

2016

# Revenge Porn

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## Recommended Citation

Quiles, Angel, "Revenge Porn" (2016). *Law School Student Scholarship*. 832.  
[https://scholarship.shu.edu/student\\_scholarship/832](https://scholarship.shu.edu/student_scholarship/832)

## **Angel Quiles Thesis**

A federal revenge-porn bill is expected in the near future, and many states have already adopted their own laws. However, there has not been a common consensus with a federal law. This paper will analyze the different state laws and court rulings to create a federal law, which will address a famous revenge-porn case – Lastonia Leviston v. Curtis Jackson (50 Cent). My newly created federal law should balance the individual's rights to free speech and the government's interest in protecting its citizens from unprotected speech.

## **Revenge Porn Defined**

Revenge porn is defined as the nonconsensual postings of images that were originally given to another with the implied expectation of confidentiality.<sup>1</sup> According to Miami law professor, Mary Anne Franks, these postings should be considered as nonconsensual pornography.<sup>2</sup> Professor Franks defines these acts as such because of the lack of consent that occurs when someone takes another's private, nude, or sexual photos and then distributes them.<sup>3</sup> Posting these images may inflict emotional damage on the victim due to the deep and personal betrayal of the act.<sup>4</sup> Since victims do not retain the power to control over who views their images their personal images can become circulated throughout the U.S., and sometimes the world. Usually grave consequences follow the victims once their intimate images reach the internet. Some victims have gained relief through state tort laws and criminal actions to combat revenge

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<sup>1</sup> [www.dailydot.com/politics/federal-revenge-porn-bill](http://www.dailydot.com/politics/federal-revenge-porn-bill).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

porn. State law violations, such as invasion of privacy, defamation, and intentional inflictions of emotional distress are only some examples of how victims have tried to combat such acts. However, the First Amendment is the biggest obstacle victims will face when seeking civil relief and/or when the government seeks criminal prosecution.

### **Criminal and Civil Actions of Revenge Porn**

A revenge porn analysis should begin with torts and then balance the individual's rights of relief under the law of torts with our Federal Constitution.<sup>5</sup> Damages for a tort action have allowed plaintiffs to recover for physical and economic injuries.<sup>6</sup> Torts have also allowed relief for assaults on an individual's reputation or invasion of one's privacy.<sup>7</sup> The types of torts that we will address in this paper will be invasion of privacy, "false light" portrayal, defamation, and intentional infliction of emotional distress.<sup>8</sup> These torts are some of the ones that may allow for a party to seek damages for injury to their reputation in society. Before discussing tort law we need to address the common law doctrines of contract law. The principles of contract law will provide a background on the breach of implied and expressed assurance of confidentiality, which is the link that would allow for tort law to be used.

### **State Contract Law**

The philosophy of contracts infers that parties will come to an agreement whereby there will be a voluntary exchange of mutual benefits and considerations.<sup>9</sup> If there is a breach in the

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<sup>5</sup> See Amanda Levendowski, Note, Using Copyright to Combat Revenge Porn, 3 N.Y.U. J. Intell. Prop. & Ent. L. 422, 424 n.9

<sup>6</sup> See, e.g., *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971) ("[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

<sup>7</sup> *Id.*

<sup>8</sup> See Restatement (Second) of Torts § 652D (1977)

<sup>9</sup> See, e.g., *Edwards v. Kearzey*, 96 U.S. 595 (1897)

agreement then remedies incur to fix damages that were caused by the broken promise.<sup>10</sup> The law of contracts identifies the binding effects of such agreements no matter if it is explicit or implicit.<sup>11</sup> Under the Second Restatement of Contracts, “A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”<sup>12</sup> The legal effects are the same no matter if that promise is oral or written, expressed or implied.

Under *Cohen v. Cowles Media Co*, Cohen, an associate with a gubernatorial candidate, wanted to provide information to a newspaper about a rival.<sup>13</sup> Cohen gave such information in return for the newspaper’s assurance of confidentiality by being anonymous.<sup>14</sup> However, after receiving the information from Cohen the newspaper company disclosed Cohen identity as the individual who provided the information.<sup>15</sup> Due to the alleged breach of confidence by the newspaper company, Cohen got fired from his associate position. Because of Cohen’s termination of employment, a suit was filed against the newspaper for damages of a breach.<sup>16</sup>

The Supreme Court of Minnesota held that Cohen was not able to establish a breach of contract.<sup>17</sup> The court did not find a breach of contract because a contract was not formed since the parties did not intend to create one.<sup>18</sup> The court did not believe all promises should be considered having binding power.<sup>19</sup> The court concluded that ethical relationships should not be

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Restatement (Second) of Contracts § 2 (1981); § 2 cmt.

