHY: A TAXONOMY

Producing and distributing naked, intimate photographs on the internet emerged as a problem about a decade ago. In the mid-2000s, websites, notably the execrable IsAnyoneUp?, posted pictures sent in by former boyfriends and girlfriends.<sup>23</sup> Samuel Warren's shock at seeing his Boston Brahmin friends in newspaper photographs could hardly presage the shock that many felt upon realizing that (mostly) young people were distributing sexually explicit photos as a form of romantic exchange and revenge. And, perhaps most shocking, even revolting: sites such as IsAnyoneUp? profited from these pictures.

Beyond the privacy violations, many point to evidence that revenge pornography creates unprecedented emotional harm. Revenge pornography increases the possibility of actual, physical stalking and physical attack as well as creating a debilitating sense of fear. Often, revenge pornography plays a role in domestic abuse. Some victims endure panic attacks as well as other mental disorders. In addition, anorexia nervosa and depression are common

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21. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 32–38 (1975); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1907–10 (2013); Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559, 568–69 (1998); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 1008 (1989); Barry Schwartz, *The Social Psychology of Privacy*, 73 AM. J. SOC. 741, 745–51 (1968).

22. Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1821 (1993); Richard A. Posner, *The Economics of Privacy*, 71 AM. ECON. REV. 405, 405 (1981); Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1, 3–4 (1979); Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393, 395 (1978); Eugene Volokh, *One-to-One Speech vs. One-To-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 758–60 (2013); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1107–08 (2000).

23. Hunter Moore's website, IsAnyoneUp, was first used to post sexually explicit photographs of the young women with whom he had amorous relations. Moore opened his website to others to post similar pictures. "Soon after, IsAnyoneUp hit more than 500 million page views and Moore netted more than \$13,000 a month in advertising revenue and hired a lawyer, public relations consultant, server administrator, and two security specialists." Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 423 (2014); see also Scott R. Stroud, *The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn*, 29 J. MASS MEDIA ETHICS 168, 170–71 (2014) (discussing Hunter Moore and IsAnyoneUP?).

ailments for individuals who are harassed online. Last, revenge pornography exacts a terrible toll on the professional lives of women.<sup>24</sup> Upon discovery of their images online, women have lost jobs or job offers.<sup>25</sup>

The problem of technology invading previously private areas extends beyond revenge pornography. The smartphone has allowed numerous unauthorized photographs in the medical setting as well as their subsequent internet distribution.<sup>26</sup> The locker room,<sup>27</sup> as well as ambiguously private areas such as outdoor changing tents at triathlons, public breastfeeding, and nudist venues likewise have not been spared.<sup>28</sup>

The scholarship of revenge pornography, though broad, often fails to distinguish among the various forms of unconsented-to naked or intimate photography. The following sets forth a legal analysis of the types of naked and intimate photographs: (1) so-called “selfies” in which the person who took the photo is the photo’s subject as well as selfies in the possession of another person, i.e., sent or gifted selfies—and to which copyright law applies; (2) unconsented photographs, i.e., those peeping toms take, and child pornography to which consent is impossible; and finally (3) consented-to explicit photographs, which the photographer then distributes on the internet without the subject’s permission.

24. Mary Anne Franks, “Revenge Porn” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1321 (2017) (“Many women report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed. When nonconsensual pornography targets women in politics, as it often does, it imposes additional harms: it discourages women from becoming active in politics, creates a significant hurdle for women’s political engagement, and undermines the quality and integrity of democratic participation.” (footnote omitted)).

25. Citron & Franks, *supra* note 10, at 350–52 (outlining these harms).

26. Peter Holley, *Nurse Who Texted Photo of Unconscious Patient’s Penis Surrenders License*, WASH. POST (Mar. 29, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/03/29/nurse-who-texted-photo-of-unconscious-patients-penis-surrenders-license>; Charles Ornstein, *New York Hospital to Pay \$2.2 Million Over Unauthorized Filming of 2 Patients*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/nyregion/new-york-hospital-to-pay-fine-over-unauthorized-filming-of-2-patients.html>; Associated Press, *Doc Who Took Pics of Tattooed Genitals Out of Job*, NBC NEWS (Dec. 21, 2007, 7:27 PM), [http://www.nbcnews.com/id/22363246/ns/health-health\\_care/t/doc-who-took-pics-tattooed-genitals-out-job](http://www.nbcnews.com/id/22363246/ns/health-health_care/t/doc-who-took-pics-tattooed-genitals-out-job); David Wenner, *UPMC Hospital Cited for Allowing Cellphone Photos, Video of Pa. Patient’s Genitals*, PENNLIVE (Sept. 15, 2017), [https://www.pennlive.com/news/2017/09/upmc\\_hospital\\_cited\\_for\\_allowi.html](https://www.pennlive.com/news/2017/09/upmc_hospital_cited_for_allowi.html).

27. Amanda Marrazzo, *Illegal Photos Taken of Students in High School Locker Room: Police*, CHI. TRIB. (Feb. 19, 2016, 1:44 PM), <http://www.chicagotribune.com/news/local/breaking/ct-high-school-locker-room-photos-cary-grove-met-20160219-story.html>.

28. Chew Hui Min, *Breastfeeding in Public is Normal, Says Mother Who Nursed Her Daughter Without a Cover on a Train*, STRAITS TIMES (Mar. 16, 2017, 9:18 PM), <http://www.straitstimes.com/singapore/breastfeeding-in-public-is-normal-says-mother-who-nursed-her-daughter-without-a-cover-on-a> (discussing photography of women breastfeeding in public).



## A. “SELFIES,” “GIFTED SELFIES” &amp; COPYRIGHT

When an individual takes a picture of him or herself, it is known as a “selfie.” When the picture portrays the individual naked or in a sexual revealing or suggestive manner—and the picture is exchanged via messaging or email, it is typically termed a “sext.” Exchanging sexts is known as “sexting.”

Sexting is relatively common. At the low end of the range, the Pew Research Center states that 4% of United States young adults have ever sent sext messages.<sup>29</sup> But, other studies show much higher numbers, with one study finding 27%.<sup>30</sup> Other recent studies show the practice more common among young adults, with approximately 13%–68% of young adults (aged 18–24) report engaging in sexting, defined as the act of sending sexually suggestive or provocative pictures or messages via mobile phone or social media.<sup>31</sup>

Another recent study, by security software firm McAfee titled “Love, Relationships, and Technology,”<sup>32</sup> shows a similarly high rate of sexting. Nearly 50% of adults have used their mobile device to share or receive intimate content.<sup>33</sup> Among 18 to 24-year-olds, this number is nearly 70%.<sup>34</sup>

Selfies and sexted selfies implicate copyright and digital property law. The person who takes the photography owns the copyright to the photography as well as the rights to reproduce and distribute it. That is a standard rule of copyright law.<sup>35</sup> Copyright would seem to be a solution to the problem of revenge pornography selfies. According to some sources, selfies constitute the overwhelming majority of photographs distributed without their subject’s consent.<sup>36</sup> Person A sends a naked selfie to person B who then posts the image on a website. Person A would retain the copyright and could demand takedown of the picture pursuant to § 514 of the Digital Millennium Copyright Act (“DMCA”).<sup>37</sup> This provision requires websites and other

29. AMANDA LENHART, PEW RESEARCH CTR., TEENS AND SEXTING 4 (2009) (“[Four percent] of cell-owning teens ages 12-17 say they have sent sexually suggestive nude or nearly nude images of themselves to someone else via text messaging.”).

30. Allyson L. Dir et al., *Understanding Differences in Sexting Behaviors Across Gender, Relationship Status, and Sexual Identity, and the Role of Expectancies in Sexting*, 16 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 568, 570 (2013).

31. Allyson L. Dir & Melissa A. Cyders, *Risks, Risk Factors, and Outcomes Associated with Phone and Internet Sexting Among University Students in the United States*, 44 ARCHIVES SEXUAL BEHAV. 1675, 1675 (2015).

32. MCAFFEE, LOVE, RELATIONSHIPS & TECHNOLOGY (2013).

33. *Id.*

34. Dir & Cyders, *supra* note 31, at 1675.

35. R. Scott Miller, Jr., *Photography and the Work-for-Hire Doctrine*, 1 TEX. WESLEYAN L. REV. 81, 107 (1994) (“The 1976 Act establishes a new presumption that copyright remains with the photographer . . .”).

36. Folderauer, *supra* note 5, at 326 (“Eighty percent of images utilized for revenge porn are selfies.”).

37. See 17 U.S.C. § 512(c) (2012). The DMCA safe harbors only apply to copyright infringement, not trademark or patent infringement or other causes of action. Most service providers, however, also enjoy broad immunity from most state law causes of action because of

internet providers to “take down” infringing photographs, videos, or other intellectual property.<sup>38</sup> Copyright law could offer a solution to the problem of distributed “gifted” selfies—as some have advocated.<sup>39</sup>

There is a complicating problem. Receivers of communications possess ownership in the copy received even though the author or creator of the communication retains the copyright.<sup>40</sup> Thus, if A writes a letter to B, A retains the copyright. A retains the rights of distribution, public performance, reproduction, i.e., all the rights enumerated in § 106 of the Copyright Act.<sup>41</sup> But, B retains property ownership of the physical letter.<sup>42</sup>

A famous case involving the letters written by J.D. Salinger, the reclusive author of *Catcher in the Rye*, illustrates the distinction between owning the copyright of a document and owning a copy of a document. Salinger’s letters, donated as gifts from the letter recipients, are available in numerous libraries and archives.<sup>43</sup> While anyone could look at the letters in the library, courts consistently have held that copying or quoting the letters is forbidden without permission of the copyright owner, J.D. Salinger.<sup>44</sup>

Applying the distinction between copyright and ownership of a digital copy presents unresolved complications.<sup>45</sup> Most courts analyze the license and sales agreement to determine the owner’s rights to the digital copy.<sup>46</sup> Courts differ as to the approach in interpreting these license and sales agreement,

§ 230 of the Communications Decency Act. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118–19 (9th Cir. 2007); see *infra* Part V.

38. 17 U.S.C. § 512(c).

39. Levendowski, *supra* note 23, at 439 (“Copyright is not a perfect solution but, unlike the aforementioned alternatives, victims’ invocation of copyright law does not threaten to erode the protections of free speech or Section 230, nor does it shoehorn revenge porn liability into existing tort schemes or create new criminal liability.”); Folderauer, *supra* note 5, at 329–30.

40. Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1278 (2001) (“Copy owners enjoy relatively broad residual ‘rights’ with respect to their copies, simply by virtue of their ownership of physical personal property.”).

41. 17 U.S.C. § 106.

42. Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211, 1255 (2015) (“Gifts, lending, and resale are limited to the number of copies acquired.”).

43. *Salinger v. Random House, Inc.*, 811 F.2d 90, 93–95 (2d Cir. 1987), *reh’g denied*, 818 F.2d 252 (2d Cir. 1987) (“The copyright owner owns the literary property rights, including the right to complain of infringing copying, while the recipient of the letter retains ownership of ‘the tangible physical property of the letter itself.’” (quoting 1 NIMMER ON COPYRIGHT § 5.04 (1986))).

44. *Id.* at 94–95.

45. Perzanowski & Schultz, *supra* note 42, at 1211 (“Copyright law sets up an inevitable tension between the intellectual property of creators and the personal property of consumers—in other words, between copyrights and copies.”).

46. Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887, 1905 (2010) (“Some courts and commentators have explicitly or impliedly adopted a view that the agreement that accompanies a copy of a copyrighted work completely controls whether title to the tangible thing passes to the recipient or remains with the copyright holder.”).

and they differ even more when the contracts are silent as to ownership of the so-called tangible digital copy.<sup>47</sup>

Even more confusing—and much less litigated—is the gifting of copyrighted digital copies.<sup>48</sup> Owning a letter has clear parameters; you can hide it, destroy it, place in a cupboard, or donate it to a library archive. Unlike a letter, digital files are simply sets of digital code. Courts will look at the license or terms of sale to help determine rights when digital copies are sold, but courts offer little to no discussion of what happens when digital images are sent or presented as gifts.<sup>49</sup>

This lack of legal clarity hurts selfie copyright holders. Say you post on your own personal website naked pictures you have received from a former lover. If digital property extends in this instance, then it would undercut the copyright holder's ability to control the picture. Rather, the receiver has some property rights, though still very much ill-defined, of the "digital copy" which appears on-line on the website.

