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Fighting Back Against "Revenge Porn"

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Abstract

"Revenge porn" is the on-line posting of intimate photographs of a former wife or girlfriend done to humiliate the subject of the image. Ironically, a defendant charged with the publication of revenge porn is likely to invoke the majestic principles underlying the First Amendment's Free Speech Clause as a defense to criminal or civil liability. His argument would be that the First Amendment protects an individual against civil or criminal liability for publishing a lawfully obtained image accurately depicting the photographer's subject, regardless of how unflattering the photograph may be or the effect that its publication may have on the subject. But intimate photographs are shared under circumstances giving rise to an implied agreement of confidentiality between the parties, and the Free Speech Clause does not shield a recipient against a broken promise not to share a photograph with others. Imposing criminal or tort liability on someone who breaches an agreement of confidentiality is not a form of actual or threatened censorship. It is only an effort to give the government or victims a remedy for the harm that it causes.

The Troublesome Phenomenon of Revenge Porn

History may always move forward, but not every step forward is an advance in civil society. Consider the modern-day phenomenon colloquially known as "revenge porn"—the on-line posting of intimate photographs of a former wife or girlfriend done to humiliate the subject of the image.[1] The boorish phenomenon of posting these photographs on the Web is likely the result of several factors: the advent of digital cell-phone cameras, the ease of access to the Internet, the modern practice of intimate partners sharing risqué photos,

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Key Points

- So-called revenge porn can inflict serious emotional harm on its victims, such as a debilitating loss of self-esteem, crippling feelings of humiliation and shame, discharge from employment, and verbal or physical harassment. In some cases, the victim has even considered or committed suicide.
- The victims of revenge porn, however, do have an opportunity for relief. Tort damages are the traditional remedy for personal injuries, such as an invasion of one's privacy or the besmirching of one's good name, and victims can pursue state-law tort suits for damages against the individuals responsible for posting revenge porn photographs.
- Recognizing a breach-of-confidentiality tort for revenge porn is a reasonable way to deal with the competing privacy and free speech interests. If a plaintiff can establish an implied promise of confidentiality, the online publication of an intimate photograph constitutes the type of betrayal for which tort law should provide a remedy.

and the harsh emotions generated by the breakup of a serious relationship.[2] Yet, unlike the daguerreotypes or Polaroids of days past, Internet photographs are widely available and may last forever. As I have noted elsewhere:

> Like an elephant, the Internet never forgets. Information potentially lives in "the cloud" forever. That is good if you are looking for an obscure music video or film clip. That is bad if your high school posts your freshman-year class photo. That is horrible if someone posts a compromising picture of you. Internet images have the half-life of Tellurium-128. It also is difficult, if not impossible, to delete information from the Internet, even with the consent of the party who posted it and the help of the site on which it sits, because the zeroes and ones may exist in a cache owned by a search engine such as Ask, Google, or Yahoo! Information also may reside in the server of a firm that collects and sells customer information. In fact, some companies, such as Spokeo or DoubleClick, specialize in "data aggregation"—that is, the scouring of social media websites, such as Facebook, for personal information about users and the sale of that information to a company that uses it to offer you particular goods or services. In an age when 2.8 billion people are connected to the Internet and "you are what Google says you are," the permanence of unflattering information about us on the Internet poses a troubling prospect for us all.
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> The ability for someone to start life over, to reinvent or reboot oneself, offers us a valuable opportunity for a fresh start. It enables us to avoid being chained to our mistakes like Jacob Marley. In order for that opportunity truly to be effective, however, we must be able to leave some of our past behind. Today, that is a difficult feat to accomplish in the United States, given the First Amendment (although it soon may become less difficult in the European Union). Information on the Internet is available for a far longer period than when only the spoken or written word could damage our reputation or disclose our private affairs. The permanence of information on the Internet carries a past insult or injury forward, potentially forever, making an original sin into an eternal one.
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> American law has never recognized a "right to be forgotten" in part because, before the last few decades, no such right was ever necessary. Before the digitalization of photography and the advent of the Internet, the transaction costs of sharing information limited its distribution to those few recipients that average people chose themselves. Only celebrities—presidents, movie stars, professional athletes, and the like—were at risk of having their everyday exploits and activities photographed and shown to the world. But that day is gone forever. Scott McNealy of Sun Microsystems once stated that "[y]ou already have zero privacy. Get over it." Many observers, regretfully, agree with him. We may not yet reside in Marshall McLuhan's "global village" (or in George Orwell's Hades-like version of it), but the ubiquity of camera-equipped cell phones and the ease of uploading photographs or videos onto the Internet means that now we all face the risk of being made into a celebrity, like it or not. What happens in Vegas may stay in Vegas, but not what appears on Facebook.[3]

This pernicious practice is not a rare phenomenon. A December 2016 study indicated that it affects one in 25 Americans, mostly people in the 15–29 age bracket and more often women than men.[4] Whenever it does occur, revenge porn can inflict serious emotional harm on its victims, such as a debilitating loss of self-esteem, crippling feelings of humiliation and shame, discharge from employment, and verbal or physical harassment. In some cases, the victim has even considered or committed suicide.[5]

