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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

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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

BENJAMIN A. GENN*

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I. INTRODUCTION

Twenty-one percent of teenage girls and thirty-nine percent of teenage boys have sent sexually suggestive content to someone they wanted to have a sexual relationship with or wanted to date.[1] Moreover, eighty-three percent of young adult women and seventy-five percent of young adult men have sent such material to a boyfriend or girlfriend.[2] With the breadth of Internet-enabled technology available today, widespread dissemination of words and pictures has never been faster or easier.[3] As technology makes

1. NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 2 (2008), *available at* http://thenationalcampaign.org/sites/default/files/resource-primary-download/sex_and_tech_summary.pdf (suggesting that an abundance of "sexting" material could easily be made publicly available).

2. *Id.*

3. *See* Nitke v. Gonzales, 413 F. Supp. 2d 262, 265 (S.D.N.Y. 2005) (explaining that the Internet is a network of interconnected private and public devices linked for

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it increasingly easier to send and receive information—via smartphones, online businesses, and social media—it has also become easier to distribute sexually explicit photographs of an individual without his or her consent.[4]

Although the First Amendment to the United States Constitution protects an individual citizen's right to exercise free speech, the Supreme Court has ruled that obscenity is not protected speech and, subsequently, has established a test to classify obscene material.[5] Despite this ruling, legal ramifications for revenge pornography—a form of sexual assault involving the unauthorized distribution on the Internet of intimate photographs and videos of a nude individual posing or engaging in various sexual activities—are absent from federal law, such that the First Amendment currently clothes perpetrators of revenge pornography with impunity.[6] However, the common law right to privacy encompasses potential causes of action for victims of revenge pornography.[7]

This Comment argues that revenge pornography is not protected by the First Amendment and, further, is subject to privacy laws.[8] Part II of this Comment summarizes the history of the First Amendment and its obscenity doctrine, as well as privacy laws that pertain to revenge pornography on the Internet.[9] Part III argues that revenge pornography, unlike permissible forms of pornography, is a form of obscenity under *Miller v. California* and

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communications and data-sharing purposes), *aff'd*, Nitke v. Gonzales, 547 U.S. 1015 (2006).

4. *See* Reno v. ACLU, 521 U.S. 844, 887-88, 889-90 (1997) (O'Connor, J., concurring) (remarking that similar to zoning laws in general, such as a bouncer restricting access to a nightclub, adult zoning laws on the Internet should be permissible to protect members of society from harm).

5. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); *see also* Miller v. California, 413 U.S. 15, 23-24 (1973) (establishing the modern obscenity test and holding that obscene materials are not protected by the First Amendment because obscenity is not a compelling governmental interest).

6. *See* 18 U.S.C. § 1461 (2014) (restricting the dissemination of obscene materials through various means, but not including public disclosure of explicit images without consent). *See generally* END REVENGE PORN, http://www.endrevengeporn.org (last visited July 26, 2014) (remarking that revenge pornography is usually posted by a contemptuous ex-partner as a means of reprisal after a relationship has ended bitterly).

7. *See* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) (examining the right to privacy and its incorporation of several causes of action, including intrusion of solitude, public disclosure of private facts, publicly placing one in false light in the public eye, and appropriation of the plaintiff's name or likeness).

8. *See infra* Part III.

9. *See infra* Part II (explaining the evolution and the application to the Internet of the obscenity legal doctrine and discussing alternative remedies for revenge pornography victims under privacy law).

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therefore is not entitled to First Amendment protection.[10] Additionally, Part III contends that there are several common law causes of action for revenge pornography under right to privacy claims.[11] Part IV urges the interpretation of revenge pornography as obscene under the current First Amendment obscenity doctrine and recommends the enactment of state and federal laws banning revenge pornography because of its injurious effects on individuals and society.[12] Part V concludes that because revenge pornography satisfies the *Miller* obscenity test and postings on the Internet are considered interstate commerce, Congress and state legislatures should revise current obscenity statutes or create new ones; further, the federal and state courts should interpret these laws so as to provide sufficient remedies for the harm caused by the dissemination of revenge pornography and to make clear that such speech is not encapsulated in the right to free speech.[13]

II. BACKGROUND

A. The First Amendment to the United States Constitution

1. Obscenity and the Right to Free Speech

The First Amendment to the United States Constitution provides that citizens, not the government, have the absolute right to propagate a multitude of ideas, regardless of whether these ideas are contrary to the government's beliefs.[14] However, in *Breard v. City of Alexandria*, the Court held that all types and all forms of speech are not necessarily protected under the First Amendment.[15] For example, the Court in *Miller v. California* held that obscenity and obscene speech are exceptions to

10. *See infra* Part III (arguing that revenge pornography, under the current obscenity doctrine, aligns with the legal definition of obscenity and is constitutionally unprotected speech).

11. *See infra* Part III (asserting that even if revenge pornography were not deemed obscene, privacy laws create potentially viable causes of action for a victim).

12. *See infra* Part IV (recommending federal and state policy changes consistent with obscenity and revenge pornography as constitutionally unprotected speech).

13. *See infra* Part V (concluding that because revenge pornography is obscene speech unprotected by the First Amendment and is subject to several privacy laws, statutes prohibiting it are vital to protect society and to further governmental interests).

14. *See* U.S. CONST. amend. I (safeguarding the right to free speech because the government does not have the power to moderate speech based on its purported messages or ideas).

15. *See* Breard v. City of Alexandria, 341 U.S. 622, 642 (1951) (clarifying that when there is a greater governmental interest at issue, the First and Fourteenth Amendment protections are not absolute guarantees).

constitutional protection.[16] Obscenity tests serve as a method of determining whether certain materials involving sexual conduct, as forms of expression and speech, are permissible and, thus, protected by the Constitution's right to free speech guarantee.[17] Notwithstanding, the Supreme Court has struggled to formulate and apply concrete standards when addressing "the intractable obscenity problem."[18]

Still, the Court in *Roth v. United States* affirmed that obscenity is not constitutionally protected speech and formulated a since-overruled test: Material is considered obscene if, as a whole, its predominant appeal is to the prurient interest (i.e. a shameful or morbid interest in nudity, sex, or excretion) and if it goes substantially beyond customary sensible limits in the description or representation of the matter.[19] In applying this test, the Court explicitly rejected that the First Amendment protected obscene speech and, consequently, sustained a conviction under a federal statute punishing the petitioner for unsolicited mailing of obscene, lewd, lascivious, or filthy circulars and advertising.[20] Because the obscene circulars and advertising depicted individuals engaging in sexual activities and were sent to solicit sales from unwilling recipients of such material, they were intended to appeal to a shameful or morbid interest in nudity, sex, or excretion that went substantially beyond the customary sensible limits in their description and representation.[21]

Subsequently, the Court in *Stanley v. Georgia* unanimously held that while obscenity is unprotected under the First Amendment, the government could not punish mere private possession of obscene material.[22] However,

16. *See* Miller v. California, 413 U.S. 15, 34 (1973) (holding that objectionable words and depictions that are offensive to the morals of society may not be protected speech because they encroach upon more important societal interests).

17. *See id.* at 23-24 (confining the obscenity test to material that involves sexual conduct).

18. *Id.* at 16 (noting a substantial increase of unregulated obscene material proliferating within the public domain).

19. *See* Roth v. United States, 354 U.S. 476, 487 n.20 (1957) (defining prurient interest as having a tendency to excite lustful thoughts); *see also* BLACK'S LAW DICTIONARY 1182, 1279 (9th ed. 2010) (defining obscene as extremely offensive and grossly repugnant to existing community standards of morality and decency, and defining pornography as material depicting sexual activity or erotic behavior that provokes sexual excitement).

20. *See Roth*, 354 U.S. at 484-85, 491, 494 (stating that these depictions tend to stir sexual impulses and lead to sexually impure thoughts).

21. *See id.* at 494 (Warren, J., concurring) (noting that in going beyond customary sensible limits, the appellant intended for the prurient and obscene materials to corrupt and debauch the minds and morals of its recipients).

22. *See* Stanley v. Georgia, 394 U.S. 557, 567-68 (1969) (touting a right to privacy such that unwanted government incursion into private possession of obscene material is

the Court expounded that the government can still ban public distribution of such material.[23] A plurality of the Court in *Memoirs v. Attorney General of Massachusetts* added an additional element to the *Roth* obscenity test: When considered as a whole, the work must be utterly without redeeming social value to be considered obscene and, accordingly, unprotected by the Constitution.[24] The Court held that the published memoir at issue was protected speech, regardless of whether it appealed to the prurient interest and was patently offensive, because it had some redeeming value.[25] Using the obscenity test delineated in *Roth*, the Court in *Jacobellis v. Ohio* held that an explicit love scene during the last reel of the film at issue was not hard-core pornography because it was so fragmented and fleeting that only a censorship alert would apprise the audience that something questionable was occurring.[26] In addition, the film was held not to be utterly without redeeming social value because it received favorable reviews in various national publications.[27]

In the subsequent 1973 seminal case *Miller v. California*, the Supreme Court cemented obscenity as unprotected speech by upholding a conviction against the petitioner for mailing adult book advertisements containing pictures and drawings of men and women performing sexual acts with visible genitalia.[28] The *Miller* Court explicitly rejected the "utterly without redeeming social value" prong set forth in *Memoirs* and rebranded the current test, which considers whether: (1) the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes sexual conduct in a patently offensive way as defined by applicable state

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unjustifiable).

