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## Revenge Pornography: Exploring Tortious Remedies in Texas.

Kevin B. Bennett

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## COMMENT

### REVENGE PORNOGRAPHY: EXPLORING TORTIOUS REMEDIES IN TEXAS

KEVIN B. BENNETT\*

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I. INTRODUCTION

A person may upload romantic honeymoon photographs one year, and then spitefully disseminate the honeymoon’s private, sexually explicit photographs the next. This Internet phenomenon of releasing photos for the sole intention of inflicting emotional harm upon another has been termed “revenge pornography.”<sup>1</sup> As exemplified by the pejorative adjective “revenge,” distributors usually release revenge pornography in order to socially ostracize a former lover through the Internet—a medium whose ability to rapidly distribute information makes the task of removing such insidious material all the more difficult.<sup>2</sup>

Eliminating revenge pornography is arduous, as the genre does not restrict itself to only photography; instead, revenge pornography could be

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1. See Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 44 (2012) (emphasizing that “[o]ne object of [revenge pornography’s] creation and distribution is to encourage and facilitate the humiliation and harassment of the victim subject”).

2. Distributors of revenge pornography intrude for the sole intention of causing mental and social harm to the victim. See Aja Styles, *School Bullying Revenge Attack Sees Boy Jailed for Child Pornography*, WA TODAY (July 16, 2011), <http://www.watoday.com.au/wa-news/school-bullying-revenge-attack-sees-boy-jailed-for-child-pornography-20110725-1hx9c.html> (expounding on the use of Internet media, threats of exposing pornographic material, and the actual distribution of pornography in order “to humiliate and degrade” others); see also David Kluff, *Revenge Porn: ‘Is Anyone Up’ on Copyright Law?*, TRADEMARK & COPYRIGHT L. BLOG (Dec. 20, 2011), <http://www.trademarkandcopyrightlawblog.com/tags/dmca> (exploring how the website “Is Anyone Up” and its owner gain “an estimated \$13,000 per month in ad revenue” by soliciting revenge pornography, posting the material onto his site, and linking the pornographic materials to individual’s Facebook accounts). See generally Adrian Chen, *Meet the Hollywood Hackers Coming for Your Nude Pics*, GAWKER (Aug. 29, 2011, 8:21 PM), <http://gawker.com/5835611/meet-the-hollywood-hackers-coming-for-your-nude-pics> (showing how Internet hackers are stealing nude photographs and other private material to defame individuals and to “publicize everything they find for maximum effect” rather than using such material for commercial gain).

anything fixed into a medium, including videos and recordings.<sup>3</sup> The population's increasing access to cameras<sup>4</sup> and the use of cell phone applications for recording materials further exacerbates the issue.<sup>5</sup> The rapidly increasing wave of revenge pornography and its socially destructive wake has prompted numerous state legislatures, including those in

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3. While nude photographs remain a popular medium, revenge pornography also includes videos, sound recordings, and other forms of media. Although revenge pornography does not have the same protections as copyrightable material, paralleling regular pornography with revenge pornography does reveal the numerous forms of media recognized in the United States. See U.S. CONST. art. I, § 8 (stating "Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); Copyright Act, 17 U.S.C. § 102(a) (2012) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."); *id.* § 102(a)(1)–(8) (enumerating how "[w]orks of authorship include . . . literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works").

4. As of 2012, "85% of American adults own a cell phone." Out of this group, 82% use their phones to take photographs, 80% use their phones to send or receive text messages, and 44% record videos. Lee Rainie & Maeve Duggan, *Cell Phone Activities 2012*, PEW RES. CTR (Nov. 25, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_CellActivities\\_11.25.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_CellActivities_11.25.pdf).

5. For instance, Snapchat offers users the ability to send photographs that disappear within seconds. The service emerged in response to users who wished to send hilarious or socially compromising photos without the Internet's permanent recordation. Snapchat and other media sharing apps are coming under fire for enabling users to send pornographic media, only to have such media used as revenge pornography at a later date. See *iTunes Preview and Description of Snapchat*, ITUNES STORE, <https://itunes.apple.com/us/app/snapchat/id447188370?mt=8> (last visited Apr. 17, 2015) (describing Snapchat's main function as the ability to "[s]nap a photo or a video, add a caption, and send it to a friend . . . [t]hey'll view it, laugh, and then the Snap disappears from the screen"); see also Nicole A. Poltash, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH. 14, at ¶¶ 14, 15 (2013) (describing the dangers of "sexting" or sending sexual images through Snapchat when "Snapchat does not and cannot entirely live up to this [timely deletion of media] claim." Users can easily circumvent Snapchat's deletion requirements by taking "a screenshot of the message, although this will notify the sender. Alternatively, recipients can take a photo of their phone, thereby circumventing the screenshot notification." Kaja Whitehouse, *Snapchat Sexting Scandal Could Scare Off Investors*, N.Y. POST (Nov. 14, 2013, 9:48 PM), <http://nypost.com/2013/11/14/snapchat-sexting-scandal-could-scare-off-investors> (reporting that Snapchat's programming to delete photos has been circumvented, thereby allowing a group of ten teenagers to keep numerous, nude photos of other underage girls); see *Privacy Policy*, SNAPCHAT, <http://www.snapchat.com/privacy> (last updated Nov. 17, 2014). See generally Michael Bolen, *10 Boys Arrested for Allegedly Using Snapchat to Make Child Porn*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/11/15/snapchat-porn-photos-quebec\\_n\\_4275696.html](http://www.huffingtonpost.com/2013/11/15/snapchat-porn-photos-quebec_n_4275696.html) (last updated Jan. 23, 2014, 5:58 PM) (elaborating on the network of ten teenagers who used the application Snapchat to receive pornographic images of female teenagers and share amongst themselves).

Maryland,<sup>6</sup> Wisconsin,<sup>7</sup> New York,<sup>8</sup> New Jersey,<sup>9</sup> and California,<sup>10</sup> to erect—or at least consider—various legal barriers. Texas will also face the threat of revenge pornography within the coming years;<sup>11</sup> yet how should

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6. In May 2014, Maryland passed a law making it a misdemeanor to distribute revenge pornography. See Pat Warren, *Bill Signed into Law Making Revenge Porn a Misdemeanor*, CBS BALTIMORE (May 15, 2014, 6:52 PM), <http://baltimore.cbslocal.com/2014/05/15/bill-signed-into-law-making-revenge-porn-a-misdemeanor> (reporting that Maryland lawmakers unanimously passed the law signed by the governor making revenge porn a misdemeanor punishable by up to one year in prison and a \$500 fine); see also Jon S. Cardin, *Make Cyber-Sexual Assault a Felony*, JON CARDIN NEWS (Nov. 21, 2013), <http://www.joncardin.com/news/make-cyber-sexual-assault-a-felony> (describing the Cyber Civil Rights Initiative to eliminate the “fear that a moment’s lapse in judgment and a click of the mouse will cost [a victim] a job, [the victim’s] reputation or lead to psychological anguish or an actual assault”).

7. Wisconsin has recently passed legislation criminalizing revenge pornography. See Kevin Collier, *Revenge Porn Is Now Illegal in Wisconsin*, DAILY DOT (Apr. 9, 2014), <http://www.dailydot.com/politics/wisconsin-revenge-porn-law-scott-walker> (“The act of vengefully publishing sexually explicit images without the permission of their subjects is now punishable by up to \$10,000 in fines and as many as nine months in jail.”).

8. In August 2014, New York Governor Andrew Cuomo signed a bill into law criminalizing the broadcasting of a sexual act without the person’s consent. See Teri Weaver, *Revenge Porn’ Now Illegal in New York*, SYRACUSE.COM (Aug. 1, 2014, 2:08 PM), [http://www.syracuse.com/news/index.ssf/2014/08/revenge\\_porn\\_now\\_illegal\\_in\\_new\\_york.html](http://www.syracuse.com/news/index.ssf/2014/08/revenge_porn_now_illegal_in_new_york.html) (describing the new state law which makes revenge pornography a felony).

9. New Jersey was the first state to enact revenge pornography laws. New Jersey took preventative measures nearly ten years before California, and as such, the law is a testament to the forward-thinking minds of the New Jersey legislature. See Act of Jan. 8, 2004, ch. 58D, 2004 N.J. Laws 2366 (penalizing an actor who “discloses any photograph, film videotape, recording or any reproduction of the image of another person whose intimate parts are exposed . . . unless that person has consented to such disclosure”).

10. While California was the second state to pass revenge pornography legislation, the legislation itself has been criticized as too narrow. As it stands, the law only penalizes distributors who take the photos and then distribute the revenge pornography. The law does not protect victims who create the photos themselves before giving the material to the distributor. In essence, the law does not protect those who “sext” or take “selfies” of themselves; thereby excluding a large portion of revenge pornography victims. See Suzanne Choney, *Revenge Porn’ Law in California Could Pave Way for Rest of Nation*, NBC NEWS (Sept. 3, 2013, 4:34 PM) (on file with the *St. Mary’s Law Journal*) (describing how the Californian legislature approached revenge pornography with trepidations concerning First Amendment free speech complications); see also Act of Oct. 01, 2013, ch. 466, 2013 Cali. Laws 255 (warning that “[a]ny person who photographs or records by any means the image of the intimate body part or parts of another identifiable person” and fulfills other requirements will be subject to a misdemeanor); *Calif. Legislation Against Revenge Porn Signed into Law*, CYBER C.R. INITIATIVE (Oct. 2, 2013), [http://www.cybercivilrights.org/press\\_releases](http://www.cybercivilrights.org/press_releases) (noting that nearly 80% of revenge pornography victims will be unaffected by the toothless law); *Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims*, CYBER C.R. INITIATIVE (Oct. 2, 2013), [http://www.cybercivilrights.org/press\\_releases](http://www.cybercivilrights.org/press_releases) (“SB 255 does not cover cases of revenge porn in which victims took photos or videos of themselves, which account for 80 percent of victims, according to a CCRI survey of 864 individuals.”).

11. See Dan Solomon, *Revenge Porn Isn’t Illegal in Texas, but It Can Cost You Half a Million Dollars*, TEX. MONTHLY (Mar. 4, 2014, 11:50 AM), <http://www.texasmonthly.com/daily-post/revenge-porn->

it handle these cases when they come forward?

First, this Comment calls for a solution outside of copyright or First Amendment claims. Second, this Comment will not advocate for the passage of a revenge pornography statute, but for use of two well-defined tortious remedies that have been used by Texas courts since the late 1970s—“Publicity Given to Private Life” and “Intrusion upon Seclusion”—to counteract revenge pornography. By using these two developed, respected, and available means of remedy, Texas courts could theoretically aid revenge pornography victims this very day. This prospect stands in stark contrast to Texas’s sister states, many of which currently have no protections for their vulnerable citizenry.

Part II of this Comment will give a brief overview and comparison of pornography and revenge pornography. Part III will survey the two aforementioned tortious remedies to help guide practitioners and courts toward a solution that best suits the situation at hand. Part IV will then

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isnt-illegal-texas-it-can-cost-you-half-million-dollars (describing the case of a Houston woman who was awarded \$500,000 in damages after her ex-boyfriend maliciously posted photos of her on several websites). In 2013, a group of plaintiffs, many of whom were revenge pornography victims, filed suit against both the website Texxxan.com and its web host GoDaddy.com. After the filing, Texxxan.com took down its site over allegations of hosting child pornography, and GoDaddy.com claimed immunity under section 230 of the Communications Decency Act. GoDaddy.com prevailed on its defense, and the Beaumont Court of Appeals reversed the trial court’s order denying dismissal against the web host. *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753 (Tex. App.—Beaumont 2014, pet. denied); see Eric Goldman, *What Should We Do About Revenge Porn Sites Like Texxxan?*, FORBES (Jan. 26, 2013, 1:13 PM), <http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan> (noting that the Texxxan.com case was “mostly dead on arrival” since all defendants, save “the users actually submitting the revenge porn,” have protections under Section 230 of the Communications Decency Act); see also Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512(c)(3) (2012) (granting copyright holders the ability to issue both a notice and a subsequent takedown procedure to the agents of information content providers); Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (2012) (protecting “information content providers” from liability for third-party content, such as revenge pornography, since the Communications Decency Act provides that “[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”); Bartow, *supra* note 1, at 45 (recognizing that under the Communications Decency Act “Internet service providers are broadly immunized from liability for harms caused by online content that these companies host, and these companies do not generally have any legal obligation to assist parties injured by online content in identifying human wrongdoers who post damaging materials”). See generally Brief for Appellant at 17, *Toups*, 429 S.W.3d at 752 (No. 09-13-00285-CV), 2013 WL 6162633, at \*17 (defending GoDaddy.com’s right to protection under the Communications Decency Act and how such protections immunize the appellant from the material hosted upon its servers); Plaintiffs’ Original Petition for Damages and Class Action Certification, a Temporary Injunction and a Permanent Injunction at 3–5, *Toups*, 429 S.W.3d at 752 (No. D130018-CV), 2013 WL 271500, at \*4 (arguing that all the victims have suffered “severe mental anguish” from the content that was posted on the Texxxan.com website).

thoroughly review and compare both “Publicity Given to Private Life” and its well-known counter, Judge Prosser’s “Public Disclosure of Embarrassing Private Facts.” In Part V, this Comment will explore the tort of “Intrusion upon Seclusion.” Lastly, Part VI will explore the scope of tortious remedies and what may or may not count as “distribution.” In addition, a step-by-step flow chart approach to this topic is included within the appendices.

## II. OVERVIEW OF PORNOGRAPHY AND REVENGE PORNOGRAPHY

Pornography is defined as “writings [and] pictures intended primarily to arouse sexual desire.”<sup>12</sup> Most pornography—typically more artistic endeavors created in traditional for-profit markets—gains copyright protection by becoming fixed in a tangible medium of expression.<sup>13</sup> The pornography is created and distributed with the consent of all involved parties, as all individuals involved are financially compensated for their collective expertise and roles. Consumers will often purchase pornography as either photographs or video recordings. However, pornography is not necessarily restricted to just these two forms of media. Instead, pornography may be generated under any tangible medium of expression, which includes “literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.”<sup>14</sup> Furthermore, if someone created a collection of pornographic works and each work was contained in a tangible medium of expression, then the entire collection would be afforded copyright protection as well.<sup>15</sup>

Revenge pornography differs from its traditional forebear in a number of ways. Generally, revenge pornography is not imbued with copyright

12. WEBSTER'S NEW WORLD DICTIONARY 1051 (3d ed. 1988).

13. See Copyright Act, 17 U.S.C. § 102(a) (2012) (defining the copyright protections afforded to “original works of authorship fixed in any tangible medium of expression”); see also Berne Convention for the Protection of Literary and Artistic Works, art. 5, § 2, as last amended on Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 30 (“The enjoyment and exercise of these [copyright] rights shall not be subject to any formality.”).

14. Copyright Act, 17 U.S.C. § 102(a)(1)–(8) (2012).

15. See *id.* § 103 (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work . . . . The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”).

protections.<sup>16</sup> Most revenge pornographers do not desire copyright protection or fiscal gains.<sup>17</sup> Revenge pornographers instead seek to distribute the material in order to “encourage and facilitate the humiliation and harassment of the victim subject.”<sup>18</sup> Revenge pornography also lacks consent of at least one of the parties because the victim is often “unaware of or opposed to the work’s distribution, usually over the Internet.”<sup>19</sup> Thus, the victimization aspect of revenge pornography is much more acute. If an individual becomes a victim of revenge pornography, two tortious remedies may prove helpful.<sup>20</sup>

### III. REMEDIES FOR REVENGE PORNOGRAPHY

An essential difference between the remedies of Intrusion upon Seclusion and Publicity Given to Public Life arises depending on when the photographs were obtained.

One scenario may arise when the victim takes the photographs and gives the photographs to the distributor as a token of affection. Subsequently, the individuals have a disagreement, and the distributor then disperses the photographs across the Internet. The crux of this situation is

16. Notably, advocates of revenge pornography legislation often agree that even if revenge pornography became vested with copyright protections, such protections are “likely to be limited at best, because the goals of true revenge porn,” as opposed to regular pornography, “are not usually financial in nature.” Bartow, *supra* note 1, at 45–46. Thus, giving victims the ability to claim financial losses for profits generated from their own revenge pornography would grant little redress, since “[b]road distribution is usually the goal of the revenge pornographer.” *Id.* at 46.

17. See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 806–07 (2008) (giving a brief listing of both commercialized, pornographic entities, and peripheral companies profiting from pornography and explaining that “pornography has become corporatized in two important ways . . . through entities that focus primarily on producing pornography,” such as Playboy Inc., and through large mainstream corporations, such as General Motors Corporation, which owns Direct-TV and sells more graphic sex films per year than Hustler). See generally Bartow, *supra* note 1, at 44–46 (defining revenge pornography).

18. Bartow, *supra* note 1, at 44; see also *Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009) (reiterating the use of revenge pornography as “a dangerous, cruel, and highly indecent use of the Internet” against a former lover); Bartow, *Pornography, Coercion, and Copyright Law 2.0*, *supra* note 17, at 812 (noting user-generated pornography—as is nearly always the case with revenge pornography—constitutes “pornography that is not distributed within traditional frameworks of mainstream commerce with ‘for-profit’ motivations”); *Proposed CA Bill Would Fail to Protect Up to 80% of Revenge Porn Victims*, CYBER C.R. INITIATIVE (Sept. 10, 2013), [http://www.cybercivilrights.org/press\\_releases](http://www.cybercivilrights.org/press_releases) (exploring how 80% of revenge pornography victims are individuals who have taken photos or videos of themselves without motivations of profit).