<sup>13</sup> 457 N.W.2d 159 (Minn. 1990), rev’d on free speech grounds, 501 U.S. 663 (1991).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

considered with legal rigidity.<sup>20</sup> Thus, the promise that occurred, between Cohen and the newspaper company, was more similar to a moral commitment than a legally binding contract.<sup>21</sup>

However, the court also concluded that Cohen should still be able to state a claim under the doctrine of promissory estoppel.<sup>22</sup> Promissory estoppel implies that a contract exists in law although it does not exist in fact.<sup>23</sup> Under the doctrine of promissory estoppel, “a promise expected or reasonably expected to induce actions by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise.”<sup>24</sup>

Despite approving that theory, the Minnesota Supreme Court ruled against Cohen on the ground that allowing him to recover damages would violate the First Amendment Free Speech Clause.<sup>25</sup> The media had the judgment in their favor. However, the Supreme Court of the United States later reversed the judgment, which then allowed for plaintiffs to recover from a broken promise of confidentiality under the doctrine of promissory estoppel.<sup>26</sup>

Under *Barnes v. Yahoo*, the United States Court of Appeals for the Ninth Circuit agreed with the theories, understandings, and applications of promissory estoppel and the claim of a broken promise of confidentiality.<sup>27</sup> In *Barnes*, a revenge porn victim filed suit against Yahoo for failing to remove explicit photographs of her; although, an employee of Yahoo advised her that it would be removed from their website.<sup>28</sup> *Barnes* was not able to sue Yahoo under tort law because of the Telecommunications Act of 1996, since Yahoo would not be considered as the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 570 F.3d 1096 (9th Cir. 2009).

<sup>28</sup> *Id.*

“publisher” or “speaker” of the information that was provided by another content provider.<sup>29</sup>

However, the court assisted with the plaintiff’s argument and suggested a claim be brought against Yahoo under section 90 of the Second Restatement of Contracts.<sup>30</sup> Section 90 recognizes a cause of action for promissory estoppel, which does not bar such a suit under the Telecommunications Act of 1996.<sup>31</sup>

Courts have enforced private bargains under promissory estoppel for individuals who care to choose judicial remedies for a breach in keeping a promise. In *Barnes* the court held that if the court were to take this route and enforce such agreements it would not encroach on the rights provided by the Telecommunications Act of 1996.<sup>32</sup> The *Barnes* court found that contract law deals with a bilateral agreement instead unilateral actions that are addressed in telecommunication law.<sup>33</sup> In a contracts law case that addresses the promissory estoppel doctrine, the breach does not come from any non-contractual action or capacity of the defendant, but instead from an enforceable promise that is perceived as a contractual obligation.<sup>34</sup>

The two contract cases, aforementioned, are important decisions for the progress of revenge porn litigation. Although the court was well aware that there is a conflict between privacy and free speech, the promissory estoppel doctrine is considered flexible. Promissory estoppel is flexible enough to extend contract law beyond its commercial connections to the law. Each court has provided the opportunity to plaintiffs to argue for a breach of implicit assurances of confidentiality. Although a plaintiff does not have an ordinary contract claim, the courts

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

looked at state-common law doctrines in order to hold an individual liable for breaking a promise. This analytical understanding of contract law is important when forming a new perspective of tort law and its usage for revenge porn.

### **State Tort Law**

The right to privacy has been analyzed under many different perspectives throughout our history. The common census amongst them all describes privacy as an autonomous individual having the right to be left alone.<sup>35</sup> The modern concept of privacy can be perceived as extensive, flexible, and even unclear at times because its boundaries have increased, tremendously, in our judicial system.<sup>36</sup> Therefore, “privacy” should be understood in a nuanced manner having many meanings rather than in a traditional way.

### **Violation of Privacy**

Privacy is a concept that has many different meanings because it deals with the interwoven distinctive relationships of the individual and their society. Although the theoretical understandings of “privacy” are flexible, a more definitive definition needs to be created to become practical and in turn applied to the facts of revenge porn cases. Tort law protects an individual’s privacy from: (1) intrusion into one’s seclusion; (2) embarrassing facts going into the public domain; (3) falsifying information about an individual to the public; and (4) appropriation of a person’s likeness.<sup>37</sup> Revenge porn invades the second and third prong,

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<sup>35</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

<sup>36</sup> See, e.g., Arthur R. Miller, *The Assault on Privacy* 25 (1971)

<sup>37</sup> William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960).

directly.<sup>38</sup> Posting images directly on the web embarrasses a person in a “false light” by giving off a degrading or distorted belief about the person- suggesting promiscuity.<sup>39</sup>

### **Defamation**

“Defamation is the act of making untrue statements about another which damages his/her reputation.”<sup>40</sup> The reputation of an individual becomes damaged because of the disgrace the person feels and the tainted name one acquires in society.<sup>41</sup> Revenge porn damages both the individual internally and externally by portraying the person in a false manner.<sup>42</sup>

### **Intentional Infliction of Emotional Distress**

Intentional infliction of emotional distress involves an act that is so vile it causes trauma to an individual’s emotional wellbeing.<sup>43</sup> Although conduct may be offensive it may not qualify to the level accepted for intentional infliction of emotional distress.<sup>44</sup> The level accepted is heightened because it is reasonable to conclude that people in society must certainly cope with a particular level of “rude” or “offensive” conduct.<sup>45</sup> However, when the conduct does rise to an “outrageous” level and emotional trauma occurs then recovery for damages can become available.<sup>46</sup>

It is reasonable for a victim to be able to satisfy the elements of defamation and intentional infliction of emotional distress, since the postings would be considered a

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<sup>38</sup> See Restatement (Second) of Torts § 652D (1977)

<sup>39</sup> See, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082-84 (9th Cir. 2002)

<sup>40</sup> [www.dictionary.law.com/default.aspx?selected=458](http://www.dictionary.law.com/default.aspx?selected=458).