23. *See id.* (stating that obscene material is subject to restriction once it enters the public realm because it impedes on the governmental interest of protecting society from harm).

24. *See* Memoirs v. Att'y Gen. of Mass., 383 U.S. 413, 418-19 (1966) (concluding that a single explicit scene does not establish the sole value of a piece of art when it advocates ideas or has social importance).

25. *See id.* at 419-20 (stating that the work will have social value in the hands of those who publish or distribute it on the basis of that value, and therefore, with all possible uses in mind, the book is not utterly without redeeming social value).

26. *See* Jacobellis v. Ohio, 378 U.S. 184, 186-87, 197 (1964) (Goldberg, J., concurring) (remarking that the explicit scene was not obscene because its ephemeral nature did not go beyond customary limits of sensibilities).

27. *See id.* at 196 (inferring that the film would not offend the sensibilities of the majority based on a national standpoint of customary sensible limits).

28. *See* Miller v. California, 413 U.S. 15, 16-17 (1973) (upholding the lower court's conviction because the brochures were prurient, patently offensive, and lacked serious literary, artistic, political, or scientific value).

law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value in accordance with a national standard.[29]

Prurient, patently offensive materials illustrating or describing sexual conduct must have serious, literary, artistic, political, or scientific value to comport with the government's interest in protecting society from harm and thereby benefit from First Amendment protection.[30] For example, the Court in *Miller* expressed that medical textbooks, with explicit depictions and descriptions of human anatomy, have societal value as educational tools and, consequently, are not considered obscene under the First Amendment.[31] Thus, censoring obscene material does not discount the right to free speech because the government's interest in a marketplace of ideas outweighs any value derived from the commercial sale of obscene material.[32] Because of the *Miller* obscenity test, a prurient, patently offensive work that lacks serious literary, artistic, political, or scientific value as a whole will be deemed obscene and unprotected speech under the First Amendment.[33]

2. Pornography as Speech

Although obscene material is a form of constitutionally unprotected speech, pornography depicting mere nudity is not obscene and, therefore, is entitled to First Amendment protection.[34] In *Jenkins v. Georgia*, the Court concluded that a film with scenes of sexual conduct did not appeal to the prurient interest nor constitute patently offensive material, but did have

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29. *See id.* at 24-25 (advancing that a statute could regulate patently offensive representations or descriptions of (1) ultimate sexual acts and (2) masturbation, excretory functions, and lewd exhibition of the genitals).

30. *See id.* at 26, 30 (stating that the diversity of viewpoints throughout the United States is used to determine the national societal value of a work under the third prong, yet, the first two prongs of the test are based on community standards because the country is too big and too diverse for a single formula to be applicable to all fifty states).

31. *See id.* (contending that these types of textbooks could be considered prurient and patently offensive, yet have value in serving the governmental interest of educating medical professionals).

32. *See id.* at 35-36 (acknowledging a lack of empirical evidence proclaiming that stern censorship of public distribution and display of obscene material represses citizens' expressions of serious literary, artistic, political, or scientific ideas).

33. *See id.* at 30 (remarking that lay jurors have generally been permitted to draw from the standards of their own community because requiring a national standard would be an exercise in futility).

34. The arguments in this Comment are limited to revenge pornography. *See* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (finding that mere nudity is not obscene because nudity alone does not satisfy the standards set out in *Miller*).

social value.[35] The film at issue in *Jenkins* did not visibly display genitalia, the actors' bodies were not emphasized by the camera's scrutiny, and neither the entire film nor the focal points of the film consisted of sexually explicit scenes.[36] In *Erznoznik v. City of Jacksonville*, the Supreme Court held a city ordinance prohibiting drive-in theatres from showing films with nudity invalid because the ordinance over-inclusively targeted films solely on the basis of nudity.[37] The Court did not analyze the work under the *Miller* obscenity test, but instead stated that, absent an intolerable invasion of substantial privacy interests, the government may not halt discourse exclusively to protect others from hearing it.[38] Thus, when not considered obscene under the standards of *Miller*, mere nudity as a form of pornography, including depictions of nude bathers on a beach, remains a form of constitutionally protected speech.[39]

Additionally, in *Nitke v. Gonzales*, the United States District Court for the Southern District of New York held that the right to free speech, including certain forms of pornography, has subsequently attached to speech on the Internet; however, obscenity laws are still applicable to Internet transmissions.[40] The forms of pornography at issue in that case were non-mainstream sexual activities, including sadomasochism.[41] As such, the Court in *Reno v. American Civil Liberties Union* struck down the anti-indecency sections of the Communications Decency Act of 1996 ("CDA") as an overbroad suppression of speech, leaving in place § 230,

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35. *See id.* (confirming that nothing in the film conforms to the patently offensive examples expressed in *Miller*).

36. *See id.* (stating that a work of nudity alone is not lewd or obscene because, taken as a whole, it could still hold value even if construed as prurient or patently offensive).

37. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975) (declaring that speech that is not obscene cannot be restricted only because the legislature deems it incompatible with governmental interests).

38. *See id.* at 209-10 (reasoning that the burden is on the viewer to avoid a steady attack of perceived offensiveness on his sensibilities by averting his eyes).

39. *See* Miller v. California, 413 U.S. 15, 26 (1973) (remarking that governmental interests are furthered by works of value, such as those that substantially educate the public).

40. *See* Nitke v. Gonzales, 413 F. Supp. 2d 262, 265 (S.D.N.Y. 2005) (reasoning that Congress may prevent the channels of interstate commerce, including the Internet—which links devices as a means of communicative speech and is where revenge pornography is disseminated—from being used to spread physical, moral, or economic evils), *aff'd*, Nitke v. Gonzales, 547 U.S. 1015 (2006).

41. *See id.* at 264, 270 (noting that depictions of these non-mainstream acts violate some contemporary standards of decency and may be subject to prosecution in multiple jurisdictions under the Communications Decency Act).

which provides legal immunity for Internet service providers.[42] Yet, in *Ashcroft v. American Civil Liberties Union*, the Court upheld a law that attempted to restrict minors' access to obscene materials on the Internet.[43] The Court declared that because community standards are used to determine obscene materials under the *Miller* obscenity test, a publisher sending obscene material to a specific community via the Internet is responsible for complying with the contemporary standards of that community.[44] Although the right to free speech is inclusive of certain forms of pornography on the Internet, restrictions on other forms, such as obscene revenge pornography, are permissible.[45]

B. Privacy Law

The right to privacy is not expressly prescribed in the United States Constitution.[46] Justices Warren and Brandeis authored an article in 1890 that acknowledged a right to privacy arising out of a concern for public exposure of private information through the increasing use of new technologies; however, the right protects neither affairs deemed legitimate public interests nor previously publicized facts.[47] The right to privacy protects written or artistically expressed thoughts, sentiments, and emotions of individuals through an implied contract, a duty of confidence, and a duty of trust.[48] Specifically, under a duty of trust, an individual trusts that

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42. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) (stating that Internet service providers are not categorized as publishers and, therefore, are not liable for the actions or words of third parties on their websites).

43. *See* Ashcroft v. ACLU, 535 U.S. 564, 569-70 (2002) (distinguishing the constitutional Child Online Protection Act ("COPA") from the overly-broad CDA because COPA only covers (1) material posted on the Internet, (2) commercial communications, and (3) a limited type of material harmful to minors).

44. *See id.* at 583 (stating that if a publisher seeks to communicate with only those in an avant-garde culture, it must use a medium that allows it to target the release of material into that culture to conform to contemporary community standards).

45. *See* Miller v. California, 413 U.S. 15, 25 (1973) (extrapolating that a state may protect society from harm by regulating patently offensive representations or descriptions, which could encompass revenge pornography).

46. *See* Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967) (noting that the right to privacy is recognized judicially or statutorily in thirty-four states and Washington, D.C.).

47. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96, 216 (1890) (stating that the prevention of private or compromising information being revealed to the public is an important societal interest, such that matters concerning an individual's private life, habits, acts, and relations that are not linked to any public act or to his or her competence for public office are not legitimate public interests).

48. *See id.* at 199 (acknowledging that personal diaries and personal letters warrant

another will not publish, without consent, writings, pictures, or art relating to the individual's private life.[49]

Furthermore, William Prosser's *Privacy* detailed modern privacy law and the formation of four separate tort claims subsequently codified in the Restatement (Second) of Torts: (1) intrusion of solitude, (2) public disclosure of private facts, (3) placing a person in false light in the public eye, and (4) appropriation of name or likeness.[50]

1. Intrusion of Solitude

For an intrusion of solitude claim to be valid, the court in *Melvin v. Burling* held that a plaintiff must prove there was an unauthorized physical or electronic intrusion into his solitude, the intrusion was objectionable or highly offensive to a reasonable person, the matter intruded upon was private, and the intrusion caused anguish and suffering.[51] In *Melvin*, the defendant intentionally ordered merchandise in the plaintiffs' names to be sent to the plaintiffs' home without their consent, which was then followed by creditors' demands for the plaintiffs to pay for the merchandise.[52] The court held that this type of activity violated the plaintiffs' expectation of privacy and therefore was a highly offensive private intrusion that necessarily caused anguish.[53] In *Cason v. Baskin*, an intrusion of solitude claim was held to include ordinary, not hypersensitive, sensibilities of the plaintiff's life where he or she has a reasonable expectation of privacy.[54] There, the Supreme Court of Florida held that an unauthorized publication of the plaintiff's life history within a biological narrative violated the plaintiff's expected level of privacy because the lack of consent to the non-newsworthy publication could cause anguish and be deemed highly

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protection from publication).