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47. *DSC Commc'ns Corp. v. Pulse Commc'ns, Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999) ("Unfortunately, ownership is an imprecise concept, and the Copyright Act does not define the term. Nor is there much useful guidance to be obtained from either the legislative history of the statute or the cases that have construed it."); Carver, *supra* note 46, at 1888 ("This Article argues for an analytic approach to determine ownership of a tangible copy of a copyrighted work. Courts have been surprisingly divided on this apparently simple question and have employed several distinct and conflicting approaches, sometimes within the same Circuit."); Liu, *supra* note 40, at 1250–51 ("[T]he answer is not at all clear. Some have argued that I physically own exactly what I have always owned—the actual piece of magnetic disk that holds the ones and zeros that represent the novel. . . . Others argue that copyright law should be interpreted or translated, not literally, but functionally, so as to preserve the substantive rights that I formerly enjoyed with physical copies." (footnotes omitted)).

48. *DSC Commc'ns Corp.*, 170 F.3d at 1360 ("[T]he court's decision has been criticized for failing to recognize the distinction between ownership of a copyright, which can be licensed, and ownership of copies of the copyrighted software. . . . Plainly, a party who purchases copies of software from the copyright owner can hold a license under a copyright while still being an 'owner' of a copy of the copyrighted software for purposes of section 117. We therefore do not adopt the Ninth Circuit's characterization of all licensees as non-owners." (citation omitted)); Jim Graves, *Who Owns a Copy?: The Ninth Circuit Misses an Opportunity to Reaffirm the Right to Use and Resell Digital Works*, 2 CYBARIS<sup>®</sup>: AN INTELL. PROP. L. REV. 45, 56 (2011) ("Three significant cases involving ownership of a copy have been decided in the Ninth Circuit in the past two years; true to form, the three district court cases came to different results on the ownership question.").

49. Courts have discussed, in the briefest way, the inheritance of digital copies and no firm legal rule have yet emerged. Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 378 (2011) ("Although it is unclear whether online accounts are legally inheritable, individual online service policies and a few recent statutes seem to indicate that survivors have, at a minimum, an inheritable interest in the contents of an online account."); Ashley F. Watkins, Comment, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193, 197 (2014) ("Despite the rising importance of digital properties, the law remains uncertain. Only seven states have enacted legislation on fiduciary access to digital assets . . . ." (footnote omitted)).

Section 514 of the DMCA<sup>50</sup> and § 230 of the Communications Act,<sup>51</sup> compound these problems. These statutory provisions give immunity to website owners for the content they post—§ 514’s immunity is limited and requires website owners to take down infringing items upon notice.<sup>52</sup> One could imagine a scenario in which person A receives a sext, posts it on his personal website and then a likely anonymous person copies the pictures and posts it on a commercial website. Person A, who posted it on his personal website, was disposing of personal digital property, not violating copyright. He would face no copyright liability. The commercial website owner in turn would receive immunity under § 514 or § 230.<sup>53</sup>

### B. VOYEURISM AND CHILD PORNOGRAPHY

Pictures taken via trespass to a private place or peeping tom-like behavior with hidden cameras or covert photography are generally criminal. Numerous state laws as well as a federal law specifically prohibits voyeurism. This crime is typically defined as the taking, copying, and transmission of such pictures.<sup>54</sup> Also, the privacy torts would allow private rights of action against the takers of such pictures.<sup>55</sup>

However, the smartphone and Internet have deprived the anti-voyeurism statutes of much of their power.<sup>56</sup> Individuals in locker rooms or bathrooms having their picture taken without their permission demonstrate the

50. 17 U.S.C. § 1201 (2012).

51. 47 U.S.C. § 230.

52. Levendowski, *supra* note 23, at 443 (“Revenge porn victims do not need to register their copyrights or hire a lawyer to file a takedown notice.”).

53. Cecil, *supra* note 5, at 2526 (“Because more than 80% of revenge porn images are self-authored images, these victims may demand removal of the sexually explicit images under § 512 of the Digital Millennium Copyright Act (DMCA). Essentially, the DMCA states that a website loses its ‘safe harbor’ immunity when it receives actual knowledge of infringing materials and fails to act.” (footnotes omitted)).

54. Video Voyeurism Prevention Act, 18 U.S.C. § 1801 (2012) (“Whoever . . . has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.”). See generally NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, NDAA VOYEURISM COMPILATION (2010), <https://ndaa.org/wp-content/uploads/Voyeurism-2010.pdf> (providing a compilation of state, federal, and U.S. territory statutes regarding voyeurism).

55. See, e.g., *Spencer v. Roche*, 755 F. Supp. 2d 250, 271–72 (D. Mass. 2010), *aff’d*, 659 F.3d 142 (1st Cir. 2011); *Peterson v. Moldofsky*, No. 07-2603-EFM, 2009 WL 3126229, at \*3 (D. Kan. Sept. 29, 2009).

56. Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469, 476–77 (2000) (“More than 20,000 women, men, and children are unknowingly taped every day in situations where the expectation and the right to privacy should be guaranteed, i.e., while showering, dressing, using a public rest room, or making love in their own homes . . . .” (quoting LOUIS R. MIZELL, JR., *INVASION OF PRIVACY* 23 (1998))).

problem.<sup>57</sup> While federal and state law make these pictures illegal, legal remedy can be difficult. First, as discussed *infra*, the Communications Decency Act (“CDA”) immunity prevents individuals from taking action against websites that host these images, provided the images were posted by or received from another person or entity.<sup>58</sup> Second, while takers of these pictures no doubt violate federal law—as well as state criminal and privacy torts—discovering who the picture takers are is difficult, and sometimes impossible. Thus, with CDA protecting distributors—and picture takers unknown—victims often lack recourse.<sup>59</sup>

The smartphone and Internet also have blurred anti-voyeurism statutes’ otherwise clear parameters.<sup>60</sup> Hidden pictures from locker rooms or bathrooms are actionable under federal and state law and the privacy torts because they were taken in areas that are either spelled out in statute or present clear privacy boundaries.<sup>61</sup> The smartphone and the Internet have rendered areas—with less clear boundaries—less secure. For instance, a writer for *Wired* magazine reflected upon the fact that he has many digital photographs of himself naked in camping trips—for instance, carrying his clothes while he crossed a stream.<sup>62</sup> Before smartphones and the Internet, one could feel sure that these moments would be recorded only in memory or with hard-to-distribute, photographic film.

Anti-voyeurism laws, which typically name protected zones, would not provide redress for photographs taken in these more ambiguous circumstances. In pre-smartphone days, taking pictures of people in such circumstances was difficult, and this difficulty provided security. Beyond the anti-voyeurism laws, the privacy torts generally exclude public behavior and

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57. David D. Kremenetsky, *Insatiable “Up-Skirt” Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places*, 31 MCGEORGE L. REV. 285, 287 (2000) (“Although video camcorders have been in existence since 1985, the recent expansion of the Internet fueled the ‘upskirt’ craze.”).

58. See *infra* notes 211–30 and accompanying text.

59. *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (discussing the CDA’s immunization of service providers against liability for secretly taken photographs of athletes in locker rooms); Maayan Y. Vodovis, Note, *Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet*, 40 HOFSTRA L. REV. 811, 828–33 (2012).

60. Pervasive image capture via modern handheld technologies, combined with the universal and excessive use of the Internet, has caused a breakdown of privacy norms. See *Garcia v. Johnson & Wales Univ.*, No. 09-21545-CIV, 2009 WL 4348338, at \*1, \*4 (S.D. Fla. Dec. 1, 2009).

61. Video Voyeurism Prevention Act, 18 U.S.C. § 1801(a) (2012) (“Whoever, in the special maritime and territorial jurisdiction of the United States, has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.”).

62. Mat Honan, *Your Dick Pics Are About to Be All Over the Internet*, WIRED (Feb. 7, 2015, 8:00 PM), <https://www.wired.com/2015/02/dick-pics>.

publicly known information.<sup>63</sup> In these ambiguous situations, nudity really is not hidden from the public eye; there is no real expectation of privacy. Rather, people exposed themselves with the understanding that nudity was acceptable in these circumstances and photography unlikely.<sup>64</sup>

This issue was presented, in a slightly different context, when a television network sports reporter gave a locker room interview to Cincinnati Bengals cornerback Adam “Pacman” Jones after the team’s 2015 victory over the Buffalo Bills. The cameraman’s angle included the shower area, and several players were filmed, on live TV, naked in the background.<sup>65</sup> As these pictures were not secretly taken—nor willfully intended to be intrusive, they fall outside the anti-voyeurism laws.<sup>66</sup> Despite the anger and frustration that many players and their wives felt, they had no meaningful legal redress.

Another category of clearly illegal photographs is child pornography. Photos or other images of underage minors implicate child pornography laws—even when minors, themselves, take those pictures. Child pornography is regulated at federal and state levels and receives severe punishment. Under these statutes, *any* picture of a sexual nature of a naked under-aged child could be considered child pornography.<sup>67</sup>

But, the relationship between child pornography and sexting is disturbing. Child pornography “laws do not explicitly exempt images that were voluntarily produced and disseminated by the minors themselves.”<sup>68</sup> As a result, successful child pornography charges have been brought against

63. Del Mastro v. Grimado, No. Civ.A. BER-C\_388-03E, 2005 WL 2002355, at \*4 (N.J. Super. Ct. Ch. Div. Aug. 19, 2005).

64. Timothy J. Horstmann, Comment, *Protecting Traditional Privacy Rights in a Brave New Digital World: The Threat Posed by Cellular Phone-Cameras and What States Should Do to Stop It*, 111 PENN ST. L. REV. 739, 739 (2007) (“Voyeurs have a new weapon in their assault on individuals’ privacy. Armed with tiny cellular phones that now come equipped with increasingly powerful cameras, these technological Peeping Toms have left their hiding places in the shadows and entered the community, snapping inappropriate pictures of men and women in public places once assumed to be safe.”).

65. SI Wire, *Wife of Bengals QB A.J. McCarron Criticizes Locker Room Media Policy*, SPORTS ILLUSTRATED (Oct. 20, 2015), <https://www.si.com/nfl/2015/10/20/cincinnati-bengals-players-naked-aj-katherine-mccarron-reaction>.

66. Video Voyeurism Prevention Act, 18 U.S.C. § 1801(a) (“Whoever, in the special maritime and territorial jurisdiction of the United States, *has the intent* to capture an image of a private area of an individual without their consent, and *knowingly* does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.” (emphasis added)).

67. Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135, 150 (2010) (“State courts across the country have been faced with the dilemma of whether the broad language of child pornography laws encompasses teen sexting conduct. Teens and their parents have been shocked to discover that child pornography laws are broad enough to encompass this conduct.”).

68. Sarah Wastler, Article, *The Harm in “Sexting”? Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J.L. & GENDER 687, 687 (2010).

minors involving in sexting, often with the serious consequence of requiring the minor to register as a sex offender.<sup>69</sup> Many states have found that the Draconian child pornography laws are inappropriate and passed laws that prohibit children from sexting but treat it more leniently than child pornography.<sup>70</sup>

And, again, this is not a hypothetical problem. As mentioned above, sexting is far from unknown among high school students. Thirty-nine percent of teen girls and 38% of teen boys reported being sent nude or semi-nude images of others, originally intended for someone else.<sup>71</sup> A 2009 telephone survey from the Pew Research Center's Internet and American Life Project found that 4% of cell-phone-owning youths aged 12 to 17 have sent sexts.<sup>72</sup> A study that included 606 high school students—nearly the entire student body from a single private high school in the southwestern United States—found that nearly 20% had sent sexts of themselves.<sup>73</sup>

### C. CONSENTED-TO PHOTOGRAPHS & REVENGE PORNOGRAPHY

The problem of revenge pornography presents in the most salient way when A takes an intimate picture of B to which B consents. A then posts B's picture to the internet. In this instance, A owns the copyright to the photograph. Copyright law is quite clear that the owner of the photograph owns the picture.<sup>74</sup> A has the right to reproduce the image—as well as the other rights, such public performance and derivative works, found in § 106 of the Copyright Act.<sup>75</sup>

69. Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM'LAW CONSP'CTUS J. COMM. L. & POL'Y 1, 1–4 (2009); Robert H. Wood, *The First Amendment Implications of Sexting at Public Schools: A Quandary for Administrators Who Intercept Visual Love Notes*, 18 J.L. & POL'Y 701, 702 (2010) (“During 2008 and 2009, a number of teenagers were brought up on child pornography charges as the result of an increasingly popular method of flirting amongst high school students called ‘sexting.’”).

