WHEN THE RELATIONSHIP WENT DOWN, THE PHOTOS WENT UP: REVENGE PORN AND FLORIDA’S NEW SEXUAL CYBERHARASSMENT STATUTE

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The frankest and freest and privatpest product of a human mind and heart is a love letter; the writer gets his limitless freedom of statement and expression from his sense that no stranger is going to see what he is writing. . . . and when he sees his letter in print it makes him cruelly uncomfortable and he perceives that he never would have unbosomed himself to that large and honest degree if he had known that he was writing for the public.

—Mark Twain

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* Alexandra Casals, Candidate for Juris Doctor, May 2016, Florida Coastal School of Law. This Article is dedicated to my parents for their constant support. I attribute all my accomplishments to the abundance of love and encouragement I receive from my family. I am also grateful for the Editorial Board and Staff Editors of Florida Coastal Law Review for the their hard work and dedication in editing this Article. Last, I would like to thank Professor Kolenc for assisting me during his office hours and for constantly challenging my understanding of constitutional law issues. Professor Kolenc made constitutional law enjoyable and thought provoking.
I. INTRODUCTION

"I hate you . . . now we're even."¹ About a year ago, a disgruntled ex-lover posted this message on Twitter accompanied with a photo of her former partner's penis.² The victim of this angry ex-lover’s “revenge post” was Adam Kuhn, the former chief of staff to Ohio GOP Representative Steve Stivers.³ After this post, Mr. Kuhn’s

² Id.
³ Id.
political career came to a halt when he was forced to submit a letter of resignation to Stivers. This post is an example of a few things. First, "revenge porn" is a real and cognizable matter. Second, the targets of these posts are victims suffering from a genuine harm. Third, although disproportionately affecting women, this post demonstrates that revenge porn is not exclusive to one gender. While it is true that both men and women have fallen victim to these hateful and humiliating posts, the impact revenge porn has on women is worth discussing in this Article. Moreover, the post about Mr. Kuhn also represents the exercise of a right cherished and protected by the U.S. Constitution and the Florida Constitution—the freedom of speech. Therefore, a law regulating such conduct raises constitutional questions regarding the extent of an individual’s right to express themself and the government’s ability to regulate such behavior to any extent.

"Revenge porn refers to sexually explicit photos and videos that are posted online or otherwise disseminated without the consent of the persons shown, generally in retaliation for a romantic rebuff."


5 Other terms that represent the same act include “non-consensual pornography,” “involuntary pornography,” “cyber exploitation,” “cyber rape,” “cyber harassment,” etc. For uniformity, this Article shall use the term “revenge porn” throughout its entirety.


7 See, e.g., id. (discussing the negative impacts revenge porn causes on victims).


9 See infra Section II.A.2.


12 John A. Humbach, How to Write a Constitutional “Revenge Porn” Law 1 (Oct. 30, 2014) (unpublished manuscript, Pace University School of Law),
Normally it involves distributing the pictures and videos through e-mail, social media, websites, or other means. The rising trend in revenge porn has led thirty-four states and the District of Columbia to pass legislation combating these issues by criminalizing this behavior. Supporters of revenge porn criminalization argue privacy concerns, the extent of the harm suffered, and insufficient civil remedies as strong reasons for this sort of legislation. However, this form of legislation does not come without its own critics. The biggest criticism of this form of legislation comes from a concern that it might violate the First Amendment right to free speech when there are sufficient civil remedies already in place. In 2014, Florida legislators attempted to pass both Florida House Bill 475 and Florida Senate Bill 532, which sought to criminalize revenge porn in Florida. However, both bills failed to pass. During the 2015 congressional session, Florida legislators reviewed two more bills attempting to criminalize revenge porn. On


13 Citron & Franks, supra note 8, at 346.
15 See, e.g., Citron & Franks, supra note 8, at 350-60.
17 See id.
19 See CS/CS/SB 532, supra note 18 (indicating in the bill history that the bill “died in messages” within House chambers on May 2, 2014); see also HB 475, supra note 18 (indicating in the bill history that the bill “died in Criminal Justice Subcommittee” on May 2, 2014).
May 14, 2015, Governor Rick Scott approved one of the two bills, creating section 784.049 of the Florida statutes addressing “sexual cyberharassment.”

This Article addresses the issues regarding revenge porn, discusses the legislative history of this issue in Florida, and analyzes section 784.049 and the idea of criminalizing this conduct. Admittedly, a simple Google search of this topic demonstrates that revenge porn legislation has created a storm of political debate. As such, the goal of this Article is not to, for lack of better terminology, pick a “winner” or provide an answer on who is “right.” Rather, this Article aims to bring to light an issue affecting a large portion of society with hopes that it fosters a healthy discussion regarding the harm suffered, privacy rights, personal autonomy, First Amendment rights, and government involvement. Part II will address the background of revenge porn and its effects on victims. Part III will discuss revenge porn legislation in Florida, with a particular focus on the language in section 784.049. Part IV shall discuss the constitutional implications of this sort of legislation and will analyze Florida’s sexual cyberharassment statute.

Overall, the harm caused by revenge porn is evident and serious enough to warrant criminalization. However, is harm alone enough? The language of section 784.049 presents valid First Amendment concerns that will likely face constitutional challenges—particularly that it is a content-based regulation. This does not mean that revenge porn statutes cannot survive constitutional muster, nor does it preclude future legislation, but the constitutional issues will denote a major hurdle for the Florida Legislature and prosecutors when they attempt to charge someone under this statute. With a valid and strong argument for a compelling state interest, a narrowly drawn statute may survive constitutional scrutiny. On the other hand, the State could try to make

21 FLA. STAT. § 784.049 (2015).
22 Citron & Franks, supra note 8, at 350.
23 See, e.g., § 784.049; Clay Calvert, Content-Based Confusion and Panhandling: Muddling a Weathered First Amendment Doctrine Takes its Toll on Society’s Less Fortunate, 18 RICH. J.L. & PUB. INT. 249, 250 (2015).
24 See Kitchen, supra note 6, at 274.
25 See, e.g., Calvert, Revenge Porn and Freedom of Expression, supra note 11.
26 See, e.g., Kitchen, supra note 6, at 277.
an argument that section 784.049 falls outside strict scrutiny's reach. However, one cannot be certain because this sort of regulation appears to be a government initiative to suppress a category of disfavored speech and doing so goes against exactly what the First Amendment sought to prevent. Nonetheless, this does not preclude an analysis of the subject starting from the beginning with revenge porn's history.

II. A BRIEF HISTORY ON REVENGE PORN AND ITS EFFECT ON VICTIMS

The following Sections will provide a general discussion on revenge porn, its victims, and the harm it causes. Within this discussion, this Article will provide one theory as to the possible influences that led to this phenomenon and why the law simply has not caught up. When discussing the topic of revenge porn, one cannot ignore the following: (1) technology and society have influenced this problem, albeit unintentionally; (2) the majority of victims are women; (3) society has a poor reputation of trivializing these harms; and (4) the harm suffered by victims has escalated beyond an emotional harm.

A. The Rise of Revenge Porn: How Did We Get Here and Whom Is It Affecting?

1. Technology and Society: Encouraging a False Sense of Privacy

The rise in revenge porn likely has to do with a number of influences, for example, the longstanding relationship between technology and pornography. Technological advancements, however, are not the only factors that inspire individuals to create these sexually

27 See, e.g., § 784.049; Kitchen, supra note 6, at 276-77.
28 See Humbach, supra note 12.
29 See infra Section II.A.1.
30 See infra Section II.A.2.
31 See infra Section II.B.
32 See infra Part III.
charged images and videos.\textsuperscript{34} Society and the media have also been influential in encouraging people to bring technology into their relationships.\textsuperscript{35} This entanglement between technology and relationships, however, has led to undesirable consequences.\textsuperscript{36}

The advancement of technologies and increased sense of privacy appealed to those interested in producing or viewing pornography.\textsuperscript{37} For example, advancements like the VCR allowed pornography to reach a larger group of people.\textsuperscript{38} The introduction of the Internet allowed pornography to reach an even larger audience, as well as increased privacy by allowing viewers to enjoy videos and photos in a private setting.\textsuperscript{39} This wide availability, increased sense of privacy, and the user-friendly nature of porn websites increased pornography's audience to the point where those “who would never have sought it out before consume it regularly.”\textsuperscript{40} Furthermore, with the introduction and rampant use of smartphones and tablets, pornography became even easier to access.\textsuperscript{41} According to statistics by porn aggregator, PornHub, the majority of U.S. viewers watch porn through a smartphone.\textsuperscript{42} These technological advancements have not only led to easier access to pornography, but have also inspired individuals to create their own

\textsuperscript{34} See infra notes 44-49 and accompanying text.

