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ABSTRACT

Effective September 2015, the Washington State Legislature passed two statutes which created both civil and criminal liability against individuals who distribute "intimate images" of others without their consent.[1] *These statutes were created to combat the modern phenomenon colloquially known as "revenge porn." Revenge porn is the non-consensual distribution of nude or sexually explicit photographs or videos, created with the intent to humiliate or harass the person these images depict. In addition to causing emotional damage to the victim, revenge porn can also produce broader consequences such as loss of employment and stalking. Traditionally, litigating these kinds of offenses has been difficult because traditional tort theories have been ruled inadequate, defendants often fall back on the Communications Decency Act ("CDA") to protect websites hosting such material, and, until recently, such offenses were not taken seriously. This Article focuses on the practical concerns of litigating civil cases under Washington's revenge porn statute and its constitutional limitations under the CDA and the First Amendment.*

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[*] Jessy R. Nations, University of Washington School of Law, Class of 2017. Thank you to Professor William Covington, David Ward, and the *Washington Journal of Law, Technology and Arts*.

[1] WASH. REV. CODE § § 4.24.795, 9a.86.010.

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INTRODUCTION

"Revenge porn", and nonconsensual pornography in general, are uniquely modern phenomena where someone posts sexually explicit or suggestive pictures or video of another person on the Internet without their consent in order to humiliate them. Some people engage in revenge porn by publicly posting nude and/or sexually explicit pictures and videos of former romantic partners on the Internet, often alongside their names and social media accounts, in

order to humiliate their former partner. In a recent example of nonconsensual pornography, a group of hackers stole private photographs from famous actresses—most of which were nude photos—and published them on every Internet outlet they could find.[2]

Many view revenge porn as the foolishness of 'kids these days', and often blame the victim or tell them to "get over it"; however, these cases can seriously impact the victim's life.[3] In addition to the psychological damage caused by the initial humiliation and breach of trust, many victims lose their jobs and suffer other negative consequences in their personal lives.[4]

This Article begins with an outline of failed attempts to litigate revenge porn cases under traditional tort law. It then explains the elements of a revenge porn claim under WASH. REV. CODE § 4.24.795 (2015).[5] The Article goes on to discuss the possibility of litigation against host websites in the face of CDA protection, followed by a discussion of the First Amendment concerns regarding revenge porn. Lastly, this Article explores the ongoing harm caused by this problem.

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[2] Jason Meisner, *Chicago Man to Plead in Agreement Over 'Celebegate' Photo Hacking*, CHICAGO TRIBUNE, (August 31, 2016), http://www.chicagotribune.com/news/local/breaking/ct-celebrity-photos-hacking-chicago-suspect-met-20160830-story.html (While the hackers were not former romantic partners, this is still an example of non-consensual pornography.)

[3] Hunter Moore, former owner of a popular revenge porn website, once referred to himself as a "professional life-ruiner" and acknowledged that such websites could benefit from provoking the suicides of victims. *See* Rheana Murray, *Is Anyone Up? Shuts Down: 'Revenge Porn' Forum Bought by Anti-Bullying Website*, N.Y. DAILY NEWS (April 20, 2012), http://www.nydailynews.com/news/money/isanyoneup-shuts-revenge-porn-forum-bought-anti-bullying-website-article-1.1064608. (internal quotations omitted).

[4] In one example, a teacher in Texas was fired after a co-worker discovered online photos of the teacher where her breasts were visible. *See* Heather L. Carter et al., Have You Googled Your Teachers Lately? Teachers' Use of Social Networking Sites, 89 PHI DELTA KAPPAN 681, 683 (2008).

[5] There is both a civil and criminal version of this statute. This Article focuses on the civil version for the sake of brevity. The criminal version can be found at WASH. REV. CODE § 9a.86.010.

I. FAILED ATTEMPTS TO LITIGATE REVENGE PORN UNDER TRADITIONAL TORT LAW

Litigants have attempted to combat revenge porn offenses under several traditional tort theories. Some victims have even attempted to copyright the photos in question in order to compel the host website to take them down.[6] Not only did such demands not work, but the copyright process made the photos the victim was attempting to keep private even more public.[7] Other traditional tort theories—such as defamation/false light, intentional infliction of emotional distress ("IIED"), breach of privacy, and libel—have similarly failed.[8] This next section will address these failings in greater detail.

A. Defamation or False Light Theories

Defamation, stated broadly, is when one person publishes false and harmful things about another.[9] Several courts have ruled against defamation or false light theories in cases of revenge porn because the material published does not always contain false claims, or even any fact-based claims at all. For example, in the recent case of *Patel v. Hussain*,[10] a spurned ex-boyfriend published sexually explicit photos and videos of the victim, taken over the course of several years. Because none of these photos or videos were published alongside any factual claims about the victim, true or false, the Texas Court of Appeals denied relief under a theory of defamation. Specifically, the court held that the "a jury's finding of substantial truth precludes liability for a defamation claim."[11] Based on this, and similar lines of reasoning, false light theories have also

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[6] Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN TECH (April 27, 2015), http://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/.