Initially, victims asked websites to delete these photographs and, if they refused, sued the website operator. For the most part, those lawsuits have been unsuccessful. The principal reason why is that Section 230 of the Communications Decency Act of 1996[6] provides that a website cannot be treated as "the publisher or speaker" of material posted online by someone else.[7] As a practical matter, Section 230 grants a website immunity from damages or injunctive relief for posting revenge porn if the website posts it without editing or revising whatever is posted.[8] Victims of revenge porn therefore found themselves unable to keep from feeling humiliated before the world.[9]

State and federal government officials have taken some steps to address this misconduct. Some states have enacted criminal laws to prohibit revenge

porn.[10] The federal government could prosecute an individual under the Computer Fraud and Abuse Act[11] if he hacked into someone else's computer to obtain photos.[12] In 2015, the Federal Trade Commission filed a complaint against one purveyor of revenge porn under Section 5(a) of the Federal Trade Commission Act,[13] alleging that he had deceived women into sending him intimate photos and then referred them to a different website that he controlled, "where they were told they could have the pictures removed if they paid hundreds of dollars."[14] Finally, to bolster federal efforts to address this problem, several Members of the House of Representatives from both parties introduced a bill in 2016 that would have made the publication of revenge porn a federal crime.[15]

Yet those developments do not guarantee relief for every victim, or perhaps even most. The government cannot bring criminal charges or civil actions against every violation of law and must therefore prioritize its use of limited enforcement resources. What is more, no one can force the government to take action against an alleged offender, because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[16]

The victims of revenge porn, however, do have an opportunity for relief. Tort damages are the traditional remedy for personal injuries, such as an invasion of one's privacy or the besmirching of one's good name,[17] and victims can pursue state-law tort suits for damages against the individuals responsible for posting revenge porn photographs. Of course, tort suits have no guarantee of success, and, to date, tort actions in such cases have had mixed outcomes.[18] In addition, defendants will argue that the First Amendment's Free Speech Clause permits them to display, on the Internet or elsewhere, whatever photographs they lawfully possess that accurately depict whatever was in the viewfinder, regardless of the embarrassment that the picture may cause a subject. The courts have yet to resolve those issues.

Properly defined, a criminal statute and civil tort law should be able to overcome a defense based on the Free Speech Clause. In fact, that defense should not pose a serious hurdle. The government should be able to bring a criminal prosecution or civil action against the party responsible for placing such images on the Internet, and a victim of revenge porn should be able to obtain damages against that person for his tortious conduct.

The Central Issue in Revenge Porn: Betrayal

A victim of revenge porn could seek relief under one or more of several traditional tort theories, such as invasion of privacy, "false light" portrayal, defamation, and intentional infliction of emotional distress.[19] Some scholars have also urged the courts to provide a tort remedy for a breach of an express or implied assurance of confidentiality in connection with otherwise private information.[20] Despite the outrageousness of the conduct at issue, however, a woman might have difficulty proving her case. The problem for a woman is that consent is a defense to each of those torts, and a defendant will argue that he obtained the photographs with her consent because she allowed him to photograph her or because she sent him a "selfie."[21] Nonetheless, whatever may be the result in other cases in which consent is raised as a defense—contact sports or magazine centerfolds, for example—there is a feature of this course of conduct that should enable a plaintiff to recover: the element of betrayal.

American courts have been reluctant to impose tort liability for breaching a promise. Part of the reason is that the claim sounds more in contract than in tort; part is that American society has operated on the presumption that a secret once disclosed is no longer entitled to legal protection; and part is that the Free Speech Clause generally entitles someone to disclose whatever information he lawfully possesses. Yet some relationships convey an implicit promise of confidentiality, an assurance that certain information "will go no further" than the recipient, an assurance that the courts have protected by offering an injured party damages for the disclosure of personal information. For example, courts have ruled that physicians and banks can be held liable for disclosing patient or depositor information.[22] American society also has an expectation in the privacy of communications sent through the mail.[23] The law of evidence recognizes a privilege for certain types of communications, such as ones between spouses or between patients and their physicians.[24] Some scholars have argued, moreover, that it is important to deter a breach of a confidential relationship or exchange by providing a tort law remedy.[25]

Those principles are relevant here because the only feature that distinguishes revenge porn from the tort remedies for other types of disclosures is this: The person who publishes revenge porn

breaches an implied promise of confidentiality that a photograph one intimate partner shares with another will never be disclosed to anyone else.[26] As I have said elsewhere:

> Betrayal is the key to the proper legal analysis of revenge porn. The essence of revenge porn is the Internet-posting of nude photographs of a former intimate partner for the purpose of subjecting her to public humiliation. That conduct is accomplished, however, through a betrayal of the trust that the victim had in her partner that he would never publicize the photographs. Online posting of the same surreptitiously taken photograph would certainly constitute the offensive publication of private details of an individual's life for which the *Restatement (Second) of Torts* would provide a damages remedy. The only difference between that scenario and the one characteristic of revenge porn is that the person who published the photograph violated a tacit agreement between the parties over what could be done with it. Taken, yes; possessed, yes; publicized, no. The breach of that assurance of confidentiality is what tort law should protect.[27]