\textsuperscript{35} See, e.g., Sean Jameson, Here’s Some Powerful Sexting Advice To Keep Things Spicy!, YOUR TANGO, http://www.yourtango.com/experts/scan-jameson/dirty-text-messages (last visited Apr. 7, 2015) (providing expert advice on ways to “sext” that will keep your significant other’s attention); Sexy Texts Can Spice Up Your Relationship, TODAY (Mar. 11, 2010, 11:45 AM), http://www.today.com/health/sexy-texts-can-spice-your-relationship-2D80555257 (discussing the benefits of sending sexy texts and images and providing “sexting” tips that will “spice up your relationship”).

\textsuperscript{36} Linkous, supra note 33, at 2-3.

\textsuperscript{37} Id. at 1.

\textsuperscript{38} Id. at 2.

\textsuperscript{39} Id. at 5.


\textsuperscript{41} Linkous, supra note 33, at 9.

porn, much like a “do-it-yourself” approach.\textsuperscript{43} Dr. Gail Saltz, an associate professor of psychiatry at New York Presbyterian Hospital, when describing the relationship between amateur porn and technology, stated the following:

\begin{quote}
Porn is old. Porn is not new . . . . What’s new is technology at a very cheap cost, which allows you to do it and merchandize it in a greater way . . . . You can do it yourself. You can do it with a flip-cam. You can do it with your phone and you can put it up with no effort.\textsuperscript{44}
\end{quote}

Likewise, society and media have advised individuals of the benefits of introducing technology into one’s intimate relationship.\textsuperscript{45} Large and influential sources like Fox News and the American Association of Retired Persons (“AARP”), for example, release articles that encourage this “sexting”\textsuperscript{46} craze as a way to get your partner excited for what awaits them at home.\textsuperscript{47} Regardless of whether one believes these choices are wise, the act of sending these photos between two adults is not illegal and is becoming increasingly more common.\textsuperscript{48} With the increase in popularity, individuals face this false sense of


\textsuperscript{44} Id.

\textsuperscript{45} See supra note 35 and accompanying text.

\textsuperscript{46} “Sexting” has been defined as “the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the internet.” Complaint at 7, Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (No. 3:09CV00540).


\textsuperscript{48} See Suzanne Choney, \textit{Nearly 1 in 5 Smartphone Users Are Sexting}, TODAY (June 6, 2012, 7:11 PM), http://www.today.com/money/nearly-1-5-smartphone-users-are-sexting-816897 (“Nearly 1 in 5 Americans who have a smartphone say they used it for sexting, sharing explicit photos or text messages with others.”); Joanna Stern, \textit{Mom and Dad Are Sexting: 18 Percent of Adults Send Lewd Text Messages}, ABC NEWS (June 8, 2012), http://abcnews.go.com/blogs/technology/2012/06/mom-and-dad-are-sexting-18-percent-of-adults-send-lewd-messages/ (describing surveys in which “[e]leven percent of Americans admitted that they recorded explicit videos on their phones” and “18 percent of American smartphone owners say they sext.”).
privacy and never fully understand or appreciate the risks involved with sending these photos.49

The advancements in technology, like the Internet and smartphones, mixed with this false sense of privacy, and an entanglement between intimate relationships and technology can lead to undesirable consequences.50 This sense of privacy and security is a myth because someone, an ex-lover for example, can easily upload these photos online to humiliate and harass the subject of the photos.51 With the millions of photos uploaded on a daily basis on social media websites like Facebook,52 it is hard to imagine how website administrators can keep track of them all and monitor any misuse. Websites like Cheaterville.com, MyEx.com, and IsAnyoneUp.com, allow users to upload photos anonymously, which makes it even more difficult to prevent this practice from occurring.53 As a result, the exciting technological advancements and exhilarating ways to spice up one’s sex life soon transform into humiliation and harassment, and all due to the “normalization . . . and modern ease with which individuals

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49 See Aubrey Burris, Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need For a Federal Nonconsensual Pornography Statute, 66 FLA. L. REV. 2325, 2329 (2014) (“Unfortunately, whether caused by naivety or lack of foresight, many people do not consider where a message will end up when sending an image for their partner’s eyes only.”); see also Choney, supra note 48 (discussing how the percent of adult smartphone users in America who worry about losing their phone with explicit images on them compared against the sixty-nine percent of smartphone users who have actually lost their phone).

50 See “Sexts” All The Rage Among College Students, CBS NEWS (July 21, 2011, 2:48 PM), http://www.cbsnews.com/news/sexts-all-the-rage-among-college-students/ (noting how a student body research study revealed that ten percent of sexual texts received had been forwarded to others without the consent of the person who sent the messages). One of the study researchers, Tiffani S. Kisler, stated, “People want to feel a sense of belonging, so they are sharing more of themselves with people they are still getting to know.” Id. “Once they click that ‘send’ button, they don’t know where else a message will wind up.” Id.

51 Linkous, supra note 33, at 3.


can now create, manage, and navigate websites.\textsuperscript{54}

2. Women and Revenge Porn

While revenge porn is not exclusive to one gender, it is evident that women have found themselves at the center of this dilemma.\textsuperscript{55} Danielle Keats Citron—vice president of the Cyber Civil Rights Initiative ("CCRI")—and Mary Anne Franks—advisor to CCRI—reported that the results for a CCRI survey indicated that ninety percent of those victimized by revenge porn were women.\textsuperscript{56} Many argue that revenge porn is a form of harassment and stalking via cyberspace.\textsuperscript{57} In the U.S. National Violence Against Women Survey, women represented sixty percent of cyber stalking victims.\textsuperscript{58} In a report by Working to Halt Online Abuse, out of the 4,043 people who reported cyberharassment from 2000-2013, seventy percent of them were female.\textsuperscript{59}

The disproportionate impact on women likely has to do with society's gender double standard in which women are judged more harshly for their sexual expression than their male counterparts.\textsuperscript{60} Society dubs a woman "slutty" for any form of sexual expression while

\textsuperscript{54} Linkous, supra note 33, at 3.

\textsuperscript{55} See Citron & Franks, supra note 8, at 353; Lorelei Laird, Victims Are Taking On 'Revenge Porn' Websites For Posting Photos They Didn't Consent To, ABA J. (Nov. 1, 2013, 9:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_forPosting_photos_they_didnt_c/.

\textsuperscript{56} Citron & Franks, supra note 8, at 353.

\textsuperscript{57} See id. at 354. See generally DANIELLE K. CITRON, HATE CRIMES IN CYBERSPACE 35-55 (2014) (discussing the issues surrounding cyberharassment and cyberstalking through the stories of a female tech blogger, a law student, and a revenge porn victim).


\textsuperscript{60} Mollie Brunworth, How Women Are Ruining Their Reputations Online: Privacy in the Internet Age, 5 CHARLESTON L. REV. 581, 597-98 (2011). The irony lies when society orders women to act "like ladies" when it comes to sexuality, but when they are verbally attacked over the Internet they are told to "toughen up." See, e.g., CITRON, supra note 57, at 74-75 (discussing a female blogger's experience in a male-dominant blogosphere).
praising men for their sexual behavior.61 This double standard is prevalent in both the offline and online spheres.62 According to research, “women who violate prescriptive gender roles are disproportionately targeted for harassment.”63 This is not to say that men are not victims of revenge porn, or are not affected by these posts, but society has a reputation for condemning a woman for the same behaviors for which they praise a man.64 Because society in general closely scrutinizes a woman’s behavior to ensure she is not “too promiscuous,” posting a sexually explicit photo of a woman online becomes far more damaging to her than if it happened to a man.65 These photos affect a woman’s own personal autonomy to make decisions regarding her sexuality and body.66 Harassers are aware that society views a woman’s sexual expression differently, so it should come to no surprise that women are the ones exploited the most on the Internet, irrespective of the fact that they never consented to the public dissemination of these intimate photos to begin with.67 However, while the disproportionate impact on women is important, it is the harm that revenge porn causes—and society’s role in the trivialization of that harm—that is concerning. Section II.B of this Article discusses society’s response to victims of sexually motivated crimes, including revenge porn, and the effect society’s response has had on the laws with regard to the ability to protect these victims. Section II.C will discuss the harm suffered by victims of revenge porn.