19. Bartow, *supra* note 1, at 46.

20. See RESTATEMENT (SECOND) OF TORTS § 652B (1977) (elaborating upon the *Second Restatement’s* tortious remedy for Intrusion upon Seclusion); see also *id.* § 652D (explaining the *Second Restatement’s* tortious remedy of Publicity Given to Private Life).



that the distributor initially received the photographs with the victim's consent only to later distribute the photographs without the victim's consent. In this situation, the distributor may be held liable for the tort of "Publicity Given to Private Life."<sup>21</sup>

Another scenario can arise where a distributor takes the photographs without the victim's consent and uploads the photographs across the Internet.<sup>22</sup> Far less frequently, a jilted lover will use their means to access pornographic material of the other individual without that individual's consent and distribute the photographs.<sup>23</sup> The crux of this situation is that the distributor did not have the initial consent in obtaining the photographs. The distributor may be held liable under the tort of Intrusion upon Seclusion. This Comment will first focus on Publicity Given to Private Life, since most revenge pornography claims occur after a lover had consented to giving the photographs but not consented towards the photographs' distribution.

#### IV. PUBLICITY GIVEN TO PRIVATE LIFE

Unlike Intrusion upon Seclusion, Texas courts have not adopted the *Second Restatement's* Publicity Given to Private Life standard. Instead, courts have used Judge Prosser's "[p]ublic disclosure of embarrassing private facts" standard in certain circumstances, such as whenever a party invokes the Texas Public Information Act (TPIA) or involves printed media.<sup>24</sup>

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21. *See id.* § 652D cmt. a (recognizing that communications to a single person or small groups of people are not considered publicity under "Publicity Given to Private Life").

22. *See id.* § 652D cmt. b (discussing ways in which a defendant has physically intruded into a place where the "the plaintiff has secluded himself").

23. For example, say that two lovers—one being the victim and the other the distributor—end their relationship. Furthermore, both share an apartment. The victim says to the distributor that the distributor is not to touch any of the victim's belongings. Moreover, the victim will be moving out shortly. The distributor, acting in a fit of rage, accesses the victim's computer without permission, obtains the pornographic material, and then distributes the material across the Internet.

24. *See Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973) (defining the right to privacy as "the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity" and determining whether courts may grant "relief expressly for invasion of right of privacy"); *see also* *Tex. Comptroller of Pub. Accounts v. Att'y Gen. of Tex.*, 354 S.W.3d 336, 365–66 (Tex. 2010) (exploring the interplay between birth dates, identify theft, and whether birth dates are granted protection from the Texas Public Information Act); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995) (utilizing Judge Prosser's standard for printed media); *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976) (utilizing Judge Prosser's "[p]ublic disclosure of embarrassing private facts" about the plaintiff standard which requires the injured party to "show (1) that publicity was given to matters concerning his private life, (2) the publication of

This Comment advocates adopting the *Second Restatement's* Publicity Given to Private Life standard due to four prevailing factors. First, Judge Prosser's standard is both the predecessor and mirror to the more modern *Second Restatement* standard.<sup>25</sup> Second, adopting the *Second Restatement's* publicity given to the private life standard would provide a clear, "Gemini" alternative to victims who fall outside the purview of the *Second Restatement's* Intrusion upon Seclusion remedy—a standard already adopted by Texas courts.<sup>26</sup> Third, in contrast to Judge Prosser's more amorphous remedy, the *Second Restatement's* six requirements provide greater specificity and more defined factors for plaintiffs, defendants, and courts as opposed to Judge Prosser's more amorphous remedy.<sup>27</sup> Finally, courts have already clearly integrated aspects of the *Second Restatement* into Judge Prosser's standard under similar, albeit distinguished, TPIA issues.<sup>28</sup> Thus,

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which would be highly offensive to a reasonable person of ordinary sensibilities, and (3) that the matter publicized is not of legitimate public concern").

25. *Compare Indus. Found. of the S.*, 540 S.W.2d at 682–83 (elaborating upon Judge Prosser's "[p]ublic disclosure of embarrassing private facts" about the plaintiff standard), *with* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (requiring an injured party to demonstrate that the actor "who [gave] publicity to a matter concerning the private life of another is subject to liability . . . for invasion of his privacy, if the matter publicized is a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public").

26. *Compare Indus. Found. of the S.*, 540 S.W.2d at 682–83 (utilizing Judge Prosser's "[p]ublic disclosure of embarrassing private facts" about the plaintiff standard), *and* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (mirroring Judge Prosser's requirements), *with id.* § 652B (defining the *Second Restatement's* "Intrusion upon Seclusion" standard as when an actor "intentionally intrudes physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person").

27. Alternatively, courts may transpose the same factors elaborated under Publicity Given to Private Life towards Judge Prosser's standard if courts instead use Judge Prosser's three-pronged standard. Both Judge Prosser's standard and the *Second Restatement's* standard use the same effective requirements; however, the *Second Restatement* further partitions and clarifies its own requirements. This higher threshold of requirements and greater specificity allows plaintiffs, defendants, and courts to better gauge whether revenge pornography fulfills the requirements under Publicity Given to Private Life. *Compare Indus. Found. of the S.*, 540 S.W.2d at 682–83 (elaborating upon Judge Prosser's three-pronged standard), *with* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (utilizing and expanding upon Judge Prosser's three-pronged approach through the Publicity Given to Private Life tort).

28. *See Tex. Comptroller*, 354 S.W.3d at 365 (incorporating the *Second Restatement's* views on privacy concerning birth dates and listing the *Second Restatement's* numerous examples of what may constitute "highly intimate or embarrassing" facts under the "highly intimate" standard); *see also Indus. Found. of the S.*, 540 S.W.2d at 683 (listing the "highly intimate" standard as including "sexual assault of a female clerk following an armed robbery; a claim on behalf of illegitimate children for benefits following their father's death; a teacher's claim for expenses of a pregnancy resulting from the failure of a contraceptive device" and other events).

incorporating the *Second Restatement's* standard would not be an abrupt departure from similar, albeit distinguished, case law. Instead, courts could easily adopt the *Second Restatement's* standard to quell the wake left by distributors of revenge pornography and its insidious progeny.

The *Second Restatement* defines a distributor or actor under Publicity Given to Private Life as follows:

[o]ne who gives publicity to a matter concerning the private life of another [and the actor] 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>29</sup>

The definition can be broken down further into six main constituent parts. First, the consent that creates the action. Second, the term “publicity” and how the photographic material becomes public. Third, what is “private” and whether pornographic materials intrinsically constitute a private matter. Fourth, the “highly offensive” requirement and how it is measured. Fifth, who is a “reasonable person” (also referred to as a “reasonable man”) and how that individual will be measured in this situation. Finally, what is a “legitimate concern” and do pornographic materials ever become a legitimate concern?<sup>30</sup>

Victims of revenge pornography must fulfill each and every one of the first six requirements in order to obtain damages. In turn, a distributor of revenge pornography need only disprove one of the six sequential requirements in order to defeat the suit. Only after meeting this high threshold will victims have access to any kind of damages. While the task is daunting, a number of these requirements may be readily fulfilled due to the nature of revenge pornography.

#### A. *Consent*<sup>31</sup>

Initially, consent must be defined. The *Second Restatement* defines consent as a “willingness in fact for conduct to occur.”<sup>32</sup> The *Second Restatement's* definition creates two understandings of consent: the victim's understanding of consent and the distributor's understanding of consent. On one hand, a victim of revenge pornography has initially invaded their

29. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

30. *See id.* (listing Publicity Given to Private Life's six constituent parts); *see also id.* § 283 (1965) (defining the “Conduct of a Reasonable Man”).

31. For a flow chart approach to this analysis and a visual analysis of consent, see *infra* Appendix 1: Consent for Publicity Given to Private Life.

32. RESTATEMENT (SECOND) OF TORTS § 892 (1979).

own interests via the taking of pornographic materials, and demonstrated willingness that an act will take place by giving the pornographic materials to the other individual. The victim will most likely state that the consent towards receiving the photographs does not extend towards distribution of such material. On the other hand, the distributor may state their understanding that receiving the photographs also granted consent in distributing the photographs. While this defense may seem like a stretch, is the distributor's understanding all that unreasonable? When the victim consents to having their interests invaded via the taking and giving of the photographs to the distributor, does the victim's conveyance also create consent to distribute the material?

The *Second Restatement* clears this discrepancy by enumerating two situations where the consent to receive the photographs and consent to distribute the photographs may be generated: through either consent in fact<sup>33</sup> or apparent consent.<sup>34</sup> The consent requirement creates a higher burden on the victim than the distributor. While the distributor will have to fulfill the requirements of either consent in fact or apparent consent in order to dismiss the tort of Publicity Given to Private Life, the victim will have to disprove both consent in fact and apparent consent in order to move onto Publicity Given to Private Life's further requirements. The following two sections will address consent's two components—consent in fact and apparent consent—and demonstrate how either the victim or distributor may address these components.<sup>35</sup>

### 1. Consent in Fact

In its comments, the *Second Restatement* defines “[c]onsent [as] willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.”<sup>36</sup> Willingness in fact may be “manifested directly to the other by words or acts.”<sup>37</sup> The *Second Restatement* refines its definition of inaction by limiting the circumstances in which inaction may constitute consent to only “if the circumstances or

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33. *See id.* § 892 cmt. b (defining consent in fact as where “the person concerned is in fact willing for the conduct of another to occur”).

34. *See id.* § 892 cmt. c (determining that consent may be found “[e]ven when the person concerned does not in fact agree to the conduct of the other his words or acts or even acts or even his inaction may manifest a consent that will justify the [distributor] in acting in reliance upon them”).

35. *Compare id.* § 892 cmt. b (giving the definition of consent in fact), *with id.* § 892 cmt. c (listing the definition of apparent consent).

36. *Id.* § 892.

37. *Id.* § 892 cmt. b.

other evidence indicate that the silence or inaction is intended to give consent.”<sup>38</sup>

If a distributor were to manifest words or acts that indicated the victim's willingness to have the photographs distributed, then the entire tort of Publicity Given to Private Life would quickly end.<sup>39</sup> However, if a victim possessed a missive stating a clear objection to distributing the pornographic material, then the victim would clearly prove a lack of consent in that instance.

Since distributors are unlikely to have a clear indication of consent, they are more likely to forego proving a clear indication and instead attempt to prove consent through either silence or inaction; both of which are equally powerful manifestations of intent.<sup>40</sup> The real battle over consent will take place over this latter situation where a victim's silence or inaction creates consent in fact.<sup>41</sup> This battleground presents a far murkier picture for courts that must weigh the possible consent generated by the inaction or silence against “the circumstances or other evidence [which] indicate that the silence or inaction is intended to give consent.”<sup>42</sup>

Courts may have difficulty in stating that a victim's silence constitutes an agreement to have their sexually explicit acts shown to the entire Internet.<sup>43</sup> For example, the *Second Restatement* calls upon courts to determine whether the “conduct would be understood by a reasonable person as indicating consent” and for courts to also ensure that the “customs of the community are to be taken into account.”<sup>44</sup> One can assume that few, if any, communities would actively encourage the distribution of revenge pornography to the detriment of its citizens.

38. *Id.*

39. Examples of a manifestation would include a use of communicative mediums indicating consent, such as a text message, e-mail, or conversation using social media. While some distributors may have direct evidence of consent that would immediately end the tort suit, victims rarely bring suit for distribution of the pornographic material in the first place if they had initially given a clear consent to the act. The unlikelihood that a distributor would have direct evidence of consent deepens when considering the victim's social ramifications in having their nude photographs posted across the Internet.

40. See RESTATEMENT (SECOND) OF TORTS § 892 cmt. b (1979) (permitting that consent “may be equally be manifested by silence or inaction”).

41. See *id.* (explaining that any competent evidence may be used to prove consent in fact).

42. *Id.*

43. See *id.* § 892 cmt. d (determining “whether [the] conduct would be understood by a reasonable person as indicating consent” by factoring in “the customs of the community”).

44. *Id.*; see also *id.* § 464 cmt. b (1965) (defining a reasonable person as “a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interest of others”).

Moreover, the actions of the distributor would have to be deemed “by a reasonable person as indicating consent” which, given the gravity of the repercussions of distributing pornographic materials to the entire Internet, may be a high threshold for the distributor as well.<sup>45</sup>

In either instance, the victim is always best protected by possessing a clear manifestation denying the photographs’ distribution. The tort of Publicity Given to Private Life will be dismissed if either the distributor demonstrates a clear manifestation of consent to distribute the photographs “by words or acts” or the court determines that the victim’s “silence or inaction [was] intended to give consent.”<sup>46</sup> The tort for Publicity Given to Private Life may instead move forward if the victim demonstrates both a clear disagreement with distributing the photographs or shows that no clear indicia existed, and that “the circumstances or other evidence” did not “indicate that the silence or inaction [was] intended to give consent.”<sup>47</sup> If the victim successfully demonstrates that the distributor did not possess consent in fact, the victim will then need to demonstrate that the distributor also lacked apparent consent.

## 2. Apparent Consent

Unlike consent in fact, apparent consent manifests “when the person concerned does not in fact agree to the conduct of the other.”<sup>48</sup> However, the “acts or . . . inaction may manifest a consent that will justify the other in acting in reliance upon them.”<sup>49</sup> Like consent in fact,

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45. *Id.* § 892 cmt. d (1979). See Meg Leta Ambrose, *A Digital Dark Age and the Right to Be Forgotten*, 17 J. INTERNET L. 3, Sept. 2013, at 15–17 (dividing the lifespan of a revenge pornography victim’s photographs into three phases: in the distribution phase, the photographs are rapidly dispersed due since “it is novel . . . heavily sought after, shared, and used” by revenge pornography sites; in the record phase, future relationships may be hindered since “[i]t would be difficult for a potential relationship to know whether the damning information . . . is up to date” and if the victim is allowing such “salacious pictures to be taken,” and lastly, during the expiration phase the value of the photographs will diminish yet the damage of such materials may “last beyond periods that seem appropriate” such as “the revenge porn site IsAnyoneUp.com”); see also Kluff, *supra* note 2 (giving a brief overview of the potential, copyright ramifications from hosting revenge pornography); Lee Moran & Beth Stebner, *Now FBI Launch Investigation into Founder of ‘Revenge Porn’ site Is Anyone Up?*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-2148522/Hunter-Moore-founder-revenge-porn-site-Is-Anyone-Up-investigated-FBI.html> (last updated May 23, 2013, 8:12 AM) (reporting on an FBI investigation against the website *Is Anyone Up* for posting revenge pornography on its site and subsequently ignoring cease and desist letters).

46. RESTATEMENT (SECOND) OF TORTS § 892 cmt. b (1979).

47. *Id.*

48. *Id.* § 892 cmt. c.

49. *Id.*

apparent consent requires evaluation under a reasonable person standard: “[I]f a reasonable person would not understand from the words or conduct that consent is given, the other is not justified in acting upon the assumption that consent is given even though he honestly so believes; and there is then no apparent consent.”<sup>50</sup> In essence, the victim seeks to prove that their action or inaction does not manifest consent and that a reasonable person would not have understood that consent was given with the surrounding circumstances. A distributor will instead seek to prove that the action or inaction does manifest this consent and that a reasonable person would have understood that consent was given in lieu of the surrounding circumstances.<sup>51</sup>

A distributor would need to demonstrate that while the victim does not necessarily agree with posting the material online, the distributor was nonetheless justified in its actions by relying on the victim’s manifested consent.<sup>52</sup> For example, suppose there are two individuals, Adam and Bella. Adam is a photographer known for his risqué photography, much of which is posted online. Bella is a model who wants to add to her portfolio and is aware that Adam’s preferred genre may be somewhat compromising. Bella tells Adam that she has never posed nude for any photo-session and that she does not have any nude photographs online. Subsequently, Adam asks Bella to pose nude. Although Bella is not too happy, she realizes that they are already in the middle of the photo-shoot and she would lose all the progress they have made that day. Bella poses for the nude photographs. Bella later receives both the clothed and nude photographs for her portfolio. However, Bella realizes that some of the nude photographs have been posted onto Adam’s website. In this situation, Adam may be able to argue that although Bella did not necessarily agree with posing nude for the photographs, Bella’s act of continuing the photo session or inaction at stopping the photo session manifested apparent consent. Adam could then argue that the apparent

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50. *Id.*

51. *See id.* (defining apparent consent); *see also id.* § 283 cmt. c (1965) (explaining how the law has often “made use of the standard of a hypothetical ‘reasonable man’” who is also sometimes called “a reasonable man of ordinary prudence, or an ordinarily prudent man, or a man of average prudence, or a man of reasonable sense exercising ordinary care. It is evident that all such phrases are intended to mean very much the same thing”); *id.* § 464 cmt. b (elaborating on the reasonable person as an individual who “exercise[es] those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interest of others”).

52. *See id.* § 892 cmt. c (1979) (creating apparent consent in certain situations where the actions or inactions of another would lead an actor to justifiably rely upon such indications).

consent, coupled with the surrounding circumstances, would have led a reasonable person to justifiably rely upon the consent in posting the photos online.