49. *See id.* at 209 (stating that the principle of privacy rests on the right to a possessory interest in one's personal property).

50. *See* Prosser, *supra* note 7, at 389 (noting that these privacy torts have nothing in common except an indeterminate "right to be left alone").

51. *See* Melvin v. Burling, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986) (considering the manner in which the defendant obtained the information, not what is gathered from the information, as the determining factor).

52. *See id.* at 1012 (acknowledging that the plaintiffs' complaint was adequate to defeat the defendant's motion to dismiss because it satisfied the four elements of the claim).

53. *See id.* at 1013-14 (noting that the difficulty of returning merchandise and dealing with irate creditors is objectionable and, moreover, is sufficient to warrant anguish and suffering).

54. *See* Cason v. Baskin, 20 So. 2d 243, 251 (Fla. 1944) (stating that the right to privacy does not prohibit the publication of a matter which is of legitimate public interest).

offensive to the sensibilities of a reasonable person.[55]

In *Snyder v. Phelps*, the Supreme Court rejected a claim for intrusion of solitude because speech on a public sidewalk regarding matters of public concern, which in that case included picket signs stating, "Thank God for Dead Soldiers," "Fags Doom Nations," and "America is Doomed," is protected, even if found to be outrageous.[56] The Court held that the plaintiff was not part of a captive audience because of the public nature and the public location of the speech; hence, to ensure public debate is not stifled, speech concerning public issues in public places, although possibly hurtful, must be protected.[57] Where a highly offensive unauthorized intrusion of a private matter causes anguish or suffering, a viable claim for intrusion of solitude will lie.[58]

2. Public Disclosure of Private Facts

According to *Peterson v. Moldofsky*, the United States District Court for the District of Kansas held that a cause of action for public disclosure of private facts is valid when a defendant publishes information that is not known to the public, is not of newsworthy or legitimate concern to the public, is personal such that its disclosure would offend a reasonable person, and is widely communicated to the public.[59] In *Peterson*, a genuine issue of material fact existed where the defendant—who previously had sexual encounters with the plaintiff—photographed and videotaped the plaintiff engaging in sexual activities with two other individuals then emailed these photographs to the plaintiff's mother, ex-husband, ex-in laws, current boyfriend, boss, and coworkers.[60]

As elaborated by the Court of Appeals of Georgia in *Zieve v. Hairston*,

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55. *See id.* at 244-45, 253 (considering that a claim for intrusion will lie where the informational aspect of the release of information is secondary).

56. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1219-20 (2011) (observing that the picketers stayed one thousand feet away from the funeral, which was far enough away so as not to disturb it or intrude upon the plaintiff's expectation of privacy).

57. *See id.* at 1220 (remarking that the time and place of the speech did not alter its public and protected nature).

58. *See Melvin*, 490 N.E.2d at 1013-14 (inferring that this claim for intrusion of solitude should stand because there are circumstances in which privacy, as a sensitive and necessary human value, must enjoy the protection of the law).

59. *See* Peterson v. Moldofsky, No. 07-2603-EFM, 2009 U.S. Dist. LEXIS 90633, at *16 (D. Kan. Sept. 29, 2009) (stating that a matter is publicized when it is reported to the public at large or to enough people that it is substantially certain to become public knowledge).

60. *See id.* at *1-2 (observing that sexual activity of an individual is a personal, private, and non-newsworthy event, such that its wide dissemination to the public, which was the material fact at issue, would offend a reasonable person).

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for a fact to be deemed private, the plaintiff must have expected that fact to remain private, and society must be willing to accept this expectation as reasonable.[61] In *Zieve*, the court concluded that a jury could have found the television advertisements—which disclosed, against the plaintiff's will, the plaintiff's hair replacement treatments that were intended to remain private knowledge—were offensive and objectionable to a reasonable person of ordinary sensibilities.[62] In *Snyder v. Phelps*, the plaintiff's claim for public disclosure of private facts was dismissed because the speech at issue involved picketing on public matters in a public place such that no private facts of the plaintiff were disclosed to the public.[63]

3. False Light in the Public Eye

The Supreme Court in *Cantrell v. Forest City Publishing Company* articulated that to prove a claim of false light, a plaintiff must show that the published facts that allegedly render a false impression of the plaintiff were made by the defendant knowing of their falsity or in reckless disregard for the truth, the defendant distributed the publication to a reasonable number of people, and the publication would be objectionable to a reasonable person under the circumstances.[64] According to *Peterson v. Moldofsky*, a reasonable number of people can consist of the public at large or as few as five people.[65] Although commercial publication is not required, the Court in *Cantrell* held that because knowingly publishing falsehoods of another could be deemed inherently objectionable, the respondent depicted the petitioner in a false light in the public eye by reporting several inaccuracies and false statements of the petitioner's mental state and general well-being

61. *See* Zieve v. Hairston, 598 S.E.2d 25, 30 (Ga. Ct. App. 2004) (remarking that although plaintiffs cannot reasonably expect facts contained in the public record to be private, offensiveness can nonetheless be found when these facts were originally disclosed without permission).

62. *See id.* at 29 (noting that the plaintiff requested the advertisements not to be shown at all, and if they were shown, not to be shown within five hundred miles of his hometown).

63. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (reasoning that the picketing did not intrude on the plaintiff's reasonable expectation of privacy).

64. *See* Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 249-50, 252-53 (1974) (stating that calculated falsehoods are sufficient to warrant liability for placing the plaintiff in a false light because a claim of false light focuses on the defendant's knowing or reckless disregard of the plaintiff's privacy and not necessarily on the truth or falsity of the material); *see also* Prosser, *supra* note 7, at 400.

65. *See* Peterson v. Moldofsky, No. 07-2603-EFM, 2009 U.S. Dist. LEXIS 90633, at *18 (D. Kan. Sept. 29, 2009) (holding that speech is publicized faster on the Internet because the Internet enables users to quickly surmount barriers of traditional communication).

from a fabricated "follow-up" interview when, in fact, the petitioner was only present at the initial interview.[66]

4. Appropriation of Name or Likeness

Under a claim of appropriation of one's name or likeness, a plaintiff must show his or her name or likeness, including photographs or portraits, was used without authorization by the defendant for commercial benefit.[67] In *Montana v. San Jose Mercury News*—where the defendant published poster renditions of a National Football League quarterback who recently won the Super Bowl championship—the Sixth District Court of Appeal of California held that the right to use one's own name or likeness for his or her own benefit is violated when his or her name or likeness is used for commercial benefit by a third party lacking authorization.[68] Yet, this rule was inapplicable to the plaintiff in *Montana* because he was a public figure involved in matters of public concern, namely winning a recent national sports championship.[69] In *Allen v. National Video*, a statutory right to privacy was held to encompass the right to publicity in one's own name or likeness.[70] There, the United States District Court for the Southern District of New York acknowledged that the defendant used a look-a-like of the plaintiff to advertise commercial services without the permission of the plaintiff; however, the plaintiff could not make out a valid claim of appropriation of one's name or likeness because, in that jurisdiction, using a look-a-like did not qualify as a portrait or picture of the plaintiff.[71]

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66. *See Cantrell*, 419 U.S. at 247-48, 252-53 (noting that these facts reveal a publication of known falsehoods about the plaintiff that falsely portrays the plaintiff to the public and is damaging to the plaintiff's reputation).

67. *See* Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 641-42 (Ct. App. 1995) (clarifying that a constitutional right to reproduce information originally exempted newsworthy information of public interest from a claim of appropriation).

68. *See id.* at 640-41.

69. *See id.* at 641-42 (recognizing that while private individuals do retain the right of publicity against the use of his or her own name and likeness in the media, a public figure does not because that figure is necessarily newsworthy and of public interest).

70. *See* Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 621 (S.D.N.Y. 1985) (holding that the common law right of publicity includes the additional element requiring the plaintiff to prove a property interest with a monetary or commercial value in his or her name or likeness).

71. *See id.* at 624 (acknowledging that a jury would find that most people could not identify an actual photograph of the plaintiff and think it was the plaintiff himself in the defendant's advertisements).

III. ANALYSIS

A. Revenge Pornography Should Not Be Afforded Free Speech Protection Under the First Amendment to the United States Constitution Because It Is Obscene.

1. Revenge Pornography Causes Sexual Excitement; Therefore, the Average Person Would Find that the Work Appeals to the Prurient Interest.