<sup>41</sup> See, e.g., Restatement (Second) of Torts § 559 (1977)

<sup>42</sup> *Id.*

<sup>43</sup> [www.injury.findlaw.com/torts-and-personal-injuries/intentional-infliction-of-emotional-distress.html](http://www.injury.findlaw.com/torts-and-personal-injuries/intentional-infliction-of-emotional-distress.html)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 879 (1939).

“publication.”<sup>47</sup> It would also be considered reasonable to find the postings of sexual photographs of another, for purposes of revenge, to be considered “outrageous” for its extreme offensiveness to the victim.<sup>48</sup>

In his biography, Mark Twain, the American novelist, described emotional and mental injuries from an unconsented disclosure of intimate information. Twain wrote about a love letter getting publicized without consent: “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”.<sup>49</sup>

Revenge porn is similar to what Mr. Twain was referring to; however, revenge porn is more extreme because of the distributive means of the internet. Revenge porn becomes worldwide since postings do not occur just in a pamphlet, magazine, or newspaper. Since postings become available for the world to see, the conduct should be suitable enough to meet the high “outrageous” test, necessary for defamation and intentional infliction of emotional distress.

### **Complete Defenses**

Although victims of revenge porn may deal with a substantial amount of turmoil due to the postings of their sexual conduct, defendants may still have a suitable defense. One complete

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<sup>47</sup> [www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling](http://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling).

<sup>48</sup> See, e.g., *Vassiliades v. Garfinckle's, Inc.*, 492 A.2d 580, 588 (D.C. 1985)

<sup>49</sup> Mark Twain, *The Autobiography of Mark Twain* xxxv (Charles Neider ed. 1990)

defense against the tort claim for invasion of privacy is “Consent.”<sup>50</sup> Consent is a complete defense that can be raised against the claim for invasion of privacy or any other intentional torts.<sup>51</sup> If consent were to be found by the court, then it would triumph over any of these tort theories.

Truth is another defense that can be raised in a revenge porn suit. The finding of “truth” is a defense to the claim of “defamation.”<sup>52</sup> The argument holds weight in court because pictures only depict the truth without any perspective narrative attached to it.<sup>53</sup> Photographs only represent what was seen at a particular time.<sup>54</sup> Although the photographs may be unappealing and the photographer may have mal intent, the photographs, themselves, would not be considered as portraying an individual through a “false light.”<sup>55</sup>

Century-long judicial and legislative adaptations of common law have created our contemporary ways of assessing the law of torts. Therefore, the inadequate principals of traditional tort should not be the issue when analyzing a revenge porn case. The law of torts has allowed for individuals to use the judicial process to seek remedies for damages suffered by another through means that are outside of contractual obligations.<sup>56</sup> Traditional law of torts focused primarily on keeping the peace within a community by giving money to victims of assault or battery. These acts were seen as a form of trespass to the body and monetary compensation was given so the victims did not become revengeful towards the perpetrator.<sup>57</sup>

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<sup>50</sup> See, e.g., Restatement (Second) of Torts § 652F cmt. b (1977)

<sup>51</sup> Id.

<sup>52</sup> See, e.g., Dianne L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *Cornell L. Rev.* 291 (1983).

<sup>53</sup> See, e.g., *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 n.5 (1974)

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> See, e.g., John G. Fleming, *An Introduction to the Law of Torts* 194 (2d ed. 1985)

<sup>57</sup> See, e.g., W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 117, at 859-62 (5th ed. 1984)

These legal interests have expanded with time, now ranging over personal, professional, and business situations.<sup>58</sup> This expansion has allowed for victims of torts to be awarded damages for physical, economic, as well as psychological injuries.<sup>59</sup> Using torts to address revenge porn is just another part of this legal expansion – providing victims the legal right to fight for the ability to become whole once again. Therefore, tort law should be the relief doctrine that revenge porn victims should be entitled to receive.