A victim must demonstrate that their conduct, or lack thereof, did not constitute apparent consent and that a reasonable person would not have generated consent from the words or conduct. Continuing from the previous example, Bella may be able to argue that her admission that she has never posed nude nor does she have anything risqué online would lead a reasonable person to disregard the photographs at a later date, or at least, a reasonable person would not post the pictures online for the general public.

If the distributor is able to prove that he had either consent in fact or apparent consent, they will not be liable for the tort for Publicity Given to Private Life. However, if the victim is able to prove a both a lack of consent in fact and apparent consent, then the victim will have to further prove that the matter was also publicized.

#### B. *Publicity*<sup>53</sup>

Under Publicity Given to Private Life, the *Second Restatement* requires that the actor

gives *publicity* to a matter concerning the private life of another [and the actor] 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>54</sup>

The *Second Restatement's* publicity requirement protects future defendants from claims when the defendant has only revealed the material in question to a small group of people. In effect, the *Second Restatement* requires that the amount of people told be large enough to actually do harm to the would-be victim before they may seek damages.<sup>55</sup>

Under this requirement, the victim will need to prove that the number of individuals meets or exceeds the publicity requirement. At the same time, the distributor will have to demonstrate that the group who received

53. For a flow chart approach to this analysis and a visual analysis of privacy, see *infra* Appendix 2: Publicity for Publicity Given to Private Life.

54. RESTATEMENT (SECOND) OF TORTS § 652D (1977) (emphasis added).

55. See *id.* § 652D cmt. a (requiring that the disseminated material has reached a large enough audience to create actionable damages; the information must be given either “to the public at large, or to so many persons” in order to prove that the audience exceeds “a small group of persons”).



the materials is effectively too small to fulfill the publicity requirement.<sup>56</sup> This naturally begs the question—how many individuals must receive the material before meeting the publicity requirement? The *Second Restatement* weighs in by defining publicity as “the matter is made public, by communicating [the material] to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”<sup>57</sup> Essentially, publicity, which is the amount of people large enough to actually do harm to the would-be victim, separates itself into two situations: where the public at large has access to the material and where “so many persons” have access that the material has become public.<sup>58</sup>

### 1. Public at Large

Dispersing material to the public at large is a far easier burden to prove than the latter, “so many persons” standard.<sup>59</sup> An individual may disperse pornographic material to the public through far smaller and more difficult means than the Internet. In the context of revenge pornography, if an individual were to publish the private material within a newspaper, magazine, or handbill and subsequently distribute the material to a large number of individuals, then the distribution would meet the *Second Restatement's* requirement. Moreover, the distributed material may be “of [a] small circulation” and still meet the *Second Restatement's* requirement.<sup>60</sup>

The *Second Restatement* shows its age when confronting questions of the Internet.<sup>61</sup> While the *Second Restatement* goes to great lengths to express how printed, distributed materials (even that of a small circulation) meets the burden of reaching the public at large, it remains silent on the Internet. Despite silence on this topic, courts may still compare both the Internet and printed materials' ability to circulate the subject matter to the public at

56. *Id.* § 652D.

57. The *Second Restatement* is also careful to distinguish between “publicity” and “publication.” For Publicity Given to Private Life, the *Second Restatement* concerns itself with whether the material or fact in question gains notoriety through publicity; the *Second Restatement* explicitly states that “[t]he difference is not one of the means of communication, which may be oral, written, or by any other means.” While the *Second Restatement* focuses on publicity rather than publication, the ability to communicate “by any other means” also allows the medium of photography in the use of communication. *Id.* § 652D cmt. a.

58. *Id.*

59. *Id.*

60. *Id.*

61. This section of the *Second Restatement* was drafted in 1977, well before the advent of the Internet. See generally *id.* § 652D (weighing in on issues of printed, rather than digital, material).

large. In general, the *Second Restatement* seeks to protect victims from individuals who communicate the material “to the public at large” by looking at how effectively the material can be dispersed to the public.<sup>62</sup> In this context, the plethora of media used is not as important as the media’s effectiveness at making the information available to the public at large.<sup>63</sup>

When comparing the Internet against the *Second Restatement’s* original example, the Internet is far superior in its ability to disseminate information to the public.<sup>64</sup> Small circulations of newspapers, magazines, or handbills were enough to satisfy the *Second Restatement*, yet when compared against the Internet, such tangible media pale in comparison to the Internet’s distributive capabilities.<sup>65</sup> Individuals may forward

62. *Id.* § 652D cmt. a.

63. It may be effective for the reader to imagine all media along a spectrum. On the left are media that are very slow or ineffective at the distribution of material. For example, imagine handbills given out on street corners. On the right are materials that may rapidly distribute material, such as printed, national newspapers or the Internet. The *Second Restatement’s* publicity requirement is more readily fulfilled by media on the right of the spectrum, rather than the left. *See id.* (“The difference is not one of the means of communication . . . [i]t is one of a communication that reaches, or is sure to reach, the public.”).

64. For instance, in the early 2000s, peer-to-peer networks allowed individuals to quickly disseminate large quantities of data such as music, pornography, and movies. Both pornography and the sheer amount of illegally disseminated, copyrighted material forced regulatory agencies and industries to try and stymie the Internet’s ability to rapidly distribute information. These efforts manifested in the music and pornography industries attacking peer-to-peer networks while the legislature enacted the Communications Decency Act. *See* Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 508–16 (2013) (comparing the general ease by which users could distribute content through large, file-sharing networks such as “MP3.com, Napster, Aimster, AudioGalaxy, Kazaa, Morpheus, Grokster, iMesh, Limewire, and The Pirate Bay” against the immense difficulty experienced by “[e]arly regulatory efforts focused on quashing the generative flood of peer-to-peer platforms”); *see also* Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (1996) (protecting “information content provider[s]” from liability for third-party content, such as revenge pornography, since under the Communications Decency Act “[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”); Copyright Act, 17 U.S.C. § 103 (2000) (granting copyright holders the ability to issue both a notice and a subsequent takedown procedure to the agents of information content providers; however, this process grants little relief to victims of revenge pornography who may have to issue notices across so many websites as to become impractical).

65. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977); *see* Choi, *supra* note 64, at 508–16 (enumerating the legal battles between file sharing networks, numerous industries, and the legislature); *see also* Communications Decency Act § 230(c)(1) (protecting “information content provider[s]” from liability for third-party content through the Communications Decency Act); Online Copyright Infringement Liability Limitation Act of 1998, 17 U.S.C. § 512(c)(3) (2000) (allowing copyright holders to issue a notice and follow a takedown procedure for online content). While outside the scope of this paper, the protections afforded to information content providers may be waning. Should the Communications Decency Act expand to allow revenge pornography victims to bring suit, then victims may instead elect to approach the issue via copyright, rather than tortious

photographs or other media to thousands connected to the Internet with the click of a button. An individual may also directly upload the material to hosting websites. In the second instance, a victim would have an easier time proving distribution to the public at large than the possible distributor demonstrating a lack thereof.

If a victim can readily demonstrate that the materials were distributed to the public at large or hosted upon a public website, then the victim need not prove the so many persons standard and instead can move towards the privacy requirement. However, if the distributor proves that the materials were neither distributed to the public nor hosted upon a public website, then the victim will have to fulfill the difficult, second-prong of publicity: the so many persons standard.

## 2. So Many Persons Standard

As opposed to the public at large standard, the victim will have a far more difficult time proving the so many persons standard.<sup>66</sup> An individual may be confronted with a situation where the revenge pornography is only distributed to a small number of individuals rather than being publicly hosted on the Internet. In its comments, the *Second Restatement* notes that disclosing the information to a single individual would not be cause enough to satisfy the publicity requirement.<sup>67</sup> Furthermore, distributing the material to a small group of individuals

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claims. However, as Professor Bartow notes that allowing revenge pornography, copyright claims to move forward would “be limited at best, because the goals of true revenge porn are not usually financial in nature.” Bartow, *supra* note 1, at 45–46; see Danielle Citron, *Revenge Porn and the Uphill Battle to Pierce Section 230 Immunity (Part II)*, CONCURRING OPINIONS (Jan. 25, 2013, 3:30 PM), <http://concurringopinions.com/archives/2013/01/revenge-porn-and-the-uphill-battle-to-pierce-section-230-immunity-part-ii.html> (reporting that the immunities typically afforded to information content providers may be forfeited in the specific situation where websites seek illegal or actionable material); see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc) (stating that the Communications Decency Act “does not provide immunity” to information content providers for all materials posted to their website); Jones v. Dirty World Entm’t Recordings, LLC, 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011) (“The immunity afforded by the [Communications Decency Act] is not absolute and may be forfeited if the site owner invites the posting of illegal materials or makes actionable posting itself.”).

66. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977) (defining publicity as a matter that “is made public, by communicating [the] material to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge”).

67. See *id.* (restricting the scope of Publicity Given to Private Life by noting how “it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff’s private life to a single person”).

would also fail to satisfy the publicity requirement.<sup>68</sup> However, the *Second Restatement* does afford a small, yet significant caveat, to protect potential victims.<sup>69</sup> The victim could compare the relative size of the group to that of the surrounding community.

The victim may be able to determine that although the material was distributed to a small group, this small group contains enough individuals within the community “that the matter must be regarded as substantially certain to become one of public knowledge.”<sup>70</sup> For example, if a victim lived within a small town with a tight-knit community, the amount of damage that could be done by distributing the material to even a small group of residents would be far greater than within a metropolitan area. However, this will be a high threshold for the victim to reach, because the distributor will have an equally powerful counterargument. The distributor may argue the recipients of the photographs (regardless of the surrounding population) still lack the sufficient amount of individuals to fulfill the publicity requirement.

Notably, this same caveat even could further aid the distributor. The distributor need only demonstrate that the group or individuals holding the materials are unlikely to distribute the materials and thus the pornographic photographs are not “substantially certain to become one of public knowledge.”<sup>71</sup> In one circumstance, if the distributor were to have given the revenge pornography materials to sixty members of the victim’s family, this number may be large enough to exceed the “small group” restriction posed by the *Second Restatement*. However, the distributor could then retort that the identity of the group, being only family members, substantially reduces the risk that the materials are “certain to become one of public knowledge” since the family would likely seek to protect its members.<sup>72</sup> In another circumstance, if the materials were distributed to both family members and other individuals, then the likelihood that this

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68. *See id.* (detailing how there is no invasion of privacy when transmitting something from the plaintiff’s life “to a small group of persons”).

69. *See id.* (requiring communication of private facts to reach more than a single individual).

70. *Id.*

71. *Id.*

72. *Id.*; *see also* VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 325 (2010) (quoting *Peterson v. Moldofsky*, No. 07–2603, 2009 WL 3126229 (D. Kan. Sept. 29, 2009)) (pointing out that some jurisdictions—excluding Texas—have adopted the “confidential relation standard” under the *Second Restatement’s* Publicity Given to Private Life tort, which “holds that the publication requirement may be met when the defendant discloses private information to people with whom the plaintiff has a special relationship” in order to both “protect an individual from unwarranted distribution of private facts” and to “ensure that this purpose is not undermined”).

material is “substantially certain to become one of public knowledge” would certainly increase.<sup>73</sup>

In either situation the court will still have to evaluate the group against the paramount requirement: whether or not the group is either larger than a “small group” or that the group of recipients is sufficiently large enough to pose a risk that the material will probably become public knowledge.<sup>74</sup>

A distributor must prove the material was neither given to the public at large nor to “so many persons” as to make the material likely to become public knowledge.<sup>75</sup> If a distributor were able to prove that the material never became publicized, then there would be no liability for the tort for Publicity Given to Private Life. A victim would have to prove either that the material was disseminated to the public at large or that the group of recipients is sufficiently large enough to cause the material will likely be publicized.<sup>76</sup> If a victim sufficiently demonstrates that the revenge pornography became public knowledge, a court can then determine whether a reasonable expectation of privacy was breached.

### C. *Privacy*<sup>77</sup>

Matters of privacy concern aspects of an individual’s life, which are not public knowledge.<sup>78</sup> The *Second Restatement* sought to protect individuals from disclosure of their intimate details through an explicit requirement in Publicity Given to Private Life.<sup>79</sup>

For example, any matter available to the “public eye” or readily seen from a public space, would not be considered private knowledge.<sup>80</sup> Thus, if an individual is photographed within the public eye, he is not afforded a reasonable expectation of privacy.<sup>81</sup>

73. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

74. *Id.*

75. *Id.*

76. *Id.*

77. For a flow chart approach to this analysis and a visual analysis of privacy, see *infra* Appendix 3: Privacy for Publicity Given to Private Life.

78. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

79. *Id.* § 652D (“One who gives publicity to a matter concerning the *private* life of another [and the actor] 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.” (emphasis added)).

80. *See id.* § 652D cmt. b, illus. 4 (“While A is walking on the street, B takes a motion picture of a scene and activities on the street, which he exhibits to the public in a newsreel. The picture shows A walking past the camera with a rip in the seat of his trousers. This is not an invasion of A’s privacy.”).

81. *See id.* § 652D cmt. b, illus. 5–6 (contrasting two examples where first, “an undistinguished

The crossroads of privacy and revenge pornography meet whenever photographs are taken in a public space. For example, if a portfolio contained eight photographs where four were taken within the privacy of a home and the other four were taken within a public area, then the latter four photographs would not fulfill the privacy requirement for Publicity Given to Private Life.<sup>82</sup> Individuals who take voyeuristic photographs within a public space, or within the purview of the public eye, cannot claim damages at a later date.<sup>83</sup> Furthermore, the voyeuristic pictures in public, while outside the purview of this Comment, may expose the victim to other offenses as well.<sup>84</sup> However, the first four photographs may meet the privacy requirement for Publicity Given to Private Life.

If the distributor proves that a reasonable expectation of privacy has not been breached, then the tort for Publicity Given to Private Life ends here. However, if a victim demonstrates that his privacy has been breached, then the victim must prove that the subject matter in question is highly

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hardware merchant” being photographed while conducting “an adulterous affair with the wife of one of his friends” constitutes an invasion of the hardware merchant’s privacy if the photograph took place while both adulterers were within a hotel room; and second, that a couple being photographed while kissing “at a sidewalk cafe in a public market” and subsequently “publishe[d] under the caption, ‘Love in the Market’” does not invade the couple’s privacy); *see also* Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex. 1973) (describing the right of privacy as “the right of an individual . . . to live a life of seclusion, to be free from unwarranted publicity . . . to be free from the unwarranted appropriation or exploitation of one’s personality . . . [and] the publicizing of one’s private affairs with which the public has no legitimate concern”).

82. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b, illus. 5–6 (1977) (contrasting how individuals who commit adulterous acts in private are protected, yet those who perform any acts in public are not).

83. *See id.* § 652D cmt. b (giving numerous examples of entirely private matters such as “[s]exual relations . . . are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, [and] most details of a man’s life in his home . . .”); *see also* JOHNSON, *supra* note 72, at 318 (exploring how photographs taken in public spaces may not bring claims of Publicity Given to Private Life since “the plaintiff has . . . chosen to appear in a place visible to others . . . [thus] taking and using the photographs does not invade a privacy interest”).

84. This Comment concerns itself with the tortious remedies to victims of revenge pornography, not with the possible offenses committed by victims during the photographic sessions. However, courts should note that victims may be less willing to come forward to their own defense if one of the revenge pornography photos had been taken in a public area. This voyeuristic photograph may effectively taint the rest of the portfolio. If a victim has numerous photographs released to the Internet without consent, yet only one of the photos was taken in a public space, such may be enough for the victim to not seek recourse through either Publicity Given to Private Life or Intrusion upon Seclusion. *See* TEX. PENAL CODE ANN. § 21.08 (West 2011) (describing indecent exposure as when “[a] person commits [this] offense if he exposes his anus or any part of his genitals with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act”).

offensive to a reasonable person.

#### D. *Highly Offensive*<sup>85</sup>

After a victim sufficiently establishes the privacy requirement, the victim must prove that the material meets the “highly offensive” threshold.<sup>86</sup>

Notably, the material itself must be of a highly offensive nature, rather than the manner in which it was publicized.<sup>87</sup> For example, if a distributor provides the revenge pornography materials to the victim’s entire family, this act would equal distributing the material to complete strangers under the highly offensive requirement.<sup>88</sup> Under both situations, the method of delivery differs, yet the material itself remains the same. Since delivery does not bear any weight to the highly offensive requirement, what constitutes highly offensive material?

Texas courts have recognized that victims seeking redress through either “publication of private facts or unwarranted intrusion into private affairs” must prove that the “action taken be ‘highly offensive to a reasonable person.’”<sup>89</sup> Moreover, determining whether the material “is ‘highly offensive’ is first a matter of law and a certain threshold of offensiveness is required.”<sup>90</sup> Although courts quickly state the “highly offensive” requirement, they have yet to provide the parameters needed to meet the “threshold of offensiveness.”<sup>91</sup> This flexibility allows courts to

85. For a flow chart approach of this analysis and a visual analysis of the highly offensive requirement, see *infra* Appendix 4: Highly Offensive to a Reasonable Person for Publicity Given to Private Life.

86. RESTATEMENT (SECOND) OF TORTS § 652D (1977) (“[An actor] 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.” (emphasis added)).

