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## Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech

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## Comments

# Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech

Sarah E. Driscoll\*

### INTRODUCTION

Charlotte and Jeff were the golden couple.<sup>1</sup> Throughout their four-year long courtship, Charlotte occasionally would send Jeff self-taken naked images in text messages using her smartphone. On a few occasions, Charlotte allowed Jeff to take photos and videos of her when the couple was engaged in intimate sexual acts. Charlotte and Jeff had a wonderfully passionate relationship, always keeping their life together fun and

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\* Candidate for Juris Doctor, Roger Williams University School of Law, 2016; B.A., University of Massachusetts, Amherst, 2013. I would like to thank Professor Jared Goldstein and the 2014–15 *Roger Williams University Law Review* Editorial Board for your support, feedback, and guidance with the early stages of this Comment. To the 2015–16 Editorial Board, I will never be able to express how grateful I am for your encouragement, hard work, and ability to keep me sane throughout this process—you are all rays of golden sunshine, and I would not have been able to do this without you. To anyone who listened to me ramble about porn for the last year and a half, thank you for putting up with me. Finally, and most importantly, to my biggest supporters, my grandparents, siblings, and especially my parents, Brian and Tina—for *everything*. HI, MOM.

1. The following scenarios are fictitious. Any description of a true event will be acknowledged as such.

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spontaneous. They enjoyed how easily they could communicate using their smart phones (and especially the cameras on their smart phones) whilst apart. Both partners felt that this relationship was the real deal—the best thing they would ever find. However, the relationship could not be maintained. After an especially troublesome break-up that included 3 A.M. drunk-dials, threats of dating each others' friends, and the ever-horrific “break-up sex,” Charlotte decided enough was enough and discontinued all contact.

Months later, Charlotte decided to Google herself while watching Netflix one afternoon. Upon clicking the “search” button, Charlotte stumbled upon some of the sexually explicit images of herself she allowed Jeff to take. Charlotte was shocked and felt sick to her stomach. She had recently submitted an application for her dream position with a well-established company that would surely look her up online. After being in the relationship for four years, Charlotte could not believe Jeff would post the pictures to the Internet.<sup>2</sup> She had allowed the images to be taken,

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2. It is commonly accepted that women are more likely to fall victim to revenge porn than men; one study estimates that ninety percent of revenge porn victims are women. See MARY ANNE FRANKS, DRAFTING AN EFFECTIVE “REVENGE PORN” LAW: A GUIDE FOR LEGISLATORS 9 (2015), [http://www.endrevengeporn.org/main\\_2013/wp-content/uploads/2013/09/Guide-for-Legislator-s-6.18.15-1.pdf](http://www.endrevengeporn.org/main_2013/wp-content/uploads/2013/09/Guide-for-Legislator-s-6.18.15-1.pdf). See also Gerald Smith, *Now Women Are Getting Arrested for Revenge Porn*, HUFFINGTON POST (Oct. 21, 2014, 7:33 AM), [http://www.huffingtonpost.com/2014/10/21/revenge-porn-arrests\\_n\\_6016946.html](http://www.huffingtonpost.com/2014/10/21/revenge-porn-arrests_n_6016946.html). Although this is the case, men have also been targeted by revenge porn posted by women. *Id.* (noting that 6% of revenge porn was posted by an ex-girlfriend whose victims identified as male). For example, in October 2014, a woman was arrested and charged in Virginia after she allegedly stole a photograph of her ex-boyfriend's ex-girlfriend and distributed the photograph on the Internet. *Id.* This was not the first case of girl-on-girl revenge porn in Virginia; two months earlier, a different woman allegedly stole a photograph of her boyfriend's ex-girlfriend and posted the image on websites such as Instagram and Twitter. *Id.* In addition, men are not only victimized by their female counterparts: Danielle Citron, Professor of Law at the University of Maryland, states that male victims are generally harassed with homophobic slurs and notes. See Lorelei Laird, *Victims are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent to*, ABA JOURNAL (Nov. 1, 2013, 9:30 AM), [http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c/](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/). Some male victims have had ads put up that suggest the victim has a fetish for being anally raped, while others have been accused of being sexual predators themselves. *Id.* Although this Comment and the discussions within discuss female victims of revenge pornography, and although women are more likely

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believing that they would remain private between the couple. Charlotte was outraged, but what could she do?

Charlotte consults with an attorney who tells her she could potentially recover from an intentional infliction of emotional distress claim or a claim for defamation—both of which could yield civil remedies. Charlotte is told that pursuing both of these claims comes with specific challenges and that, many times, the elements of each claim are difficult to prove. Although she acknowledges that a civil claim could provide her with monetary damages, Charlotte asks the attorney if there are any other remedies available to her, possibly outside of the civil system.

Charlotte learns that a new law seeking to target the perpetrators of revenge porn was recently passed in her jurisdiction. The law states that any individual who posts “involuntary pornography” to the Internet, or distributes the image to others without permission, is liable for up to two years in prison and a fine not to exceed \$30,000. The law goes further to require that the perpetrator must have knowingly distributed the image without receiving the consent to do so. Charlotte hopes to find consolation and seeks to file suit against her former lover. What Charlotte does not suspect, however, is that the law in her jurisdiction is currently being challenged on the grounds that it violates the First Amendment protection of Free Speech. Charlotte is unsure if she should bring a civil claim or attempt to find redress using the controversial criminal revenge porn law.

This Comment explores both of Charlotte’s options and argues that current revenge porn legislation is unconstitutionally overbroad and fails strict scrutiny review. In Part I, this Comment first explains the emerging phenomenon of revenge pornography—why it is so harmful to individuals in society, and how state legislatures are attempting to respond to it. It then continues in Part II to discuss how revenge porn postings and publications are, despite their morally objectionable nature, constitutionally protected speech that falls outside the Supreme Court’s obscenity jurisprudence. Next, Part III moves on to

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to be victimized, it is unfair and unjust to categorize women as the only victims of involuntary pornography—this is a phenomenon that also impacts male victims, and this Comment does not seek to disrespect those victims in any way.

explain that because revenge pornography is protected speech, courts must apply strict scrutiny to determine when it can be restricted. Applying that standard, it is clear that states have a compelling interest in regulating this kind of speech, but it is equally clear that current efforts fail the narrow tailoring requirement of strict scrutiny. I survey the chilling effects produced by the currently overbroad revenge porn legislation and conclude that more carefully crafted laws can both achieve their protective ends and satisfy strict scrutiny. Finally, in Part IV, I analyze the viable civil remedies available to victims of revenge porn and distinguish the benefits and burdens associated with the remedies. In conclusion, I address the very real need for a remedy to the growing plague of revenge porn, but argue that such a remedy absolutely cannot infringe on protected speech without satisfying strict scrutiny.<sup>3</sup>

#### I. THE PROBLEM OF REVENGE PORNOGRAPHY

Revenge porn<sup>4</sup> is the non-consensual posting<sup>5</sup> of another's sexually explicit images to the Internet, or elsewhere,<sup>6</sup> for the

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3. The author acknowledges the fact that the consequences surrounding the distribution of involuntary pornography are becoming increasingly grave. See discussion of Amanda Todd *infra* Section I. This Comment recognizes that the majority of revenge pornography is protected speech, and, therefore, such communications must be afforded the same protections guaranteed by the First and Fourteenth Amendments that are applicable to any other form of protected speech. As protected speech, revenge porn must be regulated in a way that satisfies strict scrutiny, but, unfortunately, many laws that are currently enacted or proposed are unconstitutionally overbroad.

4. The terms "revenge pornography," "involuntary pornography," and "non-consensual pornography" are used interchangeably in this Comment to refer to the posting of sexually explicit images without the subject's consent.

5. Although this Comment focuses on the revenge porn posted by disgruntled ex-lovers, these are not the only perpetrators of revenge porn. In a study of 1606 respondents, 23% of whom were victims of revenge porn, only 57% of those victims said an ex-boyfriend distributed their images, and only 6% said an ex-girlfriend posted the image. See FRANKS, *supra* note 2, at 9. Moreover, 7% of victims indicated that either a former friend or a family member distributed the image. *Id.*

6. Perpetrators of revenge porn do not always post an ex-partner's private images to the Internet: revenge porn can also be sent to family members, friends, employers, or other individuals in the victim's life. See Casey Martinez, Note, *An Argument for States to Outlaw 'Revenge Porn' and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to*

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purpose of embarrassing or causing emotional harm to the subject of the images.<sup>7</sup> The posting of revenge porn is an act that, by its nature, is designed to critically impact and emotionally devastate a victim after a break up, but could also be posted out of jealousy, or for no reason at all.<sup>8</sup>

Victims of revenge porn are not only subject to extreme embarrassment and a betrayal of trust, but victims are also often harassed by others on the Internet,<sup>9</sup> fired from jobs because

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*Protect Victims*, 14 PITT. J. TECH. L. & POL'Y 236, 238 (2014).

7. See Aubrey Burris, *Hell Hath No Fury like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2326 n.1, 2327 n.4 (2014); Ariella Alexander, *Suburban Mother, Runs Revenge Porn Sites*, OPPOSING VIEWS (Dec. 13, 2013), <http://www.opposingviews.com/i/technology/internet/ariella-alexander-suburban-mother-runs-revenge-porn-sites>. Scorned ex-lovers, however, are not the only individuals who seek revenge: websites such as “ShesAHomewrecker.com” exist to allow the wives or girlfriends of cheating significant others to post images and contact information for the women with whom their partners had affairs. *Id.* In addition, some involuntary distributions of revenge pornography are made for profit. See FRANKS, *supra* note 2, at 2.

8. Burris, *supra* note 7, at 2336 (“The nonconsensual distribution of pornography converts unwilling citizens into sexual commodities subjected to public humiliation.”).

9. See Hayley Fox, *Why Revenge Porn Laws May Not Protect Women*, TAKEPART (Dec. 2, 2014), <http://www.takepart.com/article/2014/12/02/revenge-porn-protections>. Fox’s article states that revenge porn, at a minimum, can cause psychological scarring for the victim. See *id.* (“One victim’s naked picture was found on thousands of different websites . . . and nearly all victims become vulnerable to harassment and potential stalking.”). *Id.* As one victim recounted:

When I was married, my then husband and I made a homemade porn. I thought it was a good idea at the time and I was very wrong. Not too long after we made said porn, I found out he had been cheating and I left him. I had completely forgot that we had even a video until a co-worker came to me and said he got a very interesting email from my ex (they were friends) and showed me the link. That f\*\*king asshole uploaded the video to porn site. He sent the link to everyone we know, including family. I was completely mortified to find out he had done this.

Needless to say, I had to quit my job and move back to my home province. I was being harassed at my job (I worked in a factory, it was mostly men that worked there). I couldn’t bear to see or hang out with any of my friends.