### **Betrayal**

Laws on privacy have not focused primarily on the breach of promises for confidentiality. The justification for this lack of attention has multiple parts for its analysis. A breach of an assurance of confidentiality has more of a contract feel than a tort one. The Supreme Court has expanded the definition of the First Amendment Free Speech Clause to enable publication of particular information that has been lawfully obtained, which also relates to a matter of public interest.<sup>60</sup> However, more recently some individuals have argued that the law of torts should be the focus in protecting an individual's rights in disclosing private thoughts, words, or actions with their intimate partner without the distress of a possibility that their privacy will be published for the world to view and then judge. These same individuals argue that the law of torts should protect individuals from a later nonconsensual disclosure of any information exchanged between intimate partners. The latter way of thinking would not allow for the First Amendment to exclude victims the ability to get tort relief. Moreover, the damage would be considered a breach of an

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<sup>58</sup> See, e.g., *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 252-54 (1974)

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationships Privacy Through Implied Contracts of Confidentiality*, 74 U. Cin. L. Rev. 887 (2006)

“implied in fact” contract in not revealing confidential information to others. The damaged individual would call this breach of confidence as betrayal.<sup>61</sup>

There are many considerations why we must assess when analyzing a revenge porn situation. The privacy and reputational interest of the revenge porn victim should be considered legitimate. The legitimacy is prevalent throughout the United States since more than thirty states have provided some sort of relief.<sup>62</sup> These states have provided relief because the defendants are publicly disclosing matters that are private and highly offensive to a reasonable person.<sup>63</sup>

Revenge porn, on the other hand, does not contribute to our society. It does not create any political debate or provide any public interest. Instead, revenge porn promotes only negative outcomes because it is highly offensive and immoral. It would be quite difficult to argue that revenge porn is justifiable and necessary for self-expression. It is easy to conclude that revenge porn is not a form of speech, but instead, gives a perpetrator who is mean-spirited, the ability to inflict harm on another unsuspected individual who trusted them. The victim’s trust in their partner to not publish any pictures could keep him/her from being able to obtain a judgment in his/her favor under the standard invasion of privacy theory. This perception proves to us, as a society, that betrayal should be the critical issue in any argument over the usage of tort law in order to compensate victims of revenge porn.

Betrayal is important for a revenge porn analysis. The essence of revenge porn is to publicly humiliate an intimate partner by posting nude photographs on the internet. The act betrays the trust of the victim. Posting secret photographs or information would constitute as an

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<sup>61</sup> See, e.g., Neal M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 *Geo. L.J.* 123 (2007)

<sup>62</sup> See, e.g., Anupam Chander, *Youthful Indiscretion in an Internet Age*, in *The Offensive Internet: Privacy, Speech, and Reputation*

<sup>63</sup> *Id.*

offensive publication of private details of an individual's life.<sup>64</sup> The law of torts provides remedies for an offensive publication of private details.<sup>65</sup>

There is one difference between the latter scenario and revenge porn. In a revenge-porn situation the publisher has violated an unspoken agreement between the two parties in agreeing to what can and cannot be done with the photographs or information. In a revenge porn scenario, the two parties would have agreed to take photographs and possess them, but not to publicize them throughout the world. That breach of assurance of confidentiality is what tort law should address. There are two different types of injuries the victim endures: Disclosure of information and the breach of confidentiality. Although both reveal secrets about the other, confidentiality also violates the trust within the relationship.<sup>66</sup> The breach of confidentiality damages an individual's emotionality because of the betrayal that takes place.<sup>67</sup>

Betrayal determines whether the postings of nude photographs are considered revenge porn or not. If there is a betrayal of trust and the victim is humiliated by the postings of nude photos, then it should be understood as revenge porn. The offensiveness of the publication distinguishes revenge porn from that of truthful and consensual postings.

The great thing about using tort law is that it would not only remedy the harm done to the victim, but also give them the ability to trust intimacy. In society, people move around with a façade in order to protect their intimate desires. Individuals do not self-disclose easily in intimate relationships because of judgments and lack of trust.<sup>68</sup> When a person finds an individual who

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<sup>64</sup> See *Lewis v. LeGrow*, 670 N.W.2d 675 (Mich. App. 2003)

<sup>65</sup> *Id.*

<sup>66</sup> Solove, *supra* note 61

<sup>67</sup> *Id.*

<sup>68</sup> McClurg, *supra* note 60

does not judge them and makes them feel safe in expressing who they truly are, they learn to trust a person with their deepest secrets.<sup>69</sup> If a person breaks trust in a relationship then it causes the other to never trust again, causing them to become afraid, and vulnerable of taking risks because of the fear of another exposure. “[I]f 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 publishing] 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”.<sup>70</sup>

For the vast majority of intimate relationships an “express agreement of intimacy” does not exist. However, there is an implied agreement between the two that involves an assurance of intimacy. This assurance of intimacy should have the same legal ramifications as a written nondisclosure contract. Although it may be difficult to prove that there was an assurance of intimacy between the two parties, the lack of expressly noting it should not deny the victim from having the ability to show it.