[7] *Id*. ("[Submitting the nude photos for copyright protection] made Hilary cringe. 'I thought, well no, this must be wrong ... they're forcing me to disclose them further when that's what I was trying to prevent.'").

[8] *See* Patel v. Hussain, 485 S.W.3d 153, 158 (Tex. App. 2016) (revenge porn victim denied relief under a wide range of tort theories.).

[9] *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977).

[10] *Patel* at 158.

[11] *Id.* at 174.

been unsuccessful in providing relief to most victims of revenge porn.[12]

B. IIED Theories

The plaintiff in *Patel* was also denied relief under a theory of IIED.[13] This tort usually arises as a "gap filler" when other theories of liability are unavailable to a plaintiff.[14] On appeal, the *Patel* court held that the victim's invasion of privacy claims barred her from recovering under an IIED theory.[15] Essentially, because other tort theories were triable, the court reasoned that this gap had already been filled and concluded that IIED was not available. Even in cases where IIED claims are available, a successful claim requires that the harm suffered be "utterly intolerable in a civilized community."[16] In certain communities, being a victim of revenge porn might be considered offensive, but potentially not enough to be "utterly intolerable in a civilized community."[17] As such, courts may suggest that not every victim of revenge porn suffers from emotional harm in a way actionable under traditional tort law.

C. Breach of Privacy Theories

A breach of privacy claim in a revenge porn case commonly

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[12] *Id; but see also*, RESTATEMENT (SECOND) OF TORTS § 652E, cmt. a (1976). (explaining that falsehood is a required element of a false light claim.).
[13] Patel v. Hussain, 485 S.W.3d at 158.
[14] *Id.* at 176 (citing Hoffmann–La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004))
[15] *Id.* at 176.
[16] RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (2016).
[17] *See* RESTATEMENT (SECOND) OF TORTS § 46 (2016) Illustration 4. Plaintiffs are expected to be "hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." Illustration 4 pushes at the boundaries of what is tolerable in a civilized community. It reads, "A makes a telephone call but is unable to get his number. In the course of an altercation with the telephone operator, A calls her a God damned woman, a God damned liar, and says that if he were there he would break her God damned neck. B suffers severe emotional distress, broods over the incident, is unable to sleep, and is made ill. A's conduct, although insulting, is not so outrageous or extreme as to make A liable to B."

fails for two reasons. First, the published images or videos may not be "substantially certain to become public knowledge" and thus do not meet the standard for invasion of privacy.[18] In many revenge porn cases, the published images remain available only to a small audience.[19] Second, the published images may be considered of legitimate concern to the public.[20] Many celebrities have had intimate images of themselves stolen and published, some of whom have made their sex lives part of their careers.[21] Thus, a victim who is publicly open about their sex life may also be barred from recovering on invasion of privacy claims.[22]

II. LEGISLATIVE HISTORY – REVENGE PORN AND TRADITIONAL TORTS

Legislative notes strongly suggest that the Washington State Legislature viewed a new statute for revenge porn as unnecessary because existing causes of action under traditional tort doctrine should have addressed the issue. As the committee notes, "[l]i/ability currently exists for some harms that result from disclosure of embarrassing or emotionally distressful material."[23] That the legislature nevertheless enacted a bill directed specifically towards revenge porn is a clear message to judges, juries, and litigators that these cases should not be taken as some modern anomaly brought on as a symptom of an oversensitive culture or careless youths.[24] This statement indicates that the committee

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[18] RESTATEMENT (SECOND) OF TORTS §652E cmt. A (1977).

[19] *See, e.g.* Merrit Kennedy, *Senators Grill Top Marine Over Nude Photo Scandal*, NPR (Mar. 14, 2017), http://www.npr.org/sections/thetwo-way/2017/03/14/520160602/senators-grill-top-marine-over-nude-photo-scandal (nude photographs of female Marines shared among smaller selection of Marines United)

[20] Lee v. Penthouse Int'l, Ltd., No. CV96-7069SVW, 1997 WL 33384309 (C.D. Cal. 1997) (unpublished)) (plaintiff's claim for invasion of privacy barred due to plaintiffs publicly discussing their sex lives openly in several publications).

[21] *Id.*

[22] *Id.*

[23] Wash. H.R. Off. of Program Res. Jud. Comm., *An act relating to the distribution of intimate images*, H.B. 2160, Wash. Leg., 2015-16 Reg. Sess., p. 1.

