

# William & Mary Journal of Race, Gender, and Social Justice

---

Volume 24 (2017-2018)

Issue 1 *William & Mary Journal of Women and the Law: 2017 Special Issue: Enhancing Women's Effect on Law Enforcement in the Age of Police and Protest*

Article 9

---

November 2017

## When Fame Takes Away the Right to Privacy in One's Body: Revenge Porn and Tort Remedies for Public Figures

Caroline Drinnon

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Law and Gender Commons](#), [Privacy Law Commons](#), and the [Torts Commons](#)

---

### Repository Citation

Caroline Drinnon, *When Fame Takes Away the Right to Privacy in One's Body: Revenge Porn and Tort Remedies for Public Figures*, 24 Wm. & Mary J. Women & L. 209 (2017), <https://scholarship.law.wm.edu/wmjowl/vol24/iss1/9>

Copyright c 2017 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

WHEN FAME TAKES AWAY THE RIGHT TO  
PRIVACY IN ONE'S BODY: REVENGE PORN AND  
TORT REMEDIES FOR PUBLIC FIGURES

INTRODUCTION

- I. A COMMON PHENOMENON—EXAMPLES OF INVASION OF PRIVACY OF PUBLIC FIGURES
  - A. *Harms Suffered by Victims of the Distribution of Nonconsensual Pornography*
  - B. *Legal Remedies Imposed in the “Celebgate” Hacking and Leak Incident*
- II. CIVIL REMEDIES FOR NON-PUBLIC FIGURE VICTIMS OF REVENGE PORN
  - A. *Intentional Infliction of Emotional Distress*
  - B. *Invasion of Privacy Based on Public Disclosure of Private Facts*
- III. HISTORY OF DENYING PRIVACY REMEDIES FOR PUBLIC FIGURES
  - A. *What Is a “Public Figure”?*
  - B. *Distinction Between Public and Private Figures in Privacy-Related Causes of Actions*
  - C. *Public Figure Doctrine in Terms of IIED*
  - D. *Public Figure Doctrine in Terms of Invasion of Privacy*
- IV. ARGUMENT FOR CIVIL REMEDIES FOR PUBLIC FIGURE VICTIMS OF NONCONSENSUAL PORNOGRAPHY
  - A. *Criminal Sanctions and Restitution as an Alternative Remedy*
  - B. *Civil Action Against the Online Website Operators of the Sites Containing Nonconsensual Pornographic Materials as an Alternative Remedy*

CONCLUSION

INTRODUCTION

Changes in technology, namely the rise of the Internet and social media in everyday use, have created a league of new legal issues for the courts and legislatures to contend with. As rapidly as technology changes, legal frameworks and common law cannot always keep up with the new problems society faces, leading to gaps in civil remedies that allow inappropriate behavior to proceed unchecked.<sup>1</sup> In particular, as people's images and personas are consistently shared,

---

1. Amanda L. Cecil, Note, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2525 (2014).

sometimes hundreds or thousands of times, by friends and strangers on the Internet, it becomes harder for individuals to control the dissemination of their information and exercise their right to privacy.<sup>2</sup> This has culminated in a horrifying phenomenon known colloquially as “revenge porn.”<sup>3</sup>

Everyone has felt the sting of rejection or the pain of heart-break. For centuries, spurned lovers, reeling from these pains, have sought revenge against their ex-paramours.<sup>4</sup> These acts can be seen in everyone from King Henry VIII,<sup>5</sup> who murdered two wives after accusing them of adultery, to the Greek myth Medea,<sup>6</sup> who killed her children in retaliation for her husband Jason leaving her for another woman, to modern day pop star Taylor Swift, who pens songs about her ex-lovers to let the world know of their betrayals.<sup>7</sup> This desire to exact pain against an ex-loved one has transformed with the rise of technology.<sup>8</sup> With the advent of social media, individuals have a much larger platform to air grievances or exact revenge on others.<sup>9</sup> This has led to instances where an individual’s private information, often in the form of sexually explicit pictures or videos, is shared online to hundreds of thousands of people (without the individual’s knowledge or consent) by an ex-lover or partner seeking revenge.<sup>10</sup> Additionally, these social media “grievances” or “acts of revenge” can have a permanent place on the Internet, as social media websites, such as Reddit or Twitter, often cannot remove images from their original hosting websites.<sup>11</sup> Victims have almost

---

2. The right to privacy is a common law concept that the Supreme Court deemed is a right each individual State should apply for its citizens. *See* *Katz v. U.S.*, 389 U.S. 347, 350–51 (1967).

3. Cecil, *supra* note 1, at 2520.

4. *See, e.g., Henry VIII's Wives*, HISTORIC ROYAL PALACES (2017), <http://www.hrp.org.uk/discover-the-palaces/monarchs/henry-viii/henry-viiiis-wives> [<https://perma.cc/JX5Y-ASMA>]; *Medea*, GREEKMYTHOLOGY.COM (2017), <https://www.greekmythology.com/Myths/Mortals/Medea/medea.html> [<https://perma.cc/4GRS-AWNE>].

5. *Henry VIII's Wives*, *supra* note 4.

6. *Medea*, *supra* note 4.

7. Katie Rosseinsky, *13 Times Taylor Swift's Ex-Boyfriends Inspired Her Music*, GRAZIA DAILY (Aug. 10, 2016), <http://lifestyle.one/grazia/celebrity/news/taylor-swift-ex-boyfriends-song-lyrics> [<https://perma.cc/7BYB-X2N8>].

8. *See* Nick Hopkins & Oliver Solon, *Facebook Flooded with “Sextortion” and Revenge Porn, File Reveals*, THE GUARDIAN (May 22, 2017), <https://www.theguardian.com/news/2017/may/22/facebook-flooded-with-sextortion-and-revenge-porn-files-reveal> [<https://perma.cc/XA62-8D4Z>].

9. Brian Jung, *The Negative Effect of Social Media on Society and Individuals*, CHRON SMALL BUSINESS (2017), <http://smallbusiness.chron.com/negative-effect-social-media-society-individuals-27617.html> [<https://perma.cc/S4Q4-CWS6>].

10. Cecil, *supra* note 1, at 2515.

11. Carl Franzen, *Revenge Porn Is the Hydra of the Internet*, MOTHERBOARD (Mar. 12, 2015), [https://motherboard.vice.com/en\\_us/article/twitter-follows-reddit-in-banning-revenge-porn-but-so-what](https://motherboard.vice.com/en_us/article/twitter-follows-reddit-in-banning-revenge-porn-but-so-what) [<https://perma.cc/NEJ5-MY4K>].

no way to remove their private, sexually explicit images from the public eye.<sup>12</sup>

Also known as nonconsensual pornography, revenge porn is the distribution of sexually explicit photos or videos of another individual without that individual's consent or knowledge.<sup>13</sup> The name "revenge porn" arose from its common use as a revenge mechanism for spurned lovers or ex-partners who decided to enact vengeance on their former loved ones by posting intimate images or videos of them online for the digital world to see.<sup>14</sup> Revenge porn is the ultimate violation of another's privacy, inviting our internet-driven society to view, share, and comment on the most intimate aspects of one's life.<sup>15</sup> Embarrassment, shame, body image and self-esteem issues are just a few of the negative consequences that can stem from being victim to a revenge porn attack.<sup>16</sup>

This issue has become particularly troublesome for today's public figures and celebrities, a group that traditionally does not have access to any recourse for invasions of their privacy.<sup>17</sup> For public

---

12. *Id.*

13. Cecil, *supra* note 1, at 2515. See also Emily Poole, *Fighting Back Against Non-consensual Pornography*, 49 U.S.F. L. REV. 181, 185 (2015) (expanding the definition of revenge pornography to include an intent to embarrass or shame the individual whose photos are being posted, which is not always present in cases involving public figures); Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CAL. L. REV. 1303, 1306 (2014).