61 Brunworth, supra note 60, at 603 (discussing the “walk of shame” for women vs. the “stride of pride” for men).
63 Id. at 396.
64 Brunworth, supra note 60, at 603.
65 See id. (“While it’s considered OK for college women to want sex, it’s clearly not OK for them to want it too much.”); Anupam Chander, Youthful Indiscretion in an Internet Age, in THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 124, 129 (Saul Levmore & Marth C. Nussbaum eds., 2010) (arguing that the public disclosure of a nude photograph is more damaging to a woman than a man because a man is given more sexual latitude than a woman much like a “[b]oys will be boys” mentality).
66 See Citron & Franks, supra note 8, at 348.
67 Id. at 347-48.
B. The Law’s Failure to Catch Up with Revenge Porn

Upon discovering photos online of their nude self, the first thing victims think to do is call the police.68 Unfortunately, victims quickly realize that the police are, in fact, a limited resource.69 The law’s failure to catch up with the revenge porn phenomenon limits law enforcement’s ability to help.70 For example, prior to enacting the sexual cyberharassment statute, Florida had no law specifically prohibiting posting photos of nude adults on the Internet if the subject consented to the picture.71 In the context of revenge porn, the individual pictured consents to the photos initially with the understanding they will remain private.72 Issues arise when the individual permitted to view the image subsequently publicizes it without the consent of the person pictured.73 Currently, there is no federal criminal legislation combating revenge porn specifically,74 and only thirty-four states have criminalized this behavior.75 Scholars believe that a number of factors contribute to this reality.76 In arguing for a federal statute, Citron and Franks contend that the slow-moving pace of these laws is a result of factors such as

69 See, e.g., Chiarini, supra note 68 (offering personal experience with police stating that there was nothing they could do since “no crime had been committed”); Rowland & Westfall, supra note 68 (“I called the cops right away, thinking they could help me out. When they came, they said there is no law that they know of that protects me.”).
70 See, e.g., Chiarini, supra note 68; Rowland & Westfall, supra note 68.
72 See id.
73 See, e.g., Chiarini, supra note 68.
74 See CITRON, supra note 57, at 47 (discussing the possibility of amending and expanding current federal laws in order to reach revenge porn).
75 See 24 States + DC Have Revenge Porn Laws, supra note 14.
76 See Citron & Franks, supra note 8, at 347.
ignorance to the gravity of this issue and the historical trivialization of the harm suffered.\textsuperscript{77} Additionally, Citron and Franks argue that inconsistencies regarding the way society views privacy and consent in various contexts, and the continuous debate regarding First Amendment freedom of speech jurisprudence also contribute to the lack of criminalization.\textsuperscript{78}

Historically, society has a bad reputation for trivializing the harm suffered by victims of sex crimes\textsuperscript{79} due to the “rape culture” environment prevalent today.\textsuperscript{80} MyEx.com, an infamous revenge porn website, perpetuates societal views within its own removal policy.\textsuperscript{81} Within the removal policy, the website owner “advises” individuals to avoid sending pictures if they prefer not to see them online.\textsuperscript{82} Irrespective of how one feels about the wisdom behind sending nude “selfies,” this sort of view ignores the true problem and shifts the blame towards an individual who is acting legally; it shifts the blame to the victim.\textsuperscript{83} By blaming the victim, or marginalizing the harm with comments like “Boys will be boys!” or “A man can never be sexually assaulted,” society has taken the blame from the perpetrator and placed it on the victim.\textsuperscript{84}

In addition to victim blaming, the consent conundrum further

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Some argue that the trivializing of the harm caused by revenge porn may be a result of gender inequality. See, e.g., id. at 347-48. While it is true there is a gender double standard as previously discussed, for purposes of this Article the discussion of revenge porn will be in a gender-neutral light since the victims of these incidents comprise of both male and females. Regardless of the disproportionate impact on women, legislation is sought to protect both genders equally. Id.
\textsuperscript{82} Id.
\textsuperscript{83} See Rape Culture, Victim Blaming, and the Facts, supra note 80.
\textsuperscript{84} See, e.g., id. (“Stating that ‘All men are violent’ places the blame for the violence elsewhere and stops the perpetrator being responsible.”).
trivializes the harm suffered.\textsuperscript{85} In most other circumstances, consent is context or circumstance specific.\textsuperscript{86} For example, consent to “A” does not constitute consent to “B.”\textsuperscript{87} However, in the context of sexual relations, society seems to disregard this understanding of consent.\textsuperscript{88} As such, many argue that if an individual consented to taking and sharing a sexual photo with a trusted partner at one point, then they must have consented to its subsequent public dissemination.\textsuperscript{89} Marginalizing the harm suffered by victims makes it more difficult for victims to come forward regarding their situation.\textsuperscript{90} Furthermore, much like other sexual and domestic abuse victims, revenge porn victims run the risk of further harm due to speaking out.\textsuperscript{91} Thus, much like domestic abuse and rape victims, revenge porn victims are reluctant to come forward regarding their situation.\textsuperscript{92}

Considering these factors, it is not difficult to see why the laws regarding revenge porn are moving at such a slow pace.\textsuperscript{93} With society’s disregard and trivialization of the harm and issue, lawmakers cannot truly appreciate the gravity of the situation.\textsuperscript{94} How can one expect lawmakers to address these issues when they cannot truly appreciate that this is a genuine and cognizable dilemma occurring in society worthy of legislative consideration? In the past, Florida

\textsuperscript{85} See Citron & Franks, supra note 8, at 348.
\textsuperscript{86} See id. (“Outside of sexual practices, most people recognize that consent is context-specific.”).
\textsuperscript{87} See id.
\textsuperscript{88} See id.
\textsuperscript{89} See Caille Millner, Public Humiliation Over Private Photos, SFGATE, http://www.sfgate.com/opinion/article/Public-humiliation-over-private-photos-4264155.php (last updated Feb. 10, 2013, 3:21 PM) (quoting a revenge porn website owner saying, “When you take a nude photograph of yourself and you send it to this other person, or when you allow someone to take a nude photograph of you, by your very actions you have reduced your expectation of privacy.”).
\textsuperscript{90} See Rape Culture, Victim Blaming, and the Facts, supra note 80 (“Victim-blaming attitudes marginalize the victim/survivor and make it harder to come forward and report the abuse.”).
\textsuperscript{91} See, e.g., Citron & Franks, supra note 8, at 347.
\textsuperscript{92} See id.
\textsuperscript{93} See id.
\textsuperscript{94} See id. at 350.
attempted to pass some kind of legislation, but to no avail. Section 784.049 is the first law that made it to Governor Rick Scott for approval. It is imperative that society and lawmakers understand the reality of the harm suffered by victims of revenge porn and prevent that harm through constitutionally valid criminal sanctions when appropriate.

C. The Harm Suffered By Victims of Revenge Porn

Notwithstanding one’s stance on the criminalization debate, it is undeniable that the harm suffered by victims is obvious and understandable. Whether the decision was naïve or a lapse of rational judgment, it is undeniable that the consequence of posting these photos without consent is not trivial and it is not limited to an emotional harm. On top of suffering emotionally, individuals who have discovered that a private photo went public without their consent have faced threats of physical harm as well. Furthermore, the exposure of these photos also makes an impact on a victim’s professional life. Once online, the individuals are now “sexual entertainment for complete strangers.” Studies have shown that one in ten individuals receive threats of posting sexually explicit photos of them from their ex-lovers, with roughly sixty percent of these threats turning into reality. Once online, the photo has limitless potential to reach a large amount of views at a very quick rate. These images can show up on multiple sites or come to the attention of family, friends, and employers.