[24] According to Laura Higgins, operator of the UK based revenge porn helpline, "Police forces often don't take it seriously. There's a lot of victim-blaming that

believed the law already holds individuals liable who disclose information that is embarrassing to others, and that revenge porn should be treated no differently.

The codified elements of revenge porn are nearly identical to those of several traditional torts. As the legislature noted in its review, "[t]he tort of invasion of privacy is codified in statute and is based on the common law tort of public disclosure of private facts."[25]

The bill summary also notes that, "[t]he tort of intentional infliction of emotional distress, also known as the tort of outrage, exists when a defendant engages in extreme and outrageous conduct to intentionally or recklessly inflict emotional distress on a plaintiff."[26] This language highlights the harm and intent elements of WASH. REV. CODE § 4.24.795. On the surface, this statute places a limit on speech, but so do laws concerning IIED, which is a much broader category of speech. Alternatively, this shows that these claims are to be framed similarly to negligence claims—specifically, plaintiffs would need to show (1) that defendants had a duty to not distribute material that should be considered private, (2) a breach of this reasonable expectation of privacy, (3) causation, and (4) damages.

In light of the legislature's deliberate parallels to these tort claims, future litigators in revenge porn suits would be well-advised to frame their cases around elements common to similar torts. For example, by showing that a reasonable expectation of privacy existed, a complaint can read like an invasion of privacy claim. By showing that the defendant's behavior was so severe and outrageous that it caused emotional harm to the plaintiff, a complaint can read like an IIED claim. In such cases, litigators should seek to show that something private was knowingly disclosed to the public without the concerned party's consent.

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happens, unfortunately, and in particular men get a really tough break with this." *Revenge porn victims often blamed, says helpline*, BBC NEWS (Dec. 28, 2015), http://www.bbc.com/news/uk-wales-34983437.

[25] Wash. H.R. Off. of Program Res. Jud. Comm., *supra* note 24.

[26] *Id.*

III. ELEMENTS OF A REVENGE PORN CLAIM UNDER WASH. REV. CODE § 4.24.795

A. Elements broadly

Thirty-four states, including Washington, recently passed statutes to create both public and private causes of action for victims of nonconsensual pornography.[27] Some of these statutes have had limited success; others have not.[28]

Washington's private cause of action for victims of revenge porn has three elements. Any person who (1) distributes an "intimate image"[29] of another person, (2) that they acquired that image under circumstances that a reasonable person would know it was supposed to remain private, and (3) distributes the image knowing that the distribution would cause that person harm will be liable under this statute.[30] The statute defines its key terms, such as "intimate images," and sets out specific factors for juries to consider when assessing the reasonable expectation of privacy.[31]

B. What is an "Intimate Image"?

Section five of WASH. REV. CODE § 4.24.795(5) defines an "intimate image" as "any photograph, motion picture film, videotape, digital image, or any other recording or transmission of another person ... that was taken in a private setting."[32] In creating this definition, the Washington State Legislature cast a broad net in terms of the various formats with which such images could be

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[27] *See* WASH. REV. CODE § § 4.24.795 (2016) (civil statute), 9a.86.010 (2016) (criminal statute).

[28] For example: Arizona abandoned its statute as being too broad to enforce in 2015. *See* Joe Mullin, *Arizona makes deal with ACLU, won't enforce bad law on '"revenge porn"'*, ARS Technica, July 12, 2015, https://arstechnica.com/tech-policy/2015/07/arizona-makes-deal-with-aclu-wont-enforce-bad-law-on-revenge-porn/

[29] "Intimate image" is defined in WASH. REV. CODE § 4.24.795(5) (2016); *see also* Part III.B *infra*.

[30] WASH. REV. CODE § 4.24.795(2) (2016).

[31] WASH. REV. CODE § 4.24.795(5).

[32] *Id.*

captured.[33] Most modern media could be summed up as "digital images," but this definition likely expands the statute to cover analogous forms such as VHS or Betamax since both would be considered a "motion picture film" or "videotape."

This section also establishes criteria for what makes an image "intimate." Images are only "intimate" if they depict "[s]exual activity, including sexual intercourse defined in RCW 9A.44.010," or "[a] person's intimate body parts, whether nude or visible through less than opaque clothing."[34] This language suggests that certain kinds of images will not be protected by the statute. For example, sharing images of someone in opaque lingerie or wearing a swimsuit may not be actionable under the statute.[35] While risqué photographs published without a plaintiff's knowledge may cause distress, the publication is unlikely to be actionable as revenge porn unless intimate body parts are visible or the image depicts sexual activity.[36]

C. Reasonable Expectation of Privacy

The revenge porn statute does not explicitly define a "reasonable expectation of privacy." Instead, it lists factors that determine "whether a reasonable person would know or understand that the image was to remain private."[37] One factor is the nature of the relationship between the parties.[38] For instance, people are more likely to expect privacy in communications with a romantic partner than with a modeling agent. Another factor courts may consider is the circumstance under which the image was taken.[39] For example,

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[33] *Id.* ("'intimate image' means any photograph, motion picture film, videotape, digital image, or any other recording or transmission of another person who is identifiable from the image itself or from information displayed with or otherwise connected to the image.")