70. Sarah Thompson, Comment, *Sexting Prosecutions: Minors as a Protected Class From Child Pornography Charges*, 48 U. MICH. J.L. REFORM ONLINE 11, 12–14 (2014).

71. Melissa R. Lorang et al., *Minors and Sexting: Legal Implications*, 44 J. AM. ACAD. PSYCHIATRY & L. 73, 73–80 (2016).

72. LENHART, *supra* note 29, at 2–4.

73. Donald S. Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42 ARCHIVES SEXUAL BEHAV. 15, 17–21 (2012).

74. Miller, *supra* note 35, at 107 (“The 1976 Act establishes a new presumption that copyright remains with the photographer.”).

75. *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 239 (S.D.N.Y. 2008) (“Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of [a] copyright.” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985))). The § 106 bundle includes “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public,” including importation of certain copies and phonorecords into the United States and rental of sound recordings and certain computer programs; “(4) . . . to perform the copyrighted work publicly; (5) . . . to display the copyrighted

B has no copyright interest whatsoever in the photograph because B did not create the photograph. B's consent to the photograph vitiated any legal claim whatsoever. The law has long presumed that when a person willingly exposes oneself, there is no property image in the picture. Courts construe this consent to exposure in broad ways. Thus, individuals who walk down the street, consent to their picture being taken. Any exposure to the public typically implies consent.<sup>76</sup>

This situation presents the true problem of revenge pornography. B has consented to a photograph. Under copyright law, A has near complete control over what to do with it. Criminalizing revenge pornography changes the nature of consent to these types of photographs. To these laws' content and their legal effectiveness we now turn.

### III. CRIMINALIZING DISTRIBUTION OF CONSENTED TO PHOTOGRAPHY: FIRST AMENDMENT PROBLEMS

As of this writing, approximately 40 states have passed laws criminalizing revenge pornography.<sup>77</sup> These laws define the crime in various ways. Some states criminalize revenge pornography if it is pursuant to systemic harassment or stalking<sup>78</sup> or efforts to impose emotional injury.<sup>79</sup> Other states criminalize merely the posting or transmission of intimate photographs, i.e., those involving nudity or are of sexual nature.<sup>80</sup> This Article will focus on the latter type of statute because it presents the most serious First Amendment issues.

An influential model revenge pornography law contains most of the elements that these state laws contain: (1) disclosure of an image that reveals either a person's intimate parts or a person engaged in sexual acts; (2) without consent; and (3) the image was obtained under a reasonable expectation of privacy. The model statute reads as follows:

An actor commits criminal invasion of privacy if the actor harms another person by knowingly disclosing an image of another person whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows that the other person did not consent to the disclosure and when the actor knows that the other person expected

work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." 17 U.S.C. § 106(1)–(6) (2012).

76. *Gill v. Hearst Pub. Co.*, 253 P.2d 441, 444 (Cal. 1953) (holding plaintiffs did not have a right to privacy when they "became a part of the public domain"); *see also* *Dryer v. Nat'l Football League*, 55 F. Supp. 3d 1181, 1201–02 (D. Minn. 2014) (holding that the NFL had valid copyright in Plaintiffs' performance in game footage); *Neff v. Time, Inc.*, 406 F. Supp. 858, 861–62 (W.D. Pa. 1976) (holding consent to photograph implied when plaintiff in public setting).

77. 41 *States & DC Now Have Revenge Porn Laws*, *supra* note 6.

78. *See, e.g.*, KAN. STAT. ANN. § 21-6101(a)(8) (2017).

79. *See, e.g.*, ALASKA STAT. § 11.61.120 (2016).

80. *Id.*



that the image would be kept private, under circumstances where the other person had a reasonable expectation that the image would be kept private.<sup>81</sup>

Given current Supreme Court precedent, this statute and those like it are likely unconstitutional.<sup>82</sup> The analysis is straightforward. First, to receive First Amendment protection, the prohibited conduct must be expressive, i.e., the conduct that the law attempts to prohibit must state or communicate an idea or concept.<sup>83</sup> Second, the expressive conduct must be protected, i.e., not in one of the categories that the Supreme Court has identified as unprotected, such as threats or obscenity.<sup>84</sup> Third, the court must determine whether the statute prohibits speech based upon its content (“content-based”) or simply its mode and manner of expression (“content neutral”).<sup>85</sup> For instance, a content-based prohibition would outlaw speech advocating for a communist form of government. A content-neutral prohibition would regulate the time, place, and manner of expression—say an ordinance limiting protests in a public park to certain hours.<sup>86</sup>

If the prohibition is content-based, it is only constitutional if it passes “strict scrutiny.” Under strict scrutiny, the law must be narrowly tailored, which often means being the least restrictive alternative, to respond to a “compelling” governmental goal.<sup>87</sup> Strict scrutiny has been called “‘strict’ in

81. CITRON, *supra* note 8, at 152.

82. Koppelman, *supra* note 12, at 662 (“Laws prohibiting revenge pornography thus violate the First Amendment as the Court now understands it.”).

83. Spence v. Washington, 418 U.S. 405, 409 (1974) (“It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . .”).

84. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1058 (9th Cir. 2010) (“[A]lthough pure speech is entitled to First Amendment protection unless it falls within one of the ‘categories of speech . . . fully outside the protection of the First Amendment.’” (quoting *United States v. Stevens*, 559 U.S. 460, 471 (2010))); Koppelman, *supra* note 12, at 662 (including the categories of “incitement, threats, obscenity, child pornography, defamation of private figures, criminal conspiracies, and criminal solicitation”).

85. L.A. All. for Survival v. City of L.A., 993 P.2d 334, 364–65 (Cal. 2000) (“[D]ecisions applying the liberty of speech clause . . . long have recognized that in order to qualify for intermediate scrutiny (i.e., time, place, and manner) review, a regulation must be ‘content neutral’ . . . and that if a regulation is content based, it is subject to the more stringent strict scrutiny standard.” (citations omitted)).

86. Compare *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’” (citation omitted) (quoting *Clark v. Cmty. for Creative Non-violence*, 468 U.S. 288, 293 (1984))), with *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.”).

87. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 56 (1987) (“Unlike content-neutral restrictions, content-based restrictions usually are designed to restrict

theory and fatal in fact.”<sup>88</sup> The Supreme Court rarely upholds such a statute.<sup>89</sup> Indeed, laws prohibiting content-based speech have become presumptively unconstitutional.<sup>90</sup>

Because it seemed so unlikely that any court would uphold revenge pornography statutes under strict scrutiny, the revenge porn First Amendment academic debate never gets past the first two steps: (1) can revenge pornography be expressive speech or (2) does it fit into a category of unprotected speech.

Academic commentary has defended revenge pornography statutes on the grounds that it does not constitute protected speech. As has been pointed out, “First Amendment doctrine holds that not all forms of speech regulation are subject to strict scrutiny . . . . They include true threats, speech integral to criminal conduct, defamation, obscenity, and imminent and likely incitement of violence.”<sup>91</sup> And, some commentators would add revenge pornography to this list.<sup>92</sup>

Others have argued that because “[t]he Court has recently announced that unless speech falls into such a category, it is fully protected. There can be no new categories of unprotected speech. Laws prohibiting revenge pornography thus violate the First Amendment as the Court now understands it.”<sup>93</sup> Some, therefore, argue for a change in Supreme Court precedent.<sup>94</sup>

But, then, curiously the Vermont Supreme Court in *State v. VanBuren* ruled that a Vermont revenge pornography statute was constitutional under strict scrutiny.<sup>95</sup> There have been few, if any, academic arguments that revenge pornography survives strict scrutiny.

speech because of its ‘communicative impact’—that is, because of ‘a fear of how people will react to what the speaker is saying.’” (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 111 (1980))).

88. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

89. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) (“If strict scrutiny is applied, the challenged law is never supposed to survive . . . .”); Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A. L. REV. 951, 1011 (2011) (“[I]f a content-based restriction on speech involves core First Amendment rights, it must pass strict scrutiny, which means it will almost never be upheld.”).

90. John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 234 (2014) (“[G]iven the stringent standards of proof of harm applicable to speech restrictions that discriminate based on content, it does not seem likely that revenge porn statutes of the kinds recently enacted or proposed would be able to survive strict scrutiny.”).

91. Citron & Franks, *supra* note 10, at 375.

92. *Id.*

93. Koppelman, *supra* note 12, at 662 (referring to *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

94. *Id.*

95. *State v. VanBuren*, 2018 VT 95, ¶ 58 (Vt. 2018).

The following shows that intimate pornography is expressive speech and that revenge pornography is unlikely to be treated as unprotected. As a content-based restriction on free speech, revenge pornography should receive strict scrutiny and fails under that test. The Vermont Supreme Court erred.

#### A. INTIMATE PORNOGRAPHY IS EXPRESSIVE

As an initial matter, consented-to photographs are expressive. And, that is a fairly low bar. After all, the court has found naked dancing to be expressive conduct entitled to some First Amendment protection.<sup>96</sup> And the sexting and exchange of erotic images has greater expressiveness than naked dancing. Indeed, some scholars have argued that intimate photography represents a sort of creative, personal activity.<sup>97</sup> And that, therefore, sexting and exchanging intimate photographs assume the status of erotic or explicit love letters, a sort of cyber-Abelard and Héloïse.<sup>98</sup>

In addition, social scientific evidence suggests that intimate photography is expressive.<sup>99</sup> Interestingly, these findings show that the sexes express different things through intimate photography.<sup>100</sup> Women see sexting as form of confidence or trust or sexual attractiveness while men see it as bragging or bravado.<sup>101</sup> While perhaps not dispositive, these results do suggest that sexting is meaningfully expressive.<sup>102</sup>

An individual can express this trust because he or she assumes that the recipient will not forward these pictures even though *he legally can*. In many ways, revenge pornography expresses the wish, too often cruelly dashed, that the possessor will keep and protect the shared images. If the possessor is

96. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment . . .”).

97. Bambauer, *supra* note 5, at 2035–37.

98. *Id.*

99. Joris Van Ouytsel et al., *A Nuanced Account: Why Do Individuals Engage in Sexting?*, in *SEXTING: MOTIVES AND RISK IN ONLINE SEXUAL SELF-PRESENTATION* 39, 40–47 (Michel Walgrave et al. eds., 2018) (“Adolescents’ main motives for engaging in sexting include the pursuit of a romantic relationship and the desire to please an existing romantic partner . . . . Moreover, sexting has been found to be a way to communicate sexual desire and to maintain intimacy.”); Holly Peek, *The Selfie in the Digital Age: From Social Media to Sexting*, *PSYCHIATRIC TIMES* (Dec. 25, 2014), [www.psychiatristimes.com/cultural-psychiatry/selfie-digital-age-social-media-sexting](http://www.psychiatristimes.com/cultural-psychiatry/selfie-digital-age-social-media-sexting).

100. JUDITH DAVIDSON, *SEXTING: GENDER AND TEENS* 24–25 (2014); see Murray Lee & Thomas Crofts, *Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting Between Young People*, 55 *BRIT. J. OF CRIMINOLOGY* 454, 464 (2015) (“[T]he majority of the current survey results . . . indicate [] that when young women are expressly asked about their sexting motivations they rarely express pressure or coercion as the *key* driver.”).

101. DAVIDSON, *supra* note 100, at 24–26, 43–44.

102. Van Ouytsel et al., *supra* note 99, at 40 (“Adolescents’ main motives for engaging in sexting include the pursuit of a romantic relationship and the desire to please an existing romantic partner.”).

required by law, even through an implied contract or license, then trust cannot be expressed in the same way. In this sense, revenge pornography chills or diminishes expression.