Various scholars have recognized the legitimacy of providing a remedy for privacy violations. As Professor Daniel Solove has explained:

> [D]isclosure and breach of confidentiality cause different kinds of injuries. Both involve revealing a person's secrets, but breaches of confidentiality also violate trust in a specific relationship. The harm from a breach of confidentiality, then, is not simply that information has been disclosed, but that the victim has been betrayed.[28]

Professor Jeffrey Rosen agrees:

> If individuals cannot form relationships of trust without fear that their confidences will be betrayed, the uncertainty about whether or not their most intimate moments are being recorded for future exposure will make intimacy impossible; and without intimacy, there will be no opportunity to develop the autonomous, inner-directed self that defies social expectations rather than conforms to them.[29]

Recognizing a breach-of-confidentiality tort for revenge porn is a reasonable way to deal with the competing privacy and free speech interests. A victim would need to prove that she gave a photograph to someone else with the expectation that the recipient would not disclose it to third parties. It is highly unlikely that the parties would reduce their agreement to writing, and there may not even have been an express demand for a promise of confidentiality. But neither possibility should foreclose a victim from proving that she received an implied promise as the quid pro quo for giving her partner a photograph. Accordingly, if a plaintiff can establish an implied promise of confidentiality, the online publication of an intimate photograph constitutes the type of betrayal for which tort law should provide a remedy.[30]

It is important to remember that the betrayal at issue here is not a simple breach of a commercial agreement. The practice is loutish; the speech interest (if any) is trivial; and the harm is real, can be severe, and always will be permanent. Mark Twain eloquently described the injury that can result from the disclosure of intimate information when he wrote about the unconsented-to publication of a love letter:

> The frankest and freest and privatest part of the human mind and heart is a love letter; the writer gets his limitless freedom of statement and expression from his sense that no stranger is going to see what he is writing. Sometimes there is a breach-of-promise case by and by; and when he sees his letter in print it makes him cruelly uncomfortable and he perceives that he never would have unbosomed himself to that large and honest degree if he had known that he was writing for the public.[31]

Add to the mix the proposition that "A picture is worth a thousand words" and you can start to get an idea of how much damage this practice can generate.

The Free Speech Clause

Anyone who posts intimate photographs on the Internet will undoubtedly defend against a criminal prosecution or tort suit by claiming that his conduct is protected by the First Amendment's Free Speech Clause. The argument will start from the premise that publication on the Internet is entitled to the

same First Amendment protection that the owner of a bookstore or a movie theater would receive for his displays.[32] Then he will argue that the government cannot deem simple depictions of nudity as being "obscene"[33] and cannot forbid the Internet publication of "indecent" photographs.[34] Next, he will mix in the contention that the First Amendment protects the right to publish lawfully obtained information.[35] He will conclude by maintaining that it makes no difference whether the federal government or a state makes it a crime or a tort to post revenge porn because either sanction violates the First Amendment, given its censorious effect.[36] The result, a defendant will argue, is that revenge porn is constitutionally protected speech despite its offensive character.[37]

In response, it will be argued that revenge porn should receive little, if any, First Amendment protection.[38] The argument would be that revenge porn does not inform public debate and is not a legitimate form of artistic self-expression. "The boorish practice of revenge porn inflicts harm on its victims without any corresponding social benefit."[39] Revenge porn is the photographic equivalent of coprolalia. It has no positive societal benefit and humiliates its victim. That type of speech, as Professor Daniel Solove has argued, "should not be treated the same as disclosures made to educate or inform."[40] It would therefore belittle the First Amendment to afford revenge porn anything more than *de minimis* protection—protection that is more than outweighed by the state's interest in protecting women against the harm that it causes.

Nonetheless, a plaintiff might have a difficult time persuading the Supreme Court of the United States to exclude revenge porn entirely from protected "speech." In 2010, the Court refused to treat the visual depiction of horrific forms of animal cruelty as categorically unprotected speech. In *United States v. Stevens*,[41] the Court was forced to decide whether a federal law prohibiting the interstate distribution of depictions of animal cruelty could withstand a First Amendment challenge. The relevant statute, Section 48 of Title 18 of the United States Code,[42] made it a crime to create, sell, or possess so-called crush videos— videotape depictions of the intentional torture and killing of defenseless small animals such as dogs, often by women barefoot or wearing high heels, accompanied by the helpless squeals of the animals.[43] The Court found "startling and dangerous" the government's argument that the courts could and should engage in what the Court described as a "highly manipulable" categorical balancing test directing the courts to weigh the pros and cons of particular types of speech.[44] *Stevens* therefore protected information that barely makes any material contribution to any conceivable legitimate interest, let alone an important matter of legitimate public or private concern. The upshot is that the Court might be unlikely to place revenge porn entirely out of bounds or to rank it at the bottom of the pyramid of free speech interests.

Fortunately, the courts would not need to resolve that issue, because there is another way to look at this problem, one that allows victims or the government to attack revenge porn without trespassing on the Free Speech Clause and without forcing the courts to address the issues noted above.