95 See supra notes 18-21 and accompanying text.
96 See supra notes 18-21 and accompanying text.
97 See Citron & Franks, supra note 8, at 361-70.
98 See, e.g., Chiarini, supra note 68.
99 Id.
100 Id.
103 See, e.g., Chiarini, supra note 68 (stating that in the author’s personal experience her ex-lover shared a nude photo of them on a porn website, and it received over 3,000 views in fourteen days).
104 See Harika, supra note 101.
Legislatures can, and should, consider revenge porn as a form of sexual harassment or abuse since aspects of revenge porn take the form of harassment and cyber stalking.\textsuperscript{105}

1. Threat of Physical Harm

Risks inherent with revenge porn raise serious concerns.\textsuperscript{106} The first of which is the threat of physical harm to victims.\textsuperscript{107} A study by the CCRI on revenge porn revealed that over fifty percent of victims had their names and social media addresses written next to their photos, and twenty percent of victims discovered their phone numbers and e-mail addresses posted alongside their photos.\textsuperscript{108} Even more frightening is the story of Annmarie Chiarini, who discovered that her ex-boyfriend created a profile of her on a porn website and pretended to be her as he chatted with users of the site.\textsuperscript{109} Alongside her photo, the profile stated her name, the city and state she lived in, and the college where she worked.\textsuperscript{110} The profile solicited demands from users, stating, “HOT FOR TEACHER? WELL, COME GET IT!”\textsuperscript{111}

Even worse are actions of revenge porn website owners like Hunter Moore, who marketed his revenge porn site as a center for disgruntled ex-lovers to seek revenge by voluntarily submitting the photos to the site.\textsuperscript{112} Hunter Moore would then post the “names, addresses, and work information about the victims and urged followers—strangers to the person posing—to taunt them.”\textsuperscript{113} With such private information now publicly shared, it is not difficult to see how easy it would be for such information to fall in the hands of a very dangerous predator. For example, situations similar to Hollie Toups’

\textsuperscript{105} Citron, supra note 57, at 3; see also Citron & Franks, supra note 8, at 354.

\textsuperscript{106} See Citron & Franks, supra note 8.

\textsuperscript{107} Id.

\textsuperscript{108} Id. at 350.

\textsuperscript{109} See Chiarini, supra note 68.

\textsuperscript{110} Id.

\textsuperscript{111} Id.


\textsuperscript{113} Id.
become all too real and all too likely. After someone posted Hollie's nude pictures online, Hollie became afraid to leave her home due to uncertainty of what may happen. When the word about the post spread around Hollie's small town, she received soliciting messages and people approached her in public.

The anonymity of the Internet only increases the fear of physical harm. An article in the American Bar Association Journal emphasized this behavior as highly sexualized abuse and noted that the abuse consists of "threats of rape [and] false prostitution ads . . . even when the victim is a man." Those who post these images, as well as those who view them, may do so anonymously. As such, victims are constantly living in this state of uncertainty concerning who exactly has seen these images. Rebekah Wells of Naples, Florida, stated, "When you have your pictures up like that, you don't know who’s seen them and who hasn’t." As a student at Florida Gulf Coast University, she described going to class wondering if her professor had seen her images or searched her on Google. Thus, many revenge porn victims—like Annmarie, Hollie, and Rebekah—live in a constant fear that these anonymous individuals viewing and e-mailing them will "follow up on their sexual demands." Situations such as Annmarie's are especially concerning when users of these revenge porn websites believe they are speaking with, and responding to sexual solicitations from, the individual pictured when, in fact, they are not.

In some situations, these threats to one's physical safety become

114 See generally Millner, supra note 89 (explaining that the situations revenge porn websites put victims in are detrimental by telling the stories of several victims).
115 See id.
116 See id.; Laird, supra note 55.
117 See CITRON, supra note 57, at 273.
118 Laird, supra note 55.
119 See CITRON, supra note 57, at 110, 117.
120 See Laird, supra note 55.
121 Id.
122 Id.
123 Citron & Franks, supra note 8, at 351.
124 See Chiarini, supra note 68.
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a reality; at least it did for a woman named Sara. Sara discovered a photo of herself on Craigslist with an ad that said, "Need an aggressive man with no concern or regard for women." Craigslist removed the ad as soon as Sara contacted them, but it was too late. Sara’s ex-boyfriend, Jebidiah Stipe, had posted this ad pretending to be Sara and communicated with over one hundred responders. One such responder, Ty McDowell, contacted Stipe about the ad; Stipe—was was pretending to be Sara—then requested that McDowell carry out a rape fantasy. A week later, despite Craigslist removing the ad, McDowell attacked Sara at knifepoint at her home. McDowell raped and abused her with a knife sharpener and left her bound and gagged on the floor. When police arrested McDowell, he insisted that Sara asked him to rape her and referred to the ad and conversations he had with her—when in reality McDowell’s conversations were with Stipe. Even more disturbing, while Sara was in the hospital for her injuries, her fiancé returned to the house to pick up some of her belongings and found a second man standing in Sara’s home with a camera. Apparently, Stipe e-mailed that man as well.

2. The Emotional Impact of Revenge Porn

Revenge porn victims endure psychological problems because of these posts. A study by the CCRI indicated, “Over 80% of revenge porn victims experience severe emotional distress and

126 Id.
127 Id.
128 Id.
130 Id.
131 Id.
132 See The Craigslist Rape Victim, supra note 125.
133 Id.
134 Id.
135 See Citron & Franks, supra note 8, at 351.
anxiety."\textsuperscript{136} Citron and Franks both note that it is common for victims to suffer from anorexia and depression.\textsuperscript{137} Holly Jacobs, revenge porn victim and founder of the nonprofit End Revenge Porn, dedicates her life to preventing someone else from suffering from the same psychological harm she endured.\textsuperscript{138} Holly described her psychological trauma as living in fear for years and even went as far as changing her name.\textsuperscript{139} For other victims, life becomes a ritual of constantly checking to see if there is anything new on the Internet.\textsuperscript{140} Annmarie described it as living in persistent panic and anxiety; she also commented on how she lived in a ritual where she would wake up in the middle of the night to check social media, her e-mail, and other accounts to make sure someone did not upload something new about her.\textsuperscript{141} Annmarie was under the supervision of a therapist for posttraumatic stress disorder, and described the victim blaming and lack of law enforcement support\textsuperscript{142} as “shame and embarrassment [at] a paralyzing level.”\textsuperscript{143}

Regardless of how one describes the psychological harm suffered, it is evident that these issues are grave with serious consequences.\textsuperscript{144} The anxiety resulting from this sort of cyberharassment continues to grow more severe as time passes.\textsuperscript{145} In serious cases, the psychological damage has resulted in victims

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{139} Id.
\textsuperscript{140} See, e.g., Chiarini, supra note 68.
\textsuperscript{141} Id.
\textsuperscript{142} Partially because the laws in place do not provide officers with much guidance and partially because of the rape culture we live in. See, e.g., id. (describing how the officer said there was no crime committed and having to hold back tears when she could see officers looking at the photos and snickering).
\textsuperscript{143} See, e.g., id.
\textsuperscript{144} See supra Section II.C.
commiting suicide.\textsuperscript{146} The extent of the trauma and the testimonials of victims demonstrate that the lack of legislation in this area is contributing to this public crisis rather than preventing this problem from continuing.\textsuperscript{147} Victims suffer from, what feels like to them, a never-ending torture due to the permanency and evasiveness of the Internet and the lack of legislation to deter this behavior.\textsuperscript{148} As a result, victims strongly consider ending their lives as a way to free themselves.\textsuperscript{149}

3. The Damaging Effects on Victims' Professional Lives

The professional consequences of revenge porn are just as costly as other harms.\textsuperscript{150} Online reputation has an expanding role in one's personal and professional life.\textsuperscript{151} Studies indicate that seventy percent of recruiters and human resources personnel in the United States "have rejected candidates based on information [that] they found online."\textsuperscript{152} Since revenge porn pictures posted online often include an individual's full name, a simple search of a person on Google can lead employers to images and videos that a candidate would not want them to see.\textsuperscript{153} Research indicates that, of the types of online reputational information that influence decisions regarding whether to accept or reject a candidate, human resource professionals stated "unsuitable photos, 