The First Amendment protects pornographic writings, photographs, and movies displaying sexual activity or erotic behavior in a way designed to arouse sexual excitement.[72] However, the First Amendment does not protect obscenity, under which certain forms of pornography and subordinating sexual depictions may be classified.[73] Because revenge pornography involves the posting and distribution of intimate, nude, and sexually erotic photographs of an individual on the Internet without consent, it is deemed a form of pornography.[74] As a form of both pornography and speech, revenge pornography has the potential to be obscene, making the *Miller* obscenity test applicable to the issue.[75]

Although revenge pornography websites are generally viewed by willing recipients, the displayed individual is an unwilling participant in the public distribution of such material when he or she did not give permission or agree to such distribution.[76] Similar to the advertisements in *Miller*, the victim of revenge pornography is displayed in a nude and sexually erotic position or engaging in sexual activity with his or her genitals or breasts as the emphasis of the representation.[77] This differs from *Jenkins v. Georgia*, where the Supreme Court held that the depictions of sexual conduct in the

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72. *See* Roth v. United States, 354 U.S. 476, 487 (1957) (defining pornography as material that inherently appeals to the prurient interest because it elicits sexual thoughts and lascivious desires).

73. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (stating that sexually explicit material is determined based on the speaker's subjective viewpoint).

74. *See id.* at 329 (explaining that pornography has the power of speech in view of the fact that subordinating depictions of women can perpetuate the actual subordination of women).

75. *See* Miller v. California, 413 U.S. 15, 24-25 (1973) (delineating a three-part test to determine obscene material because the government has a legitimate interest in regulating material that could be exposed to minors or offend the sensibilities of unwilling recipients).

76. *See id*. at 18 (observing that unwilling recipients are those who did not give authorization or consent).

77. *See id*. (noting that the pictured individuals in the advertisements had genitals clearly visible while engaging in sexual activities).

film at issue did not appeal to the prurient interest because there were no genitalia visible and the camera did not focus on the actors' bodies during sexual scenes.[78] As explained above, consensual and artistic nudity by itself does not propel material illustrating sexual conduct into the unprotected category of obscenity under *Miller*.[79]

However, sexually explicit photographs posted for vengeful or spiteful purposes, such as revenge pornography, are indicative of narrowing a viewer's focal point to the sexual aspect of the photograph to embarrass or harass the displayed individual; therefore, depictions of revenge pornography move beyond mere nudity.[80] Unlike the artistic appeal viewers gained from the film in *Jenkins*, sexually explicit photographs of nude individuals have an inherent tendency to excite the mind.[81] As such, the disseminators and willing viewers of revenge pornography do not go to these websites to read the news or to view art, but rather to exact revenge, view the victim, or for lustful enjoyment and sexual pleasure.[82]

A boyfriend originally receiving sexually explicit photographs from his girlfriend, or vice versa, and the average person viewing these photographs would find that a revenge pornography website resembles a hard-core pornography website where lewd acts are depicted and lustful thoughts are elicited.[83] Consequently, consistent with Supreme Court Justice Stewart's concurring belief in *Jacobellis v. Ohio*, anyone viewing a website hosting revenge pornography would certainly discern that the material inherently appeals to the prurient interest because it represents a shameful or morbid interest in nudity, sex, or excretion and offends the sensibilities of the general public.[84] Distinguishable from the Court's holding in *Jacobellis*—where the film at issue was held not to be obscene because the explicit sexual scene was at the end of the film, was fragmented and fleeting, and the film as a whole was nationally acclaimed—revenge pornography is

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

79. *See id.* (finding that mere nudity cannot be obscene because nudity alone does not satisfy the prurient, patently offensive, and lack of value standards in *Miller*).

80. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) (stating that although technology changes the way people express themselves, people who have become a captive audience may nonetheless choose to avert their eyes from mere nudity).

81. *See* Roth v. United States, 354 U.S. 476, 487 n.20 (1957) (defining prurient interest as having a propensity or lascivious desire toward sexual thoughts).

82. *See id.* (remarking that a lewd and obscene work that appeals to the prurient interest is not an essential part of any constitutionally protected exposition of ideas).

83. *See* Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (accepting the *Roth* definition of prurient and stating that obscenity largely depends on the effect the materials have upon those who receive them).

84. *See id.* at 197 (Stewart, J., concurring).

viewable as a static and non-fragmented prurient depiction with no nationally recognized awards for its social value.[85]

In *Roth*, obscenity was determined by analyzing the work in its totality based on the viewpoints of the distinct community it had reached.[86] The content, context, and circumstances are all relevant in determining whether a work tends to excite lustful thoughts in the viewer; as such, revenge pornography's depiction of one's ex-lover standing nude or in a sexually suggestive position should be viewed with its original purposeful intent in mind: to arouse the recipient at the time it was sent.[87] Like *Roth*—where the defendant mailed lewd and lascivious solicitations intended to appeal to the prurient interest (i.e. a shameful interest in nudity, sex, or excretion)—revenge pornography, posted with the victim's personally identifiable information to a website specifically exhibiting sexual conduct, becomes engulfed with lewd and lustful surroundings meant to debauch the morals of its recipients and to appeal to a shameful or morbid interest in nudity, sex, or excretion.[88]

To determine the prurient appeal of revenge pornography, the average person, not an overly sensitive or insensitive person, applies the standards of the local community where a claim involving such material is being adjudicated.[89] Thus, revenge pornography that is legally obscene in one community may enjoy full protection in another.[90] Unlike the plaintiff's case in *Nitke*—which was dismissed because the plaintiff could not prove how much speech would be impaired based on the use of different community standards—revenge pornography has the potential to be upheld

85. *See id.* at 196-97 (emphasizing that a fragmented sexually explicit scene would not surpass customary limits of sensibilities and does not detract from the value derived from a nationally acclaimed work).

86. *See Roth*, 354 U.S. at 490 (mandating that the jury must not solely take into account a single part of the work and must consider each demographic of society in determining the standards of their community).

87. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (explaining that a work as a whole should take into account its words and context to determine if it infringes on the harm Congress intended to prevent).

88. *See Roth*, 354 U.S. at 490 (noting that the same work may have varying impacts depending on the ideals of different communities).

89. *See* Miller v. California, 413 U.S. 15, 33-34 (1973) (stating that narrowing the standard to a certain locale defends against an arbitrary hypothetical standard that would be improperly applied in a large and diverse nation); *see also* United States v. Thomas, 74 F.3d 701, 709 (6th Cir. 1996) (holding that federal obscenity laws involve acts in more than one state whereby the government can prosecute individuals who transport obscene material in any district where the material is sent or received).

90. *See Miller*, 413 U.S. at 32-33 (realizing people in different states have a myriad of tastes and attitudes which should not be subject to uniformity).

as obscene in various jurisdictions because little to no permissible speech would be impaired by a prohibition against obscene revenge pornography.[91]

In addition, the Supreme Court in *Ashcroft v. American Civil Liberties Union* held that a publisher sending obscene material into a specific community via the Internet is responsible for complying with the contemporary standards of that community; however, obscene material is not forbidden merely because an unintended audience might obtain it.[92] Because obscenity laws are applicable to Internet transmissions, which occur in every jurisdiction, the prurient appeal of revenge pornography as viewed by a community in either Las Vegas or Salt Lake City would nonetheless appeal to the average person's idea of sexual conduct that is intended to excite lustful thoughts.[93] Further, regardless of where the revenge pornography is observed, its appeal to a prurient interest is evident to an average person viewing it in light of its content and context.[94]

Revenge pornography is viewable on Internet-enabled devices twenty-four hours per day, seven days per week around the world by perpetrators, victims, or anyone with an Internet connection lacking content filters or content blockers.[95] This type of access to revenge pornography is distinguishable from *Ashcroft*, where the Court reasoned that content filters and content blockers were narrow and, accordingly, acceptable methods of restricting unwilling recipients' and minors' access to hard-core pornography on the Internet.[96] Moreover, the Supreme Court in *Stanley v.*

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91. *See* Nitke v. Gonzales, 413 F. Supp. 2d 262, 267 (S.D.N.Y. 2005) (holding that the plaintiffs did not show sufficient evidence of how many websites mentioning a certain type of sexual conduct would be considered obscene altogether or in one community and not another).

92. *See* Ashcroft v. ACLU, 535 U.S. 564, 569-70, 604-05 (2002) (stating that a publisher must take steps to use a medium that allows for a targeted release of material into the intended communities).

93. *See* United States v. Orito, 413 U.S. 139, 143 (1973) (holding that Congress may regulate obscenity in interstate commerce and its channels once it leaves the privacy of the home in any way).

94. *See Miller*, 413 U.S. at 32 (maintaining that community standards are the appropriate adjudicatory method because it is unnecessary and unwise to mandate that people in one locale accept the prurient interest standard of a potentially more sinful locale).

95. *See Nitke*, 413 F. Supp. at 265 (recognizing that the advent of the Internet has facilitated a proliferation of communications and data-sharing across jurisdictional boundaries via the World Wide Web).

96. *See generally Ashcroft*, 535 U.S. at 604-05 (Stevens, J., dissenting) (contending that merely because an unintended audience could obtain obscene material does not make it constitutionally impermissible). *But see* Reno v. ACLU, 521 U.S. 844, 849 (1997) (stating that the Internet is located in no particular geographical location and is available to anyone who has access anywhere in the world).