Go back to what is the heart of revenge porn: betrayal, accomplished by the online posting of an intimate photograph that the victim reasonably believed would never be made public. Of course, it is most unlikely that an intimate couple would formalize their shared understanding that such a photograph is for the recipient alone. But imagine for a moment that they did. After all, it is not unheard of for actresses or models to negotiate a right to veto the use of particular photographs or film sequences in order to avoid the public display of complete or partial nudity. Those scenarios, of course, involve the depiction of a woman in a commercial setting, such as a film, but the principle is the same in noncommercial cases. Commitments can be made even when no money changes hands. As the *Restatements (Second) of Contracts* provides, "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[45] An enforceable commitment can also exist without being stated expressly or inscribed in a document. A promise "may be inferred wholly or partly from conduct."[46]

Add together those principles, and what you have in the case of revenge porn is this: A husband or boyfriend can agree not to disclose a photograph to anyone else; that agreement can be express or implied; and disclosure can violate that agreement, leading to an action for damages or (less often, but not by any means legally impermissible[47]) a criminal charge. What would give rise to liability in that setting, and

what would take such a case out of the ordinary free speech playing field, is the violation of the parties' implicit nonpublication agreement.[48]

Directly on point is the Supreme Court's 1991 decision in *Cohen v. Cowles Media Co.*[49] Dan Cohen was associated with a certain gubernatorial candidate. He wanted to provide the Minneapolis *Star Tribune* newspaper with information about a rival candidate but wished to remain anonymous. He and the newspaper worked out an agreement: He gave the newspaper the information in return for its assurance of confidentiality. Afterwards, however, the newspaper went back on its word and outed Cohen as its source. After losing his job, Cohen sued the newspaper for damages.[50] The Minnesota Supreme Court decided that Cohen stated a claim for damages under the Minnesota doctrine of promissory estoppel,[51] but it also ruled that the Free Speech Clause denied Cohen the right to recover for the newspaper's conduct.[52] The Supreme Court of the United States granted review and reversed.

The Court started by noting that publishers are subject to generally applicable, content-neutral statutes such as the copyright laws,[53] the labor laws,[54] the antitrust laws,[55] and the tax laws.[56] Those statutes, the Court noted, can be applied to the media in the same manner that they govern everyone else.[57] The same principle, the Court held, applies to state laws governing promissory estoppel. That body of law does not single out the media or any particular type of speech for special, unfavorable treatment. It applies to everyone and "simply requires those making promises to keep them."[58] That result, the Court held, does not infringe on freedom of expression. Because "[t]he parties themselves...determine the scope of their legal obligations," any restrictions that may be placed on the publication of truthful information are "self-imposed."[59] In addition, application of promissory estoppel doctrine would not deter third parties from engaging in protected forms of expression. Any deterrent effect would be "no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them."[60]

Cowles Media thus shows that, because parties may contract away their free speech rights, imposing liability for revenge porn involving betrayal would not violate the First Amendment.[61] Whatever the merits may be of the argument that revenge porn should receive little, if any, free speech protection, the Supreme Court's decision in *Cowles Media* enables the government to afford a victim protection through the criminal law or a damages remedy under tort law:

> [H]ere, as in *Cowles Media*, tort liability would not rest on any basis that threatens government censorship because of the messages or ideas contained in a photograph. A tort or criminal offense protects only against the publication of private aspects of a person's life that a reasonable person would find offensive and that breached an implicit promise of confidentiality. Accordingly, a *Playboy* model could not recover damages for the magazine's use of her photos because they were taken with the clear understanding that they would be published. Limiting recovery in that manner—to instances in which a plaintiff can prove that an offensive publication betrayed a promise—would not jeopardize legitimate free speech concerns. Here, as in *Cowles Media*, tort liability would simply encourage people to keep their word.[62]

Conclusion

Just as automobiles can be used as ambulances or getaway cars and firearms can be used for self-defense or murder, the Internet can be used for good or ill. The phenomenon of revenge porn is an example of the latter. Ironically, a defendant charged with the publication of such low-rent "speech" is likely to invoke the majestic principles underlying the First Amendment's Free Speech Clause as a defense to criminal or civil liability. His argument would be that the First Amendment protects an individual against civil or criminal liability for publishing a lawfully obtained image accurately depicting the photographer's subject, regardless of how unflattering the photograph may be or the effect that publication may have on the subject.

But intimate photographs are shared under circumstances giving rise to an implied agreement of confidentiality between the parties. That fact is critical because the Free Speech Clause does not shield a recipient against a broken promise not to share a photograph with others. Imposing criminal or tort liability on someone who breaches an agreement of confidentiality will not chill protected speech, because doing so is not a form of actual or threatened

censorship. It is only an effort to give the government or victims a remedy for the harm that it causes.