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{146} See, e.g., Elizabeth M. Ryan, \textit{Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults}, 96 IOWA L. REV. 357, 359 (2010) (discussing briefly the stories of thirteen-year-old Hope Witsell and eighteen-year-old Jessica Logan both of whom committed suicide after nude photos of them were distributed to third-parties without their consent).
\item \textsuperscript{147} See supra Section II.B.
\item \textsuperscript{148} See, e.g., Chiarini, supra note 68.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} See generally CROSS-TAB, \textit{ONLINE REPUTATION IN A CONNECTED WORLD} 1 (2010), http://www.job-hunt.org/guides/DPD_Online-Reputation-Research_overview.pdf (discussing the expanding role of online reputation in both professional and personal lives by studying how recruiters and human resource professionals use online reputational information in their candidate review process and how consumers feel about this use of their information).
\item \textsuperscript{151} See id. at 3, 5-6.
\item \textsuperscript{152} Id. at 3.
\item \textsuperscript{153} See Laird, supra note 55.
\end{itemize}
\end{footnotesize}
videos, and information” as one of the top three concerns.\textsuperscript{154} The same study indicated that the top three sites that recruiters and human resource professionals visit are search engines, social networking sites, and photo and video sharing sites.\textsuperscript{155} These sites are also the ones most perpetrators use to post sexually explicit photos of their victims.\textsuperscript{156} Thus, victims face the unfortunate reality that the photos posted online may prevent them from finding work in the first place.\textsuperscript{157}

Just like Adam Kuhn’s situation mentioned at the start of this Article, sexually explicit photos online may affect one’s current job, as well.\textsuperscript{158} For example, schools have terminated teachers and faculty for inappropriate photos appearing online.\textsuperscript{159} In 2011, a public school in New York fired a well-respected guidance counselor after a student brought an image of the counselor to the principal.\textsuperscript{160} This picture was from seventeen years prior when the counselor was an underwear model.\textsuperscript{161} The principal decided that the photos were too easily accessible to the students.\textsuperscript{162} The principal fired the counselor despite the fact that when she first applied for the job she was honest about her past and was hired anyways.\textsuperscript{163} In fact, the Department of Education cleared the counselor several times to work with students.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{154} See \textit{CROSS-TAB}, \textit{supra} note 150, at 9 (citing fifty-eight percent of human resource professionals were concerned with a candidate’s lifestyle based on online information, fifty-six percent were concerned with inappropriate online comments and text written by the candidate, and fifty-five percent were concerned with unsuitable photos, videos, and information posted online).
\item \textsuperscript{155} \textit{Id.} at 8.
\item \textsuperscript{156} See \textit{id.}
\item \textsuperscript{157} \textit{Id.} at 5.
\item \textsuperscript{158} See generally \textit{Porn Star Ends the Career of Congressman’s Chief of Staff, supra} note 4 (discussing how Mr. Kuhn had to resign from his job as Chief of Staff for Congressman Stivers due to the nude photos posted online).
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.}
\end{itemize}
Nonetheless, the counselor lost her job only days before she achieved tenure in the school district. In another case, a government agency terminated a female employee when a colleague brought nude photos of her and distributed copies around the workplace. The employee lost her job even though the colleague who distributed the photos violated the agency’s sexual harassment policy.

Overall, the consequence of revenge porn takes different forms. Regardless of the form it takes, the effect of revenge porn is costly. The harm suffered by victims—physical, psychological, or professional—is undeniable and understandably the reason why so many are pushing for this sort of legislation.

III. THE RECENT REVENGE PORN LEGISLATION IN FLORIDA

Florida began discussing the issue of revenge porn and nonconsensual porn in 2013. That same year, Florida legislators proposed two bills—House Bill 787 and Senate Bill 946—both of which were titled “Computer or Electronic Device Harassment.” However, both bills failed to pass. Again, in 2014, the Florida House of Representatives (“Florida House”) and the Florida Senate each

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165 Id.
167 Id. at 17, 48.
169 See Citron & Franks, supra note 8, at 352; Kitchen, supra note 6, at 263.
170 See Bahadur, supra note 168.
171 See generally Tracy Clark-Flory, Criminalizing “revenge porn,” SALON (Apr. 6, 2013, 9:00 PM), http://www.salon.com/2013/04/07/criminalizing-revenge-porn/ (discussing the newly proposed bill in Florida for the year 2013).
173 See Fla. H.R. 787 (indicating in the bill history that the bill “died on second reading calendar” on May 3, 2013); Fla. S. 946 (indicating in the bill history that the bill “died in Appropriations Subcommittee on Criminal and Civil Justice” on May 3, 2013).
proposed a bill, both titled “Disclosure of Sexually Explicit Images,” which sought to criminalize revenge porn in Florida. Both attempts were once again unsuccessful. In January of 2015, the Florida Senate proposed Senate Bill 538, titled “Disclosure of Sexually Explicit Images.” The Florida House joined by proposing House Bill 151 titled “Sexual Cyberharassment.” In the midst of writing this Article, the Florida House substituted Senate Bill 538 for House Bill 151 and laid House Bill 151 on the table. Subsequently, the Florida House read the Senate Bill 538 as replaced by House Bill 151, adopted the amendment, and sent the newly amended Senate Bill 538 to the Senate. On May 7, 2015, officers signed Senate Bill 538 and presented it to Governor Rick Scott. He approved the bill on May 14, 2015, creating section 784.049 of the Florida Statutes, titled sexual cyberharassment. Sections III.A and B will endeavor to illustrate the ways Florida is addressing the revenge porn issue by reviewing the text of the past bills and the present statute, section 784.049. By reviewing the text, this Article aims to illustrate the importance of creating a careful and precise statute in order to strike a balance between deterring revenge porn and its undeniable harms, while still protecting First Amendment rights.

175 See Fla. H.R. 475; Fla. S. 532 (indicating in the bill history that the bill “died in messages” within House chambers on May 2, 2014).
178 See id. It is important to note that although House Bill 151 is on the table, it has not “died” but rather the legislature suspends consideration of it. See H.R. JOURNAL, 9th Sess. 48-50 (Fla. 1858) (explaining what it means “to lay on the table” and its effect). It is also important to note that the text of the Florida House’s amendment of Senate Bill 538 is exactly the same as the now tabled House Bill 151, including the title. See Fla. S. 538.
179 See Fla. H.R. 151.
180 See Fla. S. 538.
181 See id.; see also FLA. STAT. § 784.049 (2015).
Failed Proposals that Attempted to Criminalize Revenge Porn

In proposing Florida House Bill 475 and Senate Bill 532, Florida legislators aimed at “prohibiting an individual from disclosing a sexually explicit image of an identifiable person.” The 2014 proposed Florida House Bill 475 stated that

(2) An individual may not intentionally and knowingly disclose a sexually explicit image of an identifiable person or that contains descriptive information in a form that conveys the personal identification information . . . of the person to a social networking service or a website, or by means of any other electronic medium, with the intent to harass such person, if the individual knows or should have known that the person depicted in the sexually explicit image did not consent to such disclosure.

The 2014 proposed Senate Bill read

(2) An individual may not intentionally and knowingly disclose a sexually explicit image of an identifiable person to a social networking service or a website, or by means of any other electronic medium, with the intent to harass such person, if the individual knows or should have known that the person depicted in the sexually explicit image did not consent to such disclosure.

Although both 2014 bills ultimately failed, each had certain aspects that were beneficial to overcoming constitutional scrutiny. First, both provided specific and detailed definitions for the terms “disclose,” “harass,” “identifiable person,” and “sexually explicit image.” Experts and lawmakers believe that it is important that

183 Fla. H.R. 475 § 1(2) (emphasis added).
184 Fla. S. 532 § 1(2) (emphasis added).
185 See supra notes 183-84 and accompanying text.
186 Fla. H.R. 475 § 1(1)(a)-(d); Fla. S. 532 § 1(1)(a)-(d).
statutes contain specific definitions because it protects the statute from First Amendment attack for being overly broad in violation of the overbreadth doctrine. However, it is important to note that both bills defined “identifiable person” differently, as such, the applicability of each bill (and possibly its constitutional validity) could have differed.

In addition, both bills contain a mens rea requirement that the perpetrator disclose the images “intentionally and knowingly.” By clarifying a defendant’s mental state, this requirement further protects the bills from First Amendment overbreadth attacks because it clarifies that only a specific set of individuals will be subject to these bills and will not sweep in individuals who thoughtlessly share someone’s photos with an honest belief that they were not infringing on someone’s privacy. Both bills also contained a malicious motive requirement that required a perpetrator to post the images with the “intent to harass.” Some contend that the malicious motive requirement is unnecessary because it makes the case harder for prosecutors and it discourages law enforcement officers. Although those contentions

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188 Compare Fla. H.R. 475 § 1(1)(c) (“‘Identifiable person’ means an individual in a sexually explicit image who can be identified through: 1. Recognition of his or her face . . . 2. Personal identification information, as defined in s. 817.568.”), with Fla. S. 532 § 1(1)(c) (“‘Identifiable person’ means an individual in a sexually explicit image who can be identified through: 1. Visual recognition of any part of his or her body . . . 2. Identifying information as defined in s. 397.311.”) (emphasis added).