Georgia observed that although the right to receive information and the right to personal privacy are fundamental, there are limited instances where the government can justifiably moderate these rights; obscene material is one such instance, as it carries the potential to cause serious public harm.[97]

Together with false statements and personally identifiable information of an unwillingly displayed individual, a revenge-seeking online post of that nude individual in a sexually provocative pose represents a shameful interest in sexual conduct and nudity that exceeds the customary limits of the societal importance of pornographic material.[98] Thus, representations of revenge pornography fall outside the parameters of constitutionally protected pornographic displays because they entice the prurient interest and inflict individual and societal harm.[99]

2. Revenge Pornography Consists of Representations and Descriptions of Ultimate Sexual Acts and Lewd Exhibition of Genitals; Therefore, It Depicts Sexual Conduct in a Patently Offensive Way to the Average Person.

To determine whether revenge pornography appeals to the prurient interest and is patently offensive under the *Miller* obscenity test, community standards of the locale where it is disseminated and where the jury is adjudicating must be applied.[100] Because obscenity laws are applicable to Internet transmissions, which transcend jurisdictional boundaries, the average person must similarly analyze the patent offensiveness of revenge pornography dispersed via the Internet using the community standards of the venue where the lawsuit is brought and where the material is sent.[101] Like the prurient appeal prong of the *Miller* obscenity test, the content, context, and circumstances of revenge pornography taken as a whole become relevant in establishing whether the

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97. *See* Stanley v. Georgia, 394 U.S. 557, 566 (1969) (advancing that the government can regulate the public spread of ideas hostile to public morality, but not private thoughts).

98. *See* Roth v. United States, 354 U.S. 476, 489 (1957) (holding that a work that does not appeal to the prurient interest or is not utterly without redeeming social importance is generally permissible under contemporary community standards of pornographic material).

99. *See Stanley*, 394 U.S. at 566 (stating that the government cannot control private thoughts but can regulate the public promulgation of ideas destructive to public morality).

100. *See Ashcroft*, 535 U.S. at 576 n.7 (asserting that the jury is to apply community standards to questions of fact regarding patent offensiveness).

101. *See* United States v. Orito, 413 U.S. 139, 143 (1973) (holding that because Congress can regulate interstate commerce and its channels, it may regulate obscenity in the public sphere).

average person applying community standards would also find the work patently offensive.[102] Because a uniform national standard is not required, the testimony of a state's expert on community standards or the instructions of a trial judge on statewide standards are sufficient to determine what could be deemed prurient and patently offensive in that jurisdiction.[103]

In concert with a vindictive mindset, descriptions and representations of sexual positions and sexual activities shadowed by sexual overtones and sexual connotations serve to excite lustful thoughts that may be patently offensive to the average observer.[104] If the average person in a community does not take or send the types of images that comprise revenge pornography, then such images have the potential to offend that average person, as well as the substantial majority of average persons within that community.[105] Comparable to *Nitke v. Gonzales*—where the plaintiffs faced a significant risk of images being deemed patently offensive in most jurisdictions because they depicted non-mainstream sexual activities such as sadomasochism—certain depictions of revenge pornography disseminated to the viewing public via the Internet could be deemed non-mainstream by the average person who does not personally take and send nude photographs of themselves or others engaging in these types of sexual activities.[106]

In line with *Miller*—where the petitioner sent out unsolicited sexually explicit brochures to unwilling recipients—revenge pornography is broadcast on the Internet by the perpetrator without the request, authorization, or consent of the unwillingly displayed individual.[107] Because revenge pornography moves beyond mere nudity and is not willingly authorized by the victim, it has the potential to offend the sensibilities of the average person and conflict with the government's

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102. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (explaining that the whole work along with its words and context must be considered by the jury when determining if it infringes on the harm Congress intended to prevent).

103. *See* Miller v. California, 413 U.S. 15, 30-31 (1973) (discussing that community standards were assumed to be that of the lawsuit venue, and not of a hypothetical standard of the entire United States).

104. *See Stanley*, 394 U.S. at 566 (finding that the government can regulate ideas harmful to public morality).

105. *See* Nitke v. Gonzales, 413 F. Supp. 2d 262, 264, 270 (S.D.N.Y. 2005) (proffering that such acts will not fit within some community standards because they conform to the outlined examples of patent offensiveness in *Miller*).

106. *See id.* at 271.

107. *See Miller*, 413 U.S. at 18 (noting that the brochures containing men and women in groups engaging in sexual activities with their genitals prominently displayed were sent to unwilling recipients without their request or consent).

interest in protecting society from harm.[108] Therefore, revenge pornography falls within the states' legitimate interest in regulating the display or distribution of obscene material when it would offend unwilling participants or recipients or be exposed to minors.[109]

Because a state statute can regulate patently offensive representations and descriptions of masturbation, excretory functions, lewd exhibition of genitalia, and normal, perverted, actual, or simulated sexual acts, a disseminator of revenge pornography could be convicted of mailing or distributing unauthorized depictions displaying genitalia of those performing ultimate sexual acts, per the circumstances in *Miller*.[110] Unlike in *Jenkins*—where no genitalia were visible, the camera did not concentrate on the actors' bodies, and the sexual scenes did not persist throughout the entire film nor were they the focal points of the film as a whole—the retributive idea behind revenge pornography necessarily establishes depictions of unwilling nude individuals with exposed genitals, penetration of sex toys, masturbation, and overt sexual positions as the principal parts of the work.[111] Consequently, because revenge pornography aligns with the examples of patently offensive representations and descriptions in *Miller*, a jury applying community standards would find it to be patently offensive.[112]

3. As a Whole, Revenge Pornography Is Displayed Solely for Retributive Purposes; Therefore, It Lacks Serious Literary, Social, Political, and Scientific Value as Viewed in Accordance with a National Standard.

Because all discussions or depictions of sex are not obscene *per se*, prurient and patently offensive representations of revenge pornography must have serious literary, artistic, political, or scientific value to fall within the First Amendment's zone of protected speech.[113] Under this

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108. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (stating that the government cannot place restrictions on speech solely based on the content of that speech).

109. *See Stanley*, 394 U.S. at 567 (recognizing that the unwilling receipt of obscene material is a disruption to public sensibilities).

110. *See Miller*, 413 U.S. at 16, 18 (upholding the lower court's conviction under CAL. PENAL CODE § 311.2(a), which makes it a misdemeanor to knowingly distribute obscene material).

111. *See* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (noting that the entire film was not obscene because several peripheral nude scenes do not align with the examples of patent offensiveness in *Miller* and, further, could still hold value).

112. *See Miller*, 413 U.S. at 24-25 (explaining that ultimate sexual acts, lewd exhibition, masturbation, or excretion are deemed patently offensive by community standards).

113. *See id.* at 24-26 (rejecting the utterly without redeeming social importance

prong—whether the work has serious literary, artistic, political, or scientific value—a national standard determines the value, if any, of revenge pornography.[114]

Similar to medical textbooks that use explicit depictions and descriptions of human anatomy—which were held to be permissible under *Miller*—revenge pornography displays sexually explicit images of various forms of human anatomy.[115] However, whereas medical textbooks state and explain factual evidence related to these descriptions and representations to educate individuals about medical matters, the intention behind revenge pornography—to inflict physical, mental, and emotional harm on the victim—furthers no educational or valuable literary, artistic, political, or scientific objectives.[116] Moreover, revenge pornography is unlike literary books that take the reader through sexual fantasy, unlike Michelangelo's "David," unlike a nudist colony banner supporting one political party or another, and unlike medical textbooks because, taken as a whole, it ostracizes the victim, diminishes his or her reputation, and holds out no value to society at large; these deleterious corollaries are contrary to the governmental interests of protecting society from harm and promoting literary, artistic, political, and scientific works of value.[117]

Revenge pornography is not mere nudity and should not be given the same protection as permissible pornography because there is no artistic value in displaying lewdly exposed genitals, penetration of sex toys, masturbation, overt sexual positions, and descriptions of the victim's sexual fantasies accompanied by his or her name, workplace, and address exclusively for malevolent purposes.[118] Additionally, these displays are exhibited not on occasion or as one part of a larger display of artistic value

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prong from *Memoirs* because it is a near impossible burden for a prosecutor to prove and has never received more than a plurality vote by the Supreme Court); *see also Stanley*, 394 U.S. at 567 (holding that there is an implied right to possess obscenity in one's home because it does not interfere with governmental interests); Roth v. United States, 354 U.S. 476, 484-85, 487 (1957) (stating that sex and obscenity are different because sex can have even the slightest redeeming social value while obscenity cannot).

114. *See Miller*, 413 U.S. at 30 (contending that the United States is too big and has too many diverse viewpoints to use a single formulation as the standard for the prurient interest and patently offensive prongs).

115. *See id.* at 26 (implying that these types of textbooks serve the governmental interest of educating members of society, especially medical professionals).

116. *See id.* (indicating that a prurient and patently offensive work depicting sexual conduct must also lack any value to be held legally obscene).

117. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975) (reiterating that nudity in certain contexts can have literary, artistic, political, or scientific value).