For a legal perspective, the National Conference of State Legislatures defines revenge porn as "the posting of nude or sexually explicit photographs or videos of people online without their consent, even if the photograph itself was taken with consent." *Revenge Porn and its Victims*, NOBULLYING.COM (July 26, 2016), <https://nobullying.com/revenge-porn> [<https://perma.cc/98B3-5U9U>].

14. *Words in the news: revenge porn*, OXFORD DICTIONARIES (Feb. 17, 2015), <http://blog.oxforddictionaries.com/2015/02/words-news-revenge-porn> [<https://perma.cc/C6JT-32RF>].

15. Poole, *supra* note 13, at 185. An inherent feature to social media is the interaction between individuals, often concerning messages or media posted by either of them or someone else. These interactions can turn cruel, as anonymous users feel comfortable saying whatever they please (regardless of social conventions inherent in face to face conversation). This cruelty adds to a revenge porn victim's sense of shame and helplessness.

16. Mudasir Kamel & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. AM. ACAD. PSYCHIATRY & L. 359, 359, 362 (2016). These negative consequences will be discussed in more detail below. However, it is important to keep in mind the negative consequences of revenge porn for celebrities as this argument unfolds. Celebrities are often seen as separate beings from private citizens and it is easy to forget that they suffer psychological, emotional, and real world damage just as easily as the private population.

17. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 255, 279–80 (1964). In *New York Times Co. v. Sullivan*, the Supreme Court established a high standard for public figures to recover for the dissemination of false facts about them. The Court held that public figures had to prove an individual spread false information about them with actual malicious intent to recover a civil remedy for the dissemination of that false fact. The Court's reasoning centered around the idea that "[f]ree and open debate about the conduct of public officials . . . was more important than occasional, honest factual errors that might hurt or damage [public] officials' reputation[]." *N.Y. Times Co. v. Sullivan*

figure victims of revenge porn, revenge is not always the motivation behind the sharing of sexually explicit photos or videos of celebrities.<sup>18</sup> As researchers Mudasir Kamel and William J. Newman note, “the term revenge pornography may be misleading, as not all perpetrators are motivated by vengeance. Some individuals participate in the distribution of explicit content to earn a profit. Others are motivated by notoriety or entertainment.”<sup>19</sup> Additionally, the term “revenge porn” can be used in the case of public figures because the act (sharing the photos without the public figure’s consent) and the consequences (emotional, financial, and social damages) are similar to that of traditional “revenge porn.”<sup>20</sup>

Society’s fascination with celebrities has led to a huge demand for any private information about these public figures, particularly any sexually explicit or private material.<sup>21</sup> Unfortunately, in this scenario, the United States common law has developed around the idea that public figures voluntarily inject themselves into the public sphere and invite the scrutiny that is inherent in the public eye.<sup>22</sup> However, this common law doctrine developed in the decades before the rise of the Internet and social media and the privacy issues that have come along with it.<sup>23</sup> Access to the Internet has given rise to some incredibly horrific privacy violations, including the sharing of one’s private, sensitive, financial, or medical information to an infinite number of people, often with little ability to stop the spread of the information once it has been released.<sup>24</sup> As access to public figures’ lives becomes more intrusive, courts need to adapt the public figure doctrine to be more sympathetic to the privacy needs of those in the public spotlight.

---

(1964), BILL OF RIGHTS INST. (2017), <https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-lessons/new-york-times-v-sullivan-1964> [<https://perma.cc/TL7N-WK9W>].

18. Kamel & Newman, *supra* note 16, at 361.

19. *Id.*

20. *Id.* at 362.

21. Nora Turriago, *The Dangerous American Obsession: Why Are We So Fascinated With Fame?*, HUFFINGTON POST (Dec. 4, 2016), [http://www.huffingtonpost.com/nora-turriago/the-dangerous-american-ob\\_b\\_8721632.html](http://www.huffingtonpost.com/nora-turriago/the-dangerous-american-ob_b_8721632.html) [<https://perma.cc/TG84-Z45R>].

22. Olympia R. Duhart, *When Time Stands Still: An Argument For Restoring Public Figures to Private Status*, 27 NOVA L. REV. 365, 373–74 (2002). See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 324 (1974). *Gertz* formally legalized this harsh public-figure standard that led to the inability of public figures to recover under IIED or invasion of privacy claims in most circumstances.

23. *Gertz* and the other initial public-figure-doctrine cases were decided in the 1960s and the 1970s, decades before the rise of the Internet and social media. See *Gertz*, 418 U.S. at 323.

24. Bob Sullivan, *Online Privacy Fears Are Real*, NBCNEWS (Dec. 6, 2013), <http://www.nbcnews.com/id/3078835/t/online-privacy-fears-are-real/#.WLC06BLys6U> [<https://perma.cc/8QSG-JFRT>].

Public figures should have two specific civil remedies that are available for non-public figures—recovery for intentional infliction of emotional distress (IIED) and invasion of privacy through public disclosure of private facts—against individuals who post pornographic or sexually explicit images without the public figure’s consent.<sup>25</sup> While it is well-established in case law that public figures do not enjoy the same right of privacy as non-public figures,<sup>26</sup> by nature of their public work and lifestyle, this should not apply in cases of revenge porn. Courts should view nonconsensual pornography differently because the reason behind limiting remedies for public figures in privacy cases—that information about the public figure is a matter of legitimate public interest<sup>27</sup>—does not apply to private, pornographic information that is not shared by the celebrity themselves.

It should be noted that the issue of revenge porn can come about from two different situations. One way is for a person to have private or pornographic photos or videos of their person taken without their knowledge and then distributed online.<sup>28</sup> The second way is for a person to knowingly and willingly take private or nude photos or videos of their person, but to have these private materials stolen and distributed online without their permission.<sup>29</sup> This Note largely concerns the second situation, where the individual’s private sexual images are disseminated without her knowledge or consent. This is due to the fact that there is already criminal recourse in place for the first situation.<sup>30</sup>

Part I of this Note will document various scenarios in which celebrities and public figures were victims of nonconsensual pornography and the harms they suffered from the invasion, both in their private lives and their careers. Part II will then trace the current civil

---

25. See 136 AM. JUR. PROOF OF FACTS 3d 175, *Proof of Intentional Infliction of Emotional Distress* § 4, Westlaw (database updated Aug. 2017) (citing *Drussel v. Elko County School Dist.*, No. 3:12-cv-00551-HDM-WGC, 2013 WL 3353531 (D. Nev. July 2, 2013)); 103 AM. JUR. PROOF OF FACTS 3d 159, *Invasion of Privacy by Public Disclosure of Private Facts* § 2, Westlaw (database updated Aug. 2017).

26. See Duhart, *supra* note 22, at 366.

27. *Gertz*, 418 U.S. at 344–45.

28. Maayan Y. Vodovis, *Look Over Your Figurative Shoulder: How to Save Individual Dignity and Privacy on the Internet*, 40 HOFSTRA L. REV. 811, 829 (2011). Vodovis’s article deals almost explicitly with the first situation, in which a person’s private or nude image is taken without their knowledge.

29. Jessica E. Easterly, *Terror in Tinseltown: Who is Accountable When Hollywood Gets Hacked*, 66 SYRACUSE L. REV. 331, 342–43. Easterly’s article details more of the second situation, in which a person’s own private photos are stolen and disseminated without their knowledge or consent. This is often the case in celebrity victim porn situations, where pictures are taken off private computers or servers and then distributed anonymously.

30. Vodovis, *supra* note 28, at 817.



remedies available to non-public figure victims of revenge porn, namely recovering under claims of intentional infliction of emotional distress and invasion of privacy. Part III will define “public figure” and then trace the history of the American judiciary’s reluctance to provide privacy remedies to public figures. Finally, this Note will conclude by arguing that the public figure doctrine should not apply in situations of nonconsensual pornography and also explain why possible alternatives to invasion of privacy and IIED claims are not sufficient options for public figure victims.