189 See supra notes 183-84 and accompanying text (explaining that a person could be identified under one statute but not the other because the Senate Bill was broader in definition). See generally Martinez, supra note 187 (explaining the importance of the First Amendment right to free speech not being too broad).

190 Fla. H.R. 475 § 1(2); Fla. S. 532 § 1(2).

191 See Citron & Franks, supra note 8, at 387.

192 Fla. H.R. 475 § 1(2); Fla. S. 532 § 1(2).

193 See, e.g., Citron & Franks, supra note 8, at 387 (stating that having an intent to harass or cause harm requirement “misunderstands the gravamen of the wrong—the disclosure of someone’s naked photographs without the person’s consent and in violation of their expectation that the image be kept private”); Harika, supra note 101, at 86-87.
are valid, by narrowly tailoring the language one can see how having an “intent to harass” requirement could benefit these bills when First Amendment advocates inevitably challenge these bills on constitutional grounds.\footnote{See infra Part IV.}

The “ideal” penalty for revenge porn is another area of debate\footnote{Citron & Franks, supra note 8, at 389.} and a significant difference between House Bill 475 and Senate Bill 532.\footnote{Fla. H.R. 475 § 1(3)(a)-(b); Fla. S. 532 § 1(3)(a)-(b).} For example, the violation under House Bill 475 made revenge porn a felony crime.\footnote{Fla. H.R. 475 § 1(3)(a)-(b).} However, the Florida Senate Bill 532 classified a violation of the revenge porn statute as a misdemeanor.\footnote{Fla. S. 532 § 1(3)(a)-(b).} A violation under House Bill 475 for a felony in the second degree may be a term of imprisonment up to fifteen years or a term of imprisonment no more than five years for a felony in the third degree.\footnote{FLA. STAT. § 775.082(3)(d) (2015).} In contrast, under Senate Bill 532, a first-degree misdemeanor is punishable by a term of imprisonment up to one year, while a second-degree misdemeanor is punishable by no more than sixty days.\footnote{Id. § 775.082(3)(d), (9)(3)(d).} An appropriate penalty is an important factor to consider in order to have the right balance between a penalty that is strong enough to deter conduct and rectify harm, but reasonable enough that it will not face public opposition.\footnote{Citron & Franks, supra note 8, at 389.}

\section*{B. Florida Statute Section 784.049 – Sexual Cyberharassment}

As mentioned above, the Florida House tabled the 2015 House Bill 151 titled “Sexual Cyberharassment” and substituted Senate Bill 538 with the text from House Bill 151.\footnote{See H.R. 151, 2015 Leg., Reg. Sess. (Fla. 2015).} The Florida House sent the amended Senate Bill 538, previously titled “Disclosure of Sexually Explicit Images,” back to the Senate with the title Senate Bill 538 “Sexual Cyberharassment.”\footnote{See S. 538, 2015 Leg., Reg. Sess. (Fla. 2015).} The Senate read the bill as amended by the Florida House (with the exact text and title of the tabled House bill),
voted, signed, and sent the bill to Governor Rick Scott for approval.\textsuperscript{204} The Governor approved the bill, creating Florida Statute section 784.049, as written.\textsuperscript{205} The language of this statute is significantly different from the original Senate Bill 538 (before it was amended by the Florida House) and even that of the 2014 bills.\textsuperscript{206} For example, subsection one of the statute lays out the legislative findings regarding the harm caused by revenge porn.\textsuperscript{207} Subsection one recognizes that individuals have a reasonable expectation of privacy in sexually explicit photos of themselves.\textsuperscript{208} This subsection further states that revenge porn has become a "common practice" and that perpetrators post these images with the intent to cause substantial emotional distress on the individual pictured.\textsuperscript{209} Subsection one also recognizes the "significant psychological harm" suffered by victims of revenge porn when others post sexually explicit photos of them on the Internet without their consent.\textsuperscript{210} Even more interesting is the Florida Legislature’s explicit statement in subsection one that the state’s interest is, in fact, compelling.\textsuperscript{211}

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item FLA. STAT. § 784.049.
\item Compare id. (showing the final language of the sexual cyberharassment statute), with Fla. S. 538 (showing the changing of the language used in one bill versus the other).
\item FLA. STAT. § 784.049(1).
\item Id. § 784.049(1)(a).
\item Id. § 784.049(1)(b).
\item Id. § 784.049(1)(c)-(e) (stating that legislative findings show that these images, once on the internet, can be viewed "indefinitely" . . . “crea[t]ing] a permanent record” that causes “significant psychological harm”).
\item Id. § 784.049(1)(f). This is interesting because “compelling” is language pertaining to strict scrutiny. See, e.g., United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000) (“[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”) (emphasis added). Laws falling under strict scrutiny are presumptively invalid. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). Thus, unlike rational basis, the court does not defer to legislative findings and presume the law valid. See Playboy Entm’t Grp., Inc., 529 U.S. at 817 (“When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed.”) (emphasis added); Lyng v. Int’l Union, UAW, 485 U.S. 360, 370 (1988). Nonetheless, this does not mean that the courts cannot, or will not, consider these findings. By placing the word “compelling” within the bill, one cannot help but
\end{enumerate}
\end{footnotesize}
Section 784.049(3) criminalizes revenge porn, it reads:

(a) Except as provided in paragraph (b), a person who willfully and maliciously sexually cyberharasses another person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) A person who has one prior conviction of sexual cyberharassment and who commits a second or subsequent sexual cyberharassment commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.083.212

At first glance, the statute seems to require proof of two things—an act (sexual cyberharassment) and a mens rea (willfulness and maliciousness). However, subsection 2 of this statute, just as in the 2014 bills, provides specific and detailed definitions.213 These definitions illustrate precisely the extent of subsection 3’s coverage.214 This statute requires proof of a number of elements, specifically when proving that the defendant engaged in sexual cyberharassment.215 As defined in the statute, “sexually cyberharass” means to “publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an internet website without the depicted person’s consent, for no legitimate purpose, with the intent of causing substantial emotional distress to the depicted person.”216 Thus, the “sexual cyberharass” element requires the existence of six sub-elements: (1) sexually explicit image, (2) personal identification information, (3) Internet website, (4) lack of consent, (5) no legitimate purpose, and (6) intent to cause substantial emotional distress.217 There are notable differences between this statute

interpret that as the legislature acknowledging that the court will likely analyze this law under strict scrutiny. However, this Article will discuss these possibilities at a later point. See infra Section IV.B.

212 § 784.049(3)(a)(b).
213 Id. § 784.049(2).
214 Id. § 784.049(3).
215 Id. § 784.049(2).
216 Id. § 784.049(2)(c).
217 Id.
and the 2014 bills that are worthy of discussion.

1. “Identifiable Person” vs. “Personal Identification Information”

   Both the 2014 House Bill 475 and Senate Bill 532 required that the image disclose an “identifiable person.”\(^{218}\) Part of the definition for “identifiable person” under House Bill 475 stated, “recognition of his or her face”\(^{219}\) and under Senate Bill 532 stated, “visual recognition of any part of his or her body.”\(^{220}\) Under section 784.049, however, the only requirement is that the image of the individual contains or conveys “personal identification information”\(^{221}\) as defined by Florida Statute 817.568. “Personal identification information” under Florida Statute 817.568 means:

   [A]ny name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

   1. Name, postal or electronic mail address, telephone number, social security number, date of birth, mother’s maiden name, official state-issued or United States-issued driver license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;

   2. Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

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\(^{219}\) Fla. H.R. 475 § (1)(c).

\(^{220}\) Fla. S. 532 § (1)(c).