118. *See id.*

as held permissible in *Jenkins*, but as the entire work of revenge pornography itself.[119] The Supreme Court, in *Erznoznik v. City of Jacksonville*, upheld *Jenkins* on the grounds that content-based regulations of mere nudity must take into consideration the context and extent of exposure; otherwise, bathers on a beach would be an impermissible display of obscenity.[120] Whereas bathers depicted in a movie or described in a literary novel would have value, the context of revenge pornography—the disseminators' spiteful intent and the victim's personally identifiable information—drastically reduces or nullifies any potential artistic or literary value.[121] Distinguishable from *Erznoznik* and *Miller*, revenge pornography does not solely depict mere nudity in the form of bathers, align with the examples expressed by the Court in *Erznoznik*, or teach society valuable information regarding human anatomy.[122] Thus, the maligned value of revenge pornography from that stated in *Miller* gives rise to intolerable invasions of citizens' substantial privacy interests and holds no societal or artistic value nor facilitates any governmental interest.[123]

Because revenge pornography generally takes the form of a picture accompanied by the displayed individual's personally identifiable information as a means of seeking retribution, the average person would be hard-pressed to conclude, as the Supreme Court in *Memoirs v. Attorney General of Massachusetts* did, that this type of prurient and patently offensive work nonetheless has redeeming social value.[124] Placing sexually explicit photographs in the context of retribution and publicly displaying them without authorization destroys any *de minimis* value originally derived from them, while only the destructive value the perpetrator seeks to attain remains.[125]

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119. *See* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (providing that the film at issue displayed mere nude sexual conduct for artistic purposes in several separate parts of the work, which is constitutionally permissible).

120. *See Erznoznik*, 422 U.S. at 213 (permitting nudity as part of a larger display because it has value in the eyes of those who view it in its totality).

121. *See id.*

122. *See id.* (acknowledging that depictions of a baby's buttocks, nude bodies of victims of war, or scenes from a culture in which nudity is indigenous cannot be restricted from works of value).

123. *See* Miller v. California, 413 U.S. 15, 26 (1973) (remarking that value can be derived from works that substantially educate the public, and that such works are considered protected speech because they promote this governmental interest).

124. *See* Memoirs v. Att'y Gen. of Mass., 383 U.S. 413, 419-20 (1966) (finding that a work can have the slightest redeeming social value if citizens view it in light of such value).

125. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (stating that congressional intent can imply certain important values while those values that impede

When a depiction of revenge pornography is prurient and patently offensive, it differs from permissible pornography because it also lacks any substantive value.[126] Although indecent and explicit speech is constitutionally protected in certain instances, revenge pornography is comprised of more than indecency and explicitness: it is morally repugnant, prurient, patently offensive, and lacks serious literary, artistic, political, and scientific value; consequently, it does not warrant First Amendment protection.[127]

B. Even if Held Not to Be Obscene Under Federal Common Law, Revenge Pornography, by Definition, Is Disclosed to the Public Without the Consent of the Pictured Subject; Therefore, Four Separate Privacy Torts Could Each Constitute a Valid Claim Involving Revenge Pornography.

1. A Lawsuit Involving Revenge Pornography Would Be Successful Based upon a Claim of Intrusion of Solitude.

Revenge pornography pertains to the crux of an intrusion of solitude claim, under which a plaintiff must prove that there was an unauthorized physical or electronic intrusion into his or her solitude, the intrusion was objectionable or highly offensive to a reasonable person, the matter intruded upon was private, and the intrusion caused anguish and suffering.[128] In addition, the right to privacy protects written and artistic work and is violated by a breach of confidence, implied contract, or trust, all of which are present and relied upon in a dating, spousal, and sexual relationship.[129] A duty of trust exists between partners as a cornerstone of protecting one another's interests; this duty generally continues after a separation and is breached when one ex-partner posts private and sexually explicit photographs of the other on the Internet.[130] Further, one partner trusts that writings, photographs, or artwork relating to his or her private life will not be published by the other partner without consent.[131]

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on governmental interests may be statutorily barred).

126. *See Miller*, 413 U.S. at 24, 26 (contending that in addition to its prurient interest and patent offensiveness, a work must also lack serious literary, artistic, political, or scientific value to be legally obscene).

127. *See id.*

128. *See* Cason v. Baskin, 20 So. 2d 243, 251 (Fla. 1944) (holding that an invasion of privacy is measured by whether an act would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence under the circumstances).

129. *See id.* at 248 (noting that it is well-settled common law that, based on a right to privacy, individuals retain possessory interests in the content of personal facts).

130. *See id.* at 252 (stating that the matters which are protected from intrusion are those relating to the private life, habits, acts, and relations of an individual).

131. *See id.* at 247-48 (acknowledging that the recipient of a letter owns the paper,

In accordance with *Cason v. Baskin*—where an unauthorized publication of a personal matter was an intrusion deemed highly offensive to a reasonable person so as to cause suffering and anguish—an intrusion of solitude would occur when an unauthorized individual posts a nude photograph of an ex-partner to any website.[132] Moreover, because partners intend sexually explicit photographs to remain private and protected through an implied contract, duty of trust, or duty of confidence, posting revenge pornography intrudes on a personal and private matter where the informational factor of its disclosure is not the primary reason for publication.[133]

As in *Melvin v. Burling*—where the plaintiffs' expectation of privacy was violated as a result of the defendant ordering, without authorization, merchandise in the plaintiffs' names to the plaintiffs' house—the displayed individual in a depiction of revenge pornography has a reasonable expectation of privacy such that the unauthorized publication of this display is embarrassing, objectionable, and consequently, highly offensive to the victim and to a reasonable person.[134] Additionally, discovering a display of oneself on a revenge pornography website is not only emotionally disturbing, but it also carries the potential to ruin one's reputation as a matter of intrusion.[135]

Posting a sexually explicit photograph to the Internet is an intrusion by an ex-partner into private matters that, similar to the alleged but unwarranted damages in *Snyder v. Phelps*, tends to cause suffering and anguish because of its offensiveness.[136] Whereas the speech at issue in *Snyder* consisted of a public interest expressed in a public place, revenge pornography involves a private interest exposed in a public place.[137] Furthermore, revenge pornography is distinguishable from *Snyder*—where

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but the writer retains a property interest in the contents of the document).

132. *See id.* at 248.

133. *See id.* at 253 (emphasizing that the right to privacy may be invoked when the public interest or informational aspect of the intrusion is secondary).

134. *See* Melvin v. Burling, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986) (holding that the unauthorized mailings the plaintiffs were subjected to were objectionable because they violated the plaintiffs' expectations of privacy in their own names and place of residence).

135. *See Cason*, 20 So. 2d at 249 (finding that the law has long considered an individual's reputation; hence libel, slander, and the right to privacy arose as remedial measures).

136. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215, 1219 (2011) (rationalizing that although the plaintiff suffered great grief, severe depression, and exacerbation of pre-existing health conditions, the defendants permissibly picketed peacefully in public on matters of public concern).

137. *See id.*

the plaintiff was not part of a captive audience since the matter disclosed to the public was not a private matter—because revenge pornography consists of personal and private matter that is publicly disclosed on the Internet whereby the victim becomes captive to the disseminator's sole control of the highly offensive public representation.[138]

Although the disseminator of revenge pornography has a physical possessory interest in the photographs or videos of such material, the pictured subject retains a possessory property interest in the material's content.[139] Thus, to avoid infringing on the pictured subject's rights, the disclosure of that subject's private matters requires consent; yet, such consent is never present in an instance of revenge pornography.[140] For the foregoing reasons, a claim of intrusion of solitude would stand where revenge pornography entails a non-newsworthy and offensive unauthorized public display of an individual's private matters that he or she reasonably intended to remain private.[141]

2. A Lawsuit Involving Revenge Pornography Would Be Successful Base upon a Claim of Public Disclosure of Private Facts.

An implied contract, a duty of trust, and a duty of confidentiality are all present during a relationship and establish a promise to keep sexually explicit photographs between partners; a violation of these duties provides for a valid claim of public disclosure of private facts.[142] Posting such photographs releases them into the public domain and makes them visible to more than a reasonably small amount of people.[143] In *Peterson v. Moldofsky*, a genuine issue of material fact as to the public disclosure of private facts existed where the defendant emailed photographs of his ex-girlfriend engaging in sexually explicit activities to more than five

138. *See id.* at 1212, 1219 (permitting outrageous or harmful speech when it complies with local laws, is on public property, and is of public concern).

139. *See Cason*, 20 So. 2d at 247-48 (stating that the rights to liberty and privacy entail the right to be left alone and the right to possessory interests in tangible and intangible forms).

140. *See id.*

141. *See* Melvin v. Burling, 490 N.E.2d 1011, 1014 (Ill. App. Ct. 1986) (upholding a claim of intrusion of solitude founded on facts that proved objectionable and offensive activity to a reasonable man).

142. *See Cason*, 20 So. 2d at 249 (implying that these duties exist to protect an individual's right to an inviolate lifestyle and personality).