### B. IS REVENGE PORNOGRAPHY PROTECTED SPEECH?

That moves us to the second step: is revenge pornography protected speech? The Supreme Court has stated that historical precedent sets and limits the categories of unprotected speech. “Existing categories of unprotected incendiary speech include ‘true threats,’ fighting words, and incitement.”<sup>103</sup> In *United States v. Stevens*, the Court rejected the claim that “[t]he First Amendment’s guarantee of free speech . . . extend[s] . . . to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”<sup>104</sup> There, the Court declined to create a new category of speech to outlaw films of killing animals.<sup>105</sup>

Therefore, a primary question is whether revenge pornography could fit within an historical category of unprotected speech. But, “[n]o established exception is likely to be helpful” in the context of revenge pornography because there is “no long-standing tradition of regulating the publication of non-newsworthy private information.”<sup>106</sup> Rather, permissible regulation of private speech generally involves either false speech or matters kept scrupulously private. Libel is a regulation of private information, but it involves falsehoods. Revenge porn, on the other hand, is a truthful portrayal of facts, and, “the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”<sup>107</sup>

In an effort to find a historical category of unprotected speech into which to fit revenge pornography, some scholars look to either the federal Wiretap Act<sup>108</sup> or the privacy tort of public disclosure of a private fact.<sup>109</sup> Because these laws regulate private, truthful speech, they support the constitutionality of revenge porn laws—or so it claimed.

103. Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 152 (2011).

104. *United States v. Stevens*, 559 U.S. 460, 470 (2010).

105. This list includes “speech integral to criminal conduct, . . . so-called ‘fighting words,’ . . . child pornography, . . . fraud, . . . true threats, . . . and speech presenting some grave and imminent threat.” *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citations omitted); see also Humbach, *supra* note 90, at 235 (listing the categorical exceptions currently recognized).

106. Koppelman, *supra* note 12, at 666 (“[T]here is ‘no long-standing tradition of regulating the publication of non-newsworthy private information.’” (quoting Geoffrey R. Stone, *Privacy, the First Amendment, and the Internet*, in THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 174, 183 (Saul Levmore & Martha C. Nussbaum eds., 2011))).

107. *Id.* at 666–67 (quoting *Sorrel v. IMS Health Inc.*, 564 U.S. 552, 577 (2011)).

108. 18 U.S.C. §§ 2510–2522 (2012).

109. Citron & Franks, *supra* note 10, at 376 (“[W]e can look to the Court’s decisions assessing the constitutionality of civil penalties under the federal Wiretap Act and lower court decisions on the public disclosure of private fact tort.”).

But, in fact, *Bartnicki* ruled the First Amendment prohibits laws outlawing dissemination of speech—acquired by a third-party wiretapper—if of public concern.<sup>110</sup> It did not address revenge pornography’s issue of one interlocutor to an intimate conversation betraying a confidence of no public concern. Illicit eavesdropping is not the same as a person reporting on a conversation he or she was part of. Further, because revenge porn prohibits far more speech than does the privacy tort of public disclosure, the tort forms a weak strut to build a constitutionality argument.

#### 1. The Wiretap Act and *Bartnicki*

The Wiretap Act prohibits distribution of the contents of illegally obtained phone conversations.<sup>111</sup> The conversation is, therefore, the fruits of the crime. In *Bartnicki v. Vopper*, the Court struck down a civil remedy against a defendant who broadcasted wiretapped conversations between a school union president and its chief negotiator.<sup>112</sup> The Court reasoned that the First Amendment prohibited punishing the broadcast of public matters even if they were obtained illegally.<sup>113</sup> *Bartnicki* stands for the proposition that the First Amendment protects illegally obtained information involving public matters.

From this ruling, supporters of revenge pornography criminal statutes conclude that dissemination of illegally obtained speech about *private* matters can be prohibited consistent with the First Amendment—and, therefore, revenge pornography might fall outside of First Amendment protection.<sup>114</sup> The Supreme Court’s decision did not directly address that question.

But, unlike the conversation in the Wiretap Act, revenge porn is often obtained legally. Sexts are voluntarily offered, and many revenge porn pictures are the product of consent. Similarly, images that are handed on by the offender to third parties, i.e., obtained as a gift, surely could not be

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110. *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001) (“[T]he outcome of these cases does not turn on whether § 2511(1)(c) may be enforced with respect to most violations of the statute without offending the First Amendment. The enforcement of that provision in these cases, however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”).

111. 18 U.S.C. §§ 2510–2511.

112. *Bartnicki*, 532 U.S. at 534–35.

113. *Id.* at 524–25.

114. Citron & Franks, *supra* note 10, at 379 (“As the Court suggested in *Bartnicki*, the state interest in protecting the privacy of communications may be ‘strong enough to justify the application of’ the federal Wiretap Act if they involve matters ‘of purely private concern.’” (quoting *Bartnicki*, 532 U.S. at 533)); *see also* State v. VanBuren, 2018 VT 95, ¶ 49 (Vt. 2018) (“Although we decline to identify a new category of unprotected speech on the basis of the above cases [including *Bartnicki*], the decisions cited above are relevant to the compelling interest analysis in that they reinforce that the First Amendment limitations on the regulation of speech concerning matters of public interest do not necessarily apply to regulation of speech concerning purely private matters.”).

considered unlawfully obtained. And, thus, it is not clear whether they would even fall under the rule of *Bartnicki*.

Defenders of revenge pornography argue—with justification—that wide dissemination of these pictures is typically *not* consented to.<sup>115</sup> And, therefore distribution proceeds from an illegal act—just like the wiretapped messages in *Bartnicki*.

And, that's really the nub of the issue. Supporters of revenge porn statutes assume—at least implicitly—that any distribution of revenge porn beyond that of the initial message is not authorized. Subsequent distribution is, in a sense, illegal and appropriate for criminal punishment. Supporters of revenge porn statutes are in essence arguing that the victims implicitly only allow their photographs to be taken under an implied license or condition not to distribute.<sup>116</sup>

Of course, supporters of the statutes are absolutely correct: victims of revenge pornography do not consent to the distribution of their images. On the other hand, the law typically recognizes that freely given images or confidences as including a sort of implied license of distribution. As copyright law clearly vests in the taker of the photograph, it is unclear why anyone would presume that subsequent transmission of an intimate picture is not allowed. Similarly, as discussed below, the Fourth Amendment does not recognize confidences to “false friends” as private.<sup>117</sup> *Bartnicki* involved illicitly obtained conversations and cannot stand for the proposition that prohibitions against licensing and distributions may be constitutionally read into voluntary disclosures.

An implicit license restricting subsequent disclosure cannot be squared with the empirical social scientific evidence. As mentioned above, research tends to show that victims give intimate pictures or allow them to be taken as a sign of confidence and trust.<sup>118</sup> Individuals *want* to exchange porn because they want to express trust for recipients. Sharing a secret cannot convey trust—or rather conveys less trust—if given under circumstances where there

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115. Benjamin A. Genn, Comment, *What Comes Off, Comes Back to Burn: Revenge Pornography as the Hot New Flame and How It Applies to the First Amendment and Privacy Law*, 23 AM. U. J. GENDER SOC. POLY & L. 163, 176 (2014) (“Because revenge pornography involves the posting and distribution of intimate, nude, and sexually erotic photographs of an individual on the Internet without consent, it is deemed a form of pornography.”).

116. Cynthia Barmore, Note, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 STAN. L. REV. 447, 448 (2015) (“Revenge porn [refers to the distribution of] intimate images of adults that were shared with [a sexual partner with] the expectation [that] they would remain private.”); Aysegul Harika, Comment, *Banning Revenge Pornography: Florida*, 39 NOVA L. REV. 65, 66 (2014) (“Revenge pornography—which is also known as non-consensual pornography—is the ‘distribution of sexually graphic images of individuals without their consent.’” (quoting Citron & Franks, *supra* note 10, at 346)).

117. *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (“Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”).

118. See *supra* note 101 and accompanying text.

is a strong legal punishment for disclosure. Similarly, a sext cannot convey trust or intimacy as strongly or powerfully if it is given under the condition that it may not be reproduced.

Last, and most fundamentally, *Bartnicki* points to a deeper problem with using the Wiretap Act as a basis for finding revenge porn statutes as constitutionally unprotected speech. The Wiretap Act recognizes that individuals engaged in a private telephone conversation have a private, confidential relationship.<sup>119</sup> *Bartnicki* stands for the proposition that the First Amendment allows privacy protections against *third party* violations of that confidence involving matters of public interest.

What *Bartnicki* does not stand for—but which the proponents of revenge porn claim—is that it would be lawful to prohibit one of the participants to a wiretapped conversation from repeating the contents of the discussion.<sup>120</sup> The participants obtained the information lawfully and the Court was clear in *Bartnicki* that respondents’ “access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else.”<sup>121</sup>

In short, *Bartnicki* deals with a confidential communication surreptitiously overheard by a third party. It does not deal with revenge porn’s legal issue—confidential communication betrayed by an interlocutor privy to that conversation.

And, in other related areas of law, such as the Fourth Amendment, betrayed confidences receive no privacy protections. The Fourth Amendment does not allow *any* expectation of privacy in comments or communications with other people. Under the so-called “false friend” doctrine, when an individual’s “false friend” reveals to the police all that was confided with him or her—or even wears a wire monitored by law enforcement—the Fourth Amendment does not protect the divulged communication.<sup>122</sup> While having no necessary application to privacy law, Fourth Amendment law certainly says something about deep societal expectations of privacy, supporting the notion that the First Amendment could not prohibit betrayed confidences.

Finally, the Supreme Court has rejected regulation of truthful, private speech *lawfully acquired*. If we view revenge pornography as consented to, lawfully acquired images, then the First Amendment protects their distribution. The Supreme Court’s statement of this principle can be found

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119. See generally 18 U.S.C. § 2511 (2012) (discussing the specific goals of the Wiretap Act).

120. Citron & Franks, *supra* note 10, at 379 (“[T]he *Bartnicki* rule thus has a built-in exception: regulations regarding the nonconsensual disclosure of private communications that are not of legitimate concern to the public deserve a lower level of First Amendment scrutiny.”).

121. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

122. In countless cases, going back to at least *Hoffa v. United States*, the Supreme Court has stated that individuals do not have an expectation of privacy in so-called “false friends.” See *Hoffa*, 385 U.S. at 302–03.

in *The Florida Star v. B.J.F.*<sup>123</sup> There, the Court upheld a newspaper's reprinting of a rape victim's name in violation of a state civil statute.<sup>124</sup> In striking down the newspaper's conviction, the Court stated that it is "daily reminded of the tragic reality of rape" and "it is undeniable that these [privacy interests] are highly significant interests."<sup>125</sup> Nonetheless, the Court found in this case that the First Amendment could not prohibit the publication of truthful information which it has lawfully obtained,<sup>126</sup> and it concluded "that[] at least under the facts, B.J.F.'s case did not meet this standard."<sup>127</sup>

Newsworthiness seems the only distinction between the facts in *Florida Star* and revenge pornography. The "newsworthiness" in *Florida Star* was quite minimal. The *name* of a rape victim as opposed to the fact that a rape occurred in a certain area or place and time seems only marginally newsworthy.<sup>128</sup> Members of the public have an interest in levels and locations of crime. They can avoid those areas or influence the political process to channel more resources to deter or remediate crime; the specific victim identities seem of only the most peripheral importance. Thus, newsworthiness might emerge as a distinction without a difference, when applying the *Florida Star* rule to revenge pornography statutes.

## 2. Gossip, Public Disclosure of Private Facts, and the First Amendment

Some scholars and courts point to the tort of public disclosure of private facts as an example of regulation of truthful speech.<sup>129</sup> This cause of action allows plaintiffs to recover when "(1) publicity was given to the disclosure of private facts; (2) the facts were private, and not public, facts; and (3) the matter made public was such as to be highly offensive to a reasonable person."<sup>130</sup> Revenge pornography statutes are, therefore, analogous to this tort because they both prohibit disclosure of private, intimate facts.<sup>131</sup>

123. *Fla. Star v. B.J.F.*, 491 U.S. 524, 537 (1989).

124. *Id.* at 541.

125. *Id.* at 537.

126. *Id.* at 536–38.

127. Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 902 (2006).

128. *Fla. Star*, 491 U.S. at 527 ("The Department prepared a report on the incident which identified B.J.F. by her full name. The Department then placed the report in its pressroom.").