Nina Bahadur, *Victims of Revenge Porn Open Up on Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014, 8:50 AM), <http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real->

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employers see the images online, or worse.<sup>10</sup> For example, in 2012, Amanda Todd, a Canadian teenager, took her own life after being bullied at school.<sup>11</sup> A man on the Internet threatened Amanda that, “if [she] don’t [sic] put on a show,” a topless picture of her would be distributed to her peers at her school.<sup>12</sup> Amanda’s naked images were distributed not only to her school peers, but to her friends, relatives, and close family as well.<sup>13</sup> After the distribution of the explicit photos, classmates began to harshly bully Amanda, on and offline.<sup>14</sup> Amanda changed schools in an attempt to escape the torture brought on by her classmates, but the bullying followed her.<sup>15</sup> The relentless tormenting became too much, and Amanda thought it was a better option to end her own life than to continue to take the abuse brought on by her peers.<sup>16</sup> With tragic stories such as Amanda’s that show the broad reach of the harms of posting revenge pornography,<sup>17</sup> it is unclear why

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impact\_n\_4568623.html. Other women have had their social media accounts, such as Facebook, suspended after exes have posted explicit images to their page, and some women have been moved for security reasons after reporting the harassment. *See id.*

10. *See* Fox, *supra* note 9.

11. *See id.*; Ryan Grenoble, *Amanda Todd: Bullied Canadian Teen Commits Suicide After Prolonged Battle Online and in School*, HUFFINGTON POST (Oct. 11, 2012, 12:17 PM), [http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying\\_n\\_1959909.html](http://www.huffingtonpost.com/2012/10/11/amanda-todd-suicide-bullying_n_1959909.html). *See also* Michael Salter et. al., *Beyond Criminalisation and Responsibilisation: Sexting, Gender and Young People*, 24 CURRENT ISSUES CRIM. JUST. 301, 302 (2013) (discussing the causes of cyber-bullying including the “increasingly common technique among domestic violence offenders seeking to threaten, control or punish partners and ex-partners”). Sending sexy text messages or sexy pictures may seem like all fun and games, but Salter notes that sending such messages and photos has “been linked . . . to cyber-bullying, school harassment and, in some cases, teenage suicide.” *Id.* at 303. Although sexting can lead to horrific consequences, less teenagers than most perceive are actually engaged in the act. *See id.* (discussing a study of 400 Australian young people aged eleven to fifteen in which 15% reported having viewed or received a “sext” message while only 4% report having sent such a message).

12. *See* Grenoble, *supra* note 11.

13. *See id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Revenge pornography is an *international* issue. *See* Alex Cochrane, *Legislating on Revenge Porn: An International Perspective*, SOC’Y FOR COMPUTERS & LAW (July 24, 2014), <http://www.scl.org/site.aspx?i=ed38027> (noting that Australia, Brazil, Canada, Germany, Israel, Japan, The Philippines and the United States have taken action to combat revenge porn).

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people would continue to distribute private images. But more and more frequently, technologically savvy couples engage in the compromising act known as “sexting.”<sup>18</sup>

In a recent Cyber Civil Rights Initiative study of 1606 respondents, 23% were victims of revenge porn.<sup>19</sup> Of these 23%, 90% of victims were women.<sup>20</sup> Of those victimized, 59% said their full name was included with the posting of the picture, 49% said either a link, screen shot, or network information was provided for their social media accounts, 26% said their e-mail address was posted, 20% said their phone number was shared, 16% had their home address shared, and 2% had their social security numbers shared.<sup>21</sup> Of those surveyed, the vast majority of revenge porn victims suffered significant emotional distress.<sup>22</sup> 82% said that discovering their personal images were distributed without consent caused them “significant impairment” with employment or familial relationships.<sup>23</sup> For 42% of victims, the emotional devastation was such that they had to seek mental health services.<sup>24</sup> 34% of victims’ relationships with family members were placed in turmoil, while 38% reported strains amongst friendships.<sup>25</sup>

Tension within, or dissolution of, close familial ties,

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18. “‘Sexting’ is a portmanteau of sex and texting. . . . [It is] not sexual texting, or sexually themed texting—[it is] sex texting. Texting as a simulacrum of doin’ it.” Sam Biddle, *Let’s Settle This Once and for All: What Exactly Is Sexting?*, GIZMODO (July 22, 2011, 1:42 PM), <http://gizmodo.com/5823847/lets-settle-this-once-and-for-all-what-exactly-is-sexting>; see also Salter, *supra* note 11, at 301 (defining sexting as “a term widely used to describe emails, text messages and other forms of electronic communication that contain sexual material, such as a suggestive or provocative text, or images of people who are nude, nearly nude or that are sexually explicit”).

19. See FRANKS, *supra* note 2, at 9. Approximately one-quarter of those surveyed were “victims of revenge porn.” See *id.*

20. *Id.* Of all victims surveyed, 68% were between the ages of eighteen and thirty and 27% were between the ages of eighteen and twenty-two. *Id.*

21. *Id.* at 10.

22. *Id.* (describing that 93% of victims reported “significant emotional distress” as a result of having their photographs leaked without permission).

23. *Id.*

24. *Id.*

25. *Id.* Over half of the victims also reported being in fear of their children discovering the material, and 40% “fear the loss of a current or future partner” if he or she were to discover the material or learn about the instance. *Id.*

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friendships, and occupational woes are not the only harms that victims face: 25% of the victims surveyed reported having to cancel an e-mail account due to receiving unwanted sexual solicitations, and 26% of victims created a new online identity.<sup>26</sup> More than half of those surveyed have had difficulty focusing on school or work and 26% had to take time off from work or lessen their school load.<sup>27</sup> Shockingly, 3% of victims (approximately forty-eight of those surveyed) had to legally change their name.<sup>28</sup>

The statistics show that when star-crossed lovers go down in flames in the modern technological age, the posting of revenge porn<sup>29</sup> to the Internet seems to be the best revenge. As well as creating a new method of seeking revenge after a breakup, the dilemma of revenge porn also adds a new dimension of legal issues to post-split spiteful acts. These problems include the debate of whether giving a partner consent to take a sexual image constitutes giving that partner the consent to distribute the image as he or she sees fit, and whether the First Amendment protects revenge porn.<sup>30</sup> Victims are negatively impacted when such images are released without their knowledge because of the private nature of the image, the trust that has been betrayed, and the impact on the life of the victim the posting may cause.<sup>31</sup> Victims harmed by revenge porn have sought redress through legislation and have demanded states prohibit revenge porn and criminalize those who post involuntary pornography.<sup>32</sup>

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26. *Id.*

27. *Id.*

28. *Id.* Sadly, 51% of victims have had suicidal thoughts, and 3% of victims have chosen to take their own revenge by posting revenge porn of someone else. *Id.*

29. See Liz Halloran, *Race to Stop 'Revenge Porn' Raises Free Speech Worries*, NAT'L PUB. RADIO (March 6, 2014, 1:42 PM), <http://www.npr.org/sections/itsallpolitics/2014/03/06/286388840/race-to-stop-revenge-porn-raises-free-speech-worries>. Although this Comment predominantly focuses on involuntary pornography posted as revenge porn, this does not exhaust the list of what constitutes as involuntary pornography. Victims have had sexually explicit photos posted involuntarily by others for profit as well. For a deeper discussion of other acts constituting involuntary pornography, see FRANKS, *supra* note 2, at 2.

30. See Burris, *supra* note 7, at 2328.

31. See *id.*

32. See, e.g., *Our Mission*, END REVENGE PORN NOW, <http://www.endrevengeporn.org/about/> (last visited Sept. 29, 2015). The mission statement of End Revenge Porn Now includes “[a]dvocating for state and federal

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Currently, multiple states have enacted legislation that addresses the legality of revenge pornography.<sup>33</sup> Other laws available to revenge porn victims focus on the unlawful violations of privacy that occur due to the distribution of private images.<sup>34</sup> Still, there is a serious push from state lawmakers and victims alike for more state laws to be enacted, for currently enacted laws to have harsher consequences, or, ultimately, for a federal law criminalizing revenge porn to be proposed and enacted.<sup>35</sup> Presently, the majority of enacted legislation focuses on the lack of consent possessed by the publisher of another's sexually explicit image.<sup>36</sup> These laws pertain not only to images displaying sexual acts, but also to images portraying mere nudity.<sup>37</sup> The laws have punishments ranging from the payment of fines to time in prison.<sup>38</sup>

Due to the increase in media attention to revenge porn and the victims' demands for help from this technological plague, federal legislation prohibiting the distribution of another's sexually explicit images without consent has been proposed.<sup>39</sup>

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legislation to prevent such abuse, when appropriate." *Id.*

33. See, e.g., CAL. PENAL CODE ANN. § 647 (West Supp, 2015); N.J. STAT. ANN. § 2C:14-9(c) (West 2005).

34. See, e.g., DEL. CODE ANN. tit. 11, § 1335(a)(9) (West Supp. 2014).

35. See Adam Clark Estes, *This Is The Revenge Porn Law We Need*, GIZMODO (Feb. 26, 2015, 9:30 PM), <http://www.gizmodo.com.au/2015/02/this-is-the-national-revenge-porn-law-we-need/>. In February 2015, it was announced that a newly drafted federal bill criminalizing the distribution of involuntary pornography would be introduced in the spring. See *id.* The proposed bill creates penalties for anyone who knowingly distributes a nude or partially nude image of another and images of another engaged in sexual conduct where the subject of the image is identifiable either in the image or by information posted in connection with the image. See generally Rep. Jackie Speier, Intimate Privacy Protection Act of 2015 Discussion Draft, available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2006&context=historical> (last visited Oct. 29, 2015).

36. See, e.g., CAL. PENAL CODE ANN. § 647; DEL. CODE ANN. tit. 11, § 1335.

37. See, e.g., CAL. PENAL CODE ANN. § 647; DEL. CODE ANN. tit. 11, § 1335.

38. See, e.g., CAL. PENAL CODE ANN. § 647. New Jersey imposes a \$30,000 fine on perpetrators who distribute a sexually explicit image or an image containing the intimate parts of another with the knowledge that he does not have the consent to do so. See N.J. STAT. ANN. § 2C:14-9(c) (West 2005). Delaware law classifies certain violations of its privacy laws, through the act of posting revenge porn, as a class A misdemeanor. See DEL. CODE ANN. tit. 11, § 1335(c).

39. See Estes, *supra* note 35.

The bill, proposed by Congresswoman Jackie Speier, would impose criminal liability on those who distribute revenge porn, and also on those who run revenge porn websites.<sup>40</sup> This proposed statute, however, is controversial because it will create liability even for those websites that unwittingly host links to websites hosting revenge porn.<sup>41</sup> The penalties imposed by the statute “will be determined on a sliding scale of sleaziness.”<sup>42</sup>

## II. REVENGE PORN IS USUALLY PROTECTED SPEECH

Although it is admirable that federal legislators, such as Congresswoman Speier, and state legislatures are taking a stand against revenge porn, most of the legislation drafted fails to acknowledge one very important issue—revenge porn is protected speech.

### A. *The First Amendment Protects Speech, But Not All Speech is Protected*

The First Amendment states “Congress shall make no law . . . abridging the freedom of speech.”<sup>43</sup> The First Amendment protects the freedom of citizens to express themselves through various mediums—speech, press, religion, etc.<sup>44</sup> It does not, however, protect certain forms of speech—for example: obscenity, fighting words, true threats, and child pornography.<sup>45</sup> Conduct qualifies as speech under the First Amendment where an actor or speaker has the intention to convey a specific message, regardless of whether the message is conveyed through actual speech or some other form of communication, and that message has a substantial likelihood of being understood by those who receive it.<sup>46</sup> The

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40. *Id.*

41. *Id.* Websites like Facebook, Twitter, and Google could be found liable under the statute. *See id.*

42. *Id.* Although the federal bill does not impose a minimum penalty for the distribution of revenge pornography, it does set a maximum penalty of time in prison. *Id.*

43. U.S. CONST. amend. I.

44. *See United States v. Stevens*, 550 U.S. 460, 468 (2010).

45. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). *See also* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 7-5700, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014), available at <http://fas.org/sgp/crs/misc/95-815.pdf>.

46. *See Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

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context in which the message is expressed is one factor that is looked at to determine if the message will be understood as intended.<sup>47</sup>

The publication of involuntary pornography is a communicative, symbolic act that expresses an idea, and is therefore speech.<sup>48</sup> The message is conveyed through the posting of a sexually explicit image to a website without the subject's consent. Typically, these images are posted with the subject's address, name, and age.<sup>49</sup> Oftentimes, the images are published on websites dedicated to revenge pornography, which makes the message of the scorned ex-lover crystal-clear.<sup>50</sup> Taken out of context, many images that constitute non-consensual pornography could be considered merely nude photographs. However, when placed in the right context, these images clearly express an intended message, one that will be readily understood by those likely to come into contact with the sexually explicit image.

Images constituting revenge pornography exist as speech under *Spence v. Washington*, which determined that verbal or nonverbal acts that communicate ideas are likely to be received constitute protected speech under the First Amendment.<sup>51</sup> As such, courts must address the issue of revenge porn in the realm of First Amendment jurisprudence.<sup>52</sup> The First Amendment disables the government from restricting speech; however, the United States Supreme Court has recognized exceptions to this rule and has excluded several categories of speech that are so devoid of societal value that First Amendment protections do not apply.<sup>53</sup> The Supreme Court has long held that images

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47. *Id.* at 410.

48. *See id.* at 410–11 (“An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”).

49. *See* Samantha H. Scheller, Comment, *A Picture is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 553 (2015). Websites such as “MyEx.com” allow users to anonymously reveal not only sexually explicit images of ex-partners, but also identifying information, such as “names, ages, locations, and alleged sexual proclivities.” *Id.* at 563.

50. *See, e.g.*, MYEX.COM, <http://www.myex.com/> (last visited July 14, 2015). MyEx.com contains links clearly showing the website's purpose of humiliating ex-partners through the posting of involuntary pornography.

51. 418 U.S. at 410–11.

52. *Id.*

53. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child

constituting obscenity do not qualify as protected speech, but rather, are specifically *unprotected* speech.<sup>54</sup> In order to determine what constitutes obscenity, however, the Court had to develop and refine a set of three factors that must all be met to establish sexually graphic speech as obscenity.<sup>55</sup>

B. *Revenge Pornography Does Not Generally Constitute Obscenity under Miller v. California*

Like many words in the English language, “obscene” has a legal meaning distinct from the colloquial use of the word. In the legal sphere, “obscene” refers to a sexually explicit image that has virtually no redeeming qualities and is patently offensive in its depiction of a sexual act.<sup>56</sup> Grappling with the constitutionality of the distribution of brochures depicting sexually explicit images, the Court provided the following guiding factors:<sup>57</sup>

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;<sup>58</sup>
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious

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pornography); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (defamatory speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573–74 (1942) (fighting words).

54. *See Miller v. California*, 413 U.S. 15, 23 (1973).

55. *See id.* at 24.

56. *See id.*

57. *Id.* at 18. The Court held that brochures depicting sexually graphic images that were sent to the unsolicited public through the mail constituted obscenity. *Id.* at 36–37.

58. Courts look to contemporary community standards to determine what sexual conduct appeals to the prurient interest. *Id.* at 24. State legislation and the courts, however, have provided guidance as to what may constitute an appeal to the prurient interest. *See Brockett v. Spokane Arcades*, 472 U.S. 491, 494 (1985) (stating that the prurient interest is *more* than a normal, healthy interest in sex or nudity and that, rather, it is a *shameful* or *obsessive* interest in sex); *Jenkins v. Georgia*, 418 U.S. 153, 154–55 (1974) (recognizing a Georgia obscenity statute defined the prurient interest).

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literary, artistic, political, or scientific value.<sup>59</sup>

*Miller*, however, did not strip all sexual images and materials from First Amendment protection.<sup>60</sup> In *Jenkins v. Georgia*, the Court determined that a showing of mere nudity was not patently offensive under *Miller*, and reversed the conviction of a theater manager that was charged under Georgia's obscenity laws for showing the film "Carnal Knowledge."<sup>61</sup> Although a jury had unanimously agreed that the manager was guilty of violating Georgia's obscenity laws, the Court reversed because it would be inconsistent with *Miller* to hold an individual liable for the "sale or exposure of obscene materials *unless* these materials depict or describe *patently offensive* 'hard core' sexual conduct," which "Carnal Knowledge," did not.<sup>62</sup>

Although in *Jenkins* the Court stated that *Miller* did not allow for communities to have a free-for-all when determining which conduct is patently offensive, the test for determining what is obscene requires an assessment of community standards.<sup>63</sup> Because there is no national standard for what constitutes obscene material, each community must develop for itself what kinds of pornographic images are deemed to be obscene.<sup>64</sup> The Court has determined that child pornography is obscene because it has absolutely no social or artistic value and is outlawed

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59. *Miller*, 413 U.S. at 24 (citations omitted). See also Benjamin A. Genn, Comment, *What Comes Off, Comes Back to Burn: Revenge Pornography as the Hot New Flame and How It Applies to the First Amendment and Privacy Law*, 23 AM. U. J. GENDER SOC. POL'Y & L. 163, 169 (2014). In *Miller*, the Court used an example of an anatomy textbook to demonstrate material that could be prurient and patently offensive, yet not obscene because of its high scientific and educational values. See *id.* (citing 413 U.S. at 26).

60. *Miller*, 413 U.S. at 29.

61. 418 U.S. at 161. The Court noted that, although the determination of what appeals to the prurient interest and what is patently offensive are questions of fact left up to the jury, "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'" *Id.* at 160.

62. *Id.* (emphasis added) (quoting *Miller*, 413 U.S. at 27).

63. *Miller*, 413 U.S. at 37. The Court held that "obscenity is to be determined by applying 'contemporary community standards,' not 'national standards.'" *Id.* (citations omitted) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

64. *Id.* at 32.

entirely in every jurisdiction in the United States.<sup>65</sup> Child pornography is so obscene that not only is its creation prohibited and criminalized, but so is its consumption.<sup>66</sup> And although the Supreme Court has deemed child pornography unprotected speech under the First Amendment due to the actual harm such speech poses to minors,<sup>67</sup> revenge porn, although not categorically unprotected, also poses actual harm to victims.<sup>68</sup> *Miller*, rather than the Court's decisions in child pornography cases, controls the decisions of the courts in determining what constitutes obscenity where minors are not involved.<sup>69</sup>

1. *Revenge Porn Does Not Categorically Appeal to the Prurient Interest*

Although sexually graphic pornography has historically been thought of as appealing to the prurient interest, revenge porn that depicts single-subject nudity does not satisfy the first *Miller*

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65. See *United States v. Williams*, 553 U.S. 285, 307 (2008) (“Child pornography harms and debases the most defenseless of our citizens.”); *New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (recognizing child pornography as a category of unprotected speech because “the evil . . . so overwhelmingly outweighs the expressive interests, if any, at stake”); see also *Osborne v. Ohio*, 495 U.S. 103, 143 (1990) (Brennan, J., dissenting) (“[T]he Court today is so disquieted by the possible exploitation of children in the *production* of the pornography that it is willing to tolerate the imposition of criminal penalties for simple *possession*.”). If victims of revenge pornography are to be associated with victims of child pornography, those victimized would be comparable to “the most defenseless of our citizens.” *Williams*, 533 U.S. at 307. Those victimized by revenge porn, however, are arguably *not* the most defenseless victims: multiple articles demonstrate bravery of many women victimized by revenge porn. See, e.g., Holly Jacobs, *Being a Victim of Revenge Porn Forced Me to Change My Name—Now I’m an Activist Dedicated to Helping Other Victims*, XOJANE (Nov. 13, 2013), <http://www.xojane.com/it-happened-to-me/revenge-porn-holly-jacobs>; Nikki Yeager, *A Man Posted My Vagina on the Internet and I’m Kind of OK With It*, XOJANE (Jan. 31, 2013), <http://www.xojane.com/sex/revenge-porn-submit-your-ex>.

66. See, e.g., 18 U.S.C. § 2252A(a)(5)(B) (2012) (making it unlawful for a person to “knowingly possess, or knowingly access with intent to view, any . . . material that contains an image of child pornography”); see also *United States v. Brown*, 862 F.2d 1033, 1038 (3d Cir. 1988). Although many of the images on the Internet constituting revenge porn are also child pornography, this Comment seeks to address only those images taken those of the age of majority.

67. See *infra* Section III.A.

68. See *supra* Section I.

69. *Miller v. California*, 413 U.S. 15, 24 (1973).

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prong.<sup>70</sup> As a sub-category of pornography, it is unquestioned that revenge porn could be determined as appealing to the prurient interest—that is, revenge porn portraying sexual conduct appeals to sexual desire and causes arousal—under any community standard.<sup>71</sup> Being prurient, however, does not automatically render an image or other type of visual work obscene.<sup>72</sup> Appealing to the prurient interest is only one of the *Miller* factors. Satisfying only one prong, and arguably the prong that is the least offensive to the general morality, is not sufficient to establish that a work is obscene.<sup>73</sup>

Many of the images that constitute revenge pornography do not depict sexual conduct; rather, they depict mere nudity.<sup>74</sup> If, as the Court stated in *Miller*, the prurient interest is defined as exciting shameful or obsessive sexual desire, mere nudity would not be considered appealing to such an interest.<sup>75</sup> Furthermore, because in *Miller* the Court determined that mere nudity did not constitute obscenity, the argument that nudity does not appeal to the prurient interest is strengthened.<sup>76</sup> Because nude images prevail in revenge pornography, these images likely withstand the first *Miller* prong. Revenge pornography, therefore, does not *categorically* appeal to the prurient interest.<sup>77</sup>

## 2. *Revenge Pornography Is Not, In Itself, Patently Offensive*

The second *Miller* factor seeks to determine if the work “depicts or describes, in a *patently offensive way*, sexual conduct

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70. See *Roth v. United States*, 354 U.S. 476, 487 (1957) (establishing that, by its nature, pornography appeals to the prurient interest because it is created to provoke sexual desire and arousal). See also Genn, *supra* note 59, at 176 nn.72–74.

71. Cf. *Miller*, 413 U.S. at 24.

72. See *id.*

73. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

74. One revenge porn article starts off with the question: “Did you know that it’s perfectly legal in most of the U.S. for someone to post naked pictures of you against your will?” Kristina Marusic, *Revenge Porn Almost Ruined Her Life, But Now She’s Saying, ‘Welcome to Our World, Jerks!’*, MTV: NEWS (Mar. 19, 2015), <http://www.mtv.com/news/2109455/revenge-porn-laws/>.