87. See *id.* § 652D cmt. c (“It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.”); see also JOHNSON, *supra* note 72, at 327 (exploring how some jurisdictions have focused on the subject matter and others have drifted from the *Second Restatement’s* clear language to “focus[] not on the subject matter of the disclosure, but on the defendant’s conduct leading to disclosure”).

88. See JOHNSON, *supra* note 72, at 327 (quoting RESTATEMENT (SECOND) OF TORTS § 652D (1977)) (noting that the “language of the *Restatement* seems clear” in that “[l]iability will not be assessed unless ‘the matter publicized is of a kind that . . . would be highly offensive to a reasonable person’” rather than analyzing the “defendant’s conduct in making the disclosure” of the material).

89. *Polansky v. Sw. Airlines Co.*, 75 S.W.3d 99, 105 (Tex. App.—San Antonio 2002, no. pet.) (citing RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977)).

90. *Id.* (citing *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88, 93 (Tex. App.—Corpus Christi 1994, writ denied)).

91. See RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977) (quoting *Shaheen v. Motion Indus., Inc.*, 880 S.W.2d 88, 93 (Tex. App.—Corpus Christi 1994, writ denied)) (requiring the

gauge offensive material against the customs of the community. However, the very same flexibility also frustrates victims in understanding what criteria under “highly offensive” must be met.<sup>92</sup>

Courts have provided analogies to what may constitute a highly offensive act. For example, the court in *Billings v. Atkinson*<sup>93</sup> stated that an actor may not wrongfully intrude upon “one’s private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.”<sup>94</sup> This definition does not specifically define the “highly offensive requirement” nor does it specifically concern a reasonable person.<sup>95</sup> The definition need not be specific towards either Publicity Given to Private Life or Intrusion upon Seclusion since both have the same requirement towards highly offensive material.<sup>96</sup> Additionally, the definition of a “reasonable man” often parallels the standards of other hypothetical persons, such as the “person of ordinary sensibilities,” used by the law.<sup>97</sup> While the aspects listed in *Billings* are not all inclusive, they do provide a basis to compare revenge pornography against material that is “highly offensive.”<sup>98</sup>

The distribution of revenge pornography encompasses all three aspects of the *Billings* “offensive” threshold, which is to either outrage or cause one of three mental states: suffering, shame, or humiliation.<sup>99</sup>

material to be “highly offensive”); see also *Polansky*, 75 S.W.3d at 105 (creating the “threshold of offensiveness”).

92. RESTATEMENT (SECOND) OF TORTS § 892 cmt. d (1979).

93. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

94. *Id.* at 859.

95. Compare *id.* (analyzing the breach of privacy “to a person of ordinary sensibilities” rather than a reasonable person), with RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965) (“[T]he law has made use of the standard of a hypothetical ‘reasonable man.’ Sometimes this person is called a reasonable man of ordinary prudence, or an ordinarily prudent man, or a man of average prudence, or a man of reasonable sense exercising ordinary care. It is evident that all such phrases are intended to mean very much the same thing.”).

96. See *Polansky*, 75 S.W.3d at 105 (quoting RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977)).

97. *Billings*, 489 S.W.2d at 859; see RESTATEMENT (SECOND) OF TORTS § 464 cmt. b (1965) (defining a reasonable person as “a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interest of others”); *id.* § 283 cmt. c (explaining the law’s use of the “reasonable man” and all of his counterparts).

98. See *Billings*, 489 S.W.2d at 859 (stating that an actor may not invade “one’s private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities”); see also *Polansky*, 75 S.W.3d at 105 (quoting RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977)) (requiring a certain “threshold of offensiveness” before either the tort of Intrusion upon Seclusion or publicity given to private fact may move forward).

99. See *Billings*, 489 S.W.2d at 859 (prohibiting actors from invading the private interest of



Distributors often disseminate revenge pornography with the intent to cause shame or humiliation to an ordinary person.<sup>100</sup> Case law shows that distributors have given revenge pornographic materials to members of the victim's family,<sup>101</sup> posted the materials online for the express purpose of spreading the image,<sup>102</sup> and given it to the victim's coworkers or employer in order to force a victim's termination.<sup>103</sup> A court would require little imagination to see how having personal, intimate, pornographic imagery within the public eye may outrage an individual,<sup>104</sup> cause them mental

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others).

100. While *Billings* illustrates the threshold for potentially offensive acts, numerous news agencies have already shed light on the distribution of pornographic materials for the sole intent of bringing shame and humiliation upon the victim. *See id.* at 860 (forbidding an actor from invading another's privacy that will cause mental suffering to an ordinary person); *see also* Styles, *supra* note 2 (describing how revenge pornographers disseminate material in order "to humiliate and degrade" others). *See generally* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) ("When . . . intimate details . . . are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy."); *id.* § 283 (1965) (describing the standard of the "reasonable man's" conduct as "that of a reasonable man under like circumstances"); Chen, *supra* note 2 (demonstrating how Internet hackers steal nude photographs and use these private photographs for the sole purpose of defaming individuals).

101. *See* Bartow, *supra* note 1, at 46 (describing how the Internet is a preferred medium to disseminate revenge pornography since "[b]road distribution is usually the goal of the revenge pornographer").

102. *See* Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20.2 COLUM. J. GENDER & L. 224, 229 (2011) (citing Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 68 (2009)) (describing how digital harassment has led women to change occupations due to online harassment); *see also* *Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009) (illustrating how a revenge pornographer listed the "telephone number at [the victim's] place of employment" and requested complete strangers to "pepper[] her office with emails, phone calls, and personal visits, all in the expectation of sex").

103. Indeed, ex-lovers often post revenge pornography with the intent to ruin the social and financial aspects of their victim's lives by distributing the pictures to specific individuals or entities. *See Barnes*, 570 F.3d at 1098 (going into detail as to the means by which an ex-lover distributed the photographs "taken without [the victim's] knowledge," posted such material to online profiles, used the photographs and fraudulent profiles to "direct[] male correspondents to the fraudulent profiles he had created," and posted "addresses, real and electronic, and [the] telephone number at [the victim's] place of employment" to solicit her for sex).

104. *Compare* WEBSTER'S NEW WORLD DICTIONARY 962 (3d ed. 1988) (defining the verb of outrage as "great anger" or "indignation . . . aroused by [a deep insult] or offense"), *with* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (describing the noun of outrageous conduct as acts that are "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . [g]enerally, the case is one in which the recitation of the facts to an average member of the community would . . . lead him to exclaim, 'Outrageous!'). *Compare* Plaintiffs' Opposition to Godaddy.com's Motion to Dismiss Pursuant to Tex. R. Civ. P. 91A at 1–2, *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, no pet.) (No. D-130,018-C), 2013 WL 2023358 (describing how the plaintiffs—"women whose intimate photographs and personal information were taken without their permission, and published"—have

suffering over the consequences of the material, shame the victim into possibly withdrawing from their occupation and society, and humiliate the individual in unimaginable ways.<sup>105</sup> If a distributor were able to prove that the distribution would not be highly offensive, then the tort would immediately end here.<sup>106</sup> However, if a victim is able to prove that the distribution of the revenge pornography would “be highly offensive to a reasonable person,” then the victim would have to prove that the material is not also of a legitimate concern to the public.<sup>107</sup>

#### E. *Legitimate Concern*<sup>108</sup>

The final requirement for Publicity Given to Private Life dictates that the published material be not of a legitimate concern to the public at large.<sup>109</sup> Yet how do courts measure a legitimate concern?

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sued the hosting website and claimed that the hosting Revenge pornography’s website’s “purpose is to harass, humiliate and threaten its innocent victims” by posting both the photographs and personal data of the “innocent victims”), *and Barnes*, 570 F.3d at 1098 (reiterating revenge pornography’s use as “a dangerous, cruel, and highly indecent use of the Internet for the apparent purpose of revenge”), *with Kluff*, *supra* note 2 (exploring the website “Is Anyone Up” and its profits), *and Chen*, *supra* note 2 (revealing how revenge pornographers “publicize everything they find for maximum effect” of humiliating the photographed victims), *and Styles*, *supra* note 2 (showing the intent behind revenge pornography distribution is “to humiliate and degrade” others).

105. *See* JOHNSON, *supra* note 72, at 326 (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993)) (“Most people . . . would nevertheless be deeply upset if nude photographs of themselves were published in a newspaper or a book. They would feel the same way about photographs of their sexual activities, however ‘normal,’ or about a narrative of those activities . . . .”); *see also* Franks, *supra* note 102, at 229 (citing Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 68 (2009)) (describing how the harm caused by digital harassment often “spill[s] over into [the victim’s] offline lives: women have dropped out of school, changed jobs, moved cities, gone into hiding, experienced mental breakdowns, and, in extreme cases, committed suicide”). *See generally* TEX. PENAL CODE ANN. § 42.07 (West 2011) (describing the offense of harassment in Texas and how such harassment may be performed through an electronic communication).

106. An example may be beneficial in demonstrating that distributing revenge pornography may not be highly offensive: if a pornography actor or actress were to have revenge pornographic materials taken and distributed, courts may hesitate at considering the distribution highly offensive. Many pornography stars have already displayed their nudity and sexual acts to the public through a for-profit medium distributed to the public at large. The court could readily determine that the material is no longer private; moreover, the pornography star is already known to the public for their sexual acts. Thus, there is nothing highly offensive about reaffirming a pornography star’s occupation and exploits already within the public eye.

107. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

108. For a flow chart approach to this analysis and a visual analysis of the legitimate concern to the public requirement, see *infra* Appendix 5: Legitimate Concern for Publicity Given to Private Life.

109. RESTATEMENT (SECOND) OF TORTS § 652D (1977) (“One who gives publicity to a matter concerning the private life of another [and the actor] 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

The Supreme Court of Texas determined that courts must weigh the legitimate concern requirement against four, broad criteria: first, the facts of each particular case; second, the kind of information given; third, whether the material or individual placed in the public eye furthers a public purpose such as education, amusement, or enlightenment, and if the public has a legitimate interest in that public purpose; and fourth, whether the victim is clearly identified in the subject matter.<sup>110</sup> These four factors are all encapsulated within the term “newsworthy.”<sup>111</sup>

Both the victim and distributor may only influence the last three factors, as the first factor, the facts of each particular case, remains solely within the purview of the court.<sup>112</sup> Concerning the second requirement, newsworthy materials include “information concerning interesting phases of human activity” and are not restricted to a genre or a series of genres.<sup>113</sup> Instead, newsworthy materials “must embrace all issues about which information is needed or appropriate [so that individuals may] cope with the exigencies of their period.”<sup>114</sup> However, the Supreme Court of Texas has also cautioned that the public’s interest in the subject matter is wholly separate from individuals listed in the subject matter for “newsworthy” information.<sup>115</sup> For example, while a topic may be newsworthy to the population, such as an increase in crime within a certain area, courts may also find that those affected by the increase in crime are

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person, and (b) is *not of legitimate concern to the public.*” (emphasis added)).

110. See *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976) (requiring the analysis that each case “is necessarily one which can only be considered in the context of each particular case, considering the nature of the information and the public’s legitimate interest in its disclosure”).

111. See *id.* (weighing a legitimate public interest against the case’s circumstances); see also *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995) (maintaining the separation between subject matter and those involved in the subject matter who may have their interests invaded; moreover, providing a warning for “[n]ewspapers and other media . . . [to] take precautions to avoid unwarranted public disclosure and embarrassment of innocent individuals who may be involved in otherwise newsworthy events of legitimate public interest”).

112. See *Indus. Found. of the S.*, 540 S.W.2d at 685 (requiring the analysis that each case be considered on a case-by-case basis).

113. *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (citing *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1966)) (noting that newsworthy content encompasses “all issues about which information is needed”).

114. *Id.*

115. See *Star-Telegram*, 915 S.W.2d at 474 (analyzing the difference between a public’s interest in the subject matter and the public’s interest in individuals involved in the subject matter: “While the general subject matter of a publication may be of a matter of legitimate public concern, it does not necessarily follow that all information given in the account is newsworthy”).

not newsworthy.<sup>116</sup>

The victim will seek to prove either that the topic of revenge pornography or the actual victim is not intrinsically a newsworthy subject. The victim will have more success proving that the victim is not newsworthy rather than arguing that revenge pornography is not newsworthy.<sup>117</sup> The distributor, however, will have to prove that both the subject of revenge pornography and the victim are newsworthy materials.

When viewing the topic of revenge pornography as a whole, courts will more than likely identify the facts of the revenge pornography case, coupled with the kind of information given, as included under newsworthy material. However, courts could also state that while the subject matter is newsworthy, the victim is not.<sup>118</sup> Determining whether a subject or individual is newsworthy requires more than just the first two requirements alone. Courts will have to evaluate the final two requirements: whether the material or individual involved furthers education, amusement, or enlightenment, and if the public has a legitimate interest; and whether the victim is clearly identified in the subject

116. *See id.* at 474–75 (describing the difference between newsworthy topics and newsworthy individuals).

117. Indeed, the creation of revenge pornography and other damning communications has become so prevalent that there is now an entire industry devoted to the elimination of such content. Professor Ann Bartow describes an entire industry which “claim[s] an ability to help clients hide bad things that have happened by burying the abhorrent websites deep within search engine results or having objectionable words and images removed from websites altogether.” Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 384 (2009). Yet Professor Bartow notes that these defending websites are often at odds with themselves, in that these websites are not necessarily incentivized to truly end Internet harassment since “the greater the quantity of sexual harassment toward affluent victims that appears on the Internet, the wealthier reputation defense services can become.” *Id.* at 384, 419. In effect, the current legal climate provides little to no remedies to victims of revenge pornography; victims who seek to purge the online material through purchased services are similarly provided little aid since these “knights in cyber shining armor” know that if their clientele no longer feel threatened, then they will no longer need digital bodyguards. *Id.* at 391; *see also* Franks, *supra* note 102, at 229 (citing Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64 (2009)) (explaining the ramifications of online harassment where “[w]omen shut down their blogs, avoid websites they formerly frequented, take down social networking profiles, refrain from engaging in online political commentary, and choose not to maintain potentially lucrative or personally rewarding online presences due to cyberspace harassment”). *See generally* TEX. PENAL CODE ANN. § 42.07 (West 2011) (enumerating the seven ways to commit harassment in Texas and how such harassment may be performed through electronic communication).

118. *See Star-Telegram*, 915 S.W.2d at 474 (differentiating between “the general subject matter of a publication” and the individuals affected by the subject matter).

matter.<sup>119</sup>

Newsworthiness encapsulates all issues which further the “purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published.”<sup>120</sup> Here, the victim will have the lowest burden of proof out of all Publicity Given to Private Life’s requirements.<sup>121</sup> The victim need only show that the distribution of their pornographic materials does not further the purposes of education.<sup>122</sup> The photographs themselves would not provide amusement to any except the original distributor and their nefarious schemes,<sup>123</sup> and the revelation of pornographic materials would not enlighten the population.<sup>124</sup>

Furthermore, the distributor will seek to prove that the subject of revenge pornography or the victim does further a public purpose. If the distributor proves that the material or victim does further a public purpose, then the tort for disclosure of private facts ends here. In contrast, the victim must demonstrate that either the subject of revenge pornography or they as the victim do not further a public purpose. If the

119. *See Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976) (requiring that the analysis each case consider “the nature of the information and the public’s legitimate interest in its disclosure”).

120. *Anonsen v. Donahue*, 857 S.W.2d 700, 703 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (citing *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975)).

121. *See Star-Telegram*, 915 S.W.2d at 474 (Tex. 1995) (citing *Indus. Found. of the S.*, 540 S.W.2d at 685) (“Generally, there is a presumption under Texas law that the public has no legitimate interest in private embarrassing facts about private citizens.”).

122. Alerting the population of revenge pornography via its distribution does not sufficiently educate the population. Such a goal could be more readily fulfilled through public dialogue without causing emotional distress to a victim. *See WEBSTER’S NEW WORLD DICTIONARY* 432 (3d ed. 1988) (defining education as “the action or process of training and developing the knowledge, skill, mind, character”); *see also id.* at 431 (stating the definition of educate to include an act “to train or develop the knowledge, skill, mind, or character of, especially by formal schooling or study”).

123. It would be difficult to imagine the population, against the backdrop of community practices, to gain amusement from the negative, life altering consequences which typically follow revenge pornography. *See id.* at 48 (noting that “amusement” means “something that . . . entertains”).

124. As stated in *Star-Telegram*, “Newspapers and other media should take precautions to avoid unwarranted public disclosure and embarrassment of innocent individuals who may be involved in otherwise newsworthy events of legitimate public interest.” *Star-Telegram*, 915 S.W.2d at 474. In most circumstances, distributors will be unable claim that the revelation of pornographic materials served to “enlighten the population” concerning the consequences of revenge pornography. Courts could immediately retort that a distributor’s intent to “enlighten the population” would be far better served by opening a public dialogue concerning the subject matter rather than possibly ruining a victim’s life over such subject matter; such would be akin to claiming that one must commit a crime to prove the negative repercussions of that crime. *See generally id.* (warning media sources to safeguard individuals involved in subject matter of legitimate concern to the public).

victim successfully proves that neither the subject nor the victim is newsworthy, then the victim will also have to prove the final requirement: the victim is either clearly or sufficiently identified in the material.