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Endnotes

1. A majority of victims are women, so this paper will use that designation.
2. Only a small percentage (perhaps 10 percent) of the photographs used in revenge porn are taken surreptitiously. In the remaining cases, either the intended recipient, usually a husband or boyfriend, is the photographer, or (what most often happens) the woman in the photo takes the picture herself, a practice known as taking a "selfie." Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 Loy. L.A. L. Rev. 57, 63–64 n.23 (2014).
3. Larkin, *supra* note 2, at 60–64 (footnotes omitted). For other discussions of the legal issues raised by revenge porn, see, for example, Danielle Keats Citron, Hate Crimes in Cyberspace (2014); Derek E. Bambauer, *Exposed*, 98 Minn. L. Rev. 2025 (2014); Cynthia Barmore, Note, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 Stan. L. Rev. 447 (2015); Aubrey Burris, Note, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 Fla. L. Rev. 2325 (2014); Anupam Chander, *Youthful Indiscretion in an Internet Age*, *in* The Offensive Internet: Privacy, Speech, and Reputation 124 (Saul Levmore & Martha C. Nussbaum eds., 2010); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014); Joseph J. Pangaro, Comment, *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 (2015); Alexis Fung Chen Pen, *Striking Back: A Practical Solution to Criminalizing Revenge Porn*, 37 T. Jefferson L. Rev. 405 (2015); Samantha H. Scheller, Comment, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. Rev. 551 (2015); Zak Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 Cal. L. Rev. 1303 (2014); Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, Slate (Sept. 25, 2013, 6:21 PM), http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html.
4. "*Revenge Porn" Takes Toll on Millions, Study Shows*, The Star Online, Tech News (Dec. 16, 2016), http://www.thestar.com.my/tech/tech-news/2016/12/16/revenge-porn-takes-toll-on-millions-study-shows/; *see also Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, Intel Security (Feb. 4, 2013), ("McAfee today released findings from the company's 2013 Love, Relationships, and Technology survey which examines the pitfalls of sharing personal data in relationships and discloses how breakups can lead to privacy leaks online.... McAfee has found that *13% of adults have had their personal content leaked to others without their permission.* Additionally, 1 in 10 ex-partners have threatened that they would expose risqué photos of their ex online. According to the study, these threats have been carried out nearly 60% of the time."), http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx) (emphasis in original).
5. Larkin, *supra* note 2, at 65–66 & nn.27–28.
6. Section 230 was part of the Communications Decency Act of 1996, which itself was Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified, as amended, at 47 U.S.C. § 230 (2012)).
7. 47 U.S.C. § 230 (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").
8. *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1099–1106 (9th Cir. 2009); Chi. Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008); Universal Commc'ns Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (collecting cases ruling that 47 U.S.C. § 230 was designed to avoid imposing liability on companies that serve as intermediaries for Internet speech); Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003); Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 984–85 (10th Cir. 2000); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); Gavra v. Google, Inc., No. 5-12-CV-06547-PSG, 2013 WL 3788241, at *2 (N.D. Cal. 2013) (dismissing defamation action against Google in reliance on Section 230); Daniel J. Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 153–60 (2007). The few lower court decisions allowing claims to go forward against Internet service providers involve odd fact patterns or are outliers. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165–70 (9th Cir. 2008) (en banc) (ruling that a website was not entitled to Section 230 immunity because it drafted the roommate housing preference questionnaire and required answers to it); Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. Intell. Prop. & Ent. L. 422, 429–30 (2014). Ironically, Congress enacted Section 230 to encourage websites voluntarily to monitor and *delete* obscene or offensive material, not to shelter it against a civil action or criminal charge. Larkin, *supra* note 2, at 67 (footnote omitted); *see, e.g.*, H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.); *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1163–64; Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003). Relying on the Free Speech Clause, the Supreme Court held unconstitutional provisions in the Communications Decency Act of 1996 defining "offensive" speech. *See* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 661 (2004); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 882 (1997). The unintended effect of those decisions was to leave in place only those provisions of the 1996 act freeing websites from liability for allowing others to post revenge porn. *See, e.g.*, Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 Harv. J.L. & Tech. 163, 174 (2006).
9. Some men even created websites just to post these photographs. *See* Larkin, *supra* note 2, at 64 n.24.
10. *See id.* at 69, 94–97.
11. 18 U.S.C. § 1030 (2012).
12. For discussions of the history and applications of the act, *see* Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minn. L. Rev. 1561 (2010); Orin S. Kerr, *Cybercrime's Scope: Access and Authorization in Computer Misuse Statutes*, 78 N.Y.U. L. Rev. 1596 (2003); Paul J. Larkin, Jr., United States v. Nosal: *Rebooting the Computer Fraud and Abuse Act*, 8 Seton Hall Circuit Rev. 257 (2012).