75. See *Miller*, 413 U.S. at 18 n.2, 26; cf. *Jenkins*, 418 U.S. at 161.

76. Cf. *Miller*, 413 U.S. at 38 (Douglas, J., dissenting).

77. This is not to say that *some* revenge pornography does not appeal to the prurient interest—some of it most certainly can. Cf. *Roth v. United States*, 354 U.S. 476, 487 & n.20 (1957).

specifically defined by the applicable state law.”<sup>78</sup> For this factor, the key language is whether the work depicts sexual material in a way that is “patently offensive.”<sup>79</sup> This factor is applied to the depictions of sexual acts presented in the image or communication.<sup>80</sup> In addition, if the intent of the poster of the image is taken into consideration at all, it should be taken as one aspect of the whole image.<sup>81</sup>

Even the most disturbing sexually explicit images must be afforded free speech protections. In *Ashcroft v. Free Speech Coalition*, the Court commented that, in regard to computer-generated child pornography, “[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”<sup>82</sup> Unlike child pornography depicting actual children, computer-generated child pornography does not pose an actual risk to children’s safety.<sup>83</sup>

As a society, we may say the intent to cause harm by posting sexually explicit images of another to the Internet is immoral or hateful, but what we cannot say is that the images themselves are obscene. That which is obscene is not protected as free speech.<sup>84</sup> That which is not obscene and is solely distasteful is protected and, therefore, any and all regulations targeting such material must be analyzed under strict scrutiny.<sup>85</sup> An image posted as revenge pornography that consists of mere nudity, *ceteris paribus*, is no more offensive than any other form of accepted nudity.<sup>86</sup> In fact, revenge pornography is often even tamer than other forms of accepted pornography since it oftentimes depicts the nudity of a singular subject.<sup>87</sup> As discussed, it has been found that these

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78. *Miller*, 413 U.S. at 24 (emphasis added).

79. *See* *Manual Enters., Inc. v. Day*, 370 U.S. 478, 486 (1962).

80. *Miller*, 413 U.S. at 24.

81. *Id.*

82. 535 U.S. 234, 250 (2002).

83. *Id.* at 241.

84. *See, e.g., Miller*, 413 U.S. at 15.

85. *See, e.g., id.* at 29.

86. *See* *Jenkins v. Georgia*, 418 U.S. 152, 161 (1974).

87. *See It Happened to Me: I Found Naked Pictures of Myself on the Internet*, XOJANE (Sept. 4, 2014), <http://www.xojane.com/it-happened-to-me/internet-revenge-porn> [hereinafter *It Happened to Me*]. In this article, which was written by an anonymous revenge porn victim, the author explains, “[a]bout a year ago, I found pictures of myself naked on the Internet . . . . I was posed and smiling for the camera. I’d certainly

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sorts of images—i.e., images depicting mere nudity—are not patently offensive *per se*.<sup>88</sup> As such, distinguishing images that depict a nude subject from those constituting inherently-offensive-revenge-pornography can be difficult.<sup>89</sup> The only differentiating aspect, between a nude image posted with consent and a nude image posted as revenge pornography, from an obscenity perspective, is the intent of the person publishing the image and the lack of consent from the victim, which are but two factors taken into the consideration.<sup>90</sup> Therefore, it is difficult to assess why, when taking an image as a whole, an image that would otherwise be recognized as protected speech would be unprotected speech solely due to the intent behind the publication of the image.

### 3. *Revenge Pornography May Have Literary or Political Value*

Although images depicting nudity may have societal value, having such value is not enough to withstand the third *Miller* factor, which requires *serious* societal value.<sup>91</sup> When the text of a statute or a Supreme Court opinion requires speech to include an element of *serious* value to make applicable First Amendment protections, the term “serious” must be taken *seriously*.<sup>92</sup> This

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consented to having them taken by a friend who did my hair and makeup and perched on a wooden stool to get the best angles.” *Id.*

I’d become so numb to the close up, amateur porn on that site that when I finally found myself in the masses I almost missed it—out of thousands of photos there was one that looked uncomfortably familiar. It was a belly button-and-down shot, so it took me several takes and a quick comparative visit to the bathroom mirror before I could be sure.

Yeager, *supra* note 65. It is interesting to note that Yeager was able to reclaim the posting of her image and does not regret the relationship with the poster of the image. *See id.* Although the young woman was the victim of a horrific betrayal of trust, she reasoned that “if any of you happen to visit submityourex.com in the future and see a young vagina on display, I hope it’s mine. And I hope you thoroughly enjoy it. Because owning my vagina’s public appearance seems to be the best revenge there is for a blackmail attempt like that.” *Id.*

88. *See Jenkins*, 418 U.S. at 161.

89. *See It Happened to Me*, *supra* note 87.

90. *See Miller*, 413 U.S. at 24.

91. *Id.*; *see supra* note 59.

92. *See United States v. Stevens*, 559 U.S. 460, 479 (2010) (noting that otherwise obscene material would not be voided of such classification for

means that in order to satisfy the third *Miller* prong, images of involuntary pornography must possess *serious* scientific value, *serious* political value, *serious* artistic value, or *serious* literary value.<sup>93</sup> Most involuntary pornography has little-to-no such value, as it is merely recreational, and the value associated with the majority of revenge pornography is either non-existent or minimal.<sup>94</sup> Any existing value could be described as sexual entertainment value, sexual recreation value,<sup>95</sup> or, potentially, value of self-expression.

It is necessary to state that *some* involuntary pornography will, and has, possessed serious societal value. Legal blogger Eric Goldman acknowledges the sheer importance in our ability to share such images: “[i]ntimate depictions are often part of other people’s life history—a story that person may want to tell in full.”<sup>96</sup> Yet, even with such assertions, most people will be hard-pressed to accept the notion that an image that was posted to cause harm to another without his or her consent could have any sort of value whatsoever. However, consider the following hypothetical:

In State A, located in the United States, a member of the State bar has decided to campaign for a spot in the state senate. The woman runs on the platform that she is heavily opposed to the legalization of same-sex marriage and openly condemns same-sex couples in her speeches

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including “[a] quotation from Voltaire in the flyleaf of a book” (quoting *Miller*, 413 U.S. at 25)). *Stevens* addressed a federal law criminalizing the commercial “creation, sale, or possession of certain depictions of animal cruelty.” *Id.* at 464. The statute used *Miller* terminology and exempted depictions of animal cruelty that have “serious religious, political, scientific, educational, journalistic, historical or artistic value.” *Id.* at 465 (quoting 18 U.S.C. § 48(b) (2010)).

93. *See id.* at 479.

94. *Cf. id.* at 478–80.

95. *Cf. id.* Sexual recreation value refers to the value in being able to take and share sexually explicit images with a partner and the value in viewing the images.

96. Eric Goldman, *California’s New Law Shows It’s Not Easy To Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:03 PM), <http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn/>. For example, an individual’s sexual experiences, including those with whom a person chooses to associate with and become intimate with sexually, are a part of an individual’s history. *Id.*

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and media promotions. The woman's former partner, who just so happens to also be a woman, finds the candidate's act of pretense to be disgraceful. In an attempt to bring the candidate's lies to the attention of the community, the ex-partner shares private sexually explicit images with the media. Under State A law, the sharing of involuntary pornography is punishable by a fine of no more than \$5,000 and up to two years of prison time. The ex-partner, for exposing her former lover as a liar in her candidacy and platform of anti-same-sex marriage and relationships, is now subject to criminal liability.

This scenario makes it clear that the posting of involuntary pornography can in fact have strong political value. For example, in 2011, Congressman Anthony Weiner asserted that his Twitter account was hacked in response to a photo of a man's genital region being posted to the account.<sup>97</sup> Thereafter, twenty-six-year-old Meagan Broussard, a then-aspiring nurse, came forward with explicit images, emails, Facebook messages, and recorded phone calls between herself and Congressman Weiner.<sup>98</sup> Broussard disclosed the information at that time because she was "concern[ed] for her own image as an aspiring nurse, and that of her 3-year-old daughter, should her identity be leaked online."<sup>99</sup> Due largely in part to Broussard's disclosure, Congressman Weiner resigned.<sup>100</sup>

If some of the proposed legislation was to pass, actions such as Broussard's that possess serious political value and importance to our society could be subject to criminal liability.<sup>101</sup> This could

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97. See Chris Cuomo et al., *Rep. Anthony Weiner: 'The Picture Was of Me and I Sent It,'* ABC NEWS (June 6, 2011), <http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605>.

98. *Id.*

99. *See id.*

100. See Raymond Hernandez, *Weiner Resigns in Chaotic Final Scene*, N.Y. TIMES (June 16, 2011), <http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html>. See also Dana Bash, *Weiner resigns after sexting scandal*, CNN (June 16, 2011, 5:40 PM), <http://www.cnn.com/2011/POLITICS/06/16/weiner.scandal/>; Elsie Foley, *Anthony Weiner Submits Official Resignation Letter*, HUFFINGTON POST (June 20, 2011, 4:22 PM), [http://www.huffingtonpost.com/2011/06/20/anthony-weiner-resignation-letter\\_n\\_880720.html](http://www.huffingtonpost.com/2011/06/20/anthony-weiner-resignation-letter_n_880720.html).

101. For example, even under California's law, Broussard could be

have a serious chilling effect on this type of image sharing, which unquestionably has societal value. Although some images constituting revenge porn possess political value, these kinds of images are rare. Therefore, taken as a whole, revenge pornography does not have serious political, literary, artistic, or scientific value as required by *Miller*.

However, it does not need to have such value. The majority of revenge pornography,<sup>102</sup> as images that depict mere nudity, cannot and do not constitute obscene imagery under *Miller* because those images are not patently offensive. Because revenge pornography arguably does not always appeal to the prurient interest and generally does not depict sexual conduct in a patently offensive way, images of involuntary pornography do not lose their First Amendment protections. The Court provided a rationale for this notion in *United States v. Stevens* when it stated that “the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception . . . but nonetheless fall within the broad reach of [the statute].”<sup>103</sup>

### III. CURRENT LAWS PROHIBITING REVENGE PORN ARE UNCONSTITUTIONALLY OVERINCLUSIVE

“As a general matter, ‘the First Amendment means that

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convicted of disseminating involuntary pornography. The law requires the victim to experience actual harm, for the publisher of the image to knowingly do so with the knowledge that he or she does not have the consent of the subject of the image, and that the publisher have the intent to cause serious emotional harm to the victim. CAL. PENAL CODE ANN. § 647 (West Supp. 2015). Broussard’s actions could easily meet two of the required elements of California’s revenge porn statute—she knowingly produced the images without the consent of the subject and the subject of the images felt actual harm by her doing so. See *Hernandez*, *supra* note 100. Although it is less obvious, Broussard’s intent to cause harm to Weiner could be called into question if she were to be prosecuted under California’s statute because the statute does not have an exception for those who disclose pornographic images without the subject’s consent for political purposes.

102. This excludes revenge pornography taken by minors, which is automatically unprotected child pornography. See *New York v. Ferber*, 458 U.S. 747, 763 (1982).