Under the fourth requirement, victims will have a more difficult time if the pornographic materials do not clearly state the name or identity of the individual. For example, if a victim's pornographic pictures are posted online, but their faces remain obscured, then courts may claim that the photographs do not disclose "embarrassing private facts which were not of legitimate public concern."<sup>125</sup> The Supreme Court of Texas held that materials "which do not directly identify an innocent individual but which make that person identifiable to persons already aware of the uniquely identifying personal information, may or may not be of legitimate public interest."<sup>126</sup>

For example, the photographs would need to contain materials that would be readily identified by the public, rather than by "persons already aware of uniquely identifying personal information."<sup>127</sup> If a bedroom scene held pieces of art which only close friends of the victim knew, then such may or may not avail.<sup>128</sup> If the photographs or portfolio held direct personal information, such as an envelope clearly stating the address of the victim, then the victim may have a claim to go forward with.

If the distributor has proven both the victim and revenge pornography are newsworthy, the distribution furthered a public purpose or the victim is not clearly or sufficiently identified in the material, then the tort for Publicity Given to Private Life will end. However, if the victim first demonstrates the victim or revenge pornography is not newsworthy, the

125. *Id.*

126. *Id.* at 474–75. The Supreme Court of Texas held that such material may or may not fulfill the legitimate public interest requirement in order to protect media organizations. Requiring the media to "anticipate and take action to avoid every conceivable circumstance where a party might be subjected to the stress of some unpleasant or undesired notoriety" would have "an unacceptable chilling effect on the media itself." *Id.* at 475. Moreover, requiring the media to always withhold information for fear "of some unpleasant or undesired notoriety" may effectively "cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public" since the media would have "to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances." The Supreme Court of Texas notes that, under these circumstances, such "would impose an impossible task" upon our news agencies. *Id.* at 474–75.

127. *Id.*

128. *See id.* (describing how Doe's articles concerning "the sexual assault upon her included information which allowed those who knew her to deduce her identity"). Such information included the general area, but not specific address, of her residence; the manufacturer of her automobile; and even the kind of business the victim owned.

distribution did not further a public purpose, and the victim is clearly or sufficiently identified in the material, then the victim may seek damages.

#### V. INTRUSION UPON SECLUSION<sup>129</sup>

As differentiated from Publicity Given to Private Life, Intrusion upon Seclusion is used whenever a revenge pornography victim has their pornographic materials taken without the initial consent.<sup>130</sup> For example, under Publicity Given to Private Life, a victim of revenge pornography would have first consented towards giving the pornographic materials to the would-be distributor.<sup>131</sup> In contrast, the distributor under Intrusion upon Seclusion would have taken the photographs without the victim's consent and then subsequently distributed the material.<sup>132</sup> The difference lies in the initial consent for receiving the pornographic materials.<sup>133</sup>

A distributor or actor is “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [and] is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”<sup>134</sup> Intrusion upon Seclusion may be further broken down into four constituent parts: (1) the actor must possess the prerequisite “intent”

129. Compared to the tort of Publicity Given to Private Life, proving the tort of Intrusion upon Seclusion will often be a simpler affair. Intrusion upon Seclusion does not concern whether the materials are revealed to others or if the revelation is sufficiently within the public eye. Since courts need not bother with whether the materials have been sufficiently revealed, this also dissipates the burden of demonstrating whether or not the intrusion legitimately concerns the public. Intrusion upon Seclusion's lack of additional factors (each of which must be closely weighed against the customs of the community) reduces the number of twists and possible convolutions behind the suit. See JOHNSON, *supra* note 72, at 340 (noting the ease of proving Intrusion upon Seclusion since “unlike an action for disclosure of private facts [or Publicity Given to Private Life], intrusion does not require publicity of information. Moreover, because publicity is not necessary, courts addressing intrusion claims rarely are asked to consider whether facts discovered . . . were of legitimate concern to the public”); see also RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977) (specifying that the tort of Intrusion upon Seclusion “does not depend upon any publicity given to the person whose interest is invaded or to his affairs”).

130. Compare RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining the tort of Intrusion upon Seclusion), and *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (incorporating the *Second Restatement's* definition of Intrusion upon Seclusion), with RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining the tort of Publicity Given to Private Life).

131. See RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining the tort of Publicity Given to Private Life).

132. See *id.* § 652B (defining the tort of Intrusion upon Seclusion).

133. Compare *id.* (defining the tort of Intrusion upon Seclusion), with *id.* § 652D (defining the tort of Publicity Given to Private Life).

134. *Id.* § 652B.

to commit the tort; (2) there must be an “intrusion” of sorts and the intrusion includes acts that are “physical or otherwise;” (3) the victim had a reasonable expectation of “privacy” in either the materials or their affairs; and (4) the intrusion would be “highly offensive to a reasonable person” in this particular circumstance.<sup>135</sup> Like *Publicity Given to Private Life*, the victim must prove each subsequent factor before seeking damages while the distributor need only disprove one of the four factors to end the tort altogether. Concerning intrusion, victims often fulfill the requirement since “the intentional nature of the intrusion is obvious.”<sup>136</sup>

#### A. *Intent*<sup>137</sup>

Under Intrusion upon Seclusion, the actor, is “[o]ne who *intentionally* intrudes physically or otherwise” on another.<sup>138</sup> The *Second Restatement* defines “intent” as the actor’s desire “to cause [the] consequences of his act, or [that] he believes that the consequences are substantially certain to result from it.”<sup>139</sup> In this instance, the victim will seek to prove that the photographs taken without consent represent either intent to intrude upon the seclusion of the victim or belief that the consequences of the intrusion are “substantially certain to result.”<sup>140</sup> Meanwhile, the distributor will instead seek to prove that they lacked the prerequisite intent to intrude upon the victim.<sup>141</sup>

This prerequisite intent may manifest in two situations: where the actor

135. *Id.*

136. See JOHNSON, *supra* note 72, at 340 (describing how most “[i]ntrusion cases rarely focus on whether an intrusion was sufficiently intentional to give rise to liability because in many cases the intentional nature of the intrusion is obvious”).

137. For a flow chart approach to this analysis and a visual analysis of intent, see *infra* Appendix 6: Intent for Intrusion upon Seclusion.

138. RESTATEMENT (SECOND) OF TORTS § 652B (1977) (emphasis added).

139. Notably, an actor may not unintentionally intrude upon another and still fulfill this factor. See *id.* § 8A (1965) (defining intent); see also *Tex. Comptroller of Pub. Accounts v. Att’y Gen. of Tex.*, 354 S.W.3d 336, 364 (Tex. 2010) (describing the tort of Intrusion upon Seclusion as “not committed by one who unintentionally facilitates the possible intrusion”); RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining Intrusion upon Seclusion); JOHNSON, *supra* note 72, at 341–42 (noting that inadvertently viewing an activity, such as sexual activity in a bathroom stall, would not fulfill the intent requirement).

140. See RESTATEMENT (SECOND) OF TORTS § 8A (1965) (defining intent as the result of an actor’s desire to cause the outcome, or the actor’s substantial certainty of an outcome).

141. See *id.* § 652B (1977) (requiring an intent to intrude upon another’s seclusion); see also *Tex. Comptroller*, 354 S.W.3d at 364 (stating that one who unintentionally intrudes upon another lacks the sufficient intent under Intrusion upon Seclusion).



intends to either physically or otherwise intrude upon the victim.<sup>142</sup> In most cases, the intent of one who physically intrudes is usually obvious. For example, if the distributor were to access the victim's home or laptop and take the photographs, there would be little doubt as to whether the distributor possessed the intent to intrude upon the victim.<sup>143</sup> The intent to intrude may become murkier, however, if the distributor accessed the laptop in a nonphysical manner such as over the Internet. Does taking the revenge pornography materials in a nonphysical manner also demonstrate intent to intrude?

Here, an actor's intent to gather the pornographic materials via a remote or otherwise would satisfy the intent requirement as well.<sup>144</sup> In this situation, the actor desired "to cause [the] consequences of his act" being the taking and subsequent distribution of the revenge pornographic materials.<sup>145</sup> To bridge both definitions together: the actor "desires to cause [the] consequences of his act"<sup>146</sup>—distributing revenge pornography—"to encourage and facilitate the humiliation and harassment of the victim subject"<sup>147</sup> by "physically or otherwise"<sup>148</sup> intruding upon the victim's pornographic materials.<sup>149</sup> If a distributor is able to prove that they lacked the intent to commit the intrusion, then the tort for Intrusion upon Seclusion will immediately end. If a victim, however, is able to prove the actor's intent to intrude then the victim may then seek to prove an actual intrusion exists.<sup>150</sup> Similar to the intent for Intrusion upon Seclusion, both the intent and the actual intrusion are typically

142. See RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining intent as one that requires a physical intrusion or other form of intrusion).

143. See *id.* § 652B cmt. b (including invasions such as a "physical intrusion into a place in which the plaintiff has secluded himself").

144. See *id.* (noting that invasions "with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires" are equal to physical intrusions).

145. RESTATEMENT (SECOND) OF TORTS § 8A (1965) (defining intent as used in the *Second Restatement*). Professor Bartow, in her review of pornography in *Copyright Law and Pornography*, defines the goal and intent of revenge pornography as "to encourage and facilitate the humiliation and harassment of the victim subject." Bartow, *supra* note 1, at 44.

146. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

147. Bartow, *supra* note 1, at 44–46.

148. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

149. See Bartow, *supra* note 1, at 44–46 (explaining the method for circulating revenge pornography).

150. In most instances, courts will refrain from focusing too heavily on this first factor. In many cases, the intrusion itself is obvious; thus, the intent always follows the act of the intrusion itself. See JOHNSON, *supra* note 72, at 340 (noting that in most "[i]ntrusion cases . . . the intentional nature of the intrusion is obvious").

obvious to the beholder. Thus, victim's often readily fulfill both the intent and intrusion requirements hand-in-hand.

#### B. *Intrusion*<sup>151</sup>

The *Second Restatement* defines an actor's intrusion as being culpable when the actor "*intrudes, physically or otherwise*" on another.<sup>152</sup> Despite the clear requirement of intrusion, the *Second Restatement* does not provide a definition of intrusion itself.

In *Valenzuela v. Aquino*,<sup>153</sup> the Texas Supreme Court incorporated the *Second Restatement's* definition of Intrusion upon Seclusion, yet the court refrained from defining "intrusion" itself.<sup>154</sup> This lapse of definition may be attributed to either the *Second Restatement's* similar lack of specific definition or that the definition belongs sufficiently enough to the vernacular not to necessitate definition or specificity.<sup>155</sup> Regardless of reason, intrusion and its definition may be elaborated through either the common dictionary definition or through peripheral, relevant information from the *Second Restatement*.

Webster's New World Dictionary defines "intrusion" as "the act of intruding" and "the illegal entering upon another's land without right to possession."<sup>156</sup> Furthermore, the dictionary defines the word "intrude" as either "to force (oneself or one's thoughts) upon others without being asked or welcomed"<sup>157</sup> or "to push or force (something in or upon)."<sup>158</sup> Peripheral information from the *Second Restatement* gives a similar definition. In a similar vein, the *Second Restatement* authorizes an actor confronting a physical intruder to "use reasonable force" in order to

151. For a flow chart approach to this analysis and a visual analysis of intrusion, see *infra* Appendix 7: Intrusion for Intrusion upon Seclusion.

152. RESTATEMENT (SECOND) OF TORTS § 652B (1977) (emphasis added).

153. *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993).

154. *See id.* at 513 (adopting the *Second Restatement's* definition of Intrusion upon Seclusion for purposes of the opinion, and ultimately determining the question of invasion of privacy is a question for the jury).

155. Interestingly enough, other jurisdictions have also refrained from defining intrusion; instead, jurisdictions have relied upon common dictionary definitions due to the belief that intrusion belongs to the vernacular as opposed to the scholar. Professor Vincent R. Johnson notes that the Third Circuit similarly lacked a definition from the *Second Restatement*. In fact, the Third Circuit "looked to [intrusion's] ordinary meaning; the dictionary 'defines "intrude" to mean to thrust oneself in without invitation, permission, or welcome.'" *See* JOHNSON, *supra* note 72, at 340–41 (quoting *Mauri v. Smith*, 929 P.2d 307, 310–11 (Or. 1996)).

156. WEBSTER'S NEW WORLD DICTIONARY 709 (3d ed. 1988).

157. *Id.*

158. *Id.*

“terminate another’s intrusion” if such an “intrusion is not privileged.”<sup>159</sup>

Both definitions find “intrusion” to be a wrongful entering, or nonconsensual intrusion, upon another’s property.<sup>160</sup> But must a person be “physically present” in order to intrude upon another’s property? More specifically, does the *Second Restatement’s* definition of Intrusion upon Seclusion—where “[o]ne who intentionally intrudes, physically or otherwise”—sufficiently encompass those who are not physically present upon the property?<sup>161</sup>

Intrusion upon another’s property is not restricted to mere physical presence; instead “[i]t includes . . . eavesdropping upon private conversations by wiretapping, microphones[,] or spying into windows of a home.”<sup>162</sup> In essence, one may use devices or equipment outside the purview of the home in order to intrude upon the private affairs of another individual.<sup>163</sup> While microphones must be placed within the home, or within the confines of the owner’s property, wiretapping or videotaping devices need not be within the owner’s property to constitute an intrusion.<sup>164</sup> In *Billings*, the respondent, a telephone repairman, placed a wiretapping device “at a terminal box on the telephone pole behind [petitioner’s] house.”<sup>165</sup> The device used for intrusion was not physically present within the house; rather, it was located outside the home. By this logic and the fact that the device’s location excludes the category of physical intrusion, the respondent’s use of a wiretapping device in *Billings*

159. RESTATEMENT (SECOND) OF TORTS § 77 (1965). *See generally id.* § 158 (1965) (stating liability for a physical intrusion upon land).

160. WEBSTER’S NEW WORLD DICTIONARY 709 (3d ed. 1988).

161. *Compare* RESTATEMENT (SECOND) OF TORTS § 652B (1977) (emphasis added) (analyzing various uses of intrusion), *with id.* § 77 (1965) (juxtaposing Intrusion upon Seclusion with seclusion in the context of defending one’s land or chattels). *See generally id.* § 158 (stating liability for a physical intrusion upon land).

162. *Gonzales v. Sw. Bell Tel. Co.*, 555 S.W.2d 219, 221 (Tex. Civ. App.—Corpus Christi 1977, no writ) (involving an invasion of privacy action against a telephone repairman who entered the plaintiffs’ home without their permission in order to remove two pieces of telephone equipment); *see also* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) (noting that “tapping [a victim’s] telephone wires” would constitute an intrusion “into a place in which the victim has secluded himself”).

163. *See Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973) (exploring the legal repercussions for a respondent who attached a wiretapping device to a telephone pole behind petitioner’s home).

164. *See id.* (stating that placing mechanical devices outside the victim’s home with the intent to intrude upon the victim will still sufficiently intrude upon the victim’s seclusion); *see also* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) (stating that using an external device to tap into a victim’s conversations constitutes an invasion of the victim’s privacy).

165. *Billings*, 489 S.W.2d at 859.

falls within the *Second Restatement's* definition of Intrusion upon Seclusion where the actor may “intentionally intrude, physically or *otherwise*.”<sup>166</sup> By extension, the use of any device both used outside the victim’s home and used to spy within the abode should also constitute an intrusion.<sup>167</sup>

If the distributor demonstrates a lack of intrusion, either physically or otherwise, then the tort for Intrusion upon Seclusion ends at this point. If the victim demonstrates an intrusion by the distributor, in any form, the victim may then prove whether the distributed revenge pornography constitutes a private affair.

### C. *Private Affairs*<sup>168</sup>

What constitutes “the solitude or seclusion of another” or “private affairs or concerns” of another?<sup>169</sup>

Courts have defined matters of privacy as aspects of an individual’s life, which are neither public knowledge nor within the public’s view.<sup>170</sup> In

166. RESTATEMENT (SECOND) OF TORTS § 652B (1977) (emphasis added); *see also id.* § 652B cmt. b (describing how the use of devices located outside a victim’s place of seclusion would constitute an invasion of victim’s privacy).

167. *See Billings*, 489 S.W.2d at 859 (declaring that the use of a wiretapping device, located outside the home, still constitutes an intrusion); *see also* RESTATEMENT (SECOND) OF TORTS § 652B (1977) (holding an actor intrudes upon another when he “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [and] is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person”).

168. For a flow chart approach to this analysis, and visual analysis of private affairs, *see infra* Appendix 8: Privacy for Intrusion upon Seclusion.