143. *See* Peterson v. Moldofsky, No. 07-2603-EFM, 2009 U.S. Dist. LEXIS 90633, at *15-16 (D. Kan. Sept. 29, 2009) (observing that the idea behind a claim of public disclosure of private facts is to protect an individual from the unwarranted distribution of private facts that serve no governmental or public interest).

people.[144] A jury could view these facts as an instance of revenge pornography where, with its intention to harm the victim by exposing sexually explicit photographs of him or her to outsiders, the pornography is used as a tool to reveal private facts not known to the public and is publicly disclosed via the Internet to enough people that it is substantially certain to become public knowledge.[145] Because revenge pornography is disclosed on the Internet, it is widely disseminated amongst the viewing public while furthering no societal interests.[146] Revenge pornography is frequently published alongside facts not known to the public at large, unless previously and consensually disclosed by the displayed individual.[147] These facts include, but are not limited to, sexual tendencies, lifestyle preferences, name, age, location, address, and workplace, none of which are newsworthy absent a public interest.[148] Distinguishable from *Snyder v. Phelps*, revenge pornography involves private facts and issues of private concern, not previously publicized facts on issues of public concern; as such, a claim of public disclosure of private facts encompassing revenge pornography would stand.[149]

Moreover, similar to *Zieve v. Hairston*—where the Court of Appeals of Georgia held that an initial lack of permission to reveal information and a subsequent revealing of that information was an offensive public disclosure of private facts—the displayed individuals in sexually explicit photographs reasonably expect them to remain private and rarely authorize their public dissemination.[150] A defendant breaches his or her agreed upon duties of trust, confidence, and implied contract when he or she publishes these private representations of the revenge pornography victim on the

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144. *See id.* at *17-18 (asserting that five people receiving private information via the Internet is a public disclosure because the Internet has the capability to rapidly disseminate information).

145. *See id*. at *15, *18 (interpreting that the defendant's conduct could be considered outrageous when he disclosed sexually explicit videos to the plaintiff's family members through email).

146. *See* Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 34 (Idaho 2003) (recognizing that public interests protect members of society from potential harm or greater harm and can include reporting a crime and the subsequent prosecution and proceedings of that crime).

147. *See id.* at 35 (noting that newsworthy facts are those which involve governmental or public interests).

148. *See id.* (stating that the release of a victim's name was newsworthy because it involved a matter of public concern, namely the commission of a crime).

149. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (explaining that the defendant's speech was not impermissible because it was public in nature).

150. *See* Zieve v. Hairston, 598 S.E.2d 25, 30 (Ga. Ct. App. 2004) (examining offensiveness in terms of a violation of the victim's expressed desires).

Internet.[151] Thus, under the rule in *Peterson v. Moldofsky*, revenge pornography consists of personal facts and depictions not generally known to the public such that their wide public disclosure would be offensive, objectionable, and intolerable to a reasonable person of ordinary sensibilities.[152]

3. A Lawsuit Involving Revenge Pornography Would Be Successful Based upon a Claim of False Light in the Public Eye.

Because revenge pornography depicts sexually explicit photographs intended exclusively for one's partner, the portrayed image could, consistent with *Cantrell v. Forest City Publishing Company*, be juxtaposed into another context fairly easily and provide proof that the defendant knowingly published facts that render a false impression of the plaintiff, distributed the publication to a reasonable number of people, and that the publication was objectionable to a reasonable person under the circumstances.[153] In *Cantrell*, the defendant reported to the public that the plaintiff was just as sad at her own home as she was at her husband's funeral although the plaintiff was not present at her home at the time the defendant knowingly and falsely reported the fabricated story from that location.[154] Similar to *Cantrell*, an ex-boyfriend posting a pornographic photograph of his ex-girlfriend to an adult services website stating the ex-girlfriend's sexual preferences, location, work schedule, and any other personally identifiable information knowingly and falsely portrays to the public that his ex-girlfriend is an escort.[155] Accordingly, displaying a representation of the ex-girlfriend on a revenge pornography website is a public disclosure of the girlfriend's private matters through knowingly false characterizations and is likely to render a false impression, embarrass, and be highly objectionable to her.[156]

Corresponding to the court's determination in *Peterson v. Moldofsky* of

151. *See id.*

152. *See* Peterson v. Moldofsky, No. 07-2603-EFM, 2009 U.S. Dist. LEXIS 90633, at *15-16 (D. Kan. Sept. 29, 2009) (holding that substantial privacy interests must be invaded in an intolerable manner as determined by a reasonable person).

153. *See* Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 247-48 (1974) (stating that inaccuracies were taken from one instance and represented to have occurred in a separate and falsified scenario); *see also* Prosser, *supra* note 7, at 400.

154. *See id.* at 253 (suggesting that these were "calculated falsehoods" consistent with a known or reckless untruth).

155. *See id.* at 253-54 (noting that calculated falsehoods were sufficient to warrant liability for placing the plaintiff in a false light).

156. *See id.* at 252 (remarking that a claim of false light focuses on the defendant's knowing or reckless disregard of the plaintiff's privacy, and not necessarily on the truth or falsity of the material).

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the point at which a matter becomes publicized, revenge pornography is viewable on the Internet by members of the public and, therefore, is distributed to a reasonable number of people.[157] Because objectionable and knowingly false impressions of a victim are portrayed to the public through the inherent disclosure of private information that occurs with the public dissemination of revenge pornography, a claim of placing a revenge pornography victim in a false light in the public eye would be sustained by a jury.[158]

4. A Lawsuit Involving Revenge Pornography May Be Successful Based upon a Claim of Appropriation of Name or Likeness.

Appropriation of one's name or likeness, which generally pertains to a celebrity's name or image used without consent by the defendant for commercial benefit, could also arise in a lawsuit involving revenge pornography.[159] This specific claim emerges because the commercial benefit of portraying a celebrity is greater than that of someone unknown to the public.[160] In the context of revenge pornography, a plaintiff would need to have substantial value to his or her name or likeness and would need to demonstrate that an ex-partner characterized him or her in a commercial representation—a hard burden to meet if the ex-partner merely posts the representation on the Internet out of spite.[161] Hence, revenge pornography is rarely employed for commercial benefit and is used more as an avenue of retribution and schadenfreude.[162]

Although generally used to protect the property interests of celebrities, the United States District Court for the Southern District of New York

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157. *See Peterson*, 2009 U.S. Dist. LEXIS 90633, at *15-16, *21 (reasoning that internet speech that is retrievable by five or more people is likely to become known to the public).

158. *See* Prosser, *supra* note 7, at 400; *cf. Cantrell*, 419 U.S. at 248 (stating that where the plaintiff is a recipient of ridicule and pity which thereafter cause outrage, mental distress, shame, and humiliation, the publication of known falsehoods could be deemed objectionable by a reasonable person).

159. *See* Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (Ct. App. 1995) (noting that the defendant had publicly marketed posters of the plaintiff and sold thirty percent of the posters for five dollars without the plaintiff's consent).

160. *See* Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 622 (S.D.N.Y. 1985) (declaring that the unauthorized depiction of a non-celebrity individual for commercial purposes equates to an appropriation of his or her name or likeness).

161. *See id.* at 621 (remarking that the right to use one's own name or likeness exists to compensate for the emotional harm to private citizens who find their identities utilized for another's commercial gain).

162. *See id.* (contending that merely suggesting certain characteristics, without actually using the plaintiff's name, portrait, or picture, is not actionable).

announced in *Allen v. National Video* that the representation of a victim's actual picture and name without consent is actionable.[163] Distinguishable from *Allen*—where the plaintiff could not make out a valid claim because the defendant did not legally use the plaintiff's actual image in advertisements but instead used the image of a celebrity look-a-like—revenge pornography does portray the plaintiff's actual image for commercial or non-commercial purposes.[164] Therefore, because revenge pornography consists of actual sexually explicit images and personally identifiable information of the victim posted without his or her endorsement, any commercial use of it would comprise an actionable claim of appropriation of the plaintiff's name or likeness.[165]

Additionally, under the rule in *Montana v. San Jose Mercury News*—where the Sixth District Court of Appeal of California explained that the sale of the celebrity plaintiff's image would have been a misappropriation of his name or likeness based on the commercial gain sought were he not a public figure with newsworthy interest—revenge pornography involves non-public figure victims who are of little or no newsworthy interest.[166] Therefore, non-celebrity victims of revenge pornography whose depictions and societal status are not of newsworthy interest have a valid claim of appropriation when his or her name or likeness, as used in sexually explicit photographs posted on the Internet, is nonetheless disclosed to the public without authorization and is used for commercial benefit.[167] However, were revenge pornography not used for the defendant's commercial benefit, a non-celebrity plaintiff would have a higher probability of success under intrusion of solitude, public disclosure of private facts, and false light in the public eye claims because all of the elements of an appropriation of the plaintiff's name or likeness would not be satisfied.[168]

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163. *See id.* at 622 (reasoning that using another's name or likeness without consent implies that the subject has endorsed or certified his or her involvement in the display, which may not be accurate).

164. *See id.*

165. *See id.*

166. *See* Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 641 (Ct. App. 1995) (acknowledging that the plaintiff was a major player in contemporaneous newsworthy sporting events and, therefore, societal interests outweighed the potential commercial value derived from the defendant's poster representations of the plaintiff).

167. *See Allen*, 610 F. Supp. at 622-23 (concluding that any living individual has the right to exploit his or her own name or likeness for commercial benefit based on an inherent property interest in one's self).

168. *See id.* at 621 (reasoning that the right of publicity generally protects the drawing power of celebrities in publicly marketed products where an economic benefit would be derived from a celebrity endorsement of a product).