[34] WASH. REV. CODE § 4.24.795(5)(a)-(b).

[35] However, the bill summary notes that an intimate image might include "a person's intimate apparel." Wash. H.R. Off. of Program Res. Jud. Comm., *An act relating to the distribution of intimate images*, H.B. 2160, Wash. Leg., 2015-16 Reg. Sess., p. 2.

[36] *See* Wash. H.R. Off. of Program Res. Jud. Comm., *supra* note 36.

[37] WASH. REV. CODE § 4.24.795(3) (2016).

[38] WASH. REV. CODE § 4.24.795(3)(a).

[39] WASH. REV. CODE § 4.24.795(3)(b).

was the photo taken in the privacy of a home, or was it taken during a professional photo-shoot or public event? Arguably, photos taken at home carry a greater expectation of privacy than those taken in public. The circumstances of distribution may also be a factor:[40] photos posted on a photographer's art blog would likely carry less culpability than myexgirlfriend.com. The former implies some consent to publication, while the latter does not. Lastly, the statute also allows courts to consider "other relevant factors".[41] This is a standard legislative catch-all indicating the list above is not meant to be exhaustive. Often the privacy element in revenge porn cases is fact-intensive, as these offenses happen in a wide variety of settings. As such, attorneys would be well advised to develop the facts of these cases in great detail.

D. Damages and Attorney's Fees

Quantifying damages under this statute presents some difficulty. WASH. REV. CODE § 4.24.795 states that anyone who distributes intimate images of another person without their consent is subject to "actual damages including, but not limited to, pain and suffering, emotional distress, economic damages, and lost earnings, reasonable attorneys' fees, and costs."[42] While some of these damages will be easily calculable, damages due to emotional distress, pain and suffering, and so on, are notoriously nebulous in a legal context.[43]

IV. OBSTACLES TO REVENGE PORN LITIGATION

A. The Communications Decency Act ("CDA") Could Bar Litigation against Host Websites

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[40] WASH. REV. CODE § 4.24.795(3)(c).
[41] WASH. REV. CODE § 4.24.795(3)(d).
[42] WASH. REV. CODE § 4.24.795(2).
[43] The RESTATEMENT (SECOND) OF TORTS § § 924 cmt. b, 912 cmt. a (1979) states that "[n]o rule can be stated profitably on the amount of damages recoverable for [emotional] harms." In another section, it states that one cannot prove with certainty any real equivalence between emotional damages and compensation in money.

The CDA provides a defense to host websites, and thus has barred causes of action against the root cause of revenge porn.[44] However, recent cases across several circuits have shown that the CDA does not offer complete immunity to websites from lawsuits.

Congress enacted the CDA in 1998 in response to *Stratton Oakmont, Inc. v. Prodigy Services*[45] and several similar cases.[46] In *Stratton*, the court held that the defendant's message board was akin to a newspaper; as such, by taking steps to police the content of this message board, the defendant had engaged in an editorial function that exposed it to publisher liability.[47] As later courts have also observed, Congress did not want to punish website operators for engaging in this kind of self-policing.[48] Rather, Congress passed the CDA to protect website operators from this liability, and to bolster the "free and open" nature of the Internet.[49]

Under the CDA, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[50] An interactive service provider is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[51] This essentially means that those who post are responsible for their words, but those who host the content are not. This has the practical

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[44] *See* GoDaddy.com, LLC v. Toups, 429 S.W.3d 752 (Tex. Ct. App. 2014).

[45] Stratton Oakmont, Inc. v. Prodigy Services, Co., 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995) (unpublished).

[46] *See, e.g.*, Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1163 (9th Cir. 2008).

[47] *See Stratton* at *3. ("The choice of material to go into a newspaper and the decisions made as to the content of the paper constitute the exercise of editorial control and judgment . . ., and with this editorial control comes increased liability.").

[48] J.S. v. Vill. Voice Media Holdings, 359 P.3d 714, 724 (Wash. 2015) ("Before it passed this statute, Congress weighed the competing policies of fostering robust interactive service provider growth, *promoting self-policing* by the interactive service provider industry, and protecting against victimization by Internet advertisements") (emphasis added).

[49] Jones. v. Dirty World Ent., 755 F.3d 398, 417 (6th Cir. 2014) (quoting 47 U.S.C. § 230(a)(1)-(5)).