13. Section 5(a) of the Federal Trade Commission Act empowers the FTC to seek civil relief against parties who use "[u]nfair methods of competition in or affecting commerce" or "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2012).
14. FTC, *Website Operator Banned from the "Revenge Porn" Business After FTC Charges He Unfairly Posted Nude Photos* (Jan. 29, 2015), http://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges; *see* 80 Fed. Reg. 6714, 6714–15 (Feb. 6, 2015). The FTC ultimately entered into a settlement agreement with Brittain over his activities. *See* Larkin, *supra* note 2, at 71–72 & n.48.
15. Section 2 of the Intimate Privacy Protection Act of 2016, H.R. 5896 (2016), would have added the following provision to the federal criminal code, Title 18 U.S.C.:

§ 1802. Certain activities relating to visual depictions of the intimate parts of an individual or of an individual engaged in sexually explicit conduct

(a) In general.—Whoever knowingly uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to distribute a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct, or of the naked genitals or post-pubescent female nipple of the person, with reckless disregard for the person's lack of consent to the distribution, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Exceptions.—

(1) LAW ENFORCEMENT AND OTHER LEGAL PROCEEDINGS.—This section—

(A) does not prohibit any lawful law enforcement, correctional, or intelligence activity;

(B) shall not apply in the case of an individual reporting unlawful activity; and

(C) shall not apply to a subpoena or court order for use in a legal proceeding.

(2) VOLUNTARY PUBLIC OR COMMERCIAL EXPOSURE.—This section does not apply to a visual depiction of a voluntary exposure of an individual's own naked genitals or post-pubescent female nipple or an individual's voluntary engagement in sexually explicit conduct if such exposure takes place in public or in a lawful commercial setting.

(3) CERTAIN CATEGORIES OF VISUAL DEPICTIONS EXCEPTED.—This section shall not apply in the case of a visual depiction, the disclosure of which is in the bona fide public interest.

(4) TELECOMMUNICATIONS AND INTERNET SERVICE PROVIDERS.—This section shall not apply to any provider of an interactive computer service as defined in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. 230 (f)(2)) with regard to content provided by another information content provider, as defined in section 230(f)(3) of the Communications Act of 1934 (47 U.S.C. 230(f)(3)) unless such provider of an interactive computer service intentionally promotes or solicits content that it knows to be in violation of this section.

(c) Definitions.—In this section:

(1) Except as otherwise provided, any term used in this section has the meaning given that term in section 1801.

(2) The term "visual depiction" means any photograph, film, or video, whether produced by electronic, mechanical, or other means.

(3) The term "sexually explicit conduct" has the meaning given that term in section 2256(2)(A).

The bill was sponsored by Representative Jackie Speier (D–CA). Nine other House members, from both parties, were co-sponsors.

16. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973); *id.* ("[A] citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.").
17. *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (1971); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 797–802; *id.* § 117, at 856–66 (5th ed. 1984).
18. *See* Larkin, *supra* note 2, at 68 & n.40.
19. *See id.* at 76–81. Each tort requires publication of defamatory or embarrassing material. *See* Restatement (Second) of Torts § 652D (1977); Keeton et al., *supra* note 17, § 113, at 797–802 (discussing publication requirement for defamation); *id.* § 117, at 856–66 (same, for privacy claim).
20. *See, e.g.*, Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 Buff. L. Rev. 1 (1995); G. Michael Harvey, Comment, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. Pa. L. Rev. 2385 (1995); Jessica Litman, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 Stan. L. Rev. 1283, 1308–11 (2000); Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationships Privacy Through Implied Contracts of Confidentiality*, 74 U. Cin. L. Rev. 887 (2006); Neal M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123 (2007); Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426 (1982). *Contra* Steven A. Bibas, *A Contractual Approach to Data Privacy*, 17 Harv. J. L. & Pub. Pol'y 591, 606–11 (1994) (arguing in favor of express privacy contracts). *Contra* Dianne L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291 (1983). It is unusual but not unheard-of to provide a tort remedy for a contract breach. *See* Larkin, *supra* note 2, at 89 ("While contract and tort law generally are distinct legal doctrines addressed to different interests, Professors Prosser and Keeton have argued that it may be possible for a party to recover damages in tort for losses suffered by a broken promise. To be sure, a breach-of-confidentiality tort is less robust in the United States than it is in the English Commonwealth of Nations. But courts have recognized a breach-of-confidentiality tort for some plaintiffs, and it is a reasonable way to deal with the competing privacy and free speech interests. Accordingly, it would be sensible for tort

law to offer the victims of revenge porn redress for an invasion of privacy if the victim can prove a broken implicit promise of confidentiality.") (footnotes omitted).