### I. A COMMON PHENOMENON—EXAMPLES OF INVASION OF PRIVACY OF PUBLIC FIGURES

In August and September 2014, hundreds of photographs of over 100 public figures, most of which contained nude or sexually explicit images of the celebrities, were released on an “imageboard” website called 4chan.<sup>31</sup> The photos were subsequently spread around the Internet through different social media sites, such as Reddit.<sup>32</sup> The individuals who released these photos, known collectively as the “hackers,” gained access to the photos by hacking into celebrities’ iCloud accounts and downloading the sensitive images.<sup>33</sup> The hack and subsequent release of the photos made major headlines for weeks after the incident, giving further attention to the victims’ photos and predicament.<sup>34</sup>

One of the most well-known and vocal victims of this attack was actress Jennifer Lawrence.<sup>35</sup> Lawrence did not shy away from her victimization, and instead chose to speak out about the attack and how it affected her life and mental health.<sup>36</sup> In an interview with *Vanity Fair* magazine, Lawrence stated, in reference to the release of her private images, “I can’t even describe to anybody what it feels like to have my naked body shoot across the world like a news flash

---

31. Adrienne Jeffries, *‘Celebgate’ attack leaks nude photos of celebrities*, THE VERGE (Sept. 2, 2014, 7:21 PM), <http://www.theverge.com/2014/9/2/6099307/celebgate-attack-leaks-nude-photos-of-more-than-100-celebrities> [<https://perma.cc/Z5DQ-CFZ2>].

32. *Id.*

33. *Id.*

34. *Id.*

35. Sam Kashner, *Both Huntress and Prey*, VANITY FAIR (Nov. 2014), <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy> [<https://perma.cc/NF6Y-86FX>]. Lawrence’s popularity, especially among young women and girls, has had a profound impact on how she has responded to the leak. Her message of empowerment speaks volumes to how serious this situation can be for women worldwide.

36. *Id.*

against my will. It just makes me feel like a piece of meat that's being passed around for a profit.”<sup>37</sup> Lawrence's description shows the intense harms that come from revenge porn invasions of privacy, harms the court could not expect prior to the Internet and social media age.<sup>38</sup> “Just because I'm a public figure, just because I'm an actress, does not mean that I asked for this,” Lawrence goes on to say.<sup>39</sup> “It does not mean that it comes with the territory. It's my body, and it should be my choice, and the fact that it is not my choice is absolutely disgusting.”<sup>40</sup>

Another victim of the attack, U.S. Olympic gymnast McKayla Maroney, was underage at the time her sexually explicit photos were taken.<sup>41</sup> Photos of her are legally considered child pornography, which attach significant criminal ramifications for the hackers and the websites who publish these photos.<sup>42</sup> Several of the imageboard websites, including Reddit, immediately removed the photos after being contacted by Maroney's representatives and learning that Maroney was underage in the photos.<sup>43</sup> However, as noted above, the images can remain on the Internet through the images' original hosting website.<sup>44</sup> Other victims included supermodel Kate Upton, U.S. soccer star Hope Solo, and singer Rihanna.<sup>45</sup> All of these victims were well-known public figures with successful careers that involved some aspect of public consumption.

More recently, reality TV star Robert Kardashian made headlines when he posted nude images of his ex-fiancée Blac Chyna, the

---

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Gil Kaufman, *Gymnast McKayla Maroney Says She's Underage in Hacked Photos*, MTV (Sept. 3, 2014), <http://www.mtv.com/news/1919057/gymnast-mckayla-maroney-underage-hacked-photos-liz-lee> [<https://perma.cc/QTN6-MQVC>]. While Maroney was of age at the time the photos were leaked, her image as an underage sports icon had widespread affect on young female athletes. Nude photos of Maroney could have had a negative effect on the positivity that women's gymnastic emanates in the United States, especially during summer Olympics years.

42. “Section 2256 of Title 18, United States Code, defines child pornography as any visual depiction of sexually explicit conduct involving a minor (someone under 18 years of age).” *Citizen's Guide to U.S. Federal Law on Child Pornography*, DEP'T OF JUST. (July 6, 2015), <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography> [<https://perma.cc/6JXD-K8UJ>].

43. Stephanie Marcus, *McKayla Maroney Was Reportedly Underage In Hacked Nude Photos*, HUFFINGTON POST (Sept. 3, 2014), [http://www.huffingtonpost.com/2014/09/02/mckayla-maroney-underage-nude-photos\\_n\\_5755600.html](http://www.huffingtonpost.com/2014/09/02/mckayla-maroney-underage-nude-photos_n_5755600.html) [<https://perma.cc/LNA8-ZAKR>].

44. Franzen, *supra* note 11.

45. Fay Strang, *Celebrity 4chan Shock Naked Picture Scandal: Full List of Star Victims Preyed Upon by Hackers*, MIRROR (Oct. 20, 2014, 10:00 AM), <http://www.mirror.co.uk/3am/celebrity-news/celebrity-4chan-shock-naked-picture-4395155> [<https://perma.cc/ZGF8-BSGJ>].



mother of Kardashian's child and a well-known model and public figure, on the social media platforms Instagram and Twitter.<sup>46</sup> While the images were promptly removed by Instagram and Twitter moderators, the images had reached up to 10 million users who follow Kardashian on those sites.<sup>47</sup>

There have been other celebrity victims of revenge porn situations in years past. Actress Vanessa Hudgens had nude photos of herself released online without her knowledge or consent in 2007.<sup>48</sup> At the time of this photo leak, Hudgens was starring in a popular kids movie franchise on the Disney Channel.<sup>49</sup> Her popularity among children caused a great outcry from parents and resulted in Hudgens' employer, Disney, releasing a statement that was reminiscent of victim-blaming.<sup>50</sup> Disney stated that they hoped Hudgens had "learned a valuable lesson" after the incident.<sup>51</sup> The idea that it is the public figure's fault for the dissemination of sexually explicit photos, or that she should be punished or blamed for taking the photos in the first place, is one of the major consequences celebrity victims of nonconsensual pornography can face.<sup>52</sup>

An additional similarity between all of the victims of this hacking, and other past victims of celebrity revenge porn, is that they were all women.<sup>53</sup> While revenge porn is not gender exclusive, "evidence

---

46. Katie Mettler, *What Rob Kardashian did to Blac Chyna could be 'revenge porn,' lawyers say, and illegal*, WASH. POST (July 6, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/07/06/what-rob-kardashian-did-to-blac-chyna-could-be-revenge-porn-lawyers-say-and-illegal> [https://perma.cc/XFW2-CTUZ].

47. *Id.*

48. See People Staff, *Vanessa Hudgens 'Embarrassed,' Apologizes for Nude Photo*, PEOPLE (Sept. 7, 2007, 5:00 PM), <http://people.com/celebrity/vanessa-hudgens-embarrassed-apologizes-for-nude-photo> [https://perma.cc/7AKB-LNA5].

49. *Id.* This popular movie franchise is the *High School Musical* series, a trilogy that teaches tolerance and the importance of being one's self to children and teens. Hudgens' nude photo leak was not in line with the message of the trilogy, something that many fans and parents took note of. See *High School Musical*, IMDB (2017), <http://www.imdb.com/title/tt0475293> [https://perma.cc/EF4V-B79N].

50. People Staff, *supra* note 48.

51. *Id.* This statement suggests that Hudgens was to blame for taking the photos in the first place, rather than placing blame on the individual who stole and leaked the photos to the press. In this particular instance, Disney showed young women and girls that men can be expected to use their sexuality and image in whatever way they want but women should be ashamed of their sexuality and hide their bodies whenever possible. This victim-blaming tactic is one of the major issues women face when dealing with privacy invasions. See Bloom, *infra* note 52, at 250.

52. Sarah Bloom, *No Vengeance for 'Revenge Porn' Victims: Unraveling Why this Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize it*, 42 FORDHAM URB. L.J. 233, 246-47 (2014).