It is unreasonable to determine that a victim cannot claim an invasion of privacy when the images were voluntarily given to a third party by the other. Professor Charles Fried of Harvard explained, “Privacy is not simply an absence of information about us in the mind of others; rather it is the control we have over information about ourselves.”<sup>71</sup> A law abiding society does not force us to be completely open, but at the same time does want us to trust enough so that relationships evolve. This balance is in the best interests of our society. A balance must be

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<sup>69</sup> Id.

<sup>70</sup> Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 *Geo. L.J.* 117, 2123-24 (2001).

<sup>71</sup> Charles Fried, *Privacy*, 77 *Yale L.J.* 475 (1968)

created for peace to emerge between a person and the collective society. Therefore, it must be accepted that our consent to one person should not mean we give consent to the whole public.

Throughout our lives we enter into a variety of situations based on assumptions of trust.<sup>72</sup> Information given to a spouse, a doctor, an attorney, or even a religious figure will be held in confidence because of the assumptions of trust.<sup>73</sup> This notion gives rise to why our legal system has a doctrine of privilege and why tort claims result if assurances are violated.<sup>74</sup> We can also claim this philosophy of confidence amongst ourselves with our mail system - if mail was given to the wrong address we are not able to open it and we instead have the legal duty to give it back to the courier.<sup>75</sup> Breaking assumption of trust is unethical and illegal because of the ramifications that may occur if the behavior was rampant within civil society. This is why there is a duty of confidentiality when it comes to private information and if a material breach occurs then a tort remedy should ensue due to the damage.

As per my previous comments, the contract law recognizes that implicit agreements, promises, or assurances may bind the promisor.<sup>76</sup> Moreover, it does not matter if the promise is oral, written, express, or implied because the legal effect is usually the same. Although contract law and tort law usually address different issues, it is possible that someone, who got harmed by a broken promise, may get relief from the doctrines of torts instead of contracts.<sup>77</sup> A breach of confidentiality claim is not completely established in the United States, but some courts have recognized this claim for some individuals because it is a reasonable way to deal with balancing

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<sup>72</sup> See, e.g., Solove, *supra* note 61

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., Restatement (Second) of Contracts § 2 (1981)

<sup>77</sup> See Keeton et al., *supra* note 57

privacy and free speech rights.<sup>78</sup> Therefore, it would make sense for tort law to provide revenge porn victims relief from an invasion of privacy claim if he/she could show that there was a broken implied promise of confidentiality.

Our judicial system recognizes betrayal in tort law. The United States Supreme Court has shown, “the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.”<sup>79</sup> Flexibility is what had allowed the judicial system to evolve and continuously balance personal interests from social interests.<sup>80</sup> For many years, tort law has taken care of rural communities that dealt with agriculture and urban areas that deal with industries. Tort law has addressed physical harms caused by others as well as products and from economic and psychological harms as well.<sup>81</sup> For all these different goals to be met, the judicial system has recognized that the tort law must be flexible enough in order to protect all types of interests.

Revenge porn also deserves the same protection from the law of torts. The internet offers great opportunity, but it also creates many issues that are not foreseeable. The internet allows us to gain information, view pictures and videos and socialize. However, information can be easily posted for millions of people to obtain for an indefinite amount of time that victims of revenge porn can suffer from psychological and emotional harm. Therefore, revenge porn victims should ultimately get relief for such damages since the act should be considered “outrageous”, as well as having no social benefit. The redress should be accepted as reasonable for our judicial system.

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<sup>78</sup> See, e.g., Solove, *supra* note 61

<sup>79</sup> *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996)

<sup>80</sup> See, e.g., *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 234-35 (1995)

<sup>81</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)

Under the Ninth Circuit's ruling of *Barnes v. Yahoo*, the court did view the matter in the scope of promissory estoppel, but the reasoning fits within tort law as well.<sup>82</sup> This holding would allow for victims to make a claim that is already recognized in the law of torts, under invasion of privacy by showing a breach of which implied agreement of confidentiality – betrayal. A revenge-porn plaintiff would have to show that there was an expressed or implied agreement between the two individuals, by which the pictures or videos only to be possessed, by the recipient, and the content would not be posted on the internet.<sup>83</sup> The *Barnes* court understood the harm that a revenge porn victim endures, which they found to be "... dangerous, cruel, and highly indecent use of the internet for the apparent purpose of revenge".<sup>84</sup> They found that the doctrine of promissory estoppel would be able to provide victims with the ability to find relief. The *Barnes* rationale is what should be applied to revenge porn suits.

### **State Case Law**

Multiple states have decided to make revenge porn a crime. New Jersey was one of the principle proponents of this movement. In 2004, New Jersey created a law that made it a crime to take or distribute photographs of someone else without their consent if those photographs displayed her "intimate parts" or show her being involve in a sexual act.<sup>85</sup> Although New Jersey prosecutors have not used that law often, they did bring a suit under it in the case of *State v. Parsons*.<sup>86</sup> In *Parsons*, Parsons was in a short term relationship with a woman whom he had met online. Although the relationship was intimate they did exchange photos of themselves. Some photographs were unclothed with the understanding that it was only for the eyes of the beholder.