103. 559 U.S. 460, 480 (2010). “Most of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical or artistic value’ (let alone serious value), but it is still sheltered from government regulation.” *Id.* at 479 (quoting 18 U.S.C. § 48(b) (2010)).

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government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>104</sup> Government-imposed restrictions on protected speech are examined under the most exacting scrutiny when such restrictions act to “suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>105</sup> Regulations, however, that are unrelated to the content of the speech being restricted are reviewed under an intermediate scrutiny.<sup>106</sup> To determine whether a law is content-based or content-neutral, courts ask whether the statute is restricting “speech because of [agreement or] disagreement with the message it conveys.”<sup>107</sup> As a general rule, content-based laws are those that distinguish acceptable speech from disfavored speech based on the ideas expressed therein.<sup>108</sup> Laws that restrict speech without addressing the views or ideas associated with the speech are generally content-neutral.<sup>109</sup>

In order for content-based laws to hold up in court, the laws *must* satisfy strict scrutiny.<sup>110</sup> To satisfy this standard of judicial review, the state must prove that it has a compelling interest in enacting the legislation and that the legislation is narrowly tailored to achieving its compelling interest.<sup>111</sup> If the state is unable to prove either prong, the legislation is unconstitutional.<sup>112</sup>

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104. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980) (quoting *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

105. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

106. *See id.* at 642 (reasoning that content-neutral restrictions “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue”).

107. *Id.* (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (noting that the purpose behind legislation that restricts speech is often facially evident).

108. *Id.* at 643.

109. *Id.*

110. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (determining that “a facially content-based restriction on political speech in a public forum must be subjected to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end”) (citations omitted) (internal quotation marks omitted).

111. *Id.*

112. This Comment concedes that states have a compelling interest in eradicating harmful involuntary pornography; it argues, however, that the means states are currently exploring are not narrowly tailored to meet the standard of strict scrutiny and that the current existing laws have a side

Because the previous section of this Comment sought to establish that revenge pornography is not obscene and is therefore protected speech, revenge porn legislation must be subject to strict scrutiny review. As explored below, revenge porn legislation is undoubtedly content-based.<sup>113</sup>

Revenge porn legislation is content-based because it seeks to prohibit a form of pornography based on the message expressed by those images constituting revenge porn. Such legislation categorizes revenge pornography as unacceptable, but favors and allows for voluntary pornography, and is therefore clearly distinguishing acceptable speech from disfavored speech. Content-based laws must withstand strict scrutiny, and as such, states must show that they have a compelling interest for enacting the prohibition and that the regulation is narrowly tailored to fulfill that interest.

A. *States Have a Compelling Interest in Restricting Revenge Porn*

To impose a content-based restriction on speech, a state must first have a compelling interest to enact the restriction.<sup>114</sup> Throughout history, the Court has recognized that protecting the general health, morality, and welfare of its citizens is a legitimate, compelling state interest justifying the prohibition of speech.<sup>115</sup> In *Paris Adult Theatre I v. Slaton*, the Supreme Court noted that, in regard to rendering obscenity unprotected by the First Amendment, states had a compelling interest in regulating obscene material because of the potential negative impact it could have on “family life, community welfare, and the development of human personality.”<sup>116</sup> The same rationale applies to states seeking to regulate the distribution of protected pornographic speech. The state has a compelling interest in protecting the

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effect of chilling other types of constitutionally protected speech.

113. See *supra* Part II.

114. See *Burson*, 504 U.S. at 198.

115. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (deciding that an ordinance helping to ensure the basic human rights of people historically discriminated against was a compelling interest).

116. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (summarizing that “[t]he sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex”).

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individual, especially in that the individual is most harmed by revenge porn postings, while still having the interest in protecting the community from the harm revenge pornography poses.

States also have a compelling interest in protecting citizens from unnecessary harm, especially if those citizens are unable to protect themselves from such harm.<sup>117</sup> In *New York v. Ferber*, the Court added an additional exception to the protections of free speech—child pornography.<sup>118</sup> The Court concluded there that the state had a compelling interest in protecting children from the actual dangers posed by the existence of child pornography.<sup>119</sup> *Ferber* is applicable to revenge porn because states have the same compelling interest in protecting those who can actually be harmed from the posting of revenge porn because the victims cannot protect themselves.<sup>120</sup> This is why including the “intent to cause harm/experience actual harm” element is important. The compelling interest must be effectuated by narrowly tailored means. One way lawmakers can draft a law that is narrowly tailored is to require, as an element of the offense, that the distributor of another’s sexually explicit image did so with the intent to cause harm to the subject of the image.

B. *The Overinclusive Nature of Revenge Porn Legislation Has a Chilling Effect on Other Types of Free Speech and Fails the Narrowly Tailored Prong of Strict Scrutiny*

States aspiring to prohibit the involuntary posting of sexually explicit images, images which are otherwise protected speech, must draft narrowly tailored laws that will be applicable only to the desired target—i.e., revenge porn.<sup>121</sup> The problem arising with many of the laws enacted and proposed is that the laws are

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117. See *New York v. Ferber*, 458 U.S. 747, 763 (1982).

118. *Id.*

119. *Id.* at 756–59. The Court also noted that the societal value of child pornography is “exceedingly modest, if not *de minimis*.” *Id.* at 762.

120. States have an interest in protecting *only* those harmed by revenge porn. Just as the Court in *Ashcroft v. Free Speech Coalition* determined computer generated images of child pornography did not pose an actual danger to children and, therefore, could not be prohibited, there needs to be actual harm posed to victims of revenge porn. See 535 U.S. 234, 250 (2002).

121. See Goldman, *supra* note 96 (arguing that a constitutionally permissive law prohibiting revenge porn should include limiting language such as requiring the intent of the distributor to cause harm to the victim).

overinclusive and exceptionally broad.<sup>122</sup> In this way, current revenge porn legislation is unconstitutional as it fails to stand up to strict scrutiny. This section surveys a few of these revenge porn laws as well as a model law, then discusses the problems with those laws, and finally addresses how these problems can be resolved.

### 1. *Delaware*

Delaware has made a valiant effort to criminalize revenge porn.<sup>123</sup> The statute entitled “Violation of privacy” creates a class A misdemeanor for those who post revenge porn.<sup>124</sup> The law applies to anyone who:

Knowingly reproduces, distributes, publishes, transmits or otherwise disseminates a visual depiction of a person who is nude, or who is engaging in sexual conduct, when the person knows or should have known that the reproduction, distribution, exhibition, publication, transmission, or other dissemination as without the consent of the person depicted and that the visual depiction was created or provided to the person under circumstances in which the person depicted has a reasonable expectation of privacy.<sup>125</sup>

Two problems arise from Delaware’s legislation: (1) its definition of “nude,” and (2) the required element that the person depicted in the image has a reasonable expectation of privacy in the image. The statute defines “nude” to include the genitals, the pubic area, the buttocks, or “any portion of the female breast below the top of the areola.”<sup>126</sup> The definition requires that the area be uncovered or visible through “less than opaque clothing.”<sup>127</sup>

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122. See, e.g., DEL. CODE. ANN. tit. 11, § 1335 (West Supp. 2014) (including the term “buttocks” in its definition of nudity, which has been called into question as creating a definition of nudity that is overbroad); see also FRANKS, *supra* note 2, at 6 (stating that the definition of nudity should not be so broad as to include “buttocks”).

123. See DEL. CODE. ANN. tit. 11, § 1335.

124. *Id.*

125. *Id.* § 1335(a)(9).

126. *Id.* § 1335(a)(9)(a)(1)(A)–(D).

127. *Id.* § 1335(a)(9)(a)(1).

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The following hypothetical illustrates why this is a problem. Josh and Katie have been dating for six months. Over the summer, the pair spent a week vacationing in Hawaii. While on vacation, multiple photographs were taken of Josh and Katie while at the beach. In the photographs, Katie is wearing a white bikini. Unbeknownst to Katie at the time, the swimsuit becomes see-through when wet. Multiple pictures taken during the vacation show Katie in her see-through white bikini. After Josh breaks up with Katie a few months after the vacation, Katie notices pictures from their trip to Hawaii on his Facebook in which she is wearing the white see-through bikini, images which she never consented to Josh posting. Katie brings suit against Josh claiming she had a reasonable expectation of privacy in the images and that the images depict Katie in the “nude” as defined under Delaware law.

Josh argues that the images do not depict Katie in the “nude.” Under the statute, however, the images do. Katie argues that although she was unaware of the see-through nature of her bikini at the time, she is aware now and that she has a reasonable expectation of privacy in the images taken of her bikini-clad body.

Delaware’s definition of “nude” is substantially overinclusive because of situations like these, and therefore, the statute is unconstitutional because it is not narrowly tailored.<sup>128</sup> The statute is substantially overinclusive because it could potentially apply to a young adult man showing an image of his girlfriend in a t-shirt and a thong to his buddies because the definition of “nude” includes the “buttocks” and showing the image to his friends would constitute “distribut[ing], exhibit[ing], pub[lishing], trans[mitting], or other[wise] disseminat[ing]” a nude image in which his girlfriend had a reasonable expectation of privacy.<sup>129</sup>

Moreover, statutes that include “reasonable expectations of privacy” language can be problematic. Terms such as this have the potential to create more ambiguity than they resolve because the term has long been associated with Fourth Amendment search

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128. The United States Supreme Court has found content-based statutes that were significantly or substantially overinclusive as unconstitutional. *See* *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

129. DEL. CODE ANN. tit. 11, § 1335(a)(9)(a)(1)(C).

and seizure jurisprudence, and as such, carries Fourth Amendment doctrinal baggage with its use.<sup>130</sup> Further adding to the ambiguity and overinclusive nature of Delaware's statute is the inclusion of images depicting the buttocks and, as stated before, "the human body visible through less than opaque clothing."<sup>131</sup> State laws should not include such expansive definitions of nudity due to the risk of being deemed overinclusive.<sup>132</sup>

## 2. *California*

When California first drafted its revenge porn bill, the American Civil Liberties Union ("ACLU") strongly objected to its implementation on the grounds that it was in violation of the First Amendment because the legislation did not include an element of intent and was thus overinclusive, creating liability for those legally in possession of the images of another.<sup>133</sup> The ACLU also opposed the law because of the potential chilling effect it posed on other types of protected speech due to the overinclusive and overbroad nature of the wording of the bill.<sup>134</sup> In its opposition,

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130. See FRANKS, *supra* note 2, at 8.

131. DEL. CODE ANN. tit. 11, § 1335(a)(9)(a)(1)(C); see also FRANKS, *supra* note 2, at 6–7.

132. FRANKS, *supra* note 2, at 6–7 (a model law should not include "unusually expansive definitions of nudity (e.g. buttocks or female nipples through gauzy or wet fabric) in its scope") (citations omitted).

133. See Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013, 1:08 PM), <http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9>; see also Halloran, *supra* note 29.

134. See *First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images*, AM. CIV. LIBERTIES UNION (Sept. 23, 2014), <https://www.aclu.org/free-speech/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images>. The ACLU also challenged Arizona's revenge porn bill under the same reasoning as it first opposed California's—the bill poses a serious "chilling effect" on protected speech. *Id.* (quoting statement of David Horowitz, executive director of the Media Coalition). The Arizona law poses a particular problem for retailers of books and magazines, with the ACLU's article noting that:

To comply with the law, booksellers and librarians will have to spend countless hours looking over books, magazines, and newspapers to determine if a nude picture was distributed with consent. Many store owners will simply decline to carry any materials containing nude images to avoid the risk of going to prison.