\(^{221}\) FLA. STAT. § 784.049(2)(b).
3. Unique electronic identification number, address, or routing code;

4. Medical records;

5. Telecommunication identifying information or access device; or

6. Other number or information that can be used to access a person's financial resources.222

The omission of any language similar to the 2014 bills was likely intentional, evidenced by the fact that House Bill 475 also included "personal identification information" and referenced the exact same statute above within its definition of "identifiable person."223 Senate bill 532 was similar,224 except its definition for "identifying information" referenced a different, but substantially similar Florida statute to the one defining "personal identifiable information."225 Thus, it seems as if the Florida Legislature decided it was best to remove text like "any part of the body" or "recognition of his or her face" in order to closely draft this law. Conceivably, under this language, there is a giant loophole. An individual can simply post an image of another person where you can clearly see his or her face, but avoid adding any kind of "personal identification information." Thus, the statute would not apply in this situation. Although closely drafting these laws may aid in surviving constitutional scrutiny,226 too narrow of a definition will cause courts to question the validity of the state's interest and concerns.227 How significant can this interest be if the Legislature defined this term so narrowly that it creates the possibility that perpetrators will find a

222 Id. § 817.568(1)(f); S. 538 § 2(b), 2015 Leg., Reg. Sess. (Fla. 2015) (referring the reader to Florida Statute section 817.568(1)(f) for the definition of "personal identification information").
223 Fla. H.R. 475 § (1)(c).
224 Fla. S. 532 § (1)(c)(2) ("identifying information as defined in s. 397.311.").
225 FLA. STAT. § 397.311(17) ("'Identifying information' means the name, address, social security number, fingerprints, photograph, and similar information by which the identity of an individual can be determined with reasonable accuracy directly or by reference to other publicly available information.").
226 See Harika, supra note 101, at 78.
227 Citron & Franks, supra note 8, at 388.
way around it?

2. “Internet Website” vs. Everything Else

The next significant difference between the 2014 bills and section 784.049 is the medium by which the perpetrator disseminated the sexually explicit photo. While section 784.049 narrows it to “Internet websites,” both of the 2014 bills broadly refer to photos posted on “social networking services,” “website[s],” or by any other “electronic medium.” Section 784.049 constricts its meaning so that the law achieves its state interest without being overly broad. Here, the legislative findings indicate that Florida’s concerns are specific to photos placed on websites, specifically porn websites. On the other hand, the 2014 bills were very broad and could encompass, for example, photos sent through text message. Although those photos may be just as harmful, the legislative concerns are specific to the harm caused due to the Internet’s unique characteristics.

3. “Sexually Explicit Image” and the Definition of “Nudity”

One of the most important definitions, if not the most important, is the definition for “sexually explicit image.” What constitutes as “sexually explicit” is a key element of the crime. As such, its definition should be “specific and narrow . . . so that defendants have a

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228 Compare Fla. H.R. 475 § (2) (prohibiting dissemination through “a social networking service or a website, or by means of any other electronic medium”), and Fla. S. 532 § (2) (prohibiting dissemination through the exact same medium as stated in House Bill 475), with Fla. Stat. § 784.049(2)(c) (narrowing the medium by which the photos are disseminated to “Internet websites”). See generally Fla. H.R. 475 (prohibiting an individual from intentionally & knowingly disclosing sexually explicit images of an identifiable person through attached personal identifiers for purposes of harassment if the individual knows, or should have known, the person depicted in sexually explicit image did not consent).

229 FLA. STAT. § 784.049(2)(c).

230 See Fla. H.R. 475 § (2); Fla. S. 532 § (2).

231 FLA. STAT. § 784.049(1)(c)(d).

232 Id. § 784.049(1).

233 See Fla. H.R. 475 § (2); Fla. S. 532 § (2).

234 FLA. STAT. § 784.049(1).

235 Citron & Franks, supra note 8, at 388.
clear understanding of the images covered by the statute." 236 Under the 2014 bills, "sexually explicit image" meant "a private photograph, film, videotape, recording, or other reproduction of (1) Nudity; or (2) Sexual intercourse, including, but not limited to, oral sexual intercourse or anal sexual intercourse." 237 What is interesting about this definition is the lack of explanation for what constitutes "nudity." 238 As a key term to establishing a "sexually explicit image," it is important to provide a precise and detailed definition to place defendants on notice. 239

In contrast, section 784.049 contains a much more precise definition for "sexually explicit image" and "nudity." 240 Section 784.049 defines "sexually explicit image" as "any image depicting nudity, as defined in section 847.001, or depicting a person engaging in sexual conduct, as defined in section 847.001." 241 Florida Statute section 847.001 states:

(9) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding. . . .

(16) "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the

236 Id.
237 Fla. H.R. 475 § (1)(d); Fla. S. 532 § (1)(d).
238 Fla. H.R. 475 § (1)(d); Fla. S. 532 § (1)(d).
239 Citron & Franks, supra note 8, at 388.
241 Id.
intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”\textsuperscript{242}

These definitions are commendable for their specificity. Although at first glance, aspects of the these definitions may seem troublesome, when section 784.049 is read as a whole, the statute does a much better job at narrowing its reach than the 2014 bills.\textsuperscript{243} The first subsection of section 784.049 indicates that the legislature recognizes that a person who consents to taking a sexually explicit image “has a reasonable expectation that the image will remain private.”\textsuperscript{244} Thus, when read as a whole, it is conceivable to interpret section 784.049 as recognizing the context-specific nature of consent and as referring to photos that were intended to remain private.\textsuperscript{245}

IV. \textbf{REVENGE PORN STATUTES AND THE CONSTITUTIONAL IMPLICATIONS}

The First Amendment of the U.S. Constitution declares that “Congress shall make no law . . . abridging the freedom of speech.”\textsuperscript{246} Likewise, the Florida Constitution declares, “no law shall be passed to restrain or abridge the liberty of speech.”\textsuperscript{247} The “bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”\textsuperscript{248} The basic premise of First Amendment jurisprudence recognizes the profound value our nation places on the open debate of public issue and that such debate be

\textsuperscript{242} \textit{Id.} § 847.001(9), (16).
\textsuperscript{243} See \textit{id.} § 784.049.
\textsuperscript{244} \textit{Id.} § 784.049(1)(a).
\textsuperscript{245} See \textit{id.} § 784.049.
\textsuperscript{246} U.S. CONST. amend. I.
\textsuperscript{247} FLA. CONST. art. 1, § 4.
“uninhibited, robust, and wide-open.” Although there are many competing theories regarding the goals and values of the First Amendment, some of these objectives include “enhancing self-government, seeking truth, encouraging self-fulfillment, balancing stability and change, and promoting tolerance in a pluralistic society.” Thus, laws regulating speech based on its content are “presumptively invalid” and are permissible only if they satisfy strict scrutiny review; for example, the regulation serves a compelling state interest and the means chosen to achieve that end are narrowly tailored and the least restrictive. Overall, it is important to note that the protections of the United States and Florida Constitutions cover verbal speech and written words, but also may extend to “expressive conduct” or “symbolic speech.”

The following paragraphs will discuss criminal laws and their effects if used to criminalize revenge porn. This Part will begin with a discussion of the general purpose of criminal laws, arguments that proponents raise for the criminalization of revenge porn, and arguments against criminalizing revenge porn. This Part will then further discuss First Amendment jurisprudence and its effect on revenge porn legislation. Specifically, it will address section 784.049 and the constitutional hurdles it will likely face.

A. Purpose of Criminal Laws

Unlike civil law, whose purpose is to compensate a wronged party, criminal law’s purpose is punishment. “The criminal law

250 JOHN C. KNECHTLE & CHRISTOPHER J. ROEDERER, MASTERING CONSTITUTIONAL LAW 430 (2009). Knechtle & Roederer provide a good discussion on the concept behind each of these values, as well as some of the criticism they receive. See id. at 431-34.
252 See Citron & Franks, supra note 8, at 374.
253 See U.S. CONST. amend. I; FLA. CONST. art. 1, § 4; Johnson, 491 U.S. at 400, 404 (recognizing that an individual’s conduct may engage in sufficient expression that merits First Amendment protection where the individual has the “intent to convey a particularized message” through that conduct and “the likelihood was great that the message would be understood.”).
254 Criminal vs. Civil Law, DAVIDOFF L. FIRM, http://davidofflawfirm.com/criminal-
Casals system is the state's primary instrument for preventing people from intentionally or recklessly harming one another.”

Criminal punishment serves as a deterrent because the penalties are meant to discourage individuals from committing crimes. Punishment also allows for control of individuals who commit crimes by imprisoning them and essentially keeping them from committing more crimes.