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<sup>82</sup> 570 F.3d 1096 (9th Cir. 2009).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See N.J. Stat. Ann. § 2C:14-9

<sup>86</sup> 2011 WL 6089210 (N.J. Super. Ct. App. Div. Dec. 8, 2011).

The relationship ended after two months and the two got quite angry with one another. As a revengeful act to the breakup, Parsons sent the nude photos to the woman's employer arguing that she was not suitable to be a teacher at her school. The New Jersey trial and appellate divisions held that the unpermitted disclosure of her nude photos violated her rights. Therefore, the case established postings of revenge porn on the internet a crime under New Jersey law.

California followed New Jersey, but with a more narrow definition, which prohibits the postings of revenge porn under certain situations. The California statute made it a crime to record and distribute "the intimate body part or parts" of someone else "under circumstances where the parties agree or understand that the image shall remain private" and the victim of the images suffers "serious emotional distress" from the postings.<sup>87</sup> In 2014, Wisconsin, Virginia, Utah, Maryland, Idaho, Hawaii, Georgia, Colorado, and Arizona created their own statutes.<sup>88</sup> Each statute made it a crime to publish nude images, or images depicting someone in a sexual act, if the individual making the disclosure knows or should know that the person in the image did not consent to such a showing.<sup>89</sup> These statutes may reach the act of "selfies" just the same as if others took the image.

Today, in several states, revenge porn is considered a crime whenever the subject does not consent to the images being posted. These criminal laws address the consent issue rather than the betrayal issue, but the proof required to win relief is parallel between the civil and criminal system. However, one big challenge for victims would be to overcome the strength wielded in the First Amendment Free Speech Clause.

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<sup>87</sup> Cal. Penal Code § 647(a), (j)

<sup>88</sup> See H.B. 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014)

<sup>89</sup> *Id.*

## **The First Amendment: Free Speech Clause**

The reasoning for the First Amendment is to prevent censorship of free communication and the exchange of ideas.<sup>90</sup> This speech is necessary in a democratic society because it holds people in office accountable and allows society to progress.<sup>91</sup> Speech also serves other purposes such as artistic expression even if it may be an expression we may not enjoy.<sup>92</sup> The trick is determining what speech is being censored because of something that a majority of society has distaste for or censored because it causes an actual harm.

The internet is an immensely large venue for individuals who utilize their First Amendment rights in order to exchange their ideas, expressions, and images about their lives. The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>93</sup> Defendants of revenge porn have the ability to argue for their First Amendment rights, regardless of how unflattering the image may be or the effect that the publication may have on the subject if the image honestly depicts the photographer’s subject. Defendants have this right because the First Amendment protects individuals against civil and criminal prosecution for publishing a lawfully obtained image.

Individuals who post images can claim their right to do so under the protection of the First Amendment.<sup>94</sup> Defendants will argue that simple depictions of nudity cannot be

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<sup>90</sup> See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)

<sup>91</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 339 (2010)

<sup>92</sup> Solove, *supra* note 61.

<sup>93</sup> “First Amendment”. Cornell University Law School Legal Information Institute.

<sup>94</sup> See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004)

criminalized under obscenity just because they are considered indecent.<sup>95</sup> State civil laws under the law of torts also raise the same First Amendment arguments because of the possibility of censorship.<sup>96</sup> In other words, defendants will argue that revenge porn is constitutionally protected under the First Amendment.<sup>97</sup> The First Amendment Free Speech Clause is a difficult defense to overcome.

### **Protected Speech**

There are a few cases that defendants would rely on in order to not be held liable for publication of true information. Under *Florida Star v. B.J.F.*, the Court held that the First Amendment protects a newspaper for publishing the name of a victim that was legally acquired by a police report.<sup>98</sup> Under *Bartnicki v. Vopper*, the Court held that the First Amendment protects newspapers who publish transcripts of wiretaps even if it was acquired illegally.<sup>99</sup> Defendants in revenge porn cases would argue that these cases do not allow the government from imposing civil and/or criminal liability on the publication of information that is true even if the state wants to protect the privacy interests of an individual.

“Offensive” language is protected under the First Amendment.<sup>100</sup> Under *Cohen v. California*, the state may not ban language merely because it is profane or “offensive”.<sup>101</sup> Language that is profane may not be banned from public places. This notion also allows for “offensive” material that is sexually-oriented, but not obscene, to be protected under the First

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<sup>95</sup> See *Tex. v. Johnson*, 491 U.S. 397, 414 (1989)

<sup>96</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991)

<sup>97</sup> [www.csmonitor.com/USA/Justice/2013/1002/California-outlaws-revenge-porn.-Not-everyone-thinks-that-s-a-good-idea.-video](http://www.csmonitor.com/USA/Justice/2013/1002/California-outlaws-revenge-porn.-Not-everyone-thinks-that-s-a-good-idea.-video)

<sup>98</sup> 491 U.S. 524 (1989).