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the ACLU argued that: “[t]he posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected. The speech must constitute a true threat or violate another otherwise lawful criminal law, such as stalking or harassment statute, in order to be made illegal.”<sup>135</sup>

The bill was amended to include language that limited its reach to only those specific instances where “the person who posted the revenge porn [did so] with the intent to ‘cause serious emotional distress.’”<sup>136</sup> The final version of the bill also required that the victim *experience* serious emotional distress or harm caused by the posting of the involuntary pornography.<sup>137</sup> Without this intent requirement, the ACLU and legal blogger Eric Goldman, argue that the law would potentially be in violation of First Amendment protections.<sup>138</sup> Goldman wrote:

California’s new law probably sidesteps First Amendment problems by requiring intent to cause serious emotional distress. Without such a restriction, involuntary porn laws can face significant First Amendment limits. *Intimate depictions are often part of other people’s life history—a story that person may want to tell in full.* Further, by design, privacy laws suppress the flow of truthful information. For example, consider Anthony Weiner’s sexting photos. California’s new law wouldn’t apply to them (they were selfies), but *any law restricting a recipient’s redistribution of those images may substantially hinder important social discourses.* The

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*Id.* (quoting statement of David Horowitz, executive director of the Media Coalition). In the summer of 2015, an agreement filed in the United States District Court in Phoenix, Arizona by the ACLU and Arizona Attorney General Mark Brnovich prohibiting prosecutors from ever enforcing Arizona’s revenge pornography law was ordered by United States District Judge Susan R. Bolton. See Miriam Wasser, *AZ Revenge Porn Law Not to Be Enforced, Says Federal Judge*, PHX. NEW TIMES (July 13, 2015), <http://www.phoenixnewtimes.com/news/az-revenge-porn-law-not-to-be-enforced-says-federal-judge-7486054>.

135. *Electronic Communication Devices: Prohibited Distribution of Personal Information: Hearing on S.B. 255 Before the S. Rules Comm.*, 2013-14 Reg. Sess. (Cal. 2013).

136. See Fuchs, *supra* note 133.

137. *Id.*

138. Goldman, *supra* note 96.

recipient could publicly claim that she received sexting photos from a famous politician, but she may need to provide photographic proof to substantiate her claims—especially in the face of the politician’s inevitable denials. Weiner’s sexting photos provide crucial evidence of his dubious decision-making and recidivism, so any law that interfered with their disclosure may violate the First Amendment.<sup>139</sup>

With the addition of the requirement of the intent to cause serious emotional distress and the requirement that actual, serious emotional distress be caused, California’s revenge porn law has remedied some of the concerns surrounding the laws possible violation of First Amendment protections.<sup>140</sup> However, Goldman’s fear of how the law may chill protected speech is not entirely remedied by the amendments.<sup>141</sup> As Goldman comments, “intimate depictions are often part of other people’s life history—a story that person may want to tell *in full*.”<sup>142</sup> Goldman’s example, however, demonstrates the complexities surrounding the creation of revenge porn legislation and the issues faced by legislators. The example does not address the real possibility that a person may have *multiple* reasons for sharing images, and one of those reasons, even in the case of Goldman’s example, may be to seek revenge. As Goldman appropriately reasons, revenge porn legislation could prohibit the redistribution of private, sexual images when such redistribution is required for the greater good.

California’s revenge porn statute imposes liability on:

[a]ny person who . . . intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances . . . in which the persons agree or understand that the image shall remain private, . . . the person . . . distributing the image . . . knows or should

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139. *Id.* (emphasis added).

140. *Id.*

141. *Id.*

142. *Id.* (emphasis added).

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know that distribution of the . . . image will cause serious emotional distress, and the . . . person depicted suffers . . . that distress.<sup>143</sup>

Although this version of the law includes images categorized as “selfies,” the law is still unsatisfactory because it is ambiguous due to terminology such as “identifiable person” and “depicted or engaged in an act of sexual intercourse.” The use of “identifiable person,” as discussed in more detail in the next section, is problematic: arguably, “identifiable” can mean different things to different people—is it identifiable to those viewing the image? Is it identifiable to the subject of the image? Who must the subject of the image be able to be identified by?

Secondly, requiring that there is an agreement or understanding that the image remain private can also pose problems. Unless there is an explicit agreement that the image remain private, this sort of understanding is incredibly subjective and up for interpretation. Even where there is an explicit agreement, this type of situation is ripe for the “he said, she said” debate. The law, therefore, creates just as many problems as it solves. Additionally, although California’s law is very victim-friendly, revenge porn activists say the states are not doing enough.<sup>144</sup> It is argued that the burden to prove liability under California’s revenge porn statute is too high and that it is unlikely for victims to be able to conclusively prove the images were distributed with the intent to cause severe emotional distress.<sup>145</sup>

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143. CAL. PENAL CODE ANN. § 647 (West Supp. 2015).

144. See Anne Flaherty, ‘Revenge Porn’ Victims Pursue New Laws, but *ACLU Urges Caution*, BOS. GLOBE (Nov. 16, 2013), <https://www.boston.com/news/nation/2013/11/16/revenge-porn-victims-press-for-new-laws/cXQNeLzOcy7oSDTUh3W5fK/story.html>. Prior to the change in California’s statute, images taken by the victims themselves and then posted to the Internet without their permission to the Internet were not included in the statute. *Id.* Holly Jacobs, founder of EndRevengePorn.com, estimates that 80% of the 1000 victims who have contacted her took the images themselves. *Id.* It is certainly clear from the standpoint of a victim that a law that seeks to protect the private images taken of the victim *must* also protect private images taken by the victim herself and then sent to another. *Id.*

145. See *California’s New “Revenge Porn” Law – All Talk and No Action!*, JACKSON & WILSON (Feb. 5, 2014), <http://jacksonandwilson.com/revenge-porn/> (“Also proving that the defendant intended to cause serious emotional distress or, that the victim actually experienced and suffered emotional distress will be a challenge.”).

It is evident that although states are attempting to provide remedies to victims of revenge porn, “many laws that have been passed suffer from overly burdensome requirements, narrow applicability, and/or constitutional infirmities.”<sup>146</sup> In order for a law to benefit victims and protect First Amendment concerns, the law must be exactly narrowly drawn.<sup>147</sup>

### 3. *Rhode Island*<sup>148</sup>

Rhode Island’s proposed revenge porn legislation falls even shorter of satisfying strict scrutiny than California’s original draft.<sup>149</sup> Rhode Island’s revenge porn bill states that:

A person is guilty of unauthorized dissemination of indecent material when such person uses an imaging device to capture, record, or store visual images of another person (18) years of age or older engaged in sexually explicit conduct or of the intimate areas of another person, with or without that other person’s knowledge and consent under circumstances in which that other person would have a reasonable expectation of privacy and, thereafter, without the consent of the person or all persons depicted in the visual image, intentionally disseminates, publishes, or sells such visual image or images.<sup>150</sup>

Rhode Island’s bill cannot withstand strict scrutiny analysis because it seeks to criminalize the otherwise lawful distribution of images.<sup>151</sup> Nude images taken of an adult subject with their consent are rightfully owned by the photographer and, as such, legally can be shared.<sup>152</sup> For images such as these to be protected under revenge porn legislation, a compromise must be made

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146. See FRANKS, *supra* note 2, at 4.

147. *Id.*

148. Current as of January 5, 2016.

149. See H.B. 5770, 2015 Leg., Jan. Sess. (R.I. 2015).

150. *Id.* § 11-64-3(a).

151. *Cf.* Halloran, *supra* note 29 (“But the reality is that revenge porn laws tend to criminalize the sharing of nude images that people lawfully own[.] . . . That treads on very thin ice constitutionally.” (quoting statement of Lee Rowland, Esq., ACLU Speech and Technology Project)).

152. *Id.*

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between competing First Amendment and privacy concerns.<sup>153</sup> In order for a plausible solution, there will need to be a compromise. What Rhode Island's law does, however, is completely ignore the First Amendment concerns and instead focuses entirely on the privacy issues at stake.

The constitutionality of Rhode Island's proposed revenge porn law is brought into question by the inclusion language that creates liability for those who "store visual images of another person."<sup>154</sup> This sort of language has concerned many critics of revenge porn legislation.<sup>155</sup> What Rhode Island's proposed law does, and what California's original draft did, is incriminate any person who receives an image and then shows that image to another person.<sup>156</sup> For example, a young woman who shows an explicit image of another, without his or her consent, to a friend is liable under Rhode Island's proposed revenge porn bill, based solely on the language of the statute, and could face a felony charge, with a punishment of no more than three years in prison and a fine not more than \$3,000.<sup>157</sup> Not only does the law create liability for any person who may otherwise lawfully own an image if that image is distributed without the subject's consent, it also criminalizes the sharing of that image once any recipient shares it.<sup>158</sup> Therefore, any person who inadvertently comes into possession of an explicit image, and then shares that image with another, could be

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153. See Lauren Walker, *Are Revenge Porn Laws Going Too Far?*, NEWSWEEK (Sept. 3, 2014, 3:47 PM), <http://www.newsweek.com/are-revenge-porn-laws-going-too-far-268292>. "Privacy advocates suggest these laws represent a step toward properly protecting the public and that some free speech sacrifices are necessary collateral damage. But free speech advocates argue existing laws are sufficient and the potential First Amendment infringements outweigh the privacy gains." *Id.*

154. H.B. 5770, sec. 11-64-3(a).

155. See, e.g., Linda Kor, *Arizona's 'Revenge Porn' Law Is Not Enforceable, Says Judge*, ARIZ. J. (July 31, 2015), <http://www.azjournal.com/2015/07/31/arizonas-revenge-porn-law-is-not-enforceable-says-judge/> (discussing the risks posed to those who disseminate involuntary pornography without the intent to cause harm to the victim, such as book and newspaper publishers and librarians).

156. Under Rhode Island's proposed statute, "disseminate" would mean to "make available by any means to any person." H.B. 5770, sec. 11-64-1(a).

157. *Id.* sec. 11-64-3(c). See also *RI AG Files 'Revenge Porn' Bill*, WPRI (March 11, 2015, 6:32 AM), <http://wpri.com/2015/03/11/ri-ag-files-revenge-porn-bill/>.