169. *Id.*

170. Typically the intrusion, in and of itself, constitutes a breach of privacy since one may only intrude upon an area of privacy or seclusion. However, a victim may not create either an area of privacy or an expectation of privacy within a public area. For example, if the victim’s pornographic materials consisted of photographs taken in a public area, the distributor may then note that such materials are not afforded privacy protections. Pornographic materials taken within public areas are considered within the public eye and are not afforded the same protections as within the victim’s abode or other similarly private areas. However, courts will have to weigh the fact that such material, though taken within a public space, was nonetheless housed within a private area. For example, if the distributor were to have used a camera to take photos of the victim engaged in a sexual act in a public area, the distributor could argue that the victim did not have a reasonable expectation of privacy. In a second example, if a distributor were to have taken the digital photographs from the victim’s computer, the victim may then argue that the distributor has still initially intruded upon the victim’s privacy. *See id.* § 652B cmt. b (noting the privacy afforded to victims in areas such as the home or a hotel room); *see also id.* § 652B cmt. c (illustrating how there is no “liability for observing [the victim] or even taking [the victim’s] photograph while [the victim] is walking on the public highway, since [the victim] is not then in seclusion, and [the victim’s] appearance is public and open to the public eye”); JOHNSON, *supra* note 72, at 318 (reiterating how photographs taken in public spaces may not bring claims of Publicity Given to Private Life since “the plaintiff has voluntarily

*Billings*, the Supreme Court of Texas noted “[t]he right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity.”<sup>171</sup> The court also noted that the right to privacy extends towards protecting victims from wiretapping, eavesdropping, and the general use of devices located outside the victim’s physical abode.<sup>172</sup> Thus, the intrusion by means of “eavesdropping and wiretapping, and other similar invasions” through the use of equipment located outside the home of the victim would also encompass a digital intrusion against the victim.<sup>173</sup> Taken together with the first two requirements of Intrusion upon Seclusion, the intent<sup>174</sup> and remote or physical intrusion,<sup>175</sup> would breach the privacy protecting the information.<sup>176</sup>

If the distributor is able to prove that either the victim’s privacy had not

chosen to appear in a place visible to others, so that taking and using the photographs does not invade a privacy interest”).

171. *Billings*, 489 S.W.2d at 859; see also RESTATEMENT (SECOND) OF TORTS § 652A(1) (1977) (noting that “[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other”).

172. See *Billings*, 489 S.W.2d at 860 (“[T]he court in *Milner v. Red River* . . . did recognize that some of the right of privacy interests have been afforded protection under such traditional theories [towards] . . . eavesdropping and wiretapping, and other similar invasions into the private business and personal affairs of an individual”); see also RESTATEMENT (SECOND) OF TORTS § 652A (1977) (explaining the four rights to privacy and how they interact with one another); RESTATEMENT (SECOND) OF TORTS § 652B (1977) (stating the liability of an actor for Intrusion upon Seclusion “if the intrusion would be highly offensive to a reasonable person”).

173. *Billings*, 489 S.W.2d at 859; see also RESTATEMENT (SECOND) OF TORTS § 652B (1977) (stating the liability of an actor for Intrusion upon Seclusion “if the intrusion would be highly offensive to a reasonable person”).

174. See RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining the intent requirement for Intrusion upon Seclusion); see also *Tex. Comptroller of Pub. Accounts v. Att’y Gen. of Tex.*, 354 S.W.3d 336, 364 (Tex. 2010) (claiming that the “tort of Intrusion upon Seclusion . . . is not committed by one who unintentionally facilitates the possible intrusion”); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (incorporating the *Restatement’s* definition).

175. WEBSTER’S NEW WORLD DICTIONARY 709 (3d ed. 1988) (defining “intrusion” as “the illegal entering upon another’s land without right to possession” and explaining how the verb “intrude” means “to force (oneself or one’s thoughts) upon others without being asked or welcomed”); see also *Billings* at 859 (exploring the respondent’s use of a wiretapping device on “a terminal box on the telephone pole” behind petitioner’s home which thereby constituted intrusion); RESTATEMENT (SECOND) OF TORTS § 77 (1965) (clarifying how “[a]n actor is privileged to use reasonable force . . . to prevent or terminate another’s intrusion upon the actor’s land or chattels, if (a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged . . .”). See generally RESTATEMENT (SECOND) OF TORTS § 158 (1965) (stating liability for a physical intrusion upon land).

176. See *Billings*, 489 S.W.2d at 859 (explaining the right to privacy’s existence); see also RESTATEMENT (SECOND) OF TORTS § 652A(1) (1977) (“One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.”).

been breached or that the victim lacked a reasonable expectation of privacy, then the tort for Intrusion upon Seclusion will end at this point. If the victim is able to prove that their privacy has been breached, then the victim may pursue the highly offensive requirement.

D. *Highly Offensive for Intrusion upon Seclusion*<sup>177</sup>

The last and final requirement for Intrusion upon Seclusion requires that “the intrusion would be *highly offensive to a reasonable person*.”<sup>178</sup> Texas courts of appeals have defined “highly offensive to a reasonable person” as requiring that “a certain threshold of offensiveness is required.”<sup>179</sup> This “highly offensive”<sup>180</sup> threshold “is a fundamental part of the definition of an invasion of privacy”<sup>181</sup> that remains unspecified.

Texas courts have not defined the boundaries of the “highly offensive” threshold.<sup>182</sup> The Supreme Court of Texas has defined the way in which one may breach privacy in an offensive manner. For example, if an individual intrudes “into one’s private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities,” then that distributor has both breached the individual’s privacy and caused a potential, “highly offensive” act.<sup>183</sup>

Victims of revenge pornography could readily demonstrate how the distribution of revenge pornography encompasses not just one, but all three aspects of the “offensive” threshold through either outrage or causing one of three states: mental suffering, shame, or humiliation.<sup>184</sup>

177. For a flow chart approach to this analysis and a visual analysis of intent, see *infra* Appendix 9: Highly Offensive to a Reasonable Person for Intrusion upon Seclusion.

178. RESTATEMENT (SECOND) OF TORTS § 652B (1977) (emphasis added).

179. *Polansky v. Sw. Airlines Co.*, 75 S.W.3d 99, 105 (Tex. App.—San Antonio 2002, no pet.) (citing *Shaheen v. Motion Indus., Inc.* 880 S.W.2d 88, 93 (Tex. App.—Corpus Christi 1994, writ denied)).

180. RESTATEMENT (SECOND) OF TORTS § 652B(1) (1977).

181. *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 637 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.).

182. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (illustrating certain private matters such as “[s]exual relations, for example, are normally entirely private matters, as are . . . most intimate personal letters . . . and some of [the actor’s] past history that [the actor] would rather forget”).

183. *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973); see RESTATEMENT (SECOND) OF TORTS § 283 (1965) (exploring the standard of the reasonable person’s conduct in that “[u]nless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances”).

184. See *Billings*, 489 S.W.2d at 859 (listing the means by which one may cause outrage to a man of ordinary sensibilities).

Distributors often disseminate revenge pornography with the intent to cause “shame or humiliation to a person of ordinary sensibilities.”<sup>185</sup>

Examples have included distributors emailing the revenge pornographic materials to the victim’s family, uploading the photographs onto numerous hosting sites for the express purpose of spreading the image and ensuring difficulty in removing the materials from the Internet, and giving the materials to the victim’s coworkers for the victim’s termination or removal from the workplace.<sup>186</sup> It is simple to see how the revelation of numerous personal pornographic images could lead to outrage or cause mental suffering, shame, or humiliation.<sup>187</sup>

185. While *Billings* illustrates the threshold for potentially offensive acts, numerous news agencies have already shed light on the distribution of pornographic materials for the sole intent of bringing down shame and humiliation upon the victim. *Id.*; see Chen, *supra* note 2 (demonstrating the means and intent of Internet hackers in stealing nude photographs; these photographs and other private materials are used for the sole purpose of defaming individuals and shaming them). See generally Styles, *supra* note 2 (describing both the threat of exposing pornographic material and the actual distribution of pornography in order “to humiliate and degrade” others; moreover, such material was not distributed with the intent to generate revenue). See generally RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (noting that “[w]hen . . . intimate details . . . are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy . . .”); *id.* § 283 (1965) (describing the standard of the reasonable person’s conduct “is that of a reasonable man under like circumstances”).

186. Ex-lovers often post revenge pornography with the intent to ruin the social and financial aspects of their victim’s lives by distributing the pictures to specific individuals or entities. See *Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009) (going into detail as to the means by which an ex-lover distributed the photographs “taken without [the victim’s] knowledge” and directed “male correspondents” to “pepper[] her office with emails, phone calls, and personal visits, all in the expectation of sex”).

187. Compare WEBSTER’S NEW WORLD DICTIONARY 962 (3d ed. 1988) (defining the verb of outrage as “great anger” or “indignation . . . aroused by [a deep insult] or offense”), with RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (describing the noun of outrageous conduct as acts that are “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community”). Compare *Plaintiffs’ Opposition to GoDaddy.com’s Motion to Dismiss Pursuant to Tex. R. Civ. P. 91A*, *supra* note 104, at 1–2 (describing how the Plaintiffs—“women whose intimate photographs and personal information were taken without their permission, and published”—have sued the hosting website and claim that the hosting Revenge pornography’s website’s “purpose is to harass, humiliate and threaten its innocent victims” by posting both the photographs and personal data of the “innocent victims”), with *Barnes*, 570 F.3d at 1098 (reiterating that revenge pornography’s use is “a dangerous, cruel, and highly indecent use of the [I]nternet for the apparent purpose of revenge”), and Franks, *supra* note 102, at 229 (citing Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 68 (2009)) (enumerating the consequences of digital harassment, such as how “women have dropped out of school, changed jobs, moved cities, gone into hiding, experienced mental breakdowns, and, in extreme cases, committed suicide . . .”), and Chen, *supra* note 2 (revealing the means by which they steal nude photographs “to publicize everything they find for maximum effect” of humiliating the photographed victims), and Marlene Naanes, *Bad Breakup? Police Warn Posting Photos of Ex-Lovers Online for Revenge Can Lead to Jail*, NORTHJERSEY (Feb. 21, 2012, 10:29 AM),

If a distributor were able to prove that the distribution would not be highly offensive, then the tort would immediately end here.<sup>188</sup> However, if a victim is able to prove that the distribution of the revenge pornography would “be highly offensive to a reasonable person” then the victim could seek damages for the distribution.<sup>189</sup>

## VI. SCOPE FOR PUBLICITY GIVEN TO PRIVATE LIFE OR INTRUSION UPON SECLUSION

If a Texas court has found a distributor guilty under either Publicity Given to Private Life or Intrusion upon Seclusion, then that same court must determine how many “distributions” have taken place. In essence, the court must determine what qualifies as a distribution and whether a single distribution ever bars claims against additional distributions of that same material.<sup>190</sup> The court may answer this question by looking at three factors present in every distribution: how many materials—photographs, videos, etc.—existed in the distribution; how many recipients actually received and utilized the photographs; and the number of times the

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[http://www.northjersey.com/news/Ex-lovers\\_can\\_be\\_charged\\_for\\_posting\\_explicit\\_photos.html](http://www.northjersey.com/news/Ex-lovers_can_be_charged_for_posting_explicit_photos.html) (noting that distributing revenge pornography defies New Jersey’s privacy statute where “violators can face between three and five years in prison . . .”), and Kluft, *supra* note 2 (exploring the website “Is Anyone Up” and its profits), and Styles, *supra* note 2 (showing the intent behind actual distribution of pornography in order “to humiliate and degrade” others).

188. The highly offensive requirement is shared by both Intrusion upon Seclusion and Publicity Given to Private Life. See RESTATEMENT (SECOND) OF TORTS § 652B (1977) (requiring the intrusion to be highly offensive); *id.* § 652D (subjecting one to liability only if the publicized matter of another is highly offensive). As such, the examples of exclusions are also applicable to both torts. Under both Intrusion upon Seclusion and Publicity Given to Private Life, a distributor could demonstrate that the distribution of revenge pornography does not fulfill the highly offensive requirement if the victim already has pornographic materials within the public eye. For example, a pornographic actor or actress will have a difficult time demonstrating the highly offensive nature of distributing pornographic materials if the pornographic images of the victim are already available within the public eye. Furthermore, if the victim has a “sex tape” of themselves on the Internet, and the distributor takes the material, created by another individual, and redistributes the content, then this act may not constitute a highly offensive act. The distributor’s defense will be further strengthened if the victim has a career in the pornographic business since they actively participate in nudity for fiscal gain. The court could readily state that the material is no longer private. Moreover, since the pornography star is already known to the public for their sexual acts, there is nothing highly offensive about reaffirming their occupation and exploits already within the public eye.

189. *Id.* § 652B (requiring the intrusion to be highly offensive); *id.* § 652D.

190. For example, if a distributor has a single photograph, he may pursue two courses. In the first course, the distributor takes that single photograph and uploads the photo to a single website. In the second course, the distributor takes that single photograph and instead uploads the photo to thirty websites. Depending on the court’s interpretation, this individual may have distributed only once in both instances, or once in the first instance and thirty times in the second instance.



distributor redistributed the material to the Internet, including former recipients.<sup>191</sup>

Each factor exists along a spectrum: the portfolio approach, where a single instance of that factor bars future claims against that distribution,<sup>192</sup> and the *per concisura*<sup>193</sup> approach, where each instance of that factor may bring a separate claim against that distribution.<sup>194</sup> To go into further detail, the future court must determine whether each material or all materials within a collection count as a distribution. The court must also determine whether material disseminated at multiple intervals may be tallied as one distribution where the initial dissemination bars stacking this offense against the individual or whether dissemination acts as a separate distribution. Finally, the court must determine whether disseminating the material to a single website where, again, the initial dissemination bars stacking the offense against the individual or whether disseminating the material separate websites acts as separate distributions.

This Comment does not adhere to either extreme; rather, it advises the court to find more of a “golden mean” amongst all three factors. It may benefit the court to think of each factor—materials, recipients, and

191. All three factors must be present at least once for an action under Publicity Given to Private Life to ensue. For example, a person may not have an upload or a recipient if there is no photo; they may not have a photo uploaded with no recipients; and they may not have recipients without uploading the photo. Since Intrusion upon Seclusion does not bother itself with the actual distribution—only the intrusion itself—all three factors need not be present. *Compare* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defining “Publicity Given to Private Life”), *with id.* § 652B (defining “Intrusion upon Seclusion”).

192. For example, the court could deem that the distributor possesses a single photograph, being photo “X.” Under the portfolio approach, if X has been either uploaded or distributed once, then the single upload or distribution bars any “stacking” of claims against that single distribution. This protects distributors from having a distribution stacked against them; however, victims may also argue that the greater the number of distributions of a single photo, the harder it is for the victim to remove such content from the Internet. Under the portfolio approach, a single photo distributed to one hundred sites is equal to a single photo distributed to a single site.

193. Defined as an ablative of means, translating to by means or through each instance, cut, incision, division, or occurrence. *See generally* FREDERIC M. WHEELOCK & RICHARD A. LAFLEUR, WHEELOCK'S LATIN 89 (6th ed. 2005) (defining the ablative of means and its usage).

194. The harsher of the two approaches, the *per concisura* approach defines each instance as a distribution in and of itself. For example, if a distributor has taken two photographs, uploaded them three times, and there have been four recipients, one effectively has twenty-four distributions that have taken place. While this may be a deterrent to future distributors, the court should bear in mind that this could very quickly “stack” the distributions against the distributor, since uploading one hundred photos to a single site in a single instance would immediately equal one hundred distributions. The victim may argue that the greater the distributions, the more difficult it will be to remove such material from the Internet because other sites could easily share such material and exponentially grow the revenge pornography until its deletion would be nearly impossible.

uploads—as the three corners of a triangle: the greater the occurrences of one factor, the larger the “area” and possible egregiousness of the situation. Moreover, the court need not assume that each factor equals another.<sup>195</sup>

A. *The Material, the Recipient, the Time of Distribution*

The court, for example, should consider that the victim seeks remedies for their ills: the greatest being the ability to delete the revenge pornography from the Internet as a whole. The greater the odds against deletion of the material from the Internet, the greater the punishment should be. Yet, some of the factors have an inverse relation between the number of occurrences and the damage they create.

Upon examining the factor of recipients, a single distribution will cause havoc in the life of a victim. A second distribution of that same material will not be as terrible as the first, but it will still decrease the odds that the victim will be able to delete the material from the Internet. Considering a third distribution, the damage again shrinks yet the likelihood of deletion certainly grows but not at the same rate as the second distribution. The reader is encouraged to consider whether distribution to a forty-fourth website truly makes a difference any longer. The material has been disseminated to forty-three websites. The odds of removing the information from each and every site are already nearing zero. Is this forty-fourth distribution as damaging as the first, second, or third? The answer is likely that it is not.

The same analysis may be applied to the fact of time, though time remains a stronger factor than the recipients. The recipients may no longer possess the revenge pornography and this factor would effectively replace the missing material. If five revenge pornography sites were to bury, or effectively delete, the materials in question, then the victim may be afforded some relief from the social ostracism to come.