[50] 47 U.S.C. § 230(c)(1).

[51] 47 U.S.C. at § 230(f)(2).

effect of barring plaintiffs from seeking remedy against online platforms that host "revenge porn."

Two landmark cases have addressed this matter. In *Fair Housing Council of San Fernando Valley v. Roommates.com* the Ninth Circuit imposed criminal liability against an "interactive service provider."[52] The *Roommates* court found that the defendant was an "information content provider,"[53] despite the fact that the bulk of their website went to hosting third-party content. This was because the defendant had "materially contributed" to the unlawful nature of the content in question.[54] By requiring that users submit information regarding their race, marital status, etc., the defendant had developed and materially contributed to content that could potentially violate the Fair Housing Act.[55] However, the defendant also encouraged its users to post additional comments, many of which contained discriminatory content. These, the court held, were not subject to publisher liability. Nothing about the defendant's "additional comments" section *required* users to submit discriminatory content[56] or any other form of content that could potentially violate the Fair Housing Act on its own. Thus, the Ninth Circuit granted the defendant immunity from liability for these comments.

This is significant to revenge porn cases because some websites may not explicitly host this type of content. For example, if a defendant uploads their images to a content neutral website (e.g., Facebook or Imgur[57]), then the host website will fail the material contribution test and likely be protected by the CDA.

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[52] Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008).

[53] The CDA defines the term as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

[54] *SeeRoommates*, 521 F.3d at 1167–1168. ("…we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness").

[55] *Id.* at 1169.

[56] Examples of comments included "NOT looking for black Muslims," and "[no] psychos or anyone on mental medication." *See id.* at 1174.

[57] Facebook.com is a generic social media website. Imgur.com is a website that hosts any images its users will post (subject to their terms and conditions).

The Sixth Circuit also relied on this idea of "material contribution" in *Jones v. Dirty World Entertainment*.[58] While the court found the defendant immune from suit under the CDA, the court employed the material contribution test to determine immunity in a civil suit.[59] The *Jones* court specifically stated that "the CDA does not necessarily leave persons who are the objects of anonymously posted, online, defamatory content without a remedy."[60] *Jones* suggests that there may not be blanket immunity for website operators in either a civil or criminal context. Under *Jones*, if a content host passes the material contribution test, then it crosses the line from "interactive service provider" into "information content provider," and is open to liability.

The statutory language giving rise to the material contribution test is the definition of "information content provider."[61] Under the CDA's definition, a content provider is "any person or entity that is responsible, *in whole or in part,* for the creation or *development* of information provided through the Internet or any other interactive computer service."[62] The *Roommates* court decided that a website can operate in two capacities: (1) as an interactive service provider whose activities are immune under the CDA; and (2) as an "information content provider,"[63] which is not immune under the CDA. The court held that:

> "… if [a website] passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider."[64]

Substituting "material contribution" for "development" does not,

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[58] Jones. v. Dirty World Entertainment, 755 F.3d 398, 411(6th Cir. 2014).
[59] *Id.* The comments giving rise to the plaintiff's defamation suit were merely edited and displayed by the defendant according to the Sixth Circuit.
[60] *Id.* at 417.
[61] Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1162 (9th Cir. 2008).
[62] 47 U.S.C. § 230(f)(3) (emphasis added).
[63] *Roommates* at 1162.
[64] *Id.*

on its own, clarify the limits of CDA immunity. While the *Roommates* court did not provide a clear definition of "material contribution," it listed a number of factors to weigh in the test. Each factor requires a website operator to do something beyond passively transmitting other people's data.[65] The contribution also needs to go beyond simply providing users with the option to create illegal or unlawful content.[66] For example, simply hosting images—be they nude photos or pictures of dogs—contributes nothing to the content that users post on a website. However, a website that collects nude photos from all corners of the internet on its own initiative is doing more than passively transmitting its users' data, and will likely be found to have made a "material contribution".

This debate led to the Sixth Circuit's decision in *Jones.* The *Jones* court held that an online tabloid, which selected and edited defamatory comments about private individuals did not "materially contribute" to the unlawful content.[67] The defendant in *Jones* operated a website dedicated entirely to the public humiliation of private individuals through comments and photographs submitted by third parties. While the substantive content came from submissions, the defendant both curated and published content with his own commentary.[68] Nevertheless, the court held that the defendant was merely performing a passive editorial function and was thus free from liability.[69]

The term "material contribution" remains demonstrably vague—due in part, the *Jones* court suggested, to the policy reasons behind the CDA.[70] The court stated that Congress "envisioned a free and open internet," and that the immunity that § 230 provides serves that purpose.[71] However, not only do the words "free and open" not appear in the section the court cited (§ 230(a)(1)-(5)), but the actual statement of policy is § 230(b), which states in a sub-provision that "it is the policy of the United States … to ensure vigorous