53. Amanda Marcotte, *'The Fappening' and Revenge Porn Culture: Jennifer Lawrence and the Creepshot Epidemic*, THE DAILY BEAST (Sept. 3, 2014, 5:45 AM), <http://www.the-dailybeast.com/the-fappening-and-revenge-porn-culture-jennifer-lawrence-and-the-creepshot-epidemic> [https://perma.cc/6YLG-Q5T6].

to date indicates that the majority of victims are female, and that female victims often face more serious consequences as a result of victimization.”<sup>54</sup> Additionally, men are more likely than women to post the nonconsensual pornography onto social media.<sup>55</sup>

However, while revenge porn affects women more than men, men can also be victims of nonconsensual publication of their nude image.<sup>56</sup> In what is perhaps the most notorious revenge porn legal case to date, Hulk Hogan, a professional wrestler and TV star whose real name is Terry Gene Bollea, won a multimillion-dollar settlement against *Gawker Media* (Gawker) for invasion of Bollea’s privacy after Gawker published a video showing Bollea involved in sexual intercourse with Heather Clem, the wife of a friend.<sup>57</sup> Bollea sued both Gawker and Clem for invasion of privacy by intrusion upon seclusion, publication of private facts, intentional infliction of emotional distress, and negligent infliction of emotional distress.<sup>58</sup> Bollea argued, among other things, that he had a reasonable expectation of privacy to a video that showed him “fully naked and engaged in . . . consensual sexual relations . . . in a private bedroom . . . .”<sup>59</sup> Bollea also argued that the publishing of the video was “not of legitimate public concern.”<sup>60</sup> At trial, the jury found Gawker liable for invasion of privacy and awarded Bollea \$115 million in compensatory damages and \$25 million in punitive damages.<sup>61</sup> Gawker appealed, and ultimately settled with Bollea for \$31 million.<sup>62</sup>

---

54. *Frequently Asked Questions*, CYBER CIV. RTS. INITIATIVE (2017), <https://www.cybercivilrights.org/faqs> [<https://perma.cc/5XK6-FMH6>]. While revenge porn is a phenomenon that affects all individuals—male, female, transgender, or gender nonconforming individuals—it disproportionately affects females and those who identify as women. There are a number of reasons this could be the case. First, harboring, stealing, or distributing (or threatening to do any of the above) nude or sensitive images can be a means of control used by males over their female partners. Second, society places more shame on women’s sexuality/nudity than it does on men’s, meaning that the threat or action of revenge porn against men may not be as harmful to a man as it is to a woman. And third, the idea that women’s bodies and image are up for sale, or are meant to be shared, manipulated, and controlled by males, is still pervasive in American culture. See Marcotte, *supra* note 53.

55. *Revenge Porn and its Victims*, *supra* note 13.

56. See Maria Bustillos, *Everything You Need to Know About Hulk Hogan vs Gawker*, MOTHERBOARD (July 1, 2015, 10:19 AM), [https://motherboard.vice.com/en\\_us/article/mgb/yd8/hulk-hogans-sex-tape-is-about-to-go-to-trial-gawker](https://motherboard.vice.com/en_us/article/mgb/yd8/hulk-hogans-sex-tape-is-about-to-go-to-trial-gawker) [<https://perma.cc/QS7W-RDYY>].

57. *Id.*

58. Amended Complaint & Demand for Jury Trial at 9, 12, 15, 20, 21, *Bollea v. Clem*, et al., No. 12012447-CI-011, at 9 (Fla. Cir. Ct. Dec. 28, 2012).

59. *Id.* at 16.

60. *Id.*

61. Nick Madigan, *Jury Tacks On \$25 Million to Gawker’s Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html> [<https://perma.cc/3E8K-JTXL>].

62. Lukas I. Alpert, *Gawker Media Settles With Hulk Hogan in Privacy Suit*, WALL ST. J. (Nov. 2, 2016, 4:48 P.M.), <https://www.wsj.com/articles/gawker-media-settles-with-hulk-hogan-in-privacy-suit-1478107236> [<https://perma.cc/CW3F-8ZFF>].

*A. Harms Suffered by Victims of the Distribution of Nonconsensual Pornography*

The harms of revenge porn affect celebrities and noncelebrities in similar ways, as the act has a comparable psychological impact no matter the fame of the public figure. A *Huffington Post* article captured the five biggest harms victims of revenge porn often felt or experienced: humiliation, concern for their personal safety, a need for hypervigilance, fear of being watched during sex, and body shame.<sup>63</sup> In addition to these emotional and personal harms, outside and real world harms can also be suffered.<sup>64</sup> These include job loss, harassment or stalking by those that saw the pornography online, or negative judgment from potential employers who discover the revenge porn images through an online search.<sup>65</sup>

Sarah Bloom, a 2015 JD Candidate from Fordham University School of Law, puts these real world harms of revenge porn into three categories: problems in career and the workplace, increased vulnerability to suicide, and increased threats by third parties or ex-partners.<sup>66</sup> A woman's reputation in her career or office can be damaged when co-workers or colleagues find or distribute the images.<sup>67</sup> A simple Google search of a victim's name can often reveal these images, leading to easy access and notoriety.<sup>68</sup> As mentioned above, these searches can also negatively affect a future employer's view of the victim.<sup>69</sup>

The mental health of revenge porn victims, addressed by Bloom in terms of suicide, is also a major harm of the nonconsensual pornography practice.<sup>70</sup> According to studies done by the *Cyber Civil Rights Initiative*, ninety-three percent of victims of nonconsensual pornography reported suffering "significant emotional distress due to being a victim."<sup>71</sup> Forty-nine percent of the victims reported being "harassed or stalked online by users who saw" the pornographic

---

63. Nina Bahadur, *Victims of 'Revenge Porn' Open Up on Reddit About How it Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014, 8:50 AM), [http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact\\_n\\_4568623.html](http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html) [<https://perma.cc/MBW7-W2DM>].

64. *Revenge Porn and its Victims*, *supra* note 13.

65. *Id.*

66. Bloom, *supra* note 52, at 240.

67. *Id.* at 241.

68. *Id.*

69. *Id.*

70. *Id.* at 242.

71. *Power in Numbers*, CYBER CIV. RTS. INITIATIVE (Jan. 3, 2014), <https://www.cybercivilrights.org/revenge-porn-infographic> [<https://perma.cc/A4ZN-5LHP>].

images of the victim.<sup>72</sup> These stressors can cause “anger, guilt, paranoia, depression, or . . . suicide” in victims.<sup>73</sup> There could also be “deterioration in . . . relationships and [increased] . . . isolation” of the victim.<sup>74</sup>

Beyond the individual harm suffered by victims of revenge porn, there is a larger cultural issue that perpetrates greater harm to the entire female population.<sup>75</sup> Reporter Amanda Marcotte of *The Daily Beast* summarizes the issue:

The real problem is a cultural one. While things have been definitely improving in recent decades as feminists raise awareness of the problem of sexual violence and the importance of consent, there are clearly still *a large number of men who disregard women’s basic human right to control your own body and own sexuality*. The men in these groups really do believe they are *entitled* to own and control female bodies. While these insular misogynist communities certainly end up reinforcing their ugly attitudes toward women amongst themselves, they didn’t invent the notion that women’s bodies are public property for men to use how they please, regardless of a woman’s feelings about it. The only real, long-term solution is to change a culture that inculcates young men with these feelings of entitlement and teach respect for women to boys starting at a young age.<sup>76</sup>

Marcotte’s analysis highlights the underlying feeling behind victims of nonconsensual pornography—they are not entitled to control over their bodies.<sup>77</sup>

### *B. Legal Remedies Imposed in the “Celebgate” Hacking and Leak Incident*

In January 2017, the man responsible for stealing the nude images of Lawrence, along with a number of other women (some famous, some not), was sentenced to nine months in federal prison for the crime.<sup>78</sup> The man, Edward Majerczyk, was charged with and

---

72. *Id.*

73. Kamel & Newman, *supra* note 16, at 362.

74. *Id.*

75. Marcotte, *supra* note 53.

76. *Id.* (first emphasis added).