158. H.B. 5770, sec. 11-64-3(a).

punished under the Act. The law does not only target those who seek to cause harm to an ex-lover by posting explicit images to the Internet, but also those who have no intention of malice and simply come into contact with a photo by chance.<sup>159</sup> Because the law holds liable those who disseminate an image “without the consent of the person or all persons depicted in the visual image,” it creates the necessity for any third person distributing or sharing a nude image to take efforts to determine whether the subject of the image gave consent for the image to be distributed originally.<sup>160</sup>

In order to resolve this issue, Rhode Island should take note of California’s revenge porn statute. California’s legislation states that not only must the distributor of the involuntary pornography have the intent to cause harm to the victim, but also that the victim *must* experience *actual harm* caused by the distribution of the image.<sup>161</sup> Rhode Island’s revenge porn legislation has no such requirement of intent or requirement of actual harm caused. This is precisely the problem the ACLU challenged in the first drafting of California’s revenge porn bill.<sup>162</sup> Without the strict requirements of intent and actual harm caused, these kinds of regulations on otherwise protected speech blatantly and alarmingly violate First Amendment protections because the laws are not narrowly tailored to the compelling interest of protecting victims of revenge porn because the laws target much more than just involuntary pornography, rendering the laws overbroad. For example, if a law is not narrowly tailored, an individual could be liable for distributing an image that he or she may not even know was originally distributed without the subject’s consent. One suggested way to satisfy strict scrutiny in regulating revenge porn is to tread very carefully on the issue and, as such, have a very

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159. See Halloran, *supra* note 29. Lee Rowland, lawyer for the ACLU, cites Arizona’s proposed revenge porn legislation, which would find a person who receives an unsolicited text message containing a nude image and then shows that image to a friend criminally liable. *Id.* (citing House Bill 2515, 51st Leg., 2d Reg. Sess. (Ariz. 2014), ARIZ. REV. STAT. § 13-1425). However, Arizona’s revenge porn law is prohibited from ever being enforced. See Wasser, *supra* note 134.

160. See § 11-64-3 R.I. ACTS & RESOLVES (proposed Feb. 6, 2014); see also CAL. PENAL CODE ANN. § 647 (West Supp. 2015).

161. See CAL. PENAL § 647.

162. See Fuchs, *supra* note 133.

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narrowly tailored solution, such as what California is now on the road to accomplishing.

However, even California has to take further steps before it can be safely assured that its revenge porn law will withstand strict scrutiny analysis. Lee Rowland of the ACLU puts it simply: any legislation that hopes to withstand strict scrutiny must include four elements—(1) the legislation must require malicious intent; (2) the distribution of the image must cause actual harm to the victim; (3) the distributor of the image must act knowingly without the consent of the victim; and (4) the victim had a reasonable expectation<sup>163</sup> that the image would be kept private.<sup>164</sup> Proponents of revenge porn legislation find these requirements troubling and argue that the California statute, as it stands, does not do *enough* to protect the privacy rights of victims even though California took action to remedy past concerns of victims.<sup>165</sup> In the original draft of the statute, any language referring to self-taken images was absent, and as such, people who redistributed self-taken explicit images were exempt from prosecution.<sup>166</sup> In response to the concerns of victims and advocates regarding the lack of liability for those who redistribute “selfies,” California amended the statute to create liability for such distributions.<sup>167</sup> California’s legislation, by focusing on the concerns of victims *and* on preserving First Amendment protections, is exemplary.

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163. The “reasonable expectation” requirement, however, may pose problems of its own. See discussion of “reasonable expectation of privacy,” *supra* Section III.B.1.

164. See Halloran, *supra* note 29.

165. See Heather Kelly, *New California ‘revenge porn’ law may miss some victims*, CNN (last updated Oct. 3, 2013, 3:01 PM), <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/>. Victims argued that, because the statute originally only did not include photographs taken by the individual subject, that many victims would not have legal recourse. See *id.* After the law was amended to include “selfies” (self-taken images), victims found another problem with the intent requirement added to the statute. See *id.* Victims argue that this requirement creates a loophole and does not hold liable persons who publish images of another for financial gain or to boast. See *id.*

166. See Flaherty, *supra* note 144.

167. See Hunter Schwarz, *California’s Revenge Porn Law, Which Notoriously Didn’t Include Selfies, now Will*, WASH. POST (Aug. 27, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/08/27/californias-revenge-porn-law-which-notoriously-didnt-include-selfies-now-will/>.

#### 4. *Model State Law*

Mary Anne Franks, Associate Professor of Law at the University of Miami School of Law, suggests a law that could potentially resolve concerns regarding the severity of punishment for revenge porn offenders as well as the “selfie” dilemma posed above.<sup>168</sup> The suggested law reads as follows:

An actor may not knowingly disclose an image of another person who is identifiable from the image itself or information displayed in connection with the image and whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or is reckless with regard to whether that the depicted person has not consented to such disclosure [and under circumstances in which the actor knew that the depicted person had a reasonable expectation of privacy. A person who has consented to the disclosure of an image within the context of a confidential relationship retains a reasonable expectation of privacy with regard to disclosures beyond such a relationship.]<sup>169</sup>

Professor Franks includes a more narrow definition of “intimate parts” than the Delaware statute, defining such parts as “the naked genitals, pubic area, anus, or female post-pubescent nipple of the person.”<sup>170</sup> Franks’ model law also provides two exceptions: one that significantly excludes from liability those who make disclosures of involuntary pornographic images in the “public interest, including but not limited to the reporting of unlawful conduct, or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment[.]” and a second pertaining to “[i]mages involving voluntary exposure in public or commercial settings.”<sup>171</sup> Each of these exceptions aids in Franks’s quest to draft a narrow model law.

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168. See FRANKS, *supra* note 2, at 8.

169. *Id.* (alteration in original). Including the requirement that the victim had a “reasonable expectation” may be problematic because it “might create more ambiguity than it resolves, especially considering the doctrinal baggage of the term from Fourth Amendment jurisprudence.” *Id.* at 8 n.39.

170. *Id.* at 9.

171. *Id.*

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However, even though this model law includes a more narrowly drawn definition of “intimate parts” and holds exempt postings made for the “public interest,” it is still unsatisfactory. The most concerning problem arises from the use of “identifiable person” in the model law. Many revenge porn victims are victimized because others viewing their image can identify them.<sup>172</sup> However, there is no concrete information stating that a person has to be identifiable in an image to experience severe emotional distress from the non-consensual distribution of a private, sexual image.<sup>173</sup>

The inclusion of “identifiable person” in the model statute is also troubling because the term “identifiable” is in itself vague. Professor Franks’ statute is ambiguous as to who must be able to identify the subject of an involuntary pornographic image to render liability against the distributor.<sup>174</sup> To avoid such ambiguity, a model law including terminology requiring the victim be identifiable would benefit from defining the term as including personal identification made by the victim as well as identification made by others as to the victim’s identity.

A second and distinct issue is that the model law does not include any requirement of an intent to cause harm to the victim. Professor Franks argues that the intent to cause harm does not necessarily have to be included in any law targeting revenge porn.<sup>175</sup> Franks argues that including the “intent to cause” language leaves revenge porn legislation vulnerable to other constitutional challenges for “under-inclusiveness and viewpoint discrimination.”<sup>176</sup> If a state finds it necessary to include such language, Professor Franks suggests that the state employ an objective standard—“e.g., when a reasonable person would know or should have known that such disclosure would cause harm or

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172. *See id.* (citing statistics showing that 59% of victims reported their name included with their photo, which leaves 41% of victims unable to recover since they are not identifiable).

173. It is likely that the *knowledge* of having a nude image posted of oneself to the Internet, even if that image did not include identifying information such as the subject’s name, address, or contact information, would cause *severe* anxiety, distrust, and depression, which is damaging.

174. *See* FRANKS, *supra* note 2, at 8.

175. *See id.* at 6 (“[I]ntent to cause harm or distress language potentially *weakens* the constitutionality of nonconsensual pornography laws.”).

176. *Id.* at 7.

distress.”<sup>177</sup>

Professor Franks’ reasoning regarding “intent to cause harm or distress” language fails to address that this type of language creates a narrowly drawn law only applicable to those who distribute the images of others with the *intent* to cause serious emotional harm. Professor Franks notes that the ACLU, while asserting that laws prohibiting revenge porn must require an element of intent, has previously argued that the required element of intent in provisions of the Violence Against Women Reauthorization Act are unconstitutional.<sup>178</sup> Professor Franks cannot draw a distinction between stalking laws and revenge porn legislation and points out that the ACLU requires such language for revenge porn legislation but holds that the same language is unconstitutional in the realm of stalking legislation.<sup>179</sup> The “intent to cause harm” language, however, is what makes laws like California’s so close to standing up against strict scrutiny because the laws only apply to a select few—those who have the intent to cause actual harm to the victim.<sup>180</sup> This is how narrow tailoring is best achieved. Laws that can withstand strict scrutiny are those laws crafted so as to not create liability for a far greater population of those exercising protected speech than necessary to accomplish a state’s goal.

Porn is speech.<sup>181</sup> Revenge porn is not obscene under *Miller* and is therefore protected speech.<sup>182</sup> Content-based laws that seek to regulate or prohibit protected speech *must* satisfy strict scrutiny.<sup>183</sup> In order to satisfy strict scrutiny, a law prohibiting protected speech must be narrowly drawn.<sup>184</sup> Laws that are substantially overinclusive are unconstitutional.<sup>185</sup> States that

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177. *Id.* (internal quotation marks omitted).

178. *Id.* (referencing 18 U.S.C § 2261A (2013)). *See also*, Gabe Rottman, *New Expansion of Stalking Law Poses First Amendment Concerns*, AM. C.L. UNION (Mar. 12, 2013, 1:55 PM), <https://www.aclu.org/blog/new-expansion-stalking-law-poses-first-amendment-concerns?redirect=blog/free-speech/new-expansion-stalking-law-poses-first-amendment-concerns>.

179. *See* FRANKS, *supra* note 2, at 6.

180. *See* CAL. PENAL CODE ANN. § 647 (West 2013).

181. *See* discussion *supra* Section II.A.

182. *See* discussion *supra* Section II.B.

183. *See* discussion *supra* Section III.A.

184. *See* discussion *supra* Section III.B.

185. *See id.*

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include language requiring the intent to cause severe emotional distress and that the victim experience such distress are laws that are closer to withstanding strict scrutiny because the laws avoid the overinclusive nature that laws without such requirements pose.<sup>186</sup> These other laws, without narrowing language, fail strict scrutiny by creating liability for those engaged in constitutionally protected speech.<sup>187</sup>

## IV. EXISTING TORT LAW DOES NOT ALWAYS PROVIDE A VIABLE REMEDY FOR REVENGE PORN VICTIMS

There is an already-existing remedy available to victims of revenge pornography that does not impose criminal liability for expressing protected speech under the First Amendment—the tort system.<sup>188</sup> Although there are burdens in the civil tort system in terms of litigating an intentional or negligent infliction of emotion distress case, there are also benefits.<sup>189</sup> In tort, damages are awarded to a person in the form of compensation for pain and suffering.<sup>190</sup> Damages in tort law go to the victim rather than the fines imposed by criminal sanctions, which often go exclusively to the state.<sup>191</sup> Civil remedies, however, are proving workable on few occasions.<sup>192</sup>

For example, a jury in Texas awarded a revenge porn victim \$500,000 in compensation.<sup>193</sup> In addition, a jury in California

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186. See Halloran, *supra* note 29.

187. See *id.*

188. The tort system focuses on the damage done to the victim but does not attempt to prohibit or suppress protected speech.