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[65] *Id.* at 1166-1167.
[66] *Id.* at 1168.
[67] Jones v. Dirty World Entertainment, 755 F.3d 398, 416 (6th Cir. 2014).
[68] All of this was supposedly done for the purpose of "humor." *Id.* at 403.
[69] *Id.* at 416.
[70] *Id.* at 417.
[71] *Id.*

enforcement of Federal criminal law to *deter and punish trafficking in obscenity, stalking, and harassment by means of computer*."[72] This suggests that, at least on a criminal level, the CDA was passed in part to prevent forms of harassment like revenge porn, and not to provide online harassers a shield against liability. A surprising number of courts have ignored this language in leading CDA cases.[73]

FTC v. Accusearch Inc. also weighed in on the definition of "material contribution" under the CDA. In this case, the Tenth Circuit denied the defendant immunity under the CDA, holding that "a service provider is 'responsible' for the development of offensive content only if it in some way *specifically encourages* development of what is offensive about the content."[74] This "encouragement test" was mentioned in the *Jones* appeal,[75] but was ultimately dismissed. The key difference between *Jones* and *Accusearch*, the Sixth Circuit reasoned, was that the defendant in *Accusearch* had bought and sold the offensive content for money, whereas the defendant in *Jones* collected and published his content for free.[76]

However, one does not have to offer money to constitute solicitation of illegal material. There are many websites whose *raison d'etre* is the collection and publication of revenge porn.[77] While revenge porn websites often do not offer money in exchange for their content, they still exist solely to propagate this type of material and to profit from it. This "encouragement" or "solicitation test", should Washington courts adopt it, would circumvent CDA immunity by showing that the host site exists solely to publish harmful, non-consensual content that is unlawful under Washington statute.

Attorneys will likely have to target websites hosting revenge porn rather than the original posters alone in order to more

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[72] 47 U.S.C. § 230(b)(5) (emphasis added).
[73] One notable exception, which will be discussed below, is J.S. v. Village Voice Media Holdings L.L.C., 359 P.3d 714, 720, Wiggins J. Concurring (Wash. 2015).
[74] 570 F.3d 1187, 1199 (12th Cir. 2009) (emphasis added).
[75] Jones v. Dirty World Entertainment, 755 F.3d 398, 414 (6th Cir. 2014).
[76] *Id.*
[77] *Id.* at 413 (quoting *Accusearch*, 570 F.3d 1187 at 1200).

effectively deter non-consensual pornography.[78] Depending on the circumstances, a revenge porn website might do nothing more than passively publish other people's illicit photos. Or it might, for example, contribute materially to its third party content by *requiring* submissions to include personal information of the person depicted. As such, attorneys should also emphasize the statement of policy embodied in section (b) of the CDA because revenge porn is the exact type of "stalking, and harassment by means of computer"[79] that the CDA was designed to punish.

1. *J.S. v. Village Voice: New CDA Jurisprudence in Washington*

In 2015, the Supreme Court of Washington decided a landmark case regarding the limits of CDA immunity. In *J.S. v. Village Voice Media Holdings, L.L.C.*, a group of minors sued a website operator who hosted ads that allegedly led to children being "bought and sold for sexual services online on Backpage.com in advertisements."[80] The issue before the court was whether the plaintiffs' case should be dismissed under Washington Superior Court Civil (CR) Rule 12(b)(6)[81] ("Rule 12(b)(6)"), in spite of a potential conflict with the CDA, or whether the case should be allowed to go forward.[82] The majority opinion, authored by Justice Gonzales, highlighted the fact that, when considering a Rule 12(b)(6) motion, courts must "accept as true the allegations in a plaintiff's complaint and any reasonable inferences therein."[83]

The plaintiffs in *Village Voice* alleged, that the defendants had "developed content requirements that it [knew would] allow pimps and prostitutes to evade law enforcement," and that "the content requirements [were] nothing more than a method developed by [the

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[78] Washington's statute specifically mentions CDA immunity. WASH. REV. CODE § 4.24.795(7) (2016) ("Nothing in this section shall be construed to impose liability on an interactive computer service, as defined in 47 U.S.C. 230(f)(2).").
[79] 47 U.S.C. § 230(b)(5).
[80] J.S. v. Vill. Voice Media Holdings, 359 P.3d 714, 717 (Wash. 2015).
[81] "Failure to state a claim upon which relief can be granted." Wash. Super. Ct. Civ. R. 12(b)(6) (2015).
[82] *Vill. Voice Media Holdings*, 359 P.3d at 717.
[83] *Id.* at 716 (quoting Reid v. Pierce County, 961 P.2d 333, 336 (Wash. 1998)).