For example, the deeper the material is embedded, or the more obscure, the closer the victim is to “relief.” Even though uncertain that the material has been completely deleted from the Internet, one would be unable to readily search for a victim’s material online, which could effectively “cure” the victim of their woes. The victim would be placed as close to normalcy as possible. This could all be immediately dashed if the distributor were to

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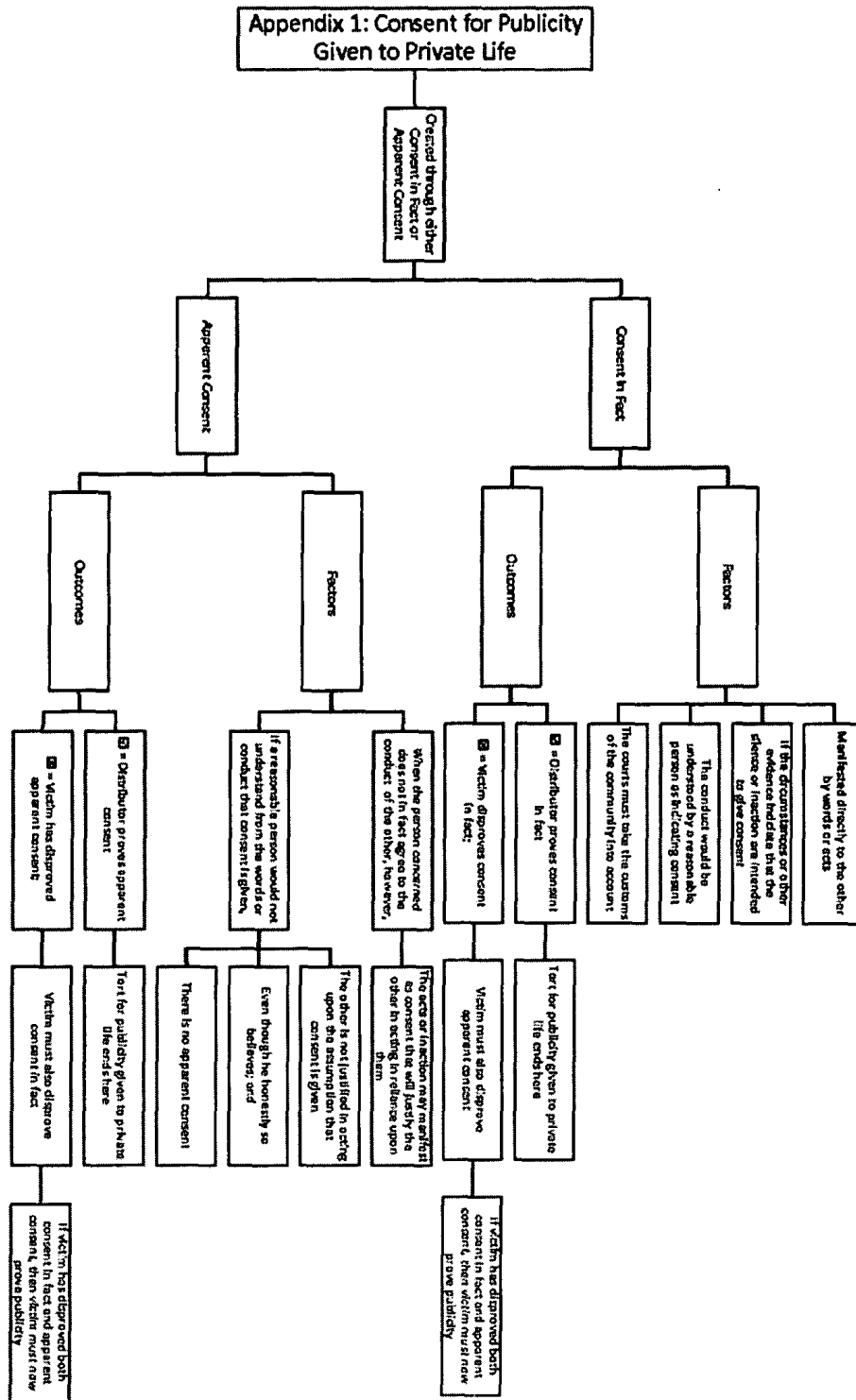
195. For a visual analysis of how materials, recipients, and the time of distributions relate to one another, see *infra* Appendix 10: Distribution of Revenge Pornography.

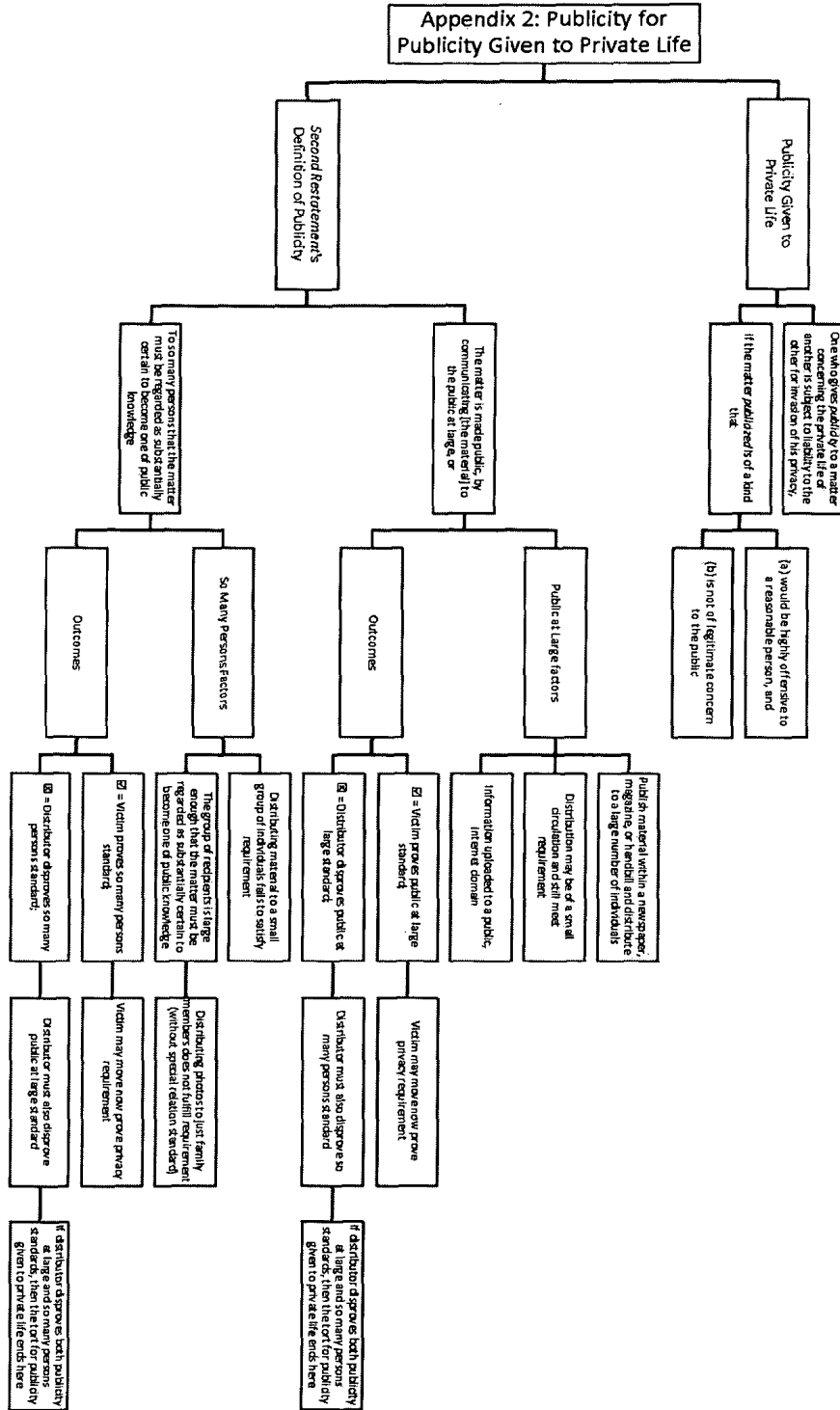
take the material and upload such content onto the revenge pornography websites again. While the forty-fourth recipient example and its damage fades with each occurrence, the upload factor instead gains the ability to deal more damage as time goes on. Revenge pornography will become obscure as it is replaced with newer material and effectively pushes back the older material. However, the victim's material, slowly fading to obscurity, could roar back to being a website's prime material with a single, new upload.

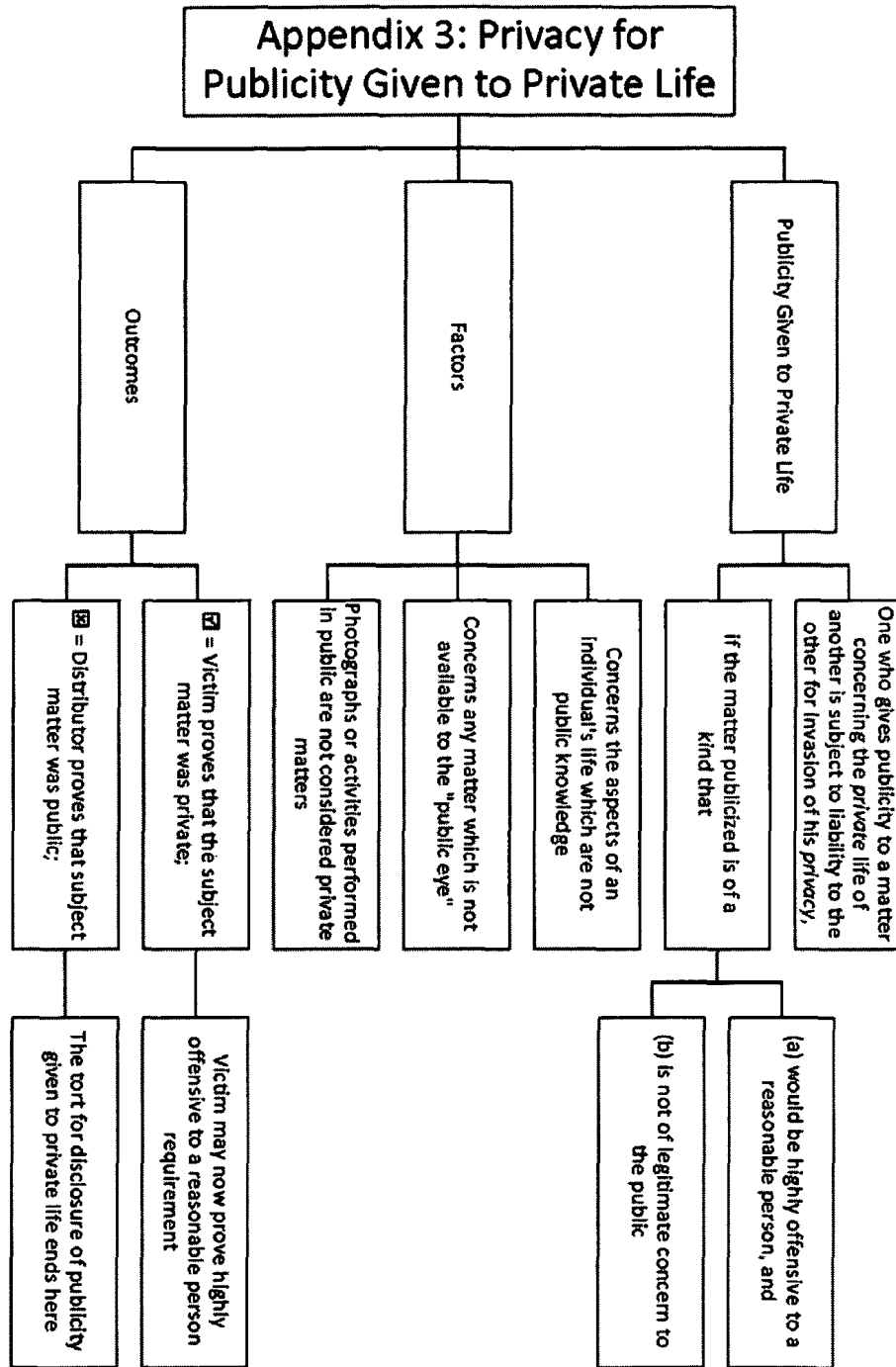
The photograph itself remains the most potent of the three factors. Each new photograph presents the possibility of an infinite amount of uploads and an infinite amount of recipients. Each new photograph may disappear like a cancerous cell under radiation, only to appear years later as a cancerous growth in the life of the victim. The photograph remains a danger in any situation and should be weighed the heaviest amongst the three factors.

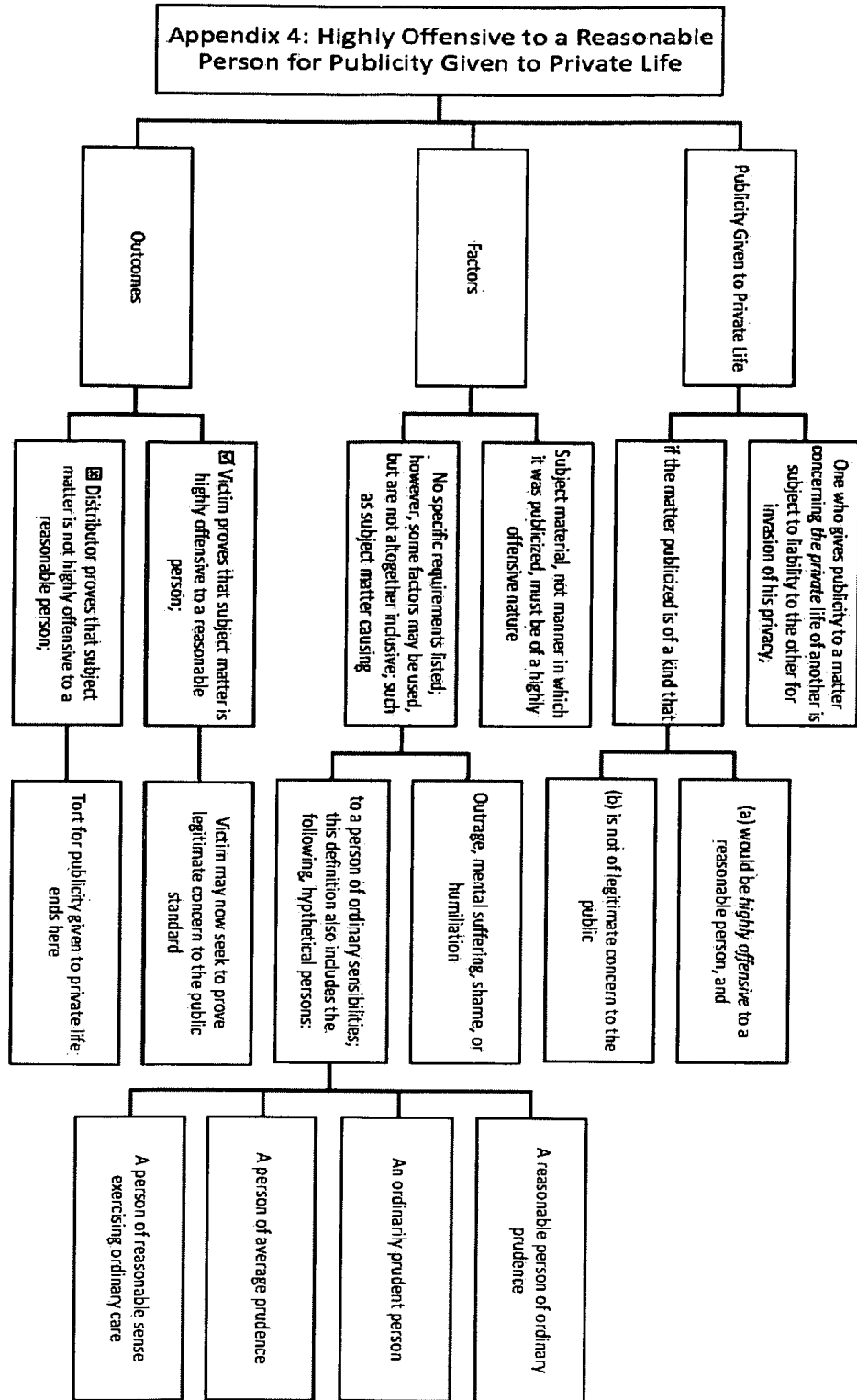
## VII. CONCLUSION

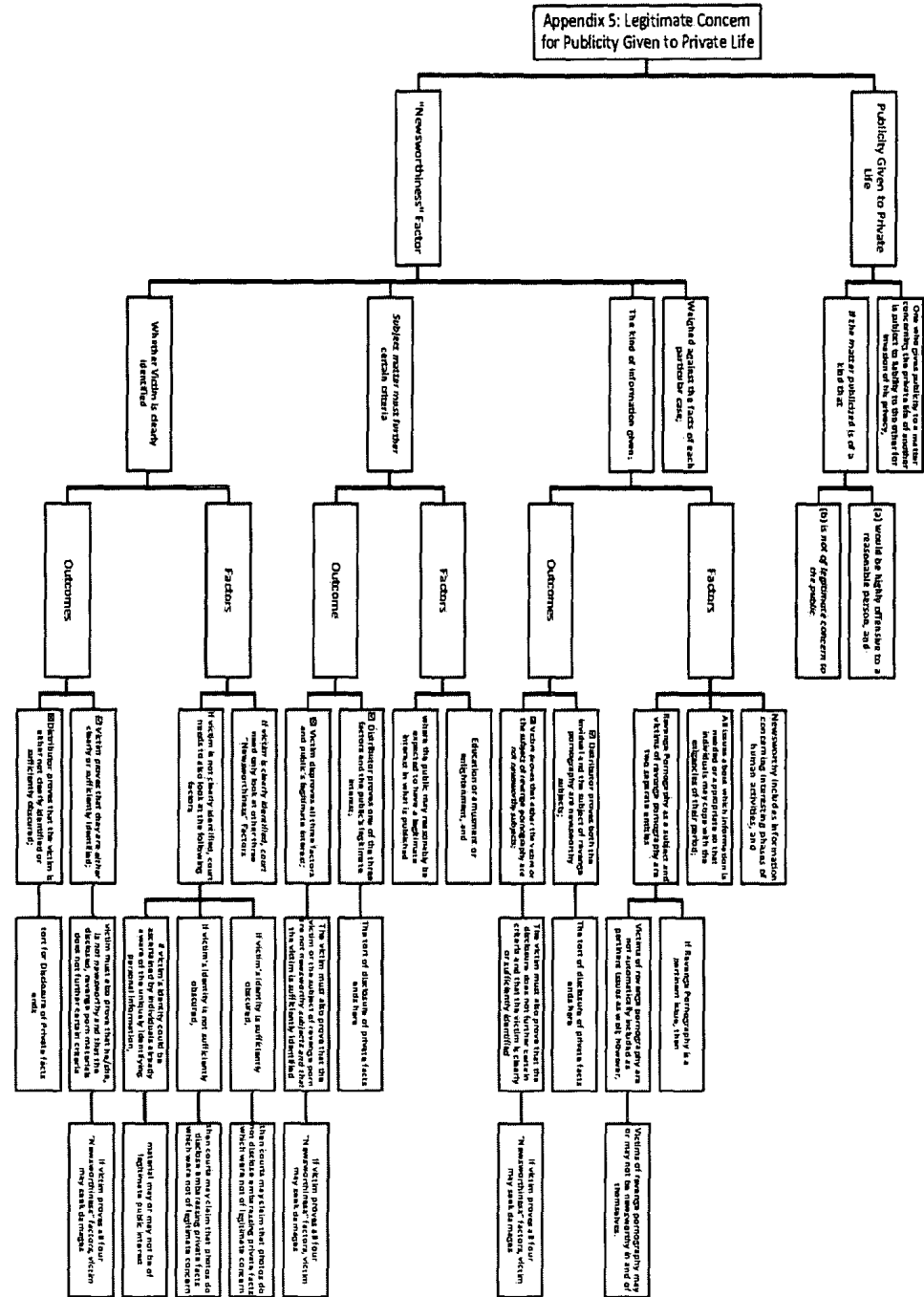
As the issue of revenge pornography surfaces in Texas, courts need not wait on the legislature or remove the case to federal courts. Instead, Texas courts can already protect citizens with the potent, tortious remedies of Intrusion upon Seclusion and either Publicity Given to Private Life or Judge Prosser's public disclosure of embarrassing private facts standard. The State of Texas will be prepared to protect its citizens with these remedies.