189. See Brian Rogers, *Jury Awards \$500,000 in 'Revenge Porn' Lawsuit*, HOUS. CHRON. (Feb. 21, 2014, 10:33 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php?t=d1101bae21>. A woman was awarded \$500,000 in damages after her ex-boyfriend posted a video of a sexually explicit Skype conversation he had recorded whilst the couple was dating. See *id.* The case was argued based on tort law; specifically, intentional infliction of emotional distress. See *id.*

190. RESTATEMENT (SECOND) OF TORTS § 903 (1979).

191. See DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 288 (2000) (“Crimes have a high standard of proof, require intent, are guaranteed a jury trial, have punishments often much higher than the damage done, pay fines to the state rather than the victim, and so on.”).

192. See Rogers, *supra* note 189.

193. See *id.*

thought it appropriate to award \$250,000 to a revenge porn victim.<sup>194</sup> However, skeptics of the tort system worry these types of awards will be few and far between.<sup>195</sup> Proving that the distributor of the image had the intent to cause serious emotional distress and that the victim suffered actual emotional distress are two required elements of the tort of intentional infliction of emotional distress (“IIED”) that are very difficult to prove.<sup>196</sup> However, University of Santa Clara law professor and legal blogger Eric Goldman says the tort system, and specifically the tort of IIED, was designed for harms caused by acts such as revenge porn.<sup>197</sup> He argues that victims of revenge porn would have a much easier time proving the requisite elements of an IIED claim than would others bringing an IIED suit not based on revenge porn.<sup>198</sup> Still, IIED is not the only civil remedy afforded to victims. Victims may also seek claims on the basis of defamation, negligence, negligent infliction of emotional distress, and copyright infringement.<sup>199</sup>

One current remedy available to revenge porn victims is a claim of defamation. In order to succeed on a defamation claim, a victim must prove that the defendant made:

- (1) a false and defamatory statement concerning the victim;
- (2) by an unprivileged publication to a third party;
- (3) with fault amounting at least to negligence on the part of the publisher; and
- (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.<sup>200</sup>

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194. *See id.*

195. *See id.*

196. *See id.*

197. *Id.* (“When someone tries to hurt another person by publishing nude recordings, that seems like what a tort like intentional infliction of emotional distress was built for,” he said. “Seeing a ruling like this (\$500,000 verdict) suggests that maybe the system is working pretty well at fixing a problem.”) (quoting statement of Eric Goldman, Law Professor at University of Santa Clara).

198. *Id.*

199. *See id.*; *see also* Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC (Feb. 4, 2014), <http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/>.

200. RESTATEMENT (SECOND) OF TORTS § 558 (1979).

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The first element of a defamation suit may prove the most difficult for a victim to succeed on. In order to bring a claim for defamation, the victim must show that a defamatory statement was made about the victim.<sup>201</sup> A Hawaiian district court determined that the involuntary publication of another's sexually graphic image could constitute a defamatory statement.<sup>202</sup> The court held that a sexually explicit photograph accompanied by identifying information constitutes a defamatory statement for purposes of such a defamation action.<sup>203</sup> This decision however aspirational, is not binding on other courts and therefore may not be a viable remedy for all victims in all situations.

As noted above, another available route of recovery for revenge porn victims is the tort claim of IIED. In order to succeed on an IIED claim, a plaintiff must show that (1) the defendant intended to cause severe emotional harm or acted with reckless disregard for whether such harm would occur; (2) by acting in an extreme or outrageous way; (3) which in fact does cause; (4) actual severe emotional harm to the plaintiff.<sup>204</sup> As with defamation claims, victims face many hurdles to prevail on IIED claims.

When looking at the elements of an IIED claim, it seems relatively easy for a claim to be brought, and won, by a victim of revenge porn because in cases of revenge porn, many victims experience actual and serious emotional harm due to the reckless conduct of another. However, IIED claims on the whole are notoriously difficult to prove in court. Historically, IIED plaintiffs have difficulty proving the "extreme and outrageous" conduct element of an IIED claim because the standard for what constitutes such conduct must rise to the level of "atrocious and utterly intolerable in a civilized community."<sup>205</sup> In the revenge porn context, it is also difficult for the plaintiff to prove that he or she has experienced actual harm because many victims decide

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201. *Id.* § 558(1); *see also id.* § 577 (stating that "defamatory statement" may be construed to include any published act through which the defamatory information is intentionally or negligently distributed to a third party).

202. *Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2118270, at \*9 (D. Haw. May 2, 2011) (holding that nude photographs posted to 11 websites without the victim's permission acted as a defamatory statement).

203. *Id.*

204. RESTATEMENT (SECOND) OF TORTS § 46 (1979).

205. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1979), cmt. d.

either not to seek mental health counseling or experience any social consequences.<sup>206</sup> If the victim sees the image and files suit before any harm has occurred, she cannot prevail on an IIED claim. The name says it all—intentional infliction of emotional *distress*—and therefore, without the realization of actual harm, sheer embarrassment is not enough to satisfy an IIED claim because statutes require a plaintiff to experience real harm before bringing a claim.<sup>207</sup>

Just as important as the actual harm caused to the plaintiff is the conduct that caused the harm. To succeed on the claim, an IIED plaintiff must prove that the conduct, which caused her actual harm, was “outrageous and extreme.”<sup>208</sup> In *Taylor v. Franco*, a district court determined that the posting of the victim’s nude photographs to eleven websites was “clearly outrageous and beyond the bounds usually tolerated by a decent society.”<sup>209</sup> Although the court in *Taylor* determined the posting of nude images without consent from the subject accompanied by identifying information about the subject constituted “extreme and outrageous” conduct when the images and information were posted to eleven different websites, the court does not address if the same outcome would have been reached if the images and information were only posted to one website.<sup>210</sup>

Although it is difficult to succeed on the aforementioned tort

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206. See FRANKS, *supra* note 2, at 10. Of those surveyed by the Cyber Civil Rights Initiative, 93% reported suffering “significant emotional distress,” however, only 42% of those surveyed reported seeking out psychological counseling, 34% reported family troubles as a consequence of the distribution of their image, and 30% reported being stalked off of the Internet. *Id.* For those who only experience mere embarrassment or awkward situations due to the publication of private images, proving actual harm will be incredibly difficult. For example, even though 93% of the victims surveyed suffered severe emotional distress, less than half reporting this condition sought counseling. *Id.* This brings doubt to the level of severity of emotional distress the victim actually suffered.

207. See RESTATEMENT (SECOND) OF TORTS § 46.

208. *Id.*

209. *Taylor*, 2011 WL 2118270, at \*1. The court reasoned that the intentional publication of an ex’s sexually explicit photographs, accompanied by identifying information, to at least eleven adult content websites would make “average members of [the] community . . . exclaim, ‘Outrageous!’” *Id.* at \*9 (quoting *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1235 (D. Haw. 2010)).

210. *Id.*

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claims, it is certainly not impossible.<sup>211</sup> Revenge porn victims who bring notoriously difficult-to-prove lawsuits have done just that.<sup>212</sup> And, although it is argued that many defendants in such cases will not be able to make damage payments in any significant amount, this should not be a reason not to bring a civil claim.<sup>213</sup> Furthermore, it can be argued that bringing a civil claim, even with all of the difficulties surrounding proving the elements of the claim, is still more-plaintiff friendly than achieving justice as a victim in the criminal system.<sup>214</sup>

In the criminal system, the standard of proof is far higher than in the civil system.<sup>215</sup> As stated before, the criminal system is also less victim-friendly in that any fines imposed on the defendant, if convicted, do not necessarily go to the victim, but rather to the state, where revenge porn victims are not able to obtain relief from victims' funds.<sup>216</sup> What the criminal system would do, however, is alert the nation that revenge porn is truly a real problem that needs to be dealt with. It would bring more attention to the stories of victim's and hopefully change the conversation surrounding the revenge porn debate.

## CONCLUSION

The phenomenon of disgruntled ex-partners seeking revenge after a break-up is not a new occurrence. Long before these men and women flocked to the Internet to expose the sexual images of the people they once cared for, "slut shaming" was occurring on and off the Internet.<sup>217</sup> Victims harmed by the acts of these

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211. *Id.* See also Rogers, *supra* note 189.

212. *Id.*

213. See FRIEDMAN, *supra* note 191, at 282 (discussing that some defendants found liable for torts are judgment proof and therefore unable to pay money damages).

214. *Cf. id.*

215. For a criminal conviction, the state must prove the culpability of the defendant beyond a reasonable doubt. See, e.g., *id.* at 289.

216. See *id.* at 290.

217. See Leora Tanenbaum, *Slut-Shaming Undermines Women*, BOS. GLOBE (Feb. 20, 2015), <https://www.bostonglobe.com/opinion/2015/02/20/slut-shaming-undermines-women/4dUdzDODYT2pNnldPS9pWM/story.html>.

Here's what campus sexual assault within this culture of slut-shaming looks like: When Jamie was a first-year student, her resident advisor created a sign for Jamie's door identifying her not by name but by a synonym for "slut." The RA thought that this was

malicious crusaders currently have different routes of redress—yet each possible route comes with different problems of its own. If a victim chooses to travel down the road of the tort claim of Intentional Infliction of Emotional Distress, he or she may find it almost impossible to prove the claims of the tort or that the defendant is insolvent. If, instead, the victim is able to proceed under an available criminal law, she may still experience a bumpy road on her healing journey.

No matter which road a victim chooses to travel down, having these options is critical for revenge porn victims. The unsettling reality, however, is that these legal options are not acting as a deterrent to those hosting revenge pornography websites and those choosing to publish images of others to those sites. Whether a federal law criminalizing involuntary pornography distribution in order to seek revenge would act as a deterrent is yet to be seen.

Because the current available remedies to victims fail as a deterrent, it is rationally presumed that a federal law will also fail. In order to remedy the expanding problem of revenge porn, it is advisable to tackle the problem before it starts—that being educating the public and addressing the grave consequences of revenge pornography through the use of the media so readily available to those partaking in the revenge porn phenomenon—the Internet, social media, and the press.

Laws do not always change the conduct they seek to prevent and punish. Although it is admirable that the law tries to have this effect, it does not always succeed. Therefore, in this instance, the conduct of those causing the harm in revenge porn cases must be addressed and remedied at the societal level. When there is no outlet for these images, no audience for these images, and no desire to post these images, that is when the images will cease to cause harm to victims.<sup>218</sup> Until then, however, victims must

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funny and acceptable because Jamie herself expressed pride that she was sexually active. Jamie took down the sign immediately, but her RA put up a new one. One night, a classmate pushed open her door, forced her on the bed, and raped her. “He must have thought, ‘Well, she sleeps around all the time, so she’ll say yes to me,’” she told me.

*Id.* (quoting statement of an anonymous source).

218. See FRANKS, *supra* note 2. Victims, family and friends of victims, and advocates of victims need to speak up about their experiences with revenge porn, even if done anonymously. The world will not recognize the true nature and vastness of this issue until its victims and those closest to

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continue to give voice to their stories, to draw attention to the issue of revenge pornography, and hope for a solution that legally toes the line of affording protection to victims while taking into consideration the very real First Amendment implications of revenge porn.

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them begin to speak up and provide evidence of its occurrence. Until we engage in a worldwide conversation about revenge porn and how to put an end to it, it will continue to thrive on the Internet and torment every aspect of the lives of victims that fall into its wake.