77. *Id.*

78. Timothy McLaughlin, *Hacker Who Stole Nude Photos of Jennifer Lawrence and Other Celebrities Jailed for Nine Months*, INDEP. (Jan. 25, 2017, 7:16 AM), <http://www.independent.co.uk/news/world/americas/hacker-celebrity-nude-pictures-videos-jennifer-lawrence-kate-upton-kirsten-dunst-edward-majerczyk-a7544626.html> [https://perma.cc/5LG9-34MU].

convicted of federal computer hacking.<sup>79</sup> This criminal sanction did not address the posting of the photos themselves, only the stealing of the images.<sup>80</sup> Majerczyk was also ordered to pay restitution in the amount of \$5,700 to one undisclosed celebrity victim of the attack.<sup>81</sup> The victim had accrued financial loss from counseling needed to deal with the emotional effects of the hack and photo leak.<sup>82</sup> Two other victims also requested the court order restitution from Majerczyk for the costs accrued in having the photos taken offline.<sup>83</sup>

## II. CIVIL REMEDIES FOR NON-PUBLIC FIGURE VICTIMS OF REVENGE PORN

While non-public victims of revenge porn or the like have several different legal recourses they can pursue, two of the most common are recovery for damages from the distributor of the private images through an intentional infliction of emotional distress or an invasion of privacy based on the public disclosure of private facts claim.<sup>84</sup> These traditional tort claims allow victims to seek redress without having to go through the criminal justice system.<sup>85</sup> Both remedies have generally not been available to public figures, but the motives behind this exclusion do not apply to the invasions of privacy inherent in revenge porn situations.<sup>86</sup> This Note will now dig deeper into the IIED and invasion of privacy doctrines, both in general and for public figures, to determine how courts have applied these remedies

---

79. *Id.*

80. *Id.*

81. Jason Meisner, *Chicagoan Gets Prison for 'Celebgate' Nude-Photo Hacking that Judge Calls 'Abhorrent,'* CHI. TRIBUNE (Jan. 24, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-celebgate-hacking-scandal-sentencing-met-20170123-story.html> [<https://perma.cc/5Q9T-ZQZ9>].

82. *Id.*

83. *Id.* This Note will delve further into the idea of restitution as a remedy for public figure victims of nonconsensual pornography in Part IV.

84. Cecil, *supra* note 1, at 2529. This Article deals with the specific invasion of privacy tort based on the public disclosure of private facts about an individual without their consent. Other types of invasion of privacy claims that may be relevant for public figure victims of revenge porn are “unreasonable intrusion upon . . . another’s private affairs” or “unreasonable intrusion upon the seclusion of another.” See Williams, *infra* note 93. While these options can be considered as a legal remedy for celebrities, this Note only deals with the Public Disclosure of Private Facts privacy tort because it is the arguably most easily attainable.

85. Cecil, *supra* note 1, at 2529–30.

86. Duhart, *supra* note 22, at 373–76. The motives behind the public figure doctrine—that public figures insert themselves into the public eye and the public has a right to know private information about them—has never, and should not, included a public figure’s body integrity and private nude photos.

in the past and how they should apply them differently for public figures in the future.

### A. *Intentional Infliction of Emotional Distress*

Recovering under an IIED claim allows a victim to be compensated for the monetary or psychological damage caused by the inflicter of emotional distress.<sup>87</sup> The Second Restatement of Torts § 46 defines the IIED claim in the following way: “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”<sup>88</sup> There are three elements that must be shown to successfully show an IIED claim. First, the plaintiff must show that the defendant acted with “extreme and outrageous conduct, intentionally or recklessly caus[ing] . . . emotional distress.”<sup>89</sup> Second, it needs to be proven by the preponderance of the evidence that the plaintiff suffered severe emotional distress and “that no reasonable man could be expected to endure it.”<sup>90</sup> And third, that the defendant’s actions were the actual or proximate cause of the plaintiff’s emotional distress.<sup>91</sup>

The first requirement of a successful IIED claim—extreme or outrageous conduct—is only satisfied when:

[T]he conduct [is] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would . . . lead him to exclaim, “Outrageous!”<sup>92</sup>

The following two lower court cases are illustrative for applying the outrageous or extreme conduct requirement to a revenge porn IIED claim.

In *Lewis v. Legrow*, the Court of Appeals of Michigan held that the defendant’s action of sending three different ex-lovers videotapes of his sexual encounters with each of the women (which none of the women knew had been filmed) constituted conduct that the average

---

87. 136 AM. JUR. PROOF OF FACTS 3d 175, *supra* note 25.

88. RESTATEMENT (SECOND) OF TORTS § 46, at 71 (AM. LAW INST. 1965).

89. *Id.* at 71.

90. *Id.*

91. *Id.*

92. *Id.* at 73.



person would deem to be outrageous.<sup>93</sup> In *Del Mastro v. Grimado*, the Superior Court of New Jersey held that the action of sending Christmas cards that contained sexually explicit images of the defendant's ex-girlfriend to his family and friends constituted outrageous or extreme conduct as necessary to fulfill an IIED claim.<sup>94</sup> Both of these cases show that spreading sexually explicit images or videos of an ex-lover to other individuals, without the ex-lover's knowledge or consent, can constitute conduct that the average individual would consider outrageous.<sup>95</sup>

The second requirement for an IIED claim—that the victim suffered severe or extreme emotional distress—is held to the standard that the average, reasonable man would not be able to endure the distress.<sup>96</sup> Researchers Mudasar Kamel and William J. Newman, psychiatrists writing for the *Journal of the American Academy of Psychiatry and the Law*, argue that revenge porn victims can fulfill this prong of the IIED claim “since the widespread dissemination of private intimate photographs can have significant immediate and lifelong mental health consequences.”<sup>97</sup> These consequences include “anger, guilt, paranoia, depression, or even suicide,” as well as “deterioration in personal relationships and feelings of isolation.”<sup>98</sup>

### *B. Invasion of Privacy Based on Public Disclosure of Private Facts*

The Second Restatement of Torts defines invasion of privacy through publicity given to private acts:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.<sup>99</sup>

The statements at issue do not need to be untrue, as in a defamation or libel case.<sup>100</sup> In fact, “it is generally the case that the matters disclosed or publicized are true, and it is the very truth of these publicly

---

93. *Lewis v. LeGrow*, 670 N.W.2d 675 (Mich. Ct. App. 2003). The *Lewis* case, and the *Del Mastro* case discussed below, were highlighted in Williams. See Elizabeth Williams, 72 CAUSES OF ACTION 2d 537, § 9 (2016).

94. *Del Mastro v. Grimado*, No. Civ. A. BER-C-388-03E, 2005 WL 2002355, at \*1, 8 (N.J. Super. Ct. Ch. Div. 2005).

95. *Del Mastro*, 2005 WL 2002355, at \*4; *Lewis*, 670 N.W.2d at 680–81.

96. Williams, *supra* note 93, at § 9 (discussing the standard established by the *Del Mastro* Court). See *Del Mastro*, 2005 WL 2002355, at \*2–3.

97. Kamel & Newman, *supra* note 16, at 363.

98. *Id.* at 362.