21. "Consent would be a complete defense to a claimed invasion of privacy or intentional tort. That would defeat any such theory here, a defendant would argue, because the victim originally consented to having the picture taken—by definition if it was a 'selfie.' Moreover, we always take the risk that once we disclose a secret to another that he will betray our confidence. As Benjamin Franklin warned, 'Three can keep a secret if two of them are dead.' Truth also is a defense to a claim of defamation, as well as to a claim that the publication depicted the victim in a false light. Pictures don't lie, the argument would go; they merely represent what the photographer saw through the viewfinder. While the pictures may be unflattering and the photographer's state of mind may have been malicious, the argument would conclude, photographs truthfully reveal exactly who the victim was and how she posed for the camera." Larkin, *supra* note 2, at 81–82 (footnotes omitted).
22. *Id.* at 88 & n.113.
23. *Id.* at 88 & n.114.
24. *Id.* at 88 n.115.
25. *See*, *e.g.*, Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationships Privacy Through Implied Contracts of Confidentiality*, 74 U. Cin. L. Rev. 887, 914 (2006); Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 Geo. L.J. 2117, 2123–24 (2001); Daniel J. Solove, Understanding Privacy 138 (2010).
26. "The privacy and reputational interests to be protected clearly are legitimate. More than thirty states provide a remedy for the public disclosure of a private matter that is highly offensive to a reasonable person. Revenge porn also does not contribute to political debate or to any issue of public interest; on the contrary, revenge porn is highly offensive, even sleazy. Finally, it would be difficult to argue that revenge porn is a legitimate, let alone necessary, mode of self-expression. One need not subscribe to the belief that revenge should be left to the Almighty in order to conclude that revenge porn is a shoddy form of speech that contributes nothing to the community's discussion of any issue of public importance and that expresses little more than a mean-spirited mindset and desire to inflict reputational harm on a former intimate partner. In fact, it is only the victim's trust in her partner not to display the photograph to the world that could keep her from being able to prevail under a standard invasion of privacy theory. Yet, that fact also shows us what should be the critical issue in any debate over the use of tort law to compensate victims of revenge porn: betrayal." Larkin, *supra* note 2, at 84 (footnotes omitted).
27. *Id.* at 85.
28. Solove, *supra* note 25, at 138. Of course, if a party mistakenly publicizes such photos to a large number of people other than an intended recipient, there would be no act of betrayal.
29. Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 Geo. L.J. 2117, 2123–24 (2001).
30. *See* Larkin, *supra* note 2, at 89–92.
31. Mark Twain, The Autobiography of Mark Twain xxv (Charles Neider ed. 1990).
32. *See*, *e.g.*, Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004) (holding unconstitutional under the Free Speech Clause provisions of the Child Online Protection Act (COPA), Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (1994 ed. Supp. II)), that required online service providers to prevent minors from accessing "material that is harmful to minors"); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (holding unconstitutional under the Free Speech Clause provisions of the Communications Decency Act, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. §§ 223(a) & 223(d) (2006)), that prohibited use of the Internet to transmit "indecent images" or to send "patently offensive messages" to minors); *cf.* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126–31 (1989) (holding unconstitutional a congressional ban on "dial-a-porn" "indecent" telecommunications).
33. *See* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (holding that "nudity alone" is insufficient to render material legally "obscene" under *Miller v. California*, 413 U.S. 15 (1973)).
34. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *id.* (collecting cases).
35. *See*, *e.g.*, Bartnicki v. Vopper, 532 U.S. 514 (2001) (ruling that the First Amendment protects a newspaper's right to publish the contents of an illegally undertaken wiretap that the newspaper played no role in conducting); Florida Star v. B.J.F., 491 U.S. 524 (1989) (ruling that that the First Amendment protects a newspaper for publishing the name of a rape victim that the paper lawfully acquired from a police report placed in the department's pressroom); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (ruling that newspapers cannot be prosecuted for disclosing the name of a juvenile offender that the papers lawfully obtained by listening to the police band and interviewing witnesses); Okla. Publ'g Co. v. Dist. Ct. of Okla., 430 U.S. 308 (1977) (ruling that a newspaper cannot be held liable for publishing the events that transpired during a closed-door juvenile proceeding when the judge allowed media to sit in the courtroom); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (ruling that a television station cannot be held liable in tort for reporting the name of a rape victim that had been disclosed in court at trial).
36. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) ("[T]he application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."); *see also*, *e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