IV. POLICY RECOMMENDATION

As technology changes and advances, the law must accept a broader construct of privacy.[169] Deeming revenge pornography obscene protects victims' reputations, safety, and psychological stability by staving off embarrassment, providing remedies, and serving as a deterrent to future public postings of such material.[170] Further, rendering revenge pornography obscene safeguards against unwanted publicity and notoriety stemming from the distribution of material that is damaging to a victim's psyche, well-being, reputation, and current and future job opportunities.[171]

Additionally, a valid cause of action for publicly posting and distributing intimate images without consent guards against the misappropriation of one's possessory interest in his or her name and likeness.[172] Regardless of whether the victim originally took a "selfie"—a photograph an individual has taken of him or herself—or the perpetrator took the photograph of the victim, or these sexually explicit materials were illegally obtained through computer hacking or other means, instituting civil or criminal liability for the nonconsensual distribution of another's sexually explicit material for retributive or malicious purposes enshrines in the law the right to privacy by enabling the victim to choose what his or her public image should be.[173] Hence, the Supreme Court in *Paris Adult Theatre I v. Slaton* correctly confirmed that obscene material does not carry with it a penumbra of

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169. *See* Warren & Brandeis, *supra* note 47, at 196 (noting that as civilization advances, individuals become more sensitive to publicity such that solitude becomes more essential).

170. *See* Prosser, *supra* note 7, at 422 (implying that the limits of society's expectations of privacy are shifting, and therefore, the types of tort claims available must also shift).

171. *See id.* at 419-20 (remarking that offensiveness is shielded against to protect a plaintiff's psychological interests).

172. *See* Warren & Brandeis, *supra* note 47, at 209 n.1 (inferring that the right to one's own image and the commercial benefit derived from that image stems from an implied right to privacy).

173. *See* Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 641-42 (Ct. App. 1995) (reasoning that one may not publicize facts or use the likeness of another without consent because it violates the protected interests of the other). *But see* Peterson v. Moldofsky, No. 07-2603-EFM, 2009 U.S. Dist. LEXIS 90633, at *14-15 (D. Kan. Sept. 29, 2009) (noting that in that jurisdiction, it is not a crime to distribute images taken with consent or properly obtained). *See also* Mike Isaac, *Nude Photos of Jennifer Lawrence Are Latest Front in Online Privacy Debate*, N.Y. TIMES (Sept. 2, 2014), http://www.nytimes.com/2014/09/03/technology/trove-of-nude-photos-sparks-debate-over-online-behavior.html?_r=2 (acknowledging that the "unlawful release" of celebrities' nude images on the Internet could be curtailed by website owners patrolling user-generated content, yet this potential solution raises both privacy and civil liberties concerns).

rights; otherwise, the Court would not have decided *Stanley* on such narrow grounds.[174]

A court's judgment finding revenge pornography not obscene or a paucity of laws criminalizing such activity creates several difficulties.[175] By not protecting citizens from morally repugnant harms such as revenge pornography, state and federal governments are effectively legitimizing these destructive exploitations and leaving victims of revenge pornography with no straightforward and clearly delineated remedies.[176]

To insulate society, prevent individuals from becoming unwilling nude celebrities, and preclude relationship issues from being decided on the basis of threats, coercion, or duress involving the public release of private material, revenge pornography must be met with statutory regulations as has been done in several states.[177] For example, N.J. STAT. ANN. § 2C:14-9

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174. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66-67 (1973) (stating that conduct that can be prohibited by the police is not automatically protected once moved from a private venue to a public or "live" theatre stage); *see also* Miller v. California, 413 U.S. 15, 16 (1973) (explaining that censorship of the commercial sale of obscene materials does not diminish the right to free speech because it still preserves the concept of a marketplace of ideas).

175. *See Paris Adult Theatre*, 413 U.S. at 69 (confirming that states have a legitimate interest in regulating the commerce of obscene materials in public places because these materials encroach on societal interests).

176. *See* People v. Barber, No. 2013NY059761, 2014 N.Y. Misc. LEXIS 638, at *1-2 (N.Y. Crim. Ct. Feb. 18, 2014) (concluding that the defendant's conduct was reprehensible yet did not violate any of the criminal statutes under which he was charged, including aggravated harassment, dissemination of an unlawful surveillance image, or public display of offensive sexual material); *see also Peterson*, 2009 U.S. Dist. LEXIS 90633, at *15 (stating that local laws have not been violated because the distribution of explicit images taken consensually is not actionable). *But see* M. Alex Johnson, *'Revenge Porn' Site Ordered to Pay Ohio Woman $385,000*, NBC NEWS (Mar. 19, 2014), http://www.nbcnews.com/news/us-news/revenge-porn-site-ordered-pay-ohio-woman-385-000-n57276 (describing a lawsuit whereby a plaintiff successfully sued the founders of a website where sexually explicit images of the revenge pornography victim were posted and where punitive and compensatory damages for child pornography and for a violation of the victim's right to publicity were subsequently awarded).

177. *See* CAL. PENAL CODE § 647(j) (West 2013) (establishing laws against revenge pornography founded on acts of disorderly conduct); N.J. STAT. ANN. § 2C:14-9 (West 2004) (imposing laws against disorderly conduct and distribution of intimate photographs with intent to cause emotional distress); *see also State 'Revenge Porn' Legislation*, NAT'L CONFERENCE OF STATE LEGISLATORS, http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx (last updated Sept. 2, 2014) (listing revenge pornography legislation by state, stating that some revenge pornography websites charge a fee to have the explicit images removed, and confirming that legislation in most states does not address the distinction between the unauthorized distribution of sexually explicit

bans revenge pornography through an unlawful disclosure measure.[178] Moreover, because revenge pornography furthers neither a governmental interest nor promotes the notion of free speech, narrowly tailored legislation has the ability to prohibit willing recipients from obtaining unwilling displays of obscenity in the form of revenge pornography.[179] In view of the facts that revenge pornography appeals to the prurient interest, is patently offensive, lacks serious literary, artistic, political, and scientific value, has deleterious effects on individuals and society as a whole, and allows a once-trusted partner to place a stranglehold on another's reputation, image, and mental state, it is obscene under contemporary community standards and violates tort law to the extent that it constitutes an intrusion of solitude, public disclosure of private facts, portrays the victim in a false light in the public eye, or is an appropriation of the plaintiff's name or likeness.[180]

V. CONCLUSION

The federal government and state governments that have not enacted laws against revenge pornography fail to account for the limitations pronounced by the First Amendment's freedom of speech doctrine and the Constitution's implied right to privacy doctrine.[181] Thus, Congress and

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photographs taken by another with the consent of the displayed individual and those taken by the displayed individual him or herself and consensually shared with another).

178. *See* State v. Parsons, No. A-3856-10T3, 2011 N.J. Super. Unpub. LEXIS 2972, at *4-5 (N.J. Super. Ct. App. Div. Dec. 8, 2011) (holding that under N.J. STAT. ANN. § 2C:14-9, "the elements the State must prove include: 1) the defendant must know that he is not licensed or privileged to disclose a photograph; 2) a person actually disclosed the photograph; 3) the photograph must be of another whose intimate parts are exposed; and 4) the individual depicted in the photograph has not consented to the disclosure of the photograph").

179. *See* Reno v. ACLU, 521 U.S. 844, 875 (1997) (emphasizing that because an overbroad suppression of speech may reduce speech to that which is not offensive to children, it is similarly overbroad in justifying the state's interest in protecting children from certain harmful materials); *see also* Editorial, *States Can Address 'Revenge Porn' with Carefully Crafted Laws*, WASH. POST (Jan. 17, 2014), http://www.washingtonpost.com/opinions/states-can-address-revenge-porn-with-carefully-crafted-laws/2014/01/17/4b71dee8-7f0d-11e3-95c6-0a7aa80874bc_story.html (acknowledging that criminalizing revenge pornography in a narrow statute is justifiable based on the harm caused to members of society and the lack of public interests served by the proliferation of revenge pornography).

180. *See* Prosser, *supra* note 7, at 398 (stating that an implied right to privacy, as further established by social mores, defends against mental distress and harm to reputation).

181. *See* Roth v. United States, 354 U.S. 476, 484-85 (1957) (claiming that the First Amendment protects political beliefs but not obscenity because obscenity exploits individual members of society and society as a whole).

state legislatures must formulate laws banning revenge pornography and federal and state courts must properly interpret these laws to close the revenge pornography loophole.[182] Even if the courts do not define revenge pornography as obscene, federal and state laws should implement tort remedies to better address revenge pornography's serious and repugnant breaches of moral standards that currently do not have the ramifications of law.[183] Failure to do so could complicate and encumber the federal obscenity doctrine and, consequently, malevolent actors could use the guarantees of the First Amendment as a sword to perpetrate unjustified retributive acts against those who are assured such protections.[184]

182. *See* Nitke v. Gonzales, 413 F. Supp. 2d 262, 265-66 (S.D.N.Y. 2005) (providing that indecent or sexually explicit speech that is obscene under *Miller* is unprotected speech because it does not advance congressional intent).

183. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) (concluding that as technology changes the way people perceive works and express themselves, laws will need to construct previously unavailable remedies).

184. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66-67 (1973) (reaffirming that obscene material in commerce is unprotected by any constitutional doctrine, and individual victims of revenge pornography are shielded by an implied right to privacy).