defendants] to allow pimps, prostitutes, and Backpage.com to evade law enforcement for illegal sex trafficking, including the trafficking of minors for sex."[84] Given the deference granted to the plaintiffs' allegations under Rule 12(b)(6), the Washington Supreme Court found that the facts as alleged were sufficient to satisfy the material contribution test of *Roommates.com*, and remanded the case back to the trial court.[85]

The concurring opinion of Justice Wiggins delved further into the defendants' failure to qualify for CDA immunity. Justice Wiggins examined the language of the CDA and determined "that subsection 230(c)(1) creates a defense to, not an immunity [from]", liability.[86] The defense created under the CDA only applies when the "plaintiff seeks to treat [the defendant], under a state law cause of action, as a publisher or speaker of information."[87] The "[p]laintiffs' claims that Backpage.com created "content rules" specifically designed to induce sex trafficking and evade law enforcement did not treat Backpage.com as the publisher or speaker of another's information.[88]

If Justice Wiggins' concurrence in *Village Voice* takes hold, litigators should not frame their complaints on the basis of publisher liability, but rather as a direct violation of R.C.W. § 4.94.795. Indeed, the civil statute does not say "[a] person who *publishes* an intimate image of another person," but instead "[a] person who *distributes* an intimate image of another person" intentionally and without consent is subject to liability.[89] As such, complaints against revenge porn websites should use language that invokes the material contribution test found in *Roommates* and *Jones*. The language should emphasize the following: (1) that a defendant's website distributes non-consensual pornography; (2) that website holds itself out to the public as a distributor of non-consensual

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[84] *Id.* at 718.
[85] *Id.* at 717 ("Viewing J.S.'s allegations in the light most favorable to J.S., as we must at this stage, J.S. alleged facts that, if proved true, would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content").
[86] *Id.* at 721.
[87] *Id.* at 719.
[88] *Id.*
[89] WASH. REV. CODE § 4.24.795(1), (2016) (emphasis added).

pornography; and (3) this materially contributes to the distribution of non-consensual pornography featuring the plaintiff.[90]

B. First Amendment Concerns

Critics of revenge porn laws, such as the ACLU,[91] have asserted that these statutes could be interpreted too broadly, and ultimately infringe upon the publisher's First Amendment right to free speech.[92] However, many of these concerns are precisely why intent and actual harm requirements were written into similar statutes in other states.[93] In *F.C.C. v. Pacifica Foundation*,[94] the Supreme Court of the United States declared that speech that is highly offensive, harmful, and does not hold any social value is not entitled to protection under the First Amendment. Specifically, the Court held that "[s]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[95] So long as juries are likely to be convinced that the harm inflicted by this content significantly

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[90] The language of the statute specifically mentions CDA immunity. *See* WASH. REV. CODE § 4.24.795(7) (2016) ("Nothing in this section shall be construed to impose liability on an interactive computer service, as defined in 47 U.S.C. 230(f)(2)") For further reading on the CDA as it relates to revenge porn, *see* Peter W. Cooper, *The Right to be Virtually Clothed*, 91 WASH. L. REV. 817, 828 (2016). Cooper frames the CDA defense in terms akin to someone who puts up "an empty newsrack" (the host site) and the users who fill the rack with whatever content they choose. It could (and perhaps should) be argued that there is a substantive distance between putting up a cork board saying "post pictures here," and putting up a cork board that specifically says, "illegally post nude photos of your ex-lovers in order to humiliate them here."

[91] Rick Stone, *In Florida, 'Revenge Porn' Is a Moving Target*, WLRN (Dec. 4, 2013, 7:56 AM), http://wlrn.org/post/florida-revenge-porn-moving-target.

[92] *See* Amanda L. Cecil, *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, 2535 (2014).

[93] Cecil, *supra* note 93 ("In response to [First Amendment] criticisms, California narrowed the scope of its law by adding the intent and proof of harm requirements.").

[94] F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

[95] *Id.* at 746.

outweighs any social benefit it might offer, the First Amendment should not deter litigation under this statute.[96] Attorneys should emphasize the harm caused by non-consensual pornography, as well as the malice behind it.

Further, revenge porn falls under a number of exceptions to First Amendment protection. The most logical of these is the obscenity exception. In *Miller v. California*, the Supreme Court held that "[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct *must have serious literary, artistic, political, or scientific valu*e to merit First Amendment protection."[97] Given that revenge porn likely does not have such value,[98] it likely falls within the obscenity exception found in *Miller*.