129. See Citron & Franks, *supra* note 10, at 357–59.

130. *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 902 (Ill. App. Ct. 1990) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 856 (5th ed. 1984)).

131. See *State v. VanBuren*, 2018 VT 95, ¶ 49 (Vt. 2018) ("Although we decline to identify a new category of unprotected speech on the basis of the above cases, the decisions cited above are relevant to the compelling interest analysis in that they reinforce that the First Amendment limitations on the regulation of speech concerning matters of public interest do not necessarily apply to regulation of speech concerning purely private matters.").



The problem with this argument is that even if the privacy tort is constitutional, revenge pornography statutes sweep way beyond the tort's scope into protectable speech.

As an initial matter, the Supreme Court has never upheld the privacy tort under a direct challenge.<sup>132</sup> In *Florida Star*, the Court limited the tort, ruling that it had no application to disclosure of private facts that are newsworthy and that are public in the sense of inclusion in government records. The Court left open, but did not rule on, whether private facts made public could still constitute a tort that would pass constitutional muster.<sup>133</sup>

Because of its interference with newsgathering and other clearly protected speech, lower courts (and commentators) have expressed the concern that the tort is likely unconstitutional.<sup>134</sup> “The public disclosure of private facts tort is not recognized in all jurisdictions. Some states have refused to recognize an individual’s right to keep certain information private.”<sup>135</sup>

Even if constitutional, however, the tort does not support the constitutionality of criminal revenge pornography laws, because they sweep way beyond the tort. Its second prong—what constitutes a private or public fact—renders this tort far more limited in its application than revenge porn laws. Explaining the tort’s second prong, the Restatement states that “there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.”<sup>136</sup> If a matter is open to the public eye, it “is made public[] by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”<sup>137</sup>

132. McClurg, *supra* note 127, at 905 (“[T]he U.S. Supreme Court has never upheld an award of tort damages for the publication of true information based on a privacy theory.”).

133. *Fla. Star*, 491 U.S. at 541 (“We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under § 794.03 to appellant under the facts of this case.”).

134. John A. Jurata, Jr., Comment, *The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 491 (1999) (“However, the private facts tort has not received universal acceptance. Due to the potential liability of media defendants, the tort has come under intense attack on constitutional grounds.”).

135. Peter Gielniak, Comment, *Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment*, 39 SANTA CLARA L. REV. 1217, 1228 n.66 (1999).

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

137. *Holmes v. Town of E. Lyme*, 866 F. Supp. 2d 108, 132 (D. Conn. 2012) (quoting *Sidiropoulos v. Bridgeport Hosp.*, No. CV0304018305, 2004 WL 202256, at \*2 (Conn. Super. Ct. Jan. 9, 2004)); *see also Orsini v. Zimmer*, No. CV075013711S, 2009 WL 5698148, at \*7–8 (Conn. Super. Ct. Dec. 24, 2009) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. a).

The Restatement is clear that communication to a small number of people does not make a matter public.

[I]t is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient.<sup>138</sup>

In contrast, revenge pornography statutes do not distinguish between displaying images to a small number of third parties and broadcasting them to the world.<sup>139</sup> These statutes criminalize both as they make the terms “distribute” or “disclosure” the crime’s *actus reus*, and those terms do not distinguish between wide and narrow disclosure. For instance, the Model Code simply criminalizes “knowingly disclosing an image of another person whose intimate parts are exposed or who is engaged in a sexual act.”<sup>140</sup> Courts interpret “disclosure” or “distribute” without “a technical legal meaning, or to mean anything other than its commonly used and known definition of ‘to give or deliver (something) to people.’”<sup>141</sup>

That revenge pornography statutes in fact criminalize *more* than the privacy statute in that there is no exception for disclosure to a small group is significant. The privacy tort *allows gossip*. You can tell embarrassing things about other people provided comments remain within a small social group.<sup>142</sup>

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

139. See MICH. COMP. LAWS ANN. § 750.145e(5) (a) (West 2018) (“‘Disseminate’ means post, distribute, or publish on a computer device, computer network, website, or other electronic device or medium of communication.”); MINN. STAT. § 617.261 (7) (b) (2016) (“‘Dissemination’ means distribution to one or more persons, other than the person depicted in the image, or publication by any publicly available medium.”); WASH. REV. CODE ANN. § 9A.86.010(6) (a) (West 2018) (“‘Disclosing’ includes transferring, publishing, or disseminating, as well as making a digital depiction available for distribution or downloading through the facilities of a telecommunications network or through any other means of transferring computer programs or data to a computer.”).

140. CITRON, *supra* note 8, at 152–53 (describing model statute).

141. *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 245 (App. Dep’t Super. Ct. 2016) (quoting *Distribute*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/distribute> (last visited Mar. 15, 2019)).

142. *Johnson v. Sawyer*, 47 F.3d 716, 731 (5th Cir. 1995) (noting “that such information was ‘communicated to the public at large,’ not simply to ‘a small group of persons’” (quoting *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683 (Tex. 1976))); *Ignat v. Yum! Brands, Inc.*, 154 Cal. Rptr. 3d 275, 285 (Ct. App. 2013) (“Liability for the common-law tort requires publicity; disclosure to a few people in limited circumstances does not violate the right.”); see also Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 300 n.35 (1983) (“When it is confined to a small group, or communicated to other individuals over a long period of time, most jurisdictions exempt private, person-to-person gossip from liability.”).

The slippery slope that revenge pornography presents is this: if the First Amendment does not prohibit laws against private disclosure of true private facts, then the First Amendment would not prohibit a law outlawing gossip. Certainly revenge pornography presents embarrassing information and photographs about individuals. But so does pillow talk and other types of gossip about individuals' sex lives. This type of gossip involves information every bit as injurious as pictures. Truthful but possibly embarrassing disclosure includes information about partners' bodies or their adequacies as lovers. This type of gossip, while not necessarily encouraged, seems quite natural and widespread. A government prohibition against the sharing of such intimate details with small groups of friends or confidants would seem an unprecedented government intrusion.

And gossip itself has important roles with which it would be unwise to alter. Sociologists recognize that gossip plays a major role in social regulation and the maintenance of law and social rules.<sup>143</sup> It serves a vital function in controlling errant social behavior—and explaining social expectations. Allowing potential government intrusion into this area could prove fatal to the functioning of society. Last, trying to distinguish between spoken gossip and photographs seems a distinction at odds with current forms of communications. As discussed above, sexting is part of modern-day human relations.<sup>144</sup> It would naturally be part of gossip as well.

#### C. A NEW CATEGORY OF UNPROTECTED SPEECH

Some argue that the Supreme Court should create a new category of unprotected speech. One prominent argument is that

Revenge pornography is different. There is a tight causal connection between speech and harm. A single posting to a website can have a permanently life-altering effect on its target, imposing a spoiled identity that it is impossible to ever escape.

Free speech depends on a willingness to disclose one's thoughts with no fear of crushing reprisal. It aims "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."<sup>145</sup>

In short, revenge pornography "harms the liberal political order by driving some citizens out of it."<sup>146</sup> Following from these claims, the argument supports making revenge porn unprotected speech.

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143. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 214–15 (1991).

144. See *supra* notes 71–72 and accompanying text.

145. Koppelman, *supra* note 12, at 686 (citation omitted) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982)).

146. *Id.* at 690.

Carving out exceptions to the First Amendment on the grounds of whether speech leads to effective participation and contribution to republican self-government seems a fraught endeavor. As an empirical matter, there simply is no good data on the relationship between the prevalence of revenge pornography and diminished political participation. Indeed, measuring such effects would be very difficult, if not impossible, and those who advocate for criminalization often rely upon anecdotes.<sup>147</sup>

Intimate photographs are emotive and often elicit feelings of shame and extreme vulnerability.<sup>148</sup> That difference might justify treating revenge pornography differently, but this is not immediately apparent. First, naked pictures may no longer—or in the near future—elicit shame. Some argue that as norms change, prompted largely by the Internet, people will feel less shameful about their exposed bodies.<sup>149</sup> Some might respond that given the power dynamics of sexual relationships, this will not change.<sup>150</sup> They could certainly be correct, and this argument may not be dispositive.

In addition, however, intimate exposures do not necessarily lead to isolation from political life. For instance, in 2004, the British tabloid newspapers published nude pictures of Angela Merkel changing her bathing suit in public. Her behavior was quite acceptable in Germany, which unlike Anglo-Saxon countries, tends to be *blasé* about nudity.<sup>151</sup> Merkel, of course, went on to be one of Germany's longest serving chancellors. Most important, sexual shaming *without* revenge pornography can be equally, if not more effective, than revenge pornography. Indeed, an article supporting criminalization cites the example of Monica Lewinsky to show the power of sexual shaming—but, of course, she was not the victim of revenge pornography.<sup>152</sup>

In short, revenge pornography may not be *sui generis* in terms of its power to delegitimize political or social participation. Many other types of speech—such as gossip—can be equally, if not more, delegitimizing, and these types

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147. See, e.g., Citron & Franks, *supra* note 10, at 345–46; Aubrey Burris, Note, *Hell Hath No Fury Like a Woman Porneed: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2326–27 (2014); Jessica M. Pollack, Note, *Getting Even: Empowering Victims of Revenge Porn with a Civil Cause of Action*, 80 ALB. L. REV. 353, 354 (2017).

148. See *supra* note 24 and accompanying text.

149. See JEFF JARVIS, PUBLIC PARTS: HOW SHARING IN THE DIGITAL AGE IMPROVES THE WAY WE WORK AND LIVE 34–36 (2011) (arguing that the internet will promote openness about nudity and other personal matters).

150. Koppelman, *supra* note 12, at 688.

151. *Merkel's Exposed Derrière Makes Headline News in Britain*, DW (Apr. 18, 2006), <https://www.dw.com/en/merkels-exposed-derriere-makes-headline-news-in-britain/a-1973479>. The incident greatly irritated the German public and points to the difference in norms. Nudity in Germany and elsewhere in Europe is quite tolerated but privacy norms are strong. England, on the hand, does not tolerate nudity to the same degree and its tabloid press can be quite sophomoric, as evidenced by the Merkel incident.

152. Koppelman, *supra* note 12, at 689.

of speech receive unquestioned First Amendment protection. A former romantic partner can make disparaging comments about his or her partner's body or sexual abilities and would receive undoubted protection. If that is the case, then making a special exception from the First Amendment for revenge pornography seems difficult to support.

*D. REVENGE PORNOGRAPHY STATUTES DO NOT SURVIVE STRICT SCRUTINY*

In a surprise move, the Vermont Supreme Court upheld the State's revenge pornography statute, ruling that the statute regulates protected speech but nonetheless passes the strict scrutiny standard under the First Amendment.<sup>153</sup> Strict scrutiny applies to content-based regulation of speech. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."<sup>154</sup> There is no doubt that revenge pornography qualifies as content based, as the Vermont Supreme Court concluded—or really, as it so obvious, simply assumed.<sup>155</sup> If content based, then "the Government [must] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."<sup>156</sup> The court's rulings that (1) a compelling government interest exists and (2) the Vermont statute was narrowly tailored to further that interest were difficult to follow.<sup>157</sup>

1. Compelling Government Interest

The court in *VanBuren* ruled that there were three compelling government interests the statute furthered: "the relatively low constitutional significance of speech relating to purely private matters, evidence of potentially severe harm to individuals arising from nonconsensual publication of intimate depictions of them, and a litany of analogous restrictions on speech that are generally viewed as uncontroversial and fully consistent with the First Amendment."<sup>158</sup>

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153. *State v. VanBuren*, 2018 VT 95, ¶ 69 (Vt. 2018). The defendant was charged with a violation of 13 V.S.A. § 2606(b)(1). This statute holds that

[a] person violates this section if he or she knowingly discloses a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm.

VT. STAT. ANN. tit. 13, § 2606(b)(1) (2018).

154. *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2227 (2015).

155. *VanBuren*, 2018 VT 95, ¶ 58 ("The fact that the disclosure requires speech, and that restriction of that speech is based squarely on its content, does not undermine the government's compelling interest in preventing such disclosures.").

156. *Az. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)).

157. *VanBuren*, 2018 VT 95, ¶¶ 48, 60.

158. *Id.* ¶ 48.