<sup>99</sup> 532 U.S. 514 (2001).

<sup>100</sup> See *CrunchTime Constitutional Law*, Eleventh Edition, Steven L. Emanuel

<sup>101</sup> *Id.*

Amendment. Under *Reno v. ACLU*, Congress banned the use of the Internet to display any “indecent” language or images which may be accessed by minors.<sup>102</sup> The Court held that statute was unconstitutional. The Court reasoned that the statute restricted the First Amendment rights of adults. It restricted adults’ ability in receiving indecent-but-not-obscene material.

### **Unprotected Speech**

Offensive language can be prohibited or punished if: (1) the audience is a “captive” one; or (2) the language is “obscene.”<sup>103</sup> Obscene is defined as lewd without socially redeeming value.<sup>104</sup> Under *Miller v. California*, a work is considered obscene if there is: (1) prurient interests; (2) depicts or describes in a patently offensive way” certain types of sexual conduct, which is defined by state law; and (3) as a whole, lacks “serious literary value, artistic, political or scientific value.”<sup>105</sup> Therefore, nudity, alone, will not suffice as obscene language – unprotected under the First Amendment, unless it depicts or describes “hard core sex.”<sup>106</sup>

Under *Cantrell v. Forest City Publishing Co.*, the Court held in favor of a plaintiff’s privacy claim because she was portrayed in a “false light”.<sup>107</sup> The privacy claim was founded on a magazine story that incorrectly showed the plaintiff and her family at a time after the plaintiff’s husband had died. The important part of this case is the lack of truth.<sup>108</sup> The errors are what caused the damage to the plaintiff. A revenge porn video or picture is also likely to create a damaging impression but on a grandeur scale. The *B.J.F.* and *Bartnicki* cases did not overturn

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> [www.legal-dictionary.thefreedictionary.com/obscenity](http://www.legal-dictionary.thefreedictionary.com/obscenity)

<sup>105</sup> See *CrunchTime Constitutional Law*, Eleventh Edition, Steven L. Emanuel

<sup>106</sup> *Id.*

<sup>107</sup> *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974). In *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967)

<sup>108</sup> *Id.*

this case and are not perfect cases for all true information as well. In both cases the Courts explicitly stated that stolen information is not permitted and published information is not immune at all times.<sup>109</sup> Therefore, the First Amendment does not prevent victims from getting relief for an invasion of privacy claim.

### **Public Official vs. Private Official**

Although it may be a difficult in overcoming the First Amendment hurdle, there are also some possibilities in breaking through such a tough defense. The defense of the First Amendment is not immune to acts of defamation and intentional infliction of emotional distress.<sup>110</sup> Under *New York Times v. Sullivan*, where the plaintiff is a public official, he/she may only win in a defamation suit against the defendant for a statement relating to the plaintiff's official conduct, if the plaintiff can prove that defendant's statement was made either "with knowledge that it was false" or with "reckless disregard" of whether it was true or false.<sup>111</sup> These two mental states are usually collectively referred to as the "actual malice" requirement. Under *Associated Press v. Walker*, plaintiffs can only recover for defamation if he shows intentional falsity or recklessness about the truth. This notion applies not only to public "officials", but also to public "figures." Public figures have to show that the defendant acted with actual malice.

Someone who voluntarily puts himself/herself into a public controversy will be considered a public figure for that particular controversy.<sup>112</sup> An anti-abortion activist might be a public figure for any news story concerning abortion, but not a public figure for stories unrelated

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<sup>109</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001)

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

to abortion or their private life.<sup>113</sup> Also, some people may be “involuntary” public figures.<sup>114</sup> An example of an involuntary public figure is a criminal defendant whose story is in a news. The defendant would not be able to sue and recover for defamation unless he/she shows actual malice.<sup>115</sup>

On the other hand, under *Gerz v. Robert Welch, Inc.*, if the plaintiff is a “private” figure rather than a “public” figure, he/she does not have to meet the *New York Times v. Sullivan* “actual malice” rule.<sup>116</sup> Instead, the First Amendment requires that the plaintiff show at least negligence. A strict liability test by the courts will not be enforced for defamation. However, a private figure who shows only negligence cannot recover for punitive damages. Instead, he/she must show actual malice to get any punitive damages. The First Amendment also requires that the defamed plaintiff show that the statement was false.<sup>117</sup>

The *New York Times v. Sullivan* rule also applies to actions for intentional infliction of emotional distress.<sup>118</sup> A public figure plaintiff cannot recover for any intentional infliction of emotional distress unless he/she can show that the defendant acted with actual malice.<sup>119</sup> Under *Hustler Magazine v. Falwell*, *Hustler* satirized religious leader Jerry Falwell as a drunken hypocrite who has sex with his mother. The Court held that Falwell cannot recover for intentional infliction of emotional distress, unless he shows that *Hustler* made a false statement with knowledge of falsity or with reckless disregard of falsity.<sup>120</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

## **Federal Bill Proposal**

It will be a crime to record, take, or distribute photographs of someone else without their consent if those photographs displayed his/her intimate body part or parts, or show his/her involved in a sexual act, whereby the parties explicitly agree or implicitly understand, having the individual making the disclosure know or should know that the image remain private and the victim of the image suffers serious emotional distress from such postings. Moreover, a victim shall have a civil claim if these images are highly offensive to a reasonable person.