99. RESTATEMENT (SECOND) OF TORTS § 652D, at 383 (AM. LAW INST. 1976).

100. 103 AM. JUR. PROOF OF FACTS 3d 159, *supra* note 25, at § 2.

revealed matters that causes the plaintiff such shame or humiliation.”<sup>101</sup> The definition also requires that the private acts not be of public concern, preserving the right of the press to publish “newsworthy matters” and foster an “uninhibited” discussion of legitimate public issues.<sup>102</sup>

In cases concerning nonconsensual pornography, invasion of privacy through publicity of private acts can usually be used as a tort remedy if “the victim’s intimate photographs were stolen from a personal electronic device or private online account.”<sup>103</sup> The victim also has to argue that their private or nude images are not “of public concern.”<sup>104</sup>

In the invasion of privacy for public disclosure of private facts claim, a victim can only recover if the facts, or information or images, are not of “legitimate public concern.”<sup>105</sup> To determine if the facts, even if deemed private, are of public concern, the court balances the rights of freedom of speech and press with the right of privacy.<sup>106</sup> Generally, the courts use a “newsworthy” standard to determine if information is of legitimate public concern.<sup>107</sup> However, the courts have also had a hard time defining “newsworthy” as a bright-line standard to be used in public disclosure of private facts cases.<sup>108</sup> David Elder, writing a treatise on privacy torts, explains the courts’ conundrum:

The definition of what is newsworthy—containing that “indefinable quality of information that arouses the public’s interest and attention”—is, in some respects, “somewhat broader” than the “exceedingly difficult to define” notion of what is of legitimate concern to the public. The cases do generally concede, however, that not *all* true matters deemed newsworthy by the public are covered by the common law privilege or the constitutional legitimate concern to the public limitation. Ultimately, the standard is one of “community mores” and the courts have generally conceded that mere public curiosity is not enough.<sup>109</sup>

---

101. *Id.*

102. *Id.* § 6.

103. Kamel & Newman, *supra* note 16, at 363. Kamel and Newman’s study addressed legal remedies and legislation available for noncelebrity victims of revenge porn.

104. *Id.*

105. RESTATEMENT (SECOND) OF TORTS § 652D, at 388 (AM. LAW INST. 1976).

106. *Id.*

107. DAVID A. ELDER, THE PUBLIC INTEREST—NEWSWORTHINESS LIMITATION, PRIVACY TORTS § 3:17, 3-154–3-156 (July 2016).

108. *Id.* at 3-156.

109. *Id.* at 3-156–3-158.

### III. HISTORY OF DENYING PRIVACY REMEDIES FOR PUBLIC FIGURES

#### A. What Is a “Public Figure”?

Public figures hold a special status in common law, solidified in defamation or libel cases that hold public figures to a higher standard to recover for privacy-related torts.<sup>110</sup> The leading precedent for the public figure doctrine, *New York Times Co. v. Sullivan*, defines public figures as “public official[s],” including elected government officials and other individuals serving the public who willingly place themselves in the public eye.<sup>111</sup> This definition has expanded to include those who have gained notoriety “by virtue of his or her accomplishments, fame, or mode of life, or because of adoption of a profession or calling that gives the public a legitimate interest in the person’s activities or character.”<sup>112</sup> Richard Kaye, writing for the American Jurisprudence Proof of Facts, summarizes the term:

The status of being a public figure can be achieved in an infinite number of ways, such as engaging in political activity, attaining public office, acquiring eminence in science or other scholarly fields, or in the theater or arts, having a particular social standing, or being recognized for achievement in the world of athletics. Examples of persons who have been deemed to be in the public eye or public figures are a prizefighter, a sheriff, an explorer, a shopping center developer, a child prodigy, a dentist, and a wealthy socialite.<sup>113</sup>

However, with the advances of technology and rise of social media, the number of individuals who qualify as “public figures” has grown exponentially.<sup>114</sup> The Internet allows any person to achieve fame or notoriety, usually from the comforts of his or her own home.<sup>115</sup> This new class of public figures will need to be addressed by the courts in order to cement its status in privacy doctrine.

---

110. *Public Figure Doctrine Law and Legal Definition*, USLEGAL (2016), <https://definitions.uslegal.com/p/public-figure-doctrine> [<https://perma.cc/J2R9-8GPA>].

111. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

112. Richard E. Kaye, *INVASION OF PRIVACY BY PUBLIC DISCLOSURE OF PRIVATE FACTS*, 103 AM. JUR. PROOF OF FACTS 3d 159, at § 6 (Dec. 2016).

113. *Id.* (internal citations omitted).

114. *Id.*

115. Kate Knibbs, *How Social Media Has Changed What It Means to be a Celebrity*, DIGITAL TRENDS (Apr. 15, 2013), <http://www.digitaltrends.com/social-media/celebrity-social-media-anger> [<https://perma.cc/BKG2-ZRCD>].

*B. Distinction Between Public and Private Figures in Privacy-Related Causes of Actions*

United States common law began to distinguish public figures from non-public figures in terms of privacy rights in the area of defamation.<sup>116</sup> The first case in which the Supreme Court discussed this issue was *New York Times Co. v. Sullivan*, in 1964. *New York Times Co.* established for the first time that “public official[s]” face a higher standard when proving defamation; they must prove “actual malice” on the part of the defamer.<sup>117</sup> The Court went on to define actual malice as:

- 1) Knowledge that the information being distributed is false;<sup>118</sup> or
- 2) The information is distributed with reckless disregard of the truthfulness of the information.<sup>119</sup>

This “actual malice” standard defined in *New York Times Co.* was expanded to include “public figures,” not just public officials (individuals holding governmental positions), by the Supreme Court in *Curtis Publ’g Co. v. Butts* and *Associated Press v. Walker*.<sup>120</sup> Chief Justice Warren’s opinion in *Associated Press* has been held by the lower courts as the prevailing law.<sup>121</sup> Chief Justice Warren reasoned that “[m]any individuals who do not hold governmental office are nonetheless intimately involved in the resolution of public issues, using their fame and power to shape events in areas of concern to society at large.”<sup>122</sup> This stressed the importance of the work that public figures do that shapes the “resolution of public issues” or directly or indirectly affects public life or the lives of private citizens.<sup>123</sup>

The Supreme Court next addressed the public figure doctrine in 1974 in *Gertz v. Robert Welch, Inc.*<sup>124</sup> Smolla and Nimmer, authors of a 1996 treatise on the First Amendment and the Freedom of Speech, explain *Gertz*’s impact: “*Gertz* attempted to resolve the inherent friction between freedom of speech and protection of reputation by announcing a grouping of rules setting forth the minimum

---

116. See generally *N.Y. Times Co.*, 376 U.S. at 268 (1964).

117. *Id.* at 279–80.

118. *Id.* at 280.

119. *Id.*

120. 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23:4, at 23-56.3–23-56.4 (2017).

121. *Id.* at 23-56.4.1–23-56.4.3.

122. *Id.* at 23-56.4.2.

123. *Id.* at 23-56.4.2–23-56.4.3.

124. *Id.* at 23-56.4.4.

constitutional requirements for compensating injury to reputation.”<sup>125</sup> These requirements included the definite rule that any claims brought by a public official or figure must always meet the *New York Times Co.* “actual malice” test.<sup>126</sup> Additionally, the Court required that “[d]efamation suits brought by private individuals (at least those concerning public issues) must at [a] minimum be based upon proof of ‘fault,’ which has come to be understood as requiring a minimum of ‘negligence’ in all cases.”<sup>127</sup> This highlights the differences between the standards for public figures and private individuals.

The Court held two rationales for this distinction between public and private individuals—the first was access to media.<sup>128</sup> Smolla and Nimmer again explain: “Given the fact that, generally, public officials and public figures enjoy significantly greater access to channels of effective communication, the Court assumed that they have, as a class, a more realistic opportunity to contradict the lie or correct the error than do private individuals.”<sup>129</sup> In terms of revenge porn invasion of privacy issues, there is no lie or error to be corrected, which is why the court’s emphasis on defamation in this area is misplaced.

The second rationale was the more traditional voluntariness approach.<sup>130</sup> “People who voluntarily attain public figure status often have assumed roles of special prominence in social affairs, and in all fairness they can be required to accept greater public scrutiny and greater exposure to defamation as part of the cost of such fame.”<sup>131</sup> Again, this rationale does not extend to instances of revenge porn, as an individual’s voluntary acceptance of “greater public scrutiny” does not include an acceptance of the public viewing their naked image or video.<sup>132</sup> Scrutiny of one’s actions, words, or work is understandable for public figures, but asking them to give up any right to privacy for their bodies or private image is too much.