Secondly, given the fact that revenge porn is intended to harm the victim's reputation and "blacken their good name," it will likely fall under the defamation exception established in *New York Times Co. v. Sullivan*.[99]

Third, given the fact that revenge porn is illegal in Washington, and often accompanied by the target's personal information (e.g., name, address, phone numbers, links to social media accounts, etc.), revenge porn could fall under the incitement exception found in *Brandenburg v. Ohio*.[100] Nearly half of all revenge porn victims report that they have been stalked and harassed by people who saw

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[96] While there doesn't appear to be a revenge porn case decided on First Amendment grounds, in *Milo v. Martin*, the court noted that, when it comes to the CDA "Congress apparently made a choice 'not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries[.]'" 311 S.W.3d 210, 215 (Tex. Ct. App. 2010). This suggests that Congress has not contemplated revenge porn and how it relates to the First Amendment.

[97] Miller v. California, 413 U.S. 15, 26 (1973) (emphasis added).

[98] Hunter Moore publically admitted that his revenge porn website existed only to cause public humiliation. Murray, *supra* note 4.

[99] New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.")

[100] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[F]ree speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation e*xcept where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action*.") (emphasis added).

their nude photos online.[101] The *Brandenburg* states that speech that is likely to create "imminent lawlessness" and is "likely to incite or produce such [lawless] action."[102] Given the fact that many revenge porn websites post their victim's personal information (e.g., address, workplace, etc.[103]), and the high percentage of victims who experience stalking as a result,[104] the imminence and likelihood requirements of *Brandenburg's* incitement exception are satisfied. Thus, revenge porn websites arguably incite people to perform unlawful acts (such as distributing revenge porn) and also incite people to stalk and harass revenge porn victims.

C. The Legal Profession Remains Unfamiliar with the Internet

Washington State's revenge porn revenge porn statute was passed in part because there was a "lack of understanding of what revenge porn was," within the legal profession.[105] There is still a presumption that sharing any kind of intimate content, be it a photo for your long-distance sweetheart or one taken for other purposes, implies that such content becomes open to the public.[106] However, revenge porn causes a great deal of emotional harm and has the potential to ruin lives. Litigators and courts alike need to take these offenses seriously, both in the technical aspects of revenge porn and the harm it causes for the sake of clients and society as whole.

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[101] Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislatures*, CYBER CIVIL RIGHTS INITIATIVE, (Sep. 22, 2016), https://www.cybercivilrights.org/guide-to-legislation/.
[102] *Brandenburg v. Ohio*, 395 U.S. at 447.
[103] Franks, *supra* note 101 at 11.
[104] Franks, *supra* note 101.
[105]Josh Feit, *Image Wars*, SEATTLE MET (May 2015), http://www.seattlemet.com/articles/2015/4/24/revenge-porn-law-passes-washington-state-may-2015.
[106] *See, e.g.* Rebecca Pocklington, *Jennifer Lawrence to blame for her naked picture leak - says Ricky Gervais (who later deleted his comment)*, MIRROR CELEBRITY NEWS, (Sep. 23, 2014), http://www.mirror.co.uk/3am/celebrity-news/jennifer-lawrence-blame-naked-picture-4145801.

CONCLUSION

Revenge porn is a serious offense that affects many people—mostly women—in today's world. Washington's legislature has made it clear that this problem should be treated as a violation of privacy and as a malicious infliction of emotional harm. Therefore, the legal community should not hesitate to take these cases, both against individual offenders and websites hosting this content. While the CDA and the First Amendment present obstacles to litigation, they are not impossible to overcome. Attorneys seeking to hold host websites liable need to demonstrate that the host "materially contributed" to the illicit nature of the content by showing that they did more than passively transmit information from third parties. Many of the predecessor statutes to WASH. REV. CODE § 4.24.795 have been challenged on several grounds, and if Washington's statute is to survive, then litigators must tread carefully to avoid both CDA and First Amendment defenses.

Lastly, this statute represents an encouraging step in the right direction for Washington State and the country as a whole. Lawyers in the contemporary era are grappling with problems that previous generations could not have anticipated. This demonstrates an attempt by the law to enter into the twenty first century by showing that an individual's rights do not end at the computer screen. WASH. REV. CODE § 4.27.795, and its criminal counterpart, will grant victims an adequate remedy for the very real damage that revenge porn can cause. The legal profession would do well to take these cases seriously.

PRACTICE POINTERS

- Revenge porn is actionable when someone distributes nude photos of someone without their consent and with the intent to cause them harm.
- Revenge porn is unlikely to be protected under the First Amendment because it falls under a number of exceptions to free speech, including obscenity, defamation, and incitement.
- Host websites for such material are generally protected under the CDA; however, case law expanding upon the material contribution test suggests that revenge porn websites may be subject to liability for revenge porn as well.
- Attorneys would be well-advised to examine how, if at all, hosts of non-consensual pornography and revenge porn contribute to the illegal nature of their content.