Oddly, none are, on their face, government interests *per se*. First, it is not considered a government interest that private speech is of “low constitutional significance.” The fact that the First Amendment may allow regulation of private speech does mean that the government has a compelling interest to, in fact, do so. The court makes a serious category confusion.

Second, the court identifies “evidence of potentially severe harm to individuals arising from nonconsensual publication.”<sup>159</sup> But, the Supreme Court has foreclosed that position in *Snyder v. Phelps* where it explicitly said “the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection.”<sup>160</sup>

The Vermont Supreme Court *could* have identified the privacy of revenge pornography victims as a compelling government interest. But it did not—and probably for good reason given that construction that the Vermont Supreme Court placed on the revenge pornography statute to preserve its constitutionality makes the statute useless in preserving privacy. The court read a limitation in the statute that the “intent requirement [must] require knowledge of both the fact of disclosing, and the fact of nonconsent.”<sup>161</sup> Thus, once a revenge pornographer releases the photograph onto the web, it can be reproduced and distributed without legal consequences by the millions on the web who do not know how the image was acquired.

In this fashion, the Vermont revenge pornography statute really *does not* protect privacy because the offending photographs can continue to be distributed lawfully on the web even if the revenge pornographer goes to jail. Rather, the statute punishes people who violate a confidence. And, protecting people from violated confidences, especially those confidences for which no efforts have been expended to keep secret are generally *not* government interests at all.

Consider Fourth Amendment law, trade secrets, and patent law, which do not protect against the harm caused from violated confidences or disclosed secrets. As discussed above, Fourth Amendment law does not protect the privacy of statements or evidence disclosed to false friends as set forth in *Hoffa v. United States*.<sup>162</sup> If you tell a close friend a secret and that friend squeals to the police, you are simply out of luck. Similarly, in intellectual property, which is often used an example of law that restricts speech consistent with the First Amendment, intellectual property’s special protections are forfeit upon voluntary disclosure. Thus, trade secrets are forfeit if the owner fails to take

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159. *Id.*

160. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975)).

161. *VanBuren*, 2018 VT 95, ¶ 62.

162. *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (“Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”).

reasonable efforts to keep them secret.<sup>163</sup> And, patent rights are forfeit if the patent is disclosed to the public before filing.<sup>164</sup>

Third, the court identifies the “litany of analogous restrictions on speech that are generally viewed as uncontroversial and fully consistent with the First Amendment.”<sup>165</sup> These include restrictions on doctors’ ability to reveal patient data, bank’s ability to reveal depositors’ information, and restrictions on social security number usage and disclosure.<sup>166</sup> But these are not examples of a general compelling government interest in preserving privacy. For most of the history of the common law, there was no legal right to medical privacy—although there was a recognized ethical duty to keep medical confidences.<sup>167</sup> And, indeed, there was a common law to keep banking records private.<sup>168</sup>

But these privacy obligations do not demonstrate a compelling government interest in privacy. Rather, they proceed from specific professional or business transactions in which there is a fiduciary relationship, and which are, and have always been, highly regulated. These laws do not represent an overriding government interest to protect privacy where no special legal relationship exists—as with personal, romantic relations. Giving government a regulatory interest in romantic relations analogous to regulating medicine or banking reflects a remarkable intrusion into personal life.

Further, a generalized privacy right is very different from the interests that precedents have recognized as compelling in First Amendment cases. According to an empirical study, federal courts have ruled a compelling government interest exists in the following types of free speech cases: “(1) . . . campaign finance laws and electioneering restrictions; (2) limits on

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163. See generally Victoria A. Cundiff, *Reasonable Measures to Protect Trade Secrets in a Digital Environment*, 49 IDEA 359 (2009) (discussing the requirement that a trade secret owner take measures to protect their trade secrets in order to receive court assistance with enforcement).

164. Vance Woodward, *Patent Innovation*, 38 L.A. LAW. 21, 21 (2015) (“With the first-to-file rule, whoever first makes it to the patent office gets the patent, which gives inventors reason to maintain secrecy regarding their inventions in development, but there are nuances. For example, an inventor may publicly disclose an invention up to a year before filing a patent application. This is because only inventions that are novel may be patented, and novelty depends on finding that nobody already publicly disclosed the same invention.” (footnote omitted)).

165. *VanBuren*, 2018 VT 95, ¶ 48.

166. *Id.* ¶¶ 58–59.

167. *Quarles v. Sutherland*, 389 S.W.2d 249, 251 (Tenn. 1965) (“[A]t common law neither the patient nor the physician had a privilege to refuse to disclose in court a communication of one to the other, nor does either have a privilege that the communication not be disclosed to a third person.” (citing 1 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 91–160 (1954); 8 WIGMORE ON EVIDENCE § 2380 (3d ed. 1940))).

168. *Peterson v. Idaho First Nat’l Bank*, 367 P.2d 284, 290 (Idaho 1961) (“It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors’ accounts. Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors.”).

the right of access to court proceedings and records; (3) indecency laws; (4) viewpoint discriminatory rules on access to public forums; (5) sign ordinances; (6) charity solicitation laws; and (7) miscellaneous other speech restrictions.”<sup>169</sup>

Plaintiffs asking courts to find a compelling government interest rarely succeed, with fewer than 25% of cases finding the interest.<sup>170</sup> But, more importantly, in recent years, these interests all involve *preserving* political speech or democratic function against regulation based on other concerns, i.e., campaign finance, access to court records, public fora, signage, or traditional categories of speech restriction (such as indecency).<sup>171</sup> There is nothing in this list akin to a generalized interest in privacy of personal information.

## 2. Narrowly Tailored

Under strict scrutiny, the First Amendment requires that a law regulating speech must be narrowly tailored to further its compelling government interest.<sup>172</sup> To be narrowly tailored, a law must be no more restrictive than necessary to achieve the compelling interest, i.e., not restrict speech unrelated to the government interest<sup>173</sup>—and may neither omit an appreciable amount of the interest unremedied, fail to restrict speech that falls under the government interest.<sup>174</sup> In addition, First Amendment strict scrutiny requires a regulation to be the “least restrictive” to further effectively the identified compelling government interest.<sup>175</sup>

This analysis is difficult to conduct because the Vermont Supreme Court identified its compelling state interest without much clarity. But assuming that

169. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844–45 (2006).

170. *Id.* at 844.

171. *Id.*

172. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 680 (1994) (“Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest.”).

173. A regulation of speech is narrowly tailored when it does not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Rock for Life–UMBC v. Hrabowski*, 643 F. Supp. 2d 729, 747 (D. Md. 2009) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), *aff’d*, 411 F. App’x 541 (4th Cir. 2010)).

174. *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (“[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.” (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring) (alteration in original))).

175. *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755 (1996) (“[N]ot only is it not a ‘least restrictive alternative’ and is not ‘narrowly tailored’ to meet its legitimate objective, it also seems considerably ‘more extensive than necessary.’ That is to say, it fails to satisfy this Court’s formulations of the First Amendment’s ‘strictest,’ as well as its somewhat less ‘strict,’ requirements.”).



the interest is in protecting intimate privacy, the statute is not narrowly tailored. Most obviously, it is woefully under-inclusive in that it does nothing to stop the distribution of compromising pictures once they are released into the internet, and no one knows that they were taken without their subjects' consent. As argued above, the statute only punishes individuals who distribute pictures knowing they were taken without consent—leaving the rest of the web to forward and post infinitely. The statute better furthers the goal of punishing betrayed confidences than protecting intimate photographs from the public gaze. Further, there are many other less restrictive alternatives that would be more effective at protecting privacy, such as civil actions, as the dissent in *State v. VanBuren* argues.<sup>176</sup> It is to one of these potential actions—the right of publicity—that the Article now turns.

#### IV. THE RIGHT OF PUBLICITY AND NAKEDNESS

Publicity rights provide a relatively efficient way to end the harm caused by revenge pornography, offering an important remedy to victims within the constraints of existing law. The following Part first examines how the right of publicity would work. Second, it compares publicity rights with other possible remedies such as criminal sanctions and copyright in terms of efficiency and retributive effect. Third, this section compares these remedies' effectiveness in the internet context, specifically their effectiveness against internet providers, such as websites and ISPs. Under § 230 of the Communications Decency Act, they enjoy immunity for material posted by others. Publicity rights offer an interesting potential to defeat this immunity.

##### A. THE RIGHT OF PUBLICITY AS A REMEDY

The right of publicity is one of the less prominent intellectual property rights. It protects against unauthorized commercial use of a person's identity<sup>177</sup> and allows every person to control the commercial use of his or her identity.<sup>178</sup> A publicity rights violation typically consists of four elements: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.<sup>179</sup>

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176. *State v. VanBuren*, 2018 VT 95, ¶ 83 (Vt. 2018) ("My primary war with the statute is simply this. The State has at its disposal less restrictive means to protect Vermonters against invasion of their privacy than subjecting a violator to a criminal penalty.") (Skoglund, J., dissenting).

177. J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130 (1995); Kearston L. Wesner, *A Reputation Held Hostage? Commercial Mug Shot Web Sites and the Trade in Digital Shame*, 22 COMM. L. & POL'Y 459, 461 (2017) ("Right of publicity laws, usually embraced by celebrities, provide legal recourse against entities that improperly exploit names or likenesses for commercial value.").

178. Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 893 (2017).

179. *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1355–56 (Ill. App. Ct. 1995) ("Considering plaintiffs' appropriation claim, the elements of the tort are: an appropriation, without consent, of one's name or likeness for another's use or benefit. This branch of the privacy doctrine is

Because “the right of publicity is intended to protect the commercial value of a person’s identity . . . the material question in determining whether someone’s publicity rights have been violated is whether the identifying characteristics that have been appropriated are ‘marketable and publicly identifiable.’”<sup>180</sup> The protections of the right of publicity apply when there is (1) a personal feature, such as voice, image, or signature that is individually recognizable; which (2) has commercial value.<sup>181</sup>

The right is found in state law, but not all state’s laws.<sup>182</sup> As the state laws all differ, the right has somewhat inconsistent parameters, with states offering differing types and levels of protections for different aspects of a person’s identity. Most states, however, protect the right of publicity against unauthorized commercial appropriation of a person’s name, likeness, picture, voice, or persona.<sup>183</sup> Because there must be “commercial

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designed to protect a person from having his name or image used for commercial purposes without consent.” (citation omitted)); *Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003) (“The interest protected by the misappropriation of name tort ‘is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or others.’” (quoting RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (AM. LAW INST. 1977))); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995) (setting a cause of action for the appropriation of “the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade”).

180. Carpenter, *supra* note 16, ¶ 16 (quoting Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 55 (1994)).

181. *Id.* ¶ 16.; *see also* CAL. CIV. CODE § 3344(a) (West 1997) (stating that an individual’s “name, voice, signature, photograph, or likeness” in a commercial manner receives protection); IND. CODE ANN. § 32-36-1-1(c)(1) (West 2013) (extending a personality’s right of publicity to one’s “name, voice, signature, photograph image, appearance, gestures, or mannerisms”); TENN. CODE ANN. § 47-25-1105(a) (2001) (prohibiting “any person [from] knowingly us[ing] or infring[ing] upon the use of another individual’s name, photograph, or likeness”).

182. R. Garrett Rice, “*Groove Is in the Hart*”: *A Workable Solution for Applying the Right of Publicity to Video Games*, 72 WASH. & LEE L. REV. 317, 330–31 (2015) (“Nineteen states have statutorily adopted the right of publicity. Twelve others recognize the doctrine through common law, some by a name other than the ‘right of publicity,’ but have not codified it.” (footnote omitted)); *Statutes & Interactive Map*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Mar. 15, 2019); *see, e.g.*, IND. CODE ANN. § 32-36-1-8(a) (“A person may not use an aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime or for one hundred (100) years after the date of the personality’s death without having obtained previous written consent from a person specified in section 17 of this chapter.”). The statute defines a person’s right of publicity as “a personality’s property interest in the personality’s: (1) name; (2) voice; (3) signature; (4) photograph; (5) image; (6) likeness; (7) distinctive appearance; (8) gestures; or (9) mannerisms.” IND. CODE ANN. § 32-36-1-7.