### C. Public Figure Doctrine in Terms of IIED

The leading case concerning the tort of intentional infliction of emotional distress and public figures is *Hustler Magazine v. Falwell*.<sup>133</sup>

---

125. *Id.* at 23-56.4.6.

126. 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23:4, 23-56.4.6 (2017).

127. *Id.* at 23-56.4.7.

128. *Id.* at 23-56.4.8.

129. *Id.* (internal citations omitted).

130. *Id.* at 23-56.4.8–23-56.4.9.

131. *Id.* at 23-56.4.9.

132. 3 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 23:4, 23-56.4.9 (2017).

133. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 603–05 (1990).

In that case, plaintiff Jerry Falwell, a well-known religious and political leader, sued *Hustler Magazine* and its publisher, Larry Flint, for intentional infliction of emotional distress after *Hustler* published a satirical account of Falwell committing incestuous acts with his mother.<sup>134</sup> The Court ultimately held that “the First and Fourteenth Amendments prohibit public figures” from recovering under an IIED claim without evidence of actual malice on behalf of the inflicter.<sup>135</sup> Paul A. LeBel, writing for the *University of Colorado Law Review*, describes the Court’s holding very well:

The Court instead appeared to be distracted by a hypothetical question along the lines of whether a publisher such as *The Washington Post* should be liable for the emotional discomfort of a public figure intentionally caused by a publication such as a Herblock editorial cartoon. Stating that he could find no principled basis on which to distinguish a case of that sort from the case that was actually before the Court, Chief Justice Rehnquist, writing for seven of the Justices, concluded that Falwell could not maintain an action for damages for the intentional infliction of emotional distress without proof that a false statement of fact had been made with “actual malice,” and accordingly set aside the lower court judgment in Falwell’s favor.<sup>136</sup>

This “actual malice” standard is carried over from the *New York Times Co.* precedent surrounding libel and defamation suits.<sup>137</sup> In that case, the court defined “actual malice” as acting “with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>138</sup>

The actual malice standard will be impossible to prove in cases of nonconsensual pornography, as there is no truth or falsity to one’s naked image or video. However, that does not mean that a public figure cannot feel the effects of the intentional infliction of emotional distress through the sharing of this material, as the material itself is arguably as harmful as false information shared in the traditional IIED claim.

---

134. *Id.* at 605.

135. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

136. Paul A. LeBel, *Emotional Distress, the First Amendment, and “This Kind of Speech”: A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315, 316–17 (1989). LeBel was critical of the *Falwell* decision, arguing that it did not leave enough room for victims to recover under a traditional intentional infliction of emotional distress claim.

137. *Id.* at 317. See Section III.B of this Note.

138. E.H. Schopler, Annotation, *Libel and Slander: What Constitutes Actual Malice, Within Federal Constitutional Rule Requiring Public Officials and Public Figures to Show Actual Malice*, 20 A.L.R. 3d 988 (1968).



This Note suggests creating a standard of presumptive actual malice in cases where an individual's private, potentially embarrassing or harmful, information is shared when there is no truth component to the information. A presumption of actual malice would allow these victims to pursue a civil remedy under an IIED claim. Additionally, the sharing of another's sexually explicit material without her consent or knowledge should be presumed malicious because of the inherently negative consequences to the victims of these attacks. Spreading these materials is a hateful act that gives the perpetrator very little, if any, arguable benefit.

The concept of a presumptive actual malice standard already exists in the legal world.<sup>139</sup> Also known as implied malice, it is "a legal presumption that dispenses with the proof of common-law actual malice when the publication [of information or material] is actionable per se."<sup>140</sup> While not exhaustive, the implied malice standard has been an element in cases of "malicious prosecution, wilful misconduct (according to terminology employed by at least some of the courts), injurious falsehood (false words), disparagement of goods . . . , various forms of unfair business competition, interference with either contract or prospective advantageous business relations, and prima facie tort."<sup>141</sup>

#### *D. Public Figure Doctrine in Terms of Invasion of Privacy*

In general, the common law has held that the public has a legitimate interest in a public figure's activities or character.<sup>142</sup> However, "[m]ore recent cases suggest that even in the case of a public figure, the facts published have to meet a 'newsworthiness' test to defeat the plaintiff's cause of action for public disclosure of those facts."<sup>143</sup> Thus "one's entire private life and past history [do not necessarily] become fair game for news media exploitation."<sup>144</sup>

---

139. Wallace K. Lightsey, John C. Few, Steven P. Groves, & Linda W. Rogers, *Malice: Actual and Implied*, 20 S.C. JUR. LIBEL & SLANDER § 5, Westlaw (database updated June 2017) (Dec. 2016).

140. *Id.*

141. Stuart M. Speiser, Charles F. Kraus, & Alfred W. Gans, *Motive, Purpose and Intent as Elements; "Malicious Acts,"* 1 AM. LAW OF TORTS § 1:12, at 57 (2013).

142. *Id.* See 103 AM. JUR. PROOF OF FACTS 3d 159 § 2, *supra* note 25.

143. Kaye, *supra* note 112 (citing *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 29 Int'l Trade Rep. (BNA) 2081 (5th Cir. 2007); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1098 (D. Haw. 2007); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 768 (BNA) 1121 (1st Dist. 1983)).

144. *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 n.2 (1976). This is especially relevant for nonconsensual pornography cases, which is the epitome of 'one's entire private life.' While the public has a right to information about a public figure's character or activities, I cannot see how nude or intimate images can qualify in this category.

Based on lower court decisions that have interpreted the legitimate public interest standard,

[T]here [must be at least] a rational and . . . arguably [a] close relationship[,] between the facts revealed and the activity to be explained[, and the media] should not be [entitled to a] no-holds-barred rummaging . . . through the private lif[e] of [an individual] engaged in [an] activit[y] of public interest under the pretense of elucidating that activity or the person's participation in it.<sup>145</sup>

The key in these cases is how the court will define “newsworthiness.”<sup>146</sup> While there is no universal test, many courts use a three-part test that focuses on: “[(1)] the social value of the facts published, [(2)] the depth of the . . . intrusion into ostensibly private affairs, and [(3)] the extent to which the party voluntarily acceded to a position of public notoriety.”<sup>147</sup>

Under both the legitimate public concern and the newsworthiness analyses, nonconsensual pornography fails the standards. In reference to a “legitimate public concern,” there is no rational relationship between a public figure's work, whether it be in government, film, television, music, or otherwise, and their private images, unless the public figure had the intention of distributing the private images themselves. Additionally, in terms of newsworthiness, there is little, if any, social value to nude or private images; the depth of the intrusion upon the public figure's privacy is immense, and the majority of private figures have not acceded to a position of public notoriety that includes their naked or intimate image.

#### IV. ARGUMENT FOR CIVIL REMEDIES FOR PUBLIC FIGURE VICTIMS OF NONCONSENSUAL PORNOGRAPHY

The denial of privacy rights to public figures stemmed from an age of localized, slow news cycles, where information was more easily verified and the lives of public figures were not so intensely invaded by the outside world.<sup>148</sup> Today's media allows individuals to invade the bodily privacy of public figures and disseminate that private, sensitive information. Because of these changes in technology and media in today's world, and the particular harms felt by victims of nonconsensual pornography, the public figure privacy

---

145. *Id.* at 1289. *Cf. Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 29 Int'l Trade Rep. (BNA) 2081 (5th Cir. 2007).

146. *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

147. *Id.*

148. *See* Part III of this Note.

doctrine should be amended to allow public figure victims of non-consensual pornography to recover a civil remedy under either an intentional infliction of emotional distress claim or an invasion of privacy through public disclosure of private facts claim.