### **Case on Hand**

#### **Lastonia Leviston v. Curtis Jackson (50 Cent)**

In 2013, Lastonia Leviston sued Curtis James Jackson, III, aka 50 Cent, for invasion of privacy intentional infliction of emotional distress and for violating her civil rights, under the New York Civil Rights Law (NYCRL).<sup>121</sup> Leviston claimed Jackson wrongfully published a copy of a sex video that she made with her at the time, boyfriend, Maurice Murray. Jackson obtained the video by purchasing it from Murray and posted it online with added crude commentary. Jackson obtained the video while having a conflict with Leviston's estranged boyfriend and rival rapper Rick Ross. Jackson publicized Leviston's sexual activities with Murray, which continued to fuel the conflict between Jackson and Ross. Although, Jackson claimed that he had received sufficient permission to use the tape from Murray, the Manhattan Supreme court held in favor of Leviston. A jury awarded Leviston \$5 million in compensatory damages and a judge awarded her \$2 million in punitive damages. The judge awarded Leviston the punitive damages since Jackson tried to evade payment by filing for bankruptcy.<sup>122</sup>

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<sup>121</sup> Leviston v. Jackson N.Y.Sup.December 03, 201343 Misc.3d 229

<sup>122</sup> Id.

### **Hypothetical Holding for the Federal Rule Proposal**

If the federal rule were to be accepted it would be reasonable to conclude that Curtis James Jackson would be prosecuted under federal law, and Lastonia Leviston would be able to file civil charges as well.

Leviston and Murray both consented to making a video, which showed them nude and participating in sexual acts. The video was not made in secrecy. Jackson did not record the video. Jackson obtained the video by purchasing it from Maurice Murray. However, Jackson did not receive consent from Leviston. Jackson received consent to acquire the video from Murray; however, Jackson did not receive consent to post the video on the internet from Leviston. At this time Leviston was not aware that Jackson had the video. It is reasonable to conclude that there was an implicit agreement between Leviston and Murray. It is reasonable to also conclude that there was no agreement between Leviston and Jackson of him having the video and then putting it on the internet. If there is not an implicit understanding between Leviston and the other two individuals, then Murray and Jackson knew or should have known that Leviston would not want the explicit video to be on the internet. Leviston suffered tremendous amounts of emotional distress as well as her children who are haunted by the release of the explicit video on the internet. Moreover, Leviston endured an increased amount of betrayal by Murray because Jackson edited the explicit video by portraying himself as a “pimp” and giving the impression that Leviston was a prostitute while having sex with Murray; therefore, casting her in a “false-light” to the public.

It is reasonable for Leviston to be able to satisfy the elements of defamation and intentional infliction of emotional distress, since the postings would be considered a “publication.” It would also be considered reasonable to find the postings of sexual photographs

of another, for purposes of revenge, to be considered “outrageous” for its extreme offensiveness to Leviston. Since the postings became available to the world, the conduct should meet the necessary standard of “outrageousness” test for defamation and intentional infliction of emotional distress. Leviston would be able to show that there was an implied agreement between her and the two men, by which the video would not be posted onto the internet. Jackson’s reason to post the explicit video was to seek revenge on Leviston’s estranged husband Rick Ross, which has no First Amendment privilege.

The explicit video was obscene and it depicted her in a patently offensive way. As a whole the video lacked serious literary, artistic, political, or scientific value. Leviston is not a public figure, but a private figure which means that she needs to show negligence and not actual malice, even though actual malice is present. On the other hand, if Leviston was a public figure due to her relationship with Rick Ross, then she would be able to show actual malice since Jackson only posted the video to seek revenge with mal intent. Therefore, it is reasonable to conclude that if the hypothetical federal law would have been enacted then Jackson would have been prosecuted for this matter. Also, Leviston would be able to win her civil claims under defamation of character and intentional infliction of emotional distress. She would be awarded compensatory for her inability to work, medical fees, and legal fees. Lastly, Leviston would be awarded punitive damages because of the mal intent and to deter Jackson and others from doing such acts in the future.

### **Conclusion**

Revenge porn injures the wellbeing of another, who unfortunately trusted their intimate partner who had a malicious intent. Allowing revenge porn victims to seek relief due to a breach in an implicit promise of confidentiality can help compensate their ability to trust again. More

importantly, creating or allowing a federal law in place, victims can find justice and a sense of peace. People who take advantage of others could pay for their mal behavior by serving time or compensating their victims. The criminal and civil remedies would not harm the value of legitimate free speech under the First Amendment, and it would protect those who have been harmed in such an outrageous manner.