183. Zehra Betul Ayranci, *Right of Publicity*, 33 ENT. & SPORTS LAW. 62, 63 (2017) (“[W]ith developments in advertising and commercial market, celebrity image started to be associated with products. Such an association reflects an economic exploitation aspect of the right of publicity, which differentiates it from the right of privacy.”).

appropriation,” the right of publicity requires that whatever aspect receives protection must have monetary value.<sup>184</sup>

Typically, actors, entertainers, athletes or other celebrities use the right to control unconsented reproduction of pictures of their faces—as well as claims about endorsements of particular items. Entertainers can use this right to stop unauthorized reproduction of their faces. Athletes can sue to stop claims that they endorse or support a particular good or product.<sup>185</sup>

But, the cause of action is not limited to instances in which the defendant uses a famous person’s face. A person’s naked body would no doubt be considered a personal feature under the tort. The fringe cases involve situations, for instance, in which a singer imitates a unique and identifiable tone or timbre of another singer’s voice. Courts have found that Bette Midler’s voice’s unique timbre is protectable.<sup>186</sup> If the tone or timbre of a person’s voice—which another person could easily imitate—a person’s naked body would fit.

The second prong presents the biggest challenge for using the right of publicity to fight revenge pornography. Non-famous people’s naked bodies likely lack commercial value. Just as courts are unified that the right of publicity does not extend to the commercially uninteresting faces and voices of the non-celebrities,<sup>187</sup> courts would not recognize rights of publicity for the naked bodies of non-famous people.

But that long accepted principle is in flux. The Internet simply has changed our notion of publicity and commercial value. To riff on Andy Warhol, “In the future, everyone will be famous for fifteen clicks.”<sup>188</sup> the Internet allows individuals who never were famous to achieve fame. From 8-year-old Ryan Popper of “Ryan’s Toys Review,” a multimillion-dollar website

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184. *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000) (“The right of publicity is designed to reserve to a celebrity the personal right to exploit the commercial value of his own identity.” (citation omitted)).

185. Kyle D. Simcox, Comment, *Selling Your Soul at the Crossroads: The Need for A Harmonized Standard Limiting the Publicity Rights of Professional Athletes*, 63 DEPAUL L. REV. 87, 88 (2013).

186. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (“Why did the defendants ask Midler to sing if her voice was not of value to them? Why did they studiously acquire the services of a sound-alike and instruct her to imitate Midler if Midler’s voice was not of value to them? What they sought was an attribute of Midler’s identity. Its value was what the market would have paid for Midler to have sung the commercial in person.”).

187. Carpenter, *supra* note 16, ¶ 17 (“Whereas celebrities regularly prevail in litigation challenging the appropriation of their identities, non-celebrities have much more difficulty showing that the commercial value of their identity has been exploited. While many courts have conceded that a non-celebrity has a right of publicity, for the most part these holdings state that the mere fact of *the defendant’s use* proves that there is a commercial value to the identity, even if it hasn’t been exploited before not that the non-celebrity’s identity has any intrinsic commercial value irrespective of that use.” (footnotes omitted)).

188. Rachel Nuwer, *Andy Warhol Probably Never Said His Celebrated “Fifteen Minutes of Fame” Line*, SMITHSONIAN (Apr. 8, 2014), <https://www.smithsonianmag.com/smart-news/andy-warhol-probably-never-said-his-celebrated-fame-line-180950456>.

featuring an incredibly cute kid reviewing toys, to PewDiePie, one of the world's most popular YouTube broadcaster with over 57 million subscribers, the Internet has spawned instant celebrities as well as lower tiers of celebrities: those with large Twitter, YouTube, or other social media followings.

And beyond creating this “celebrity,” the Internet is a mechanism to monetize it. Once one has a following on social media, one can sell the eyeballs to advertisers. As informed observers point out, “[S]ocial media may be the most direct means imaginable to support the argument that anyone and everyone’s identity has some level of commercial value.”<sup>189</sup> If nearly all naked bodies can be used to attract eyeballs and thus have commercial value, this principle does not only apply to Playboy models. A quick search (remember to go into your browser and delete the search log) reveals a dizzying array of websites purveying to virtually every taste in human form—the young and old, the trim and chubby, the dark and the fair. Whether you wish to or not, you can monetize your naked body.

Because the value of (most) people’s naked bodies is, nonetheless, small, perhaps even *de minimis*, it is not immediately clear that this value could form the predicate for right of publicity action. But courts have shown a willingness to accept the small incremental value of a person’s image as predicate for a right of publicity action. For instance, in *Gabiola v. Sarid*, plaintiffs sued “Mugshots.com,” a website that posted individuals’ mugshot photographs.<sup>190</sup> Mugshots.com linked to another website, owned by the same firm, that provided a removal service.<sup>191</sup> Plaintiffs alleged that the use of their image in the mugshot constituted an infringement of their rights of publicity.<sup>192</sup> The court refused to dismiss the plaintiffs’ right of publicity claim.<sup>193</sup> Rather, the court ruled that plaintiffs’ “allegations support an inference that everything, including the articles on . . . Mugshots.com are click-bait to increase consumers and to embarrass the profiled arrestees and in turn to drive revenue to the removal service.”<sup>194</sup>

Similarly, courts have upheld right of publicity actions against social media firms for using personal profile information. In *Fraleay v. Facebook, Inc.*, a federal court ruled that the right of publicity could prevent Facebook from reproducing users’ “likes” and “endorsements.”<sup>195</sup> The court reasoned that

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189. Brian D. Wassom, *Uncertainty Squared: The Right of Publicity and Social Media*, 63 SYRACUSE L. REV. 227, 235 (2013). Indeed, this idea extends the notion put forth by Jerry Kang that our personal information may have a monetary value which could support improved privacy. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1265 (1998) (“Both market and nonmarket talk recommend adopting a default rule that allows personal information collected in the course of a cyberspace transaction to be processed only in functionally necessary ways.”).

190. *Gabiola v. Sarid*, No. 16-cv-02076, 2017 WL 4264000, at \*2 (N.D. Ill. Sept. 26, 2017).

191. *Id.*

192. *Id.* at \*3.

193. *Id.* at \*5–6.

194. *Id.* at \*6.

195. *Fraleay v. Facebook, Inc.*, 830 F. Supp. 2d 785, 798–800 (N.D. Cal. 2011).

[I]n the same way that celebrities suffer economic harm when their likeness is misappropriated for another's commercial gain without compensation, Plaintiffs allege that they have been injured by Facebook's failure to compensate them for the use of their personal endorsements because '[i]n essence, Plaintiffs are celebrities—to their friends.' The Court does not find Plaintiffs' alleged injury so speculative as to deny them standing.<sup>196</sup>

Further, it is *unquestionable* that naked images have value and give "advantage, commercially or otherwise" to their illicit distributors.<sup>197</sup> For instance, the execrable website, IsAnyoneup?.com, the first major revenge pornography site, made money by offering to remove images. While this activity proved its undoing, as the FBI brought extortion charges against the site's owner<sup>198</sup>, the site's profitability shows the value of these images.

To put it simply, revenge pornography gives their distributors and viewers a type of utility. Distributors receive the pleasure of revenge and consumers satisfy concupiscent desire and interest. These utilities are not morally admirably, but they constitute an "advantage" that is certainly real enough for the law to recognize.

#### B. COMPARISONS TO OTHER REMEDIES

Using the right of publicity to combat revenge pornography is a novel proposal; others have suggested criminal law,<sup>199</sup> copyright<sup>200</sup>, or obscenity<sup>201</sup> might do the job as well. The following argues that the right of publicity is superior to each of these approaches. Most importantly, it provides quicker and more efficient redress and remedy while minimizing public disclosure. It also responds to the generic problem of non-sexual photographs such as hidden locker room photos or unconsented to medical photos. Copyright proposals, and similar proposals, are less desirable because they would require major statutory reform.

##### 1. Criminal Law

Perhaps the greatest weakness in the right of publicity remedy is its lack of strong social stigma. In contrast, criminalizing revenge pornography does provide a degree of social stigma that the right of publicity cannot. And, to the degree one values this stigma, one would favor criminal sanction.

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196. *Id.* at 799–800 (quoting Memorandum of Law in Opposition to Motion to Dismiss at 2, *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011) (No. CV 11-01726 LHK PSG)).

197. *Id.* at 803 (quoting CAL. CIVIL CODE § 3344).

198. Doug Bolton, 'King of Revenge Porn' and IsAnyoneUp Owner Hunter Moore Given Two and a Half Years in Prison, INDEP. (Dec. 4, 2015, 8:26 PM), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/hunter-moore-jail-isanyoneup-revenge-porn-a6761126.html>.

199. Citron & Franks, *supra* note 10, at 349.

200. Bambauer, *supra* note 5, at 2031–32.

201. Barmore, *supra* note 116, at 461–62.

But criminalizing revenge pornography presents both procedural and normative problems. The procedural problems are quite significant. If you are a victim of revenge pornography, you would likely first want remediation that includes removing the pictures from the internet. The criminal law is a remarkably inept tool at that job because it can be so cumbersome and take a long time—and relies upon prosecutorial discretion. In contrast, aggrieved individuals, themselves, can enforce their privacy rights.

That is only the beginning to the procedural problems that criminalization presents. It is reasonable to assume that a victim of revenge porn probably would like the pictures taken down in a discrete manner that does not bring further attention to them. Yet, due process limitations require a degree of openness in all criminal proceedings. Most courts generally do not allow victims to remain anonymous.<sup>202</sup> Further, to guarantee secrecy, records would have to be sealed—and, again, courts only seal records on highly unusual facts.<sup>203</sup> Criminal proceedings, therefore, raise the specter of not only further publication of the pictures—but indeed their permanent memorialization.<sup>204</sup>

Once again, the right of publicity offers a far more efficient response. Pictures could be taken down quickly and discretely without the creation of public documents with rights of public inspection as private attorneys could write demand letters. State laws that permit contingent attorney fees would create the necessary incentives for all people, regardless of economic status, to receive access to these legal services. And, it might be an effective tool to deal with so-called whack-a-mole problem of photographs spreading

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202. Jennifer A. Brobst, *The Modern Penny Dreadful: Public Prosecution and the Need for Litigation Privacy in a Digital Age*, 96 NEB. L. REV. 281, 290–91 (2017) (“Adjusting court procedure and policy, including public access to records, in order to protect the interests of crime victims invokes core constitutional considerations related to the rights of defendants and the integrity of the court system.”); Charles R. Petrof, Note, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677, 1686 (1994) (“In light of [Supreme Court precedent], a child sexual assault victim’s right to anonymity in the courts depends on a showing of compelling state interest advanced by a narrowly tailored statute.”).

203. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1057–58 (1991); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1159 (2002) (“Courts retain discretion to issue special orders to keep certain proceedings and information confidential. A court will sometimes, under very limited circumstances, seal court proceedings such as trials. Courts can seal court records if the parties’ desire for confidentiality outweighs the need for public access.” (footnote omitted)).

204. David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1397 (“With the move to online court records, these impediments to access are vanishing. Although the specifics of electronic access vary by state (and sometimes by court), in all federal courts and in many state courts that provide online access the public can access a court’s electronic case database through a website interface.”); Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 777 (2012) (“The conclusion of our inquiry is that courts have an obligation to rewrite rules governing the creation of, and access to, public court records in light of substantive changes that online access augurs.”).

throughout the web because, unlike law enforcement, fees and damages recovered from violators could give the right incentives to lawyers to track copiers down.

Supporters of revenge porn statutes seem to think that police can better deal with the challenge of tracking down offending images on the Internet than private lawsuits.<sup>205</sup> But police, overburdened as they are, probably lack the resources to pursue images across the internet. They would not prioritize revenge pornography enforcement. Further, police investigations, like court proceedings, work against privacy. They both involve a wide spectrum of community members learning about (and maybe seeing) the private images. Publicity rights, however, offer the possibility that offending images can be removed through private negotiation conducted under the threat of lawsuit. This could be done discretely with only counsel and offending parties involved.

Last, the criminal statutes present burdensome, difficult problems in courtroom proof. Consider the model statute cited above. Trying to avoid constitutional challenge on both First Amendment and vagueness grounds, the statute requires proof of *three separate mens reas*: The statute requires the defendant (1) “knowingly disclos[es] an image” of another person in a sexually revealing way; (2) “knows that the other person did not consent to the disclosure”; and (3) “knows that the other person expected that the image would be kept private.”<sup>206</sup> Proving any *mens rea* at trial is considerably difficult, as the Supreme Court has long recognized.<sup>207</sup> Proving three presents an enormous judicial challenge.