The act of disseminating nonconsensual pornography does not align with the original rationale of the public figure doctrine. As related above, “[t]he public figure doctrine [was established as] an attempt to strike a balance between the First Amendment interest in a free press from the self-censorship considerations arising from the existence of libel laws and the state interest in providing civil remedies for defamatory falsehood.”<sup>149</sup> This First Amendment interest in a free press does not include the interest of sexually explicit, private photos or videos.<sup>150</sup> The public has no legitimate interest in these materials.<sup>151</sup> The state’s interest in protecting the privacy of nonconsensual pornographic materials is inherently higher than its interest in protecting the privacy of legitimate newsworthy material.<sup>152</sup> Additionally, while public figures do voluntarily enter the public realm, and thus voluntarily give up a certain amount of expectation of privacy into their lives, this voluntariness cannot include the giving up of the image of one’s naked body or other sexually explicit, sensitive material. Asking this of public figures is too much and goes beyond the scope of what the free press should include.<sup>153</sup>

Allowing public figures to recover from revenge porn attacks under two different legal tort remedies will help victims recover from their trauma and will potentially deter the spread of non-consensual pornography of public figures in the future. By allowing public figures to recover under an intentional infliction of emotional distress claim, with the inclusion of an implied or presumed actual malice standard, the court will give redress to public figures who have suffered great emotional, social, financial, or psychological harm from a revenge porn attack. And by allowing public figures to recover under an invasion of privacy through public disclosure of

---

149. *Public Figure Doctrine Law and Legal Definition*, *supra* note 110.

150. *Id.*

151. The legitimate interest referred to here is the one that the public has in information about public figures. This Note does not argue that the public does not have any legitimate interest in the lives of public figures, only that the legitimate interest does not extend to public figures’ private, nude images or videos.

152. This is because the nonconsensual pornography gives little-to-no benefit to society and its interest in public figures, unlike actual newsworthy material; protection of a state’s citizens’ privacy interests in their body, on the other hand, holds great weight.

153. This Note does not attempt to go into the complexities of the First Amendment’s right to freedom of the press. It only mentions in passing that nonconsensual pornographic images should not fall into the covered entities of the right to freedom of the press.

private facts claim, courts will be giving a voice to the inherent privacy interest all humans, public and non-public alike, have in their body and naked image.

#### A. *Criminal Sanctions and Restitution as an Alternative Remedy*

The criminal law that surrounds nonconsensual pornography is quite extensive; it differs from state to state (including many states that have no criminalization of the dissemination of nonconsensual pornography), and varies in how successful it is in prosecuting and punishing the perpetrators.<sup>154</sup> The amount of information on criminal sanctions of revenge porn goes well beyond the scope of this Note, but this Note will briefly address some of the different criminal routes available for prosecuting revenge porn perpetrators.

When criminal charges are pursued, they give victims of revenge porn a chance to receive restitution, as in the criminal case of the Celebgate hacker.<sup>155</sup> Restitution can be ordered by the court to repay victims for any financial losses suffered as a result of the crime being prosecuted.<sup>156</sup> However, restitution is contingent on both the defendant being found guilty of the accused revenge porn crime and the defendant having the financial means to pay the court-ordered restitution.<sup>157</sup>

While this is a potential option for public figure victims of revenge porn, there are some limitations that make it not as good of an option as recovering under an IIED or public disclosure of private facts claim. Criminal law sanctions, tough enough to get because of the general lack of criminal law surrounding nonconsensual pornography, are even tougher to successfully get in a case involving a public figure victim of revenge porn, as the perpetrator is usually an anonymous online presence.<sup>158</sup> This is different from non-public figure cases involving revenge porn, where the perpetrator is generally known by and/or close to the victim and is more easily identified.<sup>159</sup> The varying laws, different standards, and elusivity of the defendants make criminal restitution a poor remedy for most public figure victims of revenge porn.

---

154. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 373–74 (2014).

155. See Section I.B of this Note.

156. *Understanding Restitution*, USAO N. DIST. GA. (Apr. 17, 2015), <https://www.justice.gov/usao-ndga/victim-witness-assistance/understanding-restitution> [<https://perma.cc/BK3K-WUEX>].

157. *Id.*

158. Citron & Franks, *supra* note 154, at 371.

159. *Id.* at 351.

*B. Civil Action Against the Online Website Operators of the Sites Containing Nonconsensual Pornographic Materials as an Alternative Remedy*

Victims of revenge porn will often look to the websites themselves to take down any nonconsensual pornography posted by a third-party user.<sup>160</sup> Victims also often try to sue for a legal remedy to enforce this deletion of material if the website's operators refuse to do it on their own.<sup>161</sup> These remedies allow victims to get immediate relief from the harmful action—the posting of the revenge porn images.<sup>162</sup> Additionally, the offending party, the website operator, is easily identifiable and reachable through the court system.<sup>163</sup>

However, this remedy is not easily achieved by most victims of revenge porn.<sup>164</sup> “[W]ebsite operators and their Internet Service Providers . . . generally hold far-reaching immunity from the actions of third-party posters.”<sup>165</sup> A provision of the Communications Decency Act (§ 230) “allows revenge porn websites and their hosts to retain immunity from the actions of the individuals who post the images so long as the website did not create or develop the material.”<sup>166</sup> This makes it extremely difficult for hosting websites to be held accountable for the posted nonconsensual pornography.<sup>167</sup> In one of the most relevant examples of case law, a Texas trial court allowed a class action suit to be brought against a hosting website for invasion of privacy by a class of victims of revenge porn.<sup>168</sup> However, the Court of Appeals of Texas overturned the trial court's ruling, citing § 230 immunity as the inability to bring a claim against the hosting website.<sup>169</sup> Seeking to recover from the hosting website is a poor alternative for public figure victims of revenge porn because of the far-reaching immunity of website providers.

#### CONCLUSION

Public figures who have had private, pornographic material distributed to the public without their consent should be able to recover

---

160. Cecil, *supra* note 1, at 2522.

161. *Id.* at 2526.

162. *Id.* at 2525.

163. *Id.* at 2520–22.

164. *Id.* at 2525.

165. *Id.* at 2517.

166. Cecil, *supra* note 1, at 2517.

167. *Id.* at 2539.

168. See *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753–55 (Tex. App. 2014).

169. *Id.* at 755.

damages from the original distributors or thieves of the material through an IIED or invasion of privacy claim. The original rationale for excluding public figures for recovering damages in privacy disputes, that public figures voluntarily inject themselves into the public sector and assume the public scrutiny that comes with the territory, does not apply in the new digital, internet and social media-based era we live in today. An injection into today's social media-driven public sector should not give an automatic license to the invasion of one's bodily privacy. Additionally, there should be an implied or presumptive standard of actual malice for public figure victims of revenge porn in IIED or invasion of privacy by disclosure of public facts cases because there is no truth element to nonconsensual pornography from which actual malice can be inferred.

The emotional, psychological, and tangible harms of revenge porn affect public figures and private individuals in almost exactly the same manner. While public figures do insert themselves into the public eye and narrative, and inevitably opt in for public scrutiny and comment, this insertion does not, or should not, include the giving up of private, intimate, or nude images against their will. There is no legitimate public interest in these images or videos to justify the public's need for these materials.

The Supreme Court should redefine the requirements for public figures recovering under IIED or invasion of privacy by public disclosure of private facts when the information that was distributed is nonconsensual pornography. Specifically, the Supreme Court should take away the strict "actual malice" standard for IIED and invasion of privacy claims for public figures who are victims of nonconsensual pornography attacks and replace it with a presumptive standard of malice.

CAROLINE DRINNON\*

---

\* Caroline Drinnon is a 2018 JD Candidate at William & Mary Law School. She has a BA in Political Science from Vanderbilt University. The Author would like to give special thanks to Professor Rebecca Green for her help in the preparation and editing of this Note.