37. *See, e.g.*, Scheller, *supra* note 3, at 565–76; Gloria Goodale, *California Outlaws "Revenge Porn." Not Everyone Thinks That's a Good Idea*, Christian Sci. Monitor (Oct. 2, 2013), http://www.csmonitor.com/USA/Justice/2013/1002/California-outlaws-revenge-porn.-Not-everyone-thinks-that-s-a-good-idea.-video; Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013), http://www.businessinsider.com/is-revenge-pornprotected-by-the-first-amendment-2013-9 (quoting former state court judge Andrew Napolitano stating that the First Amendment protects a person from liability for publishing freely given intimate photos); Sarah Jeong, *Revenge Porn Is Bad. Criminalizing It Is Worse*, Wired (Oct. 28, 2013, 9:30 AM), http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/.
38. That is the argument often made in response to a free speech defense. *See, e.g.*, Barmore, *supra* note 3, at 460–77; Burris, *supra* note 3, at 2346–50; Citron & Franks, *supra* note 3, at 374–86.
39. Larkin, *supra* note 2, at 91.
40. Solove, *supra* note 25, at 74.
41. 559 U.S. 460 (2010).
42. 18 U.S.C. § 48 (2012).
43. *Stevens*, 559 U.S. at 465–66; H.R. Rep. No. 106-397, at 2–3 (1999).
44. *Stevens*, 559 U.S. at 465–66, 469–72.
45. Restatement (Second) of Contracts § 2 (1981).
46. *Id.* § 4; *see* Larkin, *supra* note 2, at 73–76, 108–11.
47. Contracts are generally enforced through the civil law, and using the criminal law to punish a breach, absent fraud, would raise a serious notice problem. *See* United States v. Nosal, 676 F.3d 854, 860 (9th Cir. 2012) (en banc). Nonetheless, it is theoretically possible (albeit unwise) to enforce contracts via the criminal law.
48. Disclosure of a photograph to one person is not tantamount to disclosure to the world. *See* Larkin, *supra* note 2, at 86 ("It also would be unreasonable to conclude that the victim of revenge porn cannot claim to retain a privacy or confidentiality interest in photographs voluntarily turned over to someone else. Why? Because it is a mistake to treat privacy as an all-or-nothing decision—that is, to treat information as private or confidential only if no one else is aware of it. As Harvard Professor Charles Fried has explained, 'Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.' Society and the law do not force that binary choice on us to avoid opening ourselves to the world. Our consent to disclose private information to a select group of parties is not tantamount to a disclosure to the public at large.") (footnotes omitted).
49. 457 N.W.2d 159 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991).
50. *Id.* at 200–02.
51. *Id.* at 203–04 ("The doctrine of promissory estoppel implies a contract in law where none exists in fact. According to the doctrine, well-established in this state, a promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise.").
52. *Id.* at 205.
53. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576–79 (1977) (ruling that the First Amendment does not give the media a right to violate the copyright laws).
54. *See, e.g.*, Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 192–93 (1946); Associated Press v. NLRB, 301 U.S. 103 (1937) (ruling that the First Amendment does not protect the media against application of the labor laws).
55. *See, e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969); *Associated Press*, 301 U.S. 103 (same, the antitrust laws).
56. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r, 460 U.S. 575, 581–83 (1983); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (same, the tax laws).
57. *See Cowles Media*, 501 U.S. at 669–70.
58. *Id.* at 671.
59. *Id.*
60. *Id.* at 672. The Supreme Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980), prefigured its decision in *Cowles Media*. As a condition of his employment with the Central Intelligence Agency, Frank Snepp signed an agreement in which he promised to submit for prepublication review any book that he wrote, during or after his tenure as a government employee, relating to his work for the government. *See* United States v. Snepp, 595 F.2d 926, 930 nn.1–2 (4th Cir. 1979), *rev'd*, 444 U.S. 507 (1980). Snepp was stationed in Vietnam and, based on what he learned there, wrote a book entitled *Decent Interval* that was critical of the government's withdrawal from that war. The government sued Snepp for breaching the terms of his prepublication agreement, and he defended in part on the ground that the agreement violated the First Amendment. *Snepp*, 444 U.S. at 507–10. The Supreme Court rejected Snepp's claim for two separate reasons. First, the Court noted that Snepp had voluntarily entered into that agreement when he accepted a position with the CIA and that the agreement was a reasonable exercise of the government's authority to protect classified information. *Id.* at 509 n.3 (citation omitted) ("When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree

with the Court of Appeals that Snepp's agreement is an entirely appropriate exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'"). (Four years later, the Court granted relief on a similar line of reasoning to uphold a civil nondisclosure order. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31–37 (1984) (ruling that the First Amendment does not grant a party to litigation the right to publish material obtained during pretrial discovery but placed under a protective order).) Second, the Court reasoned that, in any event, the government had a compelling interest in protecting the secrecy of whatever national security–related information Snepp had acquired by virtue of his government employment. *Id*. at 509 n.3. The Court therefore held that the government could sue Snepp for breaching his prepublication contract even though doing so would otherwise infringe on his free speech rights.

61. *See*, *e.g.*, Jerome A. Barron, Cohen v. Cowles Media *and Its Significance for First Amendment Law and Journalism*, 3 Wm. & Mary Bill Rts. J. 419 (1994); Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media, 35 Ga. L. Rev. 1087 (2001); Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 Buff. L. Rev. 1, 71 (1995); Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationships Privacy Through Implied Contracts of Confidentiality*, 74 U. Cin. L. Rev. 887, 909 (2006); Neal M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123 (2007); Geoffrey R. Stone, *Privacy, the First Amendment, and the Internet*, *in* The Offensive Internet: Privacy, Speech, and Reputation 179 (Saul Levmore & Martha C. Nussbaum eds., 2010) (all explaining that *Cowles Media* allows parties to contract away their First Amendment rights); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1057–58 (2000) ("The Supreme Court explicitly held in *Cohen v. Cowles Media* that contracts not to speak are enforceable with no First Amendment problems. Enforcing people's own bargains, the Court concluded (I think correctly), doesn't violate those people's rights, even if they change their minds after the bargain is struck.... [S]uch protection ought not be limited to express contracts, but should also cover implied contracts (though, as will be discussed below, there are limits to this theory). In many contexts, people reasonably expect—because of custom, course of dealing with the other party, or all the other factors that are relevant to finding an implied contract—that part of what their contracting partner is promising is confidentiality. This explains much of why it's proper for the government to impose confidentiality requirements on lawyers, doctors, psychotherapists, and others: When these professionals say 'I'll be your advisor,' they are implicitly promising that they'll be confidential advisors, at least so long as they do not explicitly disclaim any such implicit promise.") (footnotes omitted).

62. Larkin, *supra* note 2, at 114 (footnote omitted).