## 2. Copyright Solutions

Copyright solutions work, to some degree, for selfies. As discussed above, the taker of a selfie owns its copyright. The selfie owner can sue for infringement for any unauthorized reproductions. But there are limitations in this approach. First, copyright cannot cover consented to photographs taken by third parties as the copyright does not vest with the subject. Second, in the rough and tumble internet world establishing who took a photograph can be difficult. Third, there is the problem of digital ownership discussed *supra*.<sup>208</sup> Fourth, the DMCA, 17 U.S.C. § 512, places limits (and to some degree assists) the copyright remedy. Under the DMCA, website owners and other

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205. Citron & Franks, *supra* note 10, at 349 (“[E]ven a successful suit cannot stop the spread of an image already disclosed, and most disclosers know they are unlikely ever to be sued. Most victims do not have either the time or money to bring claims, and litigation may make little sense even for those who can afford to sue if perpetrators have few assets.”).

206. CITRON, *supra* note 8, at 152–53.

207. *United States v. Balint*, 258 U.S. 250, 254 (1922) (“Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion.”).

208. See *supra* notes 26–48 and accompanying text.

internet entities have “safe harbors” that limit their copyright liability if they “ha[ve] adopted and reasonably implemented, and inform[ed] subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”<sup>209</sup> In other words, if website owners allow for an efficient system of notice-and-take down that removes infringing content, these websites are absolved of copyright violations.<sup>210</sup>

This both helps and hinders the copyright remedy. Notice-and-takedown can lead to quick resolution, but it provides no redress. Further, due to the fluidity of the internet, it may simply create a “whack-a-mole” problem in which victims spend their entire lives tracking down photos that float around the internet.<sup>211</sup>

Some academics have attempted to expand the copyright protection suggesting the idea that “intimate photographs” are best viewed as a collaborative and personal creations. They argue that these photos are like art or literary works and should be entitled to copyright protection for both the subject and the maker of the photograph.<sup>212</sup>

This expanded copyright protection would accomplish much that a right of publicity would. However, it requires a much greater change in the law. Indeed, it would change an essential part of copyright law—that the creator of a work of art keeps the copyright. Similar proposals, such as creating a “right to be clothed”, face similar responses; they would achieve much that

209. 17 U.S.C. § 512(i)(1)(A) (2012); *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004) (quoting 17 U.S.C. § 512(i)).

210. Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 621–22 (2006) (“[T]he Digital Millennium Copyright Act[] created a process that was intended to help copyright owners ensure rapid removal of allegedly infringing material from the Internet while guaranteeing compliant OSPs a safe harbor from liability for Internet users’ acts of copyright infringement. . . . To qualify, OSPs must ‘accommodate’ technical protection measures employed by copyright holders and implement policies for terminating the accounts of repeat infringers.” (footnote omitted)).

211. See Zoe Carpou, Note, *Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users*, 39 COLUM. J.L. & ARTS 551, 559 (2016) (“The DMCA requires ISPs to implement reasonable policies to deal with repeat infringers, but it is often difficult if not impossible for ISPs to respond adequately to instances in which the same content reappears in high volume, either from the same infringer or from different infringers.”).

212. Bambauer, *supra* note 5, at 2031–32 (“[T]he consensual production and distribution of intimate media is normatively desirable—it brings people, particularly those in intimate relationships, closer together, and allows them to express romantic and sexual feelings in new ways. . . . Tailoring copyright law to encourage production of intimate media is both normatively desirable and entirely in keeping with copyright’s pattern of media and industry-specific adjustment.”).



the right of publicity does, but would require a major change in existing law.<sup>213</sup>

And, although in general all creative work is copyrightable, it is at least a debatable normative question that copyright should be *expanded and changed* specifically for intimate photography. Certainly, other types of creative endeavors—including non-intimate photographs or even biographies—could be seen as collaborative, yet few have called for changes in copyright law to give subjects' copyright in them. One would have to place a tremendous value on intimate media in order to change copyright law simply to encourage production of such media.

Viewing “intimate media” as a worthy erotic expression is not a view universally shared. At least one commentator has called for classifying revenge pornography as “obscene” contending that it lacks serious literary or artistic merit and exists purely to satisfy prurient interests.<sup>214</sup> Contending the lack of consent inherent to revenge pornography is “patently offensive” and thus within the legal ambit of obscenity,<sup>215</sup> this commentator reflects the view that intimate media, in general, is of questionable literary or creative value.<sup>216</sup>

Of course, *de gustibus non disputandum est*, and no doubt this type of media has different meanings when distributed between different types of couples and on the Internet. And, certainly this Article does not wish to determine whether intimate media is patently offensive—or the modern-day version of Peter Paul Ruben’s *Het Pelsken*—the celebrated nude portrait of his second wife, Helene Fourment. Rather, this Article only argues that a commitment in copyright law to protect and encourage the production of intimate media, which would require significant change in existing law, requires a societal consensus that intimate media is worthwhile. That may be lacking.

#### V. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT AND REVENGE PORNOGRAPHY

The Internet complicates this entire discussion. Websites or other Internet firms typically host revenge pornography. Section 230 of the Communications Decency Act of 1996 states that websites and other internet firms cannot be treated as speakers or publishers of content provided by other content producers, i.e., individuals who post on these sites or internet fora.<sup>217</sup>

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213. *Id.* at 2056 (“The production and distribution of media capturing intimacy is best addressed by adding a new section, 17 U.S.C. § 106B, to the Copyright Act.”); Cooper, *supra* note 14, at 833.

214. Barmore, *supra* note 116, at 462 (“[R]evenge porn readily satisfies the first and third prongs of the *Miller* test, appealing to prurient interests and lacking serious literary, artistic, political, or scientific value.”).

215. *Id.*

216. *See id.*

217. 47 U.S.C. § 230(c)(1) (2012) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

The statute terms websites and other internet firms that host content as “interactive computer service[s].”<sup>218</sup> Congress relieved websites and other interactive computer services for liability directly caused by third parties posters in order to “promote the free exchange of information and ideas over the Internet.”<sup>219</sup>

But, as many have regretted, § 230 relieves revenge porn site operators from liability for the pictures they host.<sup>220</sup> These site operators are “interactive computer services” and thus cannot “be treated as the publisher or speaker of any information provided by another information content provider.”<sup>221</sup> This immunity has protected website and internet firms from suits for “defamation, false information, sexually explicit content including minors, discriminatory housing ads, and threats.”<sup>222</sup> It also immunizes them from state criminal laws based on the material others post on their sites.<sup>223</sup>

There are exceptions and special rules for this immunity. The immunity created by § 230(c)(1) is limited by § 230(e)(2), which requires the court to construe § 230(c)(1) in a manner that would neither “limit or expand any law pertaining to intellectual property.”<sup>224</sup> As a result, the CDA does not clothe service providers in immunity from “law[s] pertaining to intellectual property.”<sup>225</sup> In addition, § 230(e)(3) states that “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”<sup>226</sup>

The courts are split as to whether § 230(c)(1) immunizes internet web sites from claims of the rights of publicity—which are, of course, state claims.

218. *Id.* § 230(f)(2) (“The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”).

219. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

220. Zak Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CALIF. L. REV. 1303, 1334 (2014) (“Most legal commentators argue that courts would interpret Section 230 to grant these websites immunity. Revenge porn websites would likely satisfy the first and third elements required for Section 230 immunity: they provide interactive computer services and are treated as publishers or speakers.”).

221. Dalisi Otero, Comment, *Confronting Nonconsensual Pornography with Federal Criminalization and a “Notice-and-Takedown” Provision*, 70 U. MIAMI L. REV. 585, 597, 602 (2016) (quoting Communications Decency Act of 1996 § 230) (“Although state criminalization of nonconsensual pornography protects victims more than tort law does, service providers still have broad immunity under § 230 that protects them from state criminal law. Thus, service providers generally cannot be prosecuted under state criminal law for content posted by third parties.” (citations omitted)).

222. Franklin, *supra* note 220, at 1313.

223. Otero, *supra* note 221, at 602.

224. 47 U.S.C. § 230(e)(2) (2012).

225. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001)).

226. 47 U.S.C. § 230(e)(1), (3).

The Ninth Circuit Court of Appeals has concluded that “*only* [the] federal intellectual property claims such as copyright and trademark infringement are exempt from CDA immunity.”<sup>227</sup> In *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit made a policy-oriented argument that looked to the statutory purpose of the CDA.<sup>228</sup> It pointed out that state law “may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals.”<sup>229</sup> Due to the transboundary nature of the internet, these varied laws would subject internet websites and firms to large and unpredictable sets of legal rules. This “would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.”<sup>230</sup> Thus, the Ninth Circuit read § 230(e)(2)’s “law[s] pertaining to intellectual property” as meaning *only* federal laws.<sup>231</sup> This would immunize internet services from state publicity rights liabilities.

Other Circuits have come to the opposite conclusion. Most notably, in *Doe v. Friendfinder Network*, the District Court of New Hampshire took a more textual approach.<sup>232</sup> It followed dicta from a First Circuit opinion in *Universal Communication Systems, Inc. v. Lycos, Inc.*, that focused on § 230(e)(2)’s text.<sup>233</sup> Unlike the Ninth Circuit’s limitation of the words “any law” to federal intellectual property law, the District Court read the term literally to include state intellectual property law. It observed that the CDA sometimes distinguishes between federal law and state law—and its failure to do so in § 230(e)(2) and its explicit use of the word “any” demonstrates an intention to exclude state intellectual property law from the immunity’s ambit.<sup>234</sup>

Assuming the First Circuit’s approach proves more influential, publicity rights, as state intellectual property laws, stand the best shot of providing redress against website and other internet firms that host and distribute revenge pornography received from third-parties. The First Circuit’s approach to § 230 would provide redress against website owners—which no other proposed civil remedy, nor the state criminal law, allows.

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227. Ericka H. Spears, Comment, *Strangers with Our Faces: How the Communications Decency Act Can Prevent Right of Publicity Stunts*, 79 U. CIN. L. REV. 409, 421 (2010) (emphasis added).

228. *Perfect 10, Inc.*, 488 F.3d at 1118–19.

229. *Id.* at 1118.

230. *Id.*

231. *Id.* at 1118–19.

232. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294–98 (D.N.H. 2008).

233. *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23 (1st Cir. 2007) (“Claims based on intellectual property laws are not subject to Section 230 immunity.”).

234. *Doe*, 540 F. Supp. 2d at 300 (“[T]he use of ‘any’ in § 230(e)(2), in contrast to the use of ‘federal’ elsewhere in the CDA, suggests that Congress did not intend the terms to be read interchangeably. ‘It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’” (quoting *Duncan v. Walker*, 533 U.S. 167, 173 (2001))).

## VI. CONCLUSION

So far, we have not said anything about the theory of privacy, yet the justifications and goals of privacy law remain hotly debated. But this Article tries to draw a line that seems natural and consistent with both moral intuition as well as privacy theory. Scholars have argued that privacy “safeguards rules of civility that in some significant measure constitute both individuals and community.”<sup>235</sup> Protecting private information is like creating “spatial territories [that] provide a normative framework for the development of individual personality.”<sup>236</sup> Others have argued that controlling access to information about oneself is necessary for personal development because such protection “shelters dynamic, emergent subjectivity from the efforts of commercial and government actors to render individuals and communities fixed, transparent, and predictable.”<sup>237</sup>

Thus, at some level, protecting privacy creates a zone free from social judgment so that we can do certain things. Protecting the naked body’s integrity in the age of the smartphone and the internet does just that. It gives people greater comfort and control when going to the doctors or staying at the hospital, working out at the gym, and, yes, having romantic relationships. Using publicity rights as the legal mechanisms offers a constitutional, relatively efficient mechanism to provide people protection and victims remedy.

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235. Post, *supra* note 21, at 959.

236. *Id.* at 985. “[C]ivility rules maintained by the tort embody the obligations owed by members of a community to each other, and to that extent define the substance and boundaries of community life.” *Id.* at 1008.

237. Cohen, *supra* note 21, at 1905.