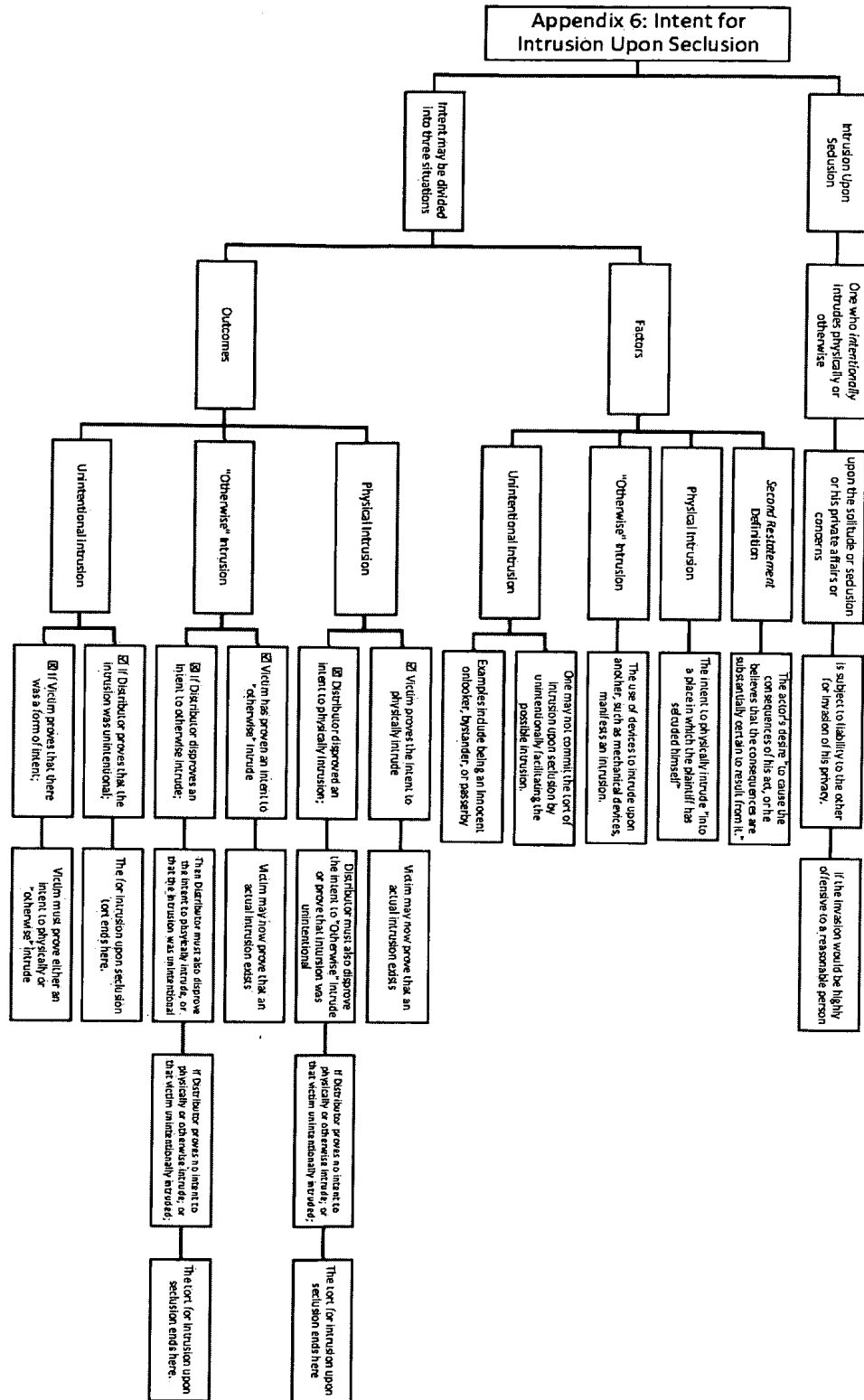


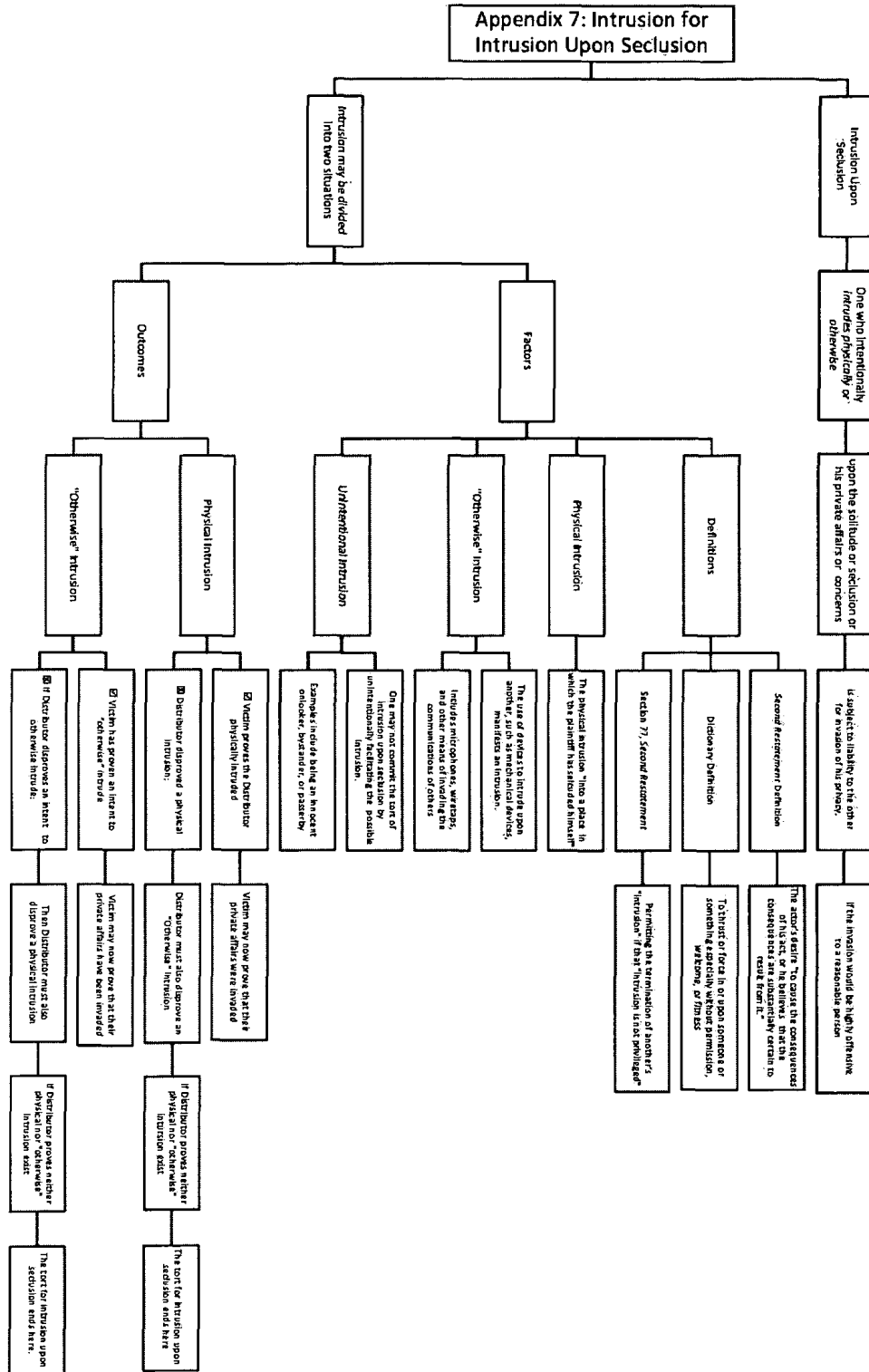


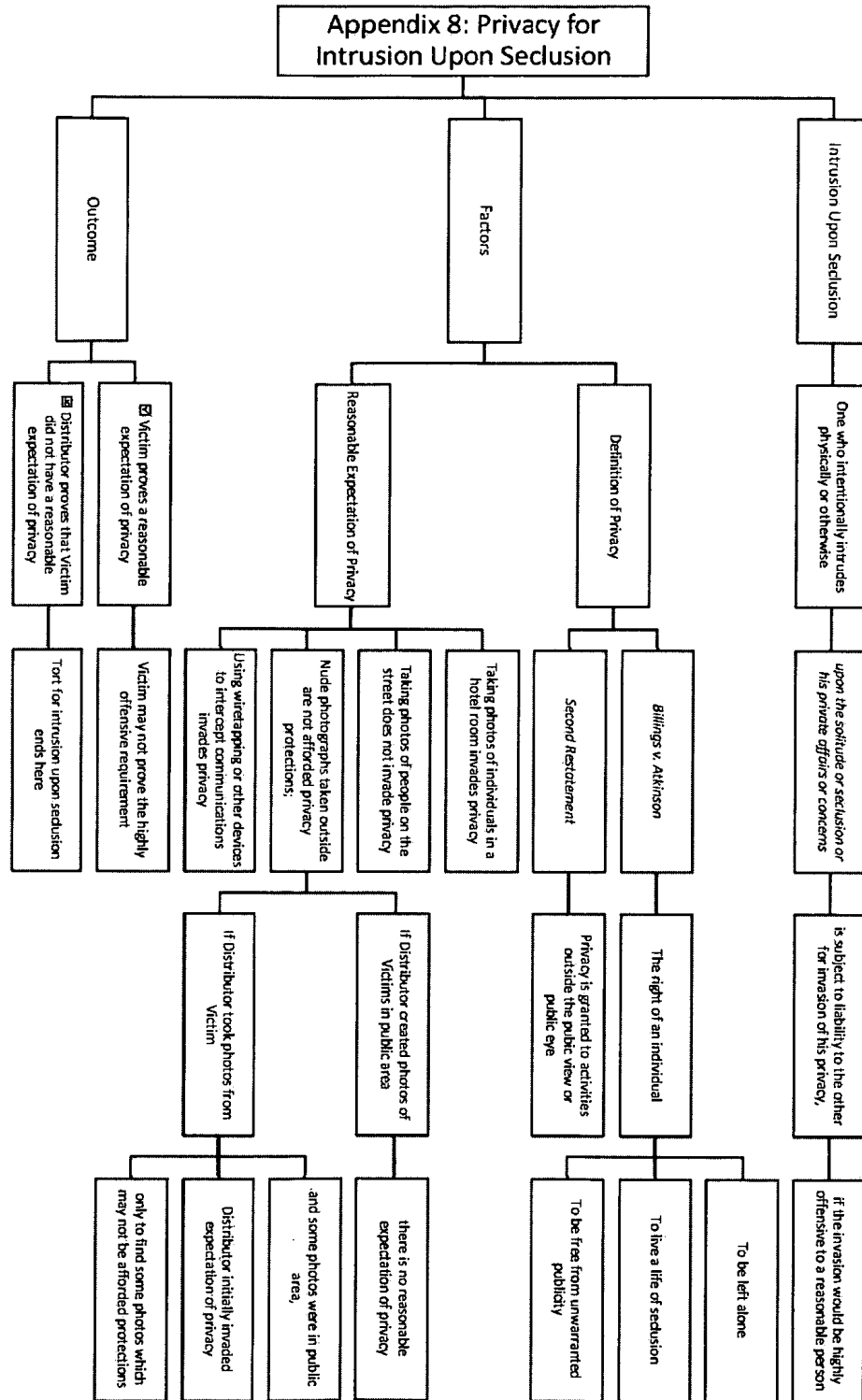


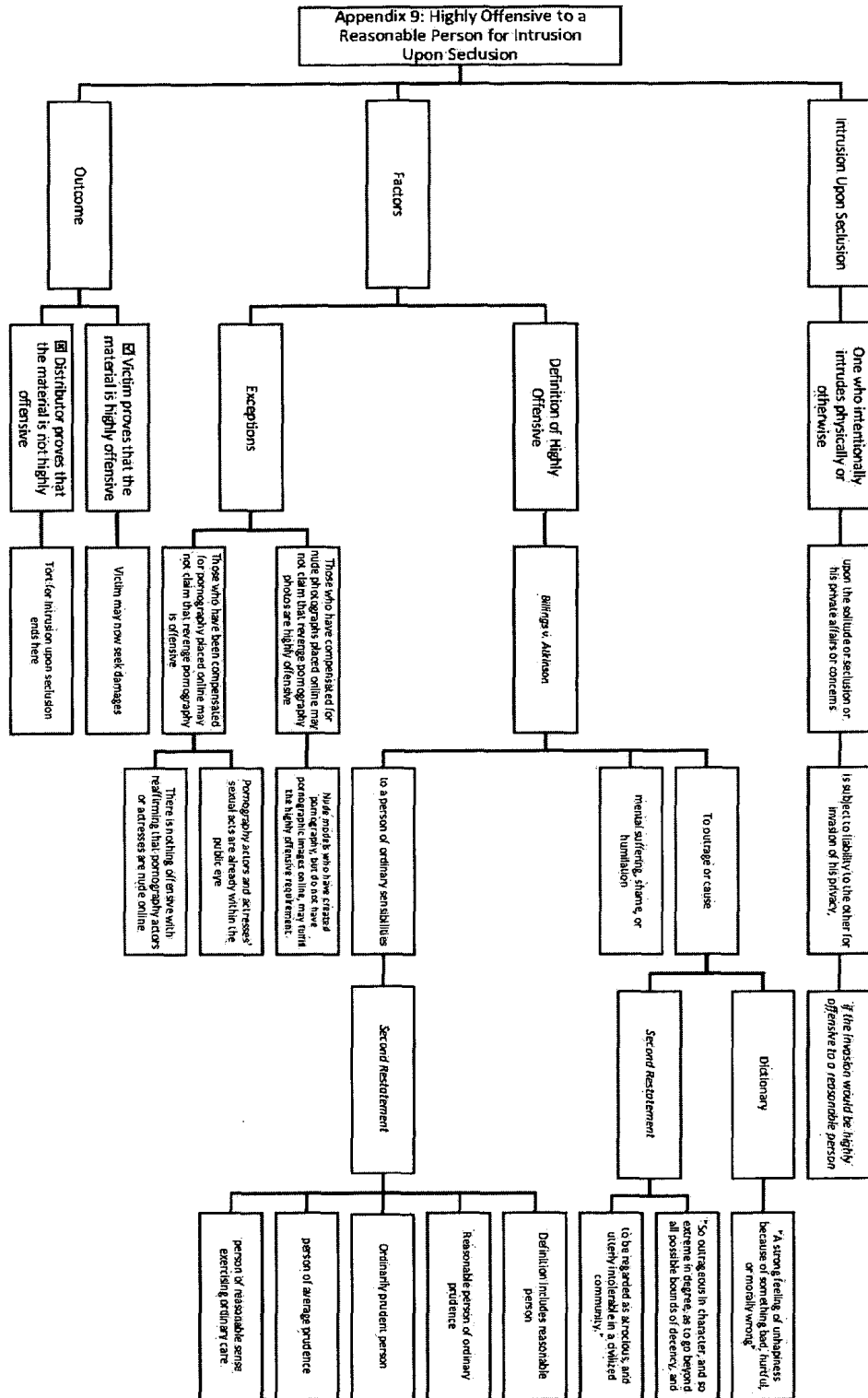












**Appendix 10: Distributions of Revenge Pornography**