Proponents of revenge porn criminalization argue that criminal laws are necessary to deter perpetrators who are judgment proof. People may not be afraid of being sued; however, they should be afraid of a criminal conviction showing up on their record. Proponents argue that criminal laws will send a clear message to perpetrators that this sort of behavior is unacceptable and the state will not tolerate it. Additionally, proponents state that civil laws are insufficient remedies for victims and, unlike criminal laws, are ineffective deterrents. For example, civil suits are expensive, perpetrators are often judgment proof, and most lawyers are not familiar with this area of the law. Furthermore, civil suits often require victims to bring suits using their real name, thus, victims are unwilling to sue in order to avoid bringing more publicity to their case. Courts are reluctant to have “Jane Doe” litigation because “it is assumed to interfere with the transparency of the judicial process, to deny a defendant’s constitutional right to confront his or her accuser, and to encourage frivolous claims from being asserted by those whose names and reputations would not be on the line.”

vs-civil-law/ (last visited Sept. 25, 2015).

255 Id.


257 Id.

258 Citron & Franks, supra note 8.

259 Clark-Flory, supra note 171.

260 Citron & Franks, supra note 8, at 361-62 (“Criminal law is essential to send the clear message to potential perpetrators that nonconsensual pornography inflicts grave privacy and autonomy harms that have real consequences and penalties.”).

261 See id. at 357.

262 See id. at 358.

263 Id.

264 Id.
Besides First Amendment concerns, critics of legislation addressing revenge porn are concerned that the lack of proper definitions and overly broad statutes are a dangerous path to go down.\(^{265}\) In addition, critics feel that civil remedies are sufficient to rectify the harm.\(^{266}\) For example, tort remedies such as public disclosure of private information and intentional infliction of emotional distress are claims that victims have brought and won in the past.\(^{267}\) The Digital Millennium Copyright Act would protect a victim who holds copyright to their picture.\(^{268}\) Furthermore, porn websites are subject to section 230 of the Communications Decency Act, and 18 U.S.C. § 2257 may allow FBI agents to pursue porn website owners for failing to keep record of the subject in their photos.\(^{269}\) Finally, those website owners who require victims to pay a removal fee in order to remove their photos from websites may be criminally liable for extortion.\(^{270}\)

**B. Constitutional Implications of a Revenge Porn Criminal Statute**

First Amendment doctrines hold that all forms of restriction on the content of speech are subject to strict scrutiny.\(^{271}\) This restriction on

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\(^{265}\) See generally Sara Jeong, Revenge Porn is Bad. Criminalizing it is Worse, WIRED (Oct. 28, 2013, 9:30 AM), http://www.wired.com/2013/10/why-criminalizing-revenge-porn-is-a-bad-idea/ (arguing that overly broad laws are a threat to the public because they may bring "questionable" convictions).

\(^{266}\) Id.

\(^{267}\) See, e.g., Taylor v. Franko, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *3 (D. Haw. July 12, 2011). But see Paul J. Larkin, Jr., Revenge Porn, State Law, and Free Speech, 48 LOY. L.A. L. REV. 57, 81 (2014) (explaining how defamation and a false light claim are inadequate remedies because truth is a defense to them, and "while the pictures may be unflattering and the photographer's state of mind may have been malicious . . . [the] photographs truthfully reveal exactly who the victim was and how she appeared to the camera.").


\(^{269}\) 18 U.S.C. § 2257(a)-(i) (2006). But see CITRON, supra note 57 (making the argument that section 230 of the Communications Decency Act should be expanded because it does not provide an adequate remedy for revenge porn victims).


\(^{271}\) Citron & Franks, supra note 8, at 374.
the government’s power is the basic meaning of the Freedom of Speech Clause. This functions on the notion that the harm that results from the government controlling speech outweighs any harm that may result from speech. Any rules restraining speech, especially its content, are perceived to be highly suspicious. Thus, much of First Amendment analysis turns on whether a restriction is content-based or content-neutral.

However, this freedom is not absolute; there are categorical exceptions that do not receive strict scrutiny First Amendment protection. As of 2016, the list of recognized categorical exceptions that either are not protected by the First Amendment or receive less protection includes the following: (1) incitement to imminent unlawful action, (2) obscenity, (3) defamation, (3) speech integral to criminal conduct, (4) “fighting words,” (5) child pornography, (6) fraud, (7) true threats, and (8) grave and imminent threats to national security. The Supreme Court has made it clear that it will not be creating new exceptions. With these exceptions in mind, it is important to note that just because exceptions to First Amendment protections exist, it does not mean that legislatures can control speech because they find it misguided or hurtful. These categories of speech are considered “low-value” because they do not contribute to the First Amendment freedom of speech values.

Revenge porn laws face major First Amendment hurdles because by their very nature they appear to suppress unfavorable

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272 Humbach, supra note 12.
274 See CITRON, supra note 57, at 199.
275 Humbach, supra note 12.
278 Id.
279 United States v. Stevens, 559 U.S. 460, 472 (2010) (denying that there is any “freewheeling authority to declare new categories of speech outside the scope of the First Amendment”).
281 See CITRON, supra note 57, at 200.
speech—nonconsensual sexual exposure. Critics of revenge porn legislation argue that this is content-based discrimination because it restricts what an individual may post based on its content, i.e., sexual exposure. However, could revenge porn legislation, particularly section 784.049 of the Florida Statutes, still survive strict scrutiny review? Could it fit neatly within one of the categories of speech that receive little to no protection? Alternatively, is section 784.049 simply concerned with the victim’s lack of consent, irrespective of the content, and aimed at enforcing an agreement of confidentiality between two parties? The remainder of Part IV analyzes these possibilities.

1. Nonconsensual Disclosure: Breach of an Agreement of Confidentiality

The key language in section 784.049 is the phrase, “without the depicted person’s consent.” Thus, it makes it a crime to publish these photos only if the public dissemination of these private photos was nonconsensual. Hence, the statute does not prevent someone from sharing sexually explicit photos in general; it just speaks to the issue of consent. Since the focus is on the unpermitted disclosure, and not necessarily the content of the photo, it does not infringe on one’s freedom of expression, but merely holds one to his assurances. An analysis of Cohen v. Cowles Media Co. helps understand this point.

In Cohen, Dan Cohen provided information to a newspaper on a political candidate in return for the newspaper’s promise to keep Cohen’s identity confidential. In the end, the editorial staff decided to identify Cohen as the source, prompting Cohen to sue for a breach of

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282 Humbach, supra note 12. This author also stated that revenge porn constitutes viewpoint discrimination because it prohibits dissemination without consent. Id. Thus, Humbach argues, “a restriction designed to suppress a particular view, e.g., negative or unflattering personal information, is viewpoint discrimination.” Id.
283 Id.
284 FLA. STAT. § 784.049(2)(c) (2015).
285 See id.
286 Id.
287 Id.
289 Id. at 665.
a promise. The state supreme court ruled that he could not recover damages because it would violate the First Amendment, but the U.S. Supreme Court granted certiorari and ultimately reversed. This case involved a state’s promissory estoppel law, which applied to both media and non-media defendants. The law did not seek to censor an individual’s speech; rather it sought to provide a remedy for those injured by a broken promise. Responding to the assertion that allowing recovery on this cause of action would “inhibit truthful reporting” the Court stated, “[I]f this is the case, it is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain promises to keep them.”

Nothing in the First Amendment prevents an individual (or media defendant) from freely relinquishing or limiting their rights as the newspaper company freely agreed to do with its promise. Therefore, the Court likely reasoned that providing relief for a broken promise “no more infringes free speech principles than affording a remedy for broken promises having nothing to do with speech.” It should be immaterial that Cohen involved a civil claim, so long as the civil or criminal law does not censor speech beyond what the parties agreed—the label used to describe the cause of action is irrelevant. With respect to revenge porn, Cohen permits a state to institute criminal action for a betrayal triggered by the publication of a photo that violates an express or implied promise not to do so because that would

290 Id. at 666.
291 Id. at 667, 672.
292 Id. at 669-70.
293 Id. at 671-72.
294 Id.
295 See Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You, 52 STAN. L. REV. 1049, 1057 (2000) (“The Supreme Court explicitly held in Cohen v. Cowles Media that contracts not to speak are enforceable with no First Amendment problems. Enforcing people’s own bargains, the Court concluded (I think correctly), doesn’t violate those people’s rights, even if they change their mind after the bargain is struck.”).
296 Larkin, supra note 267, at 115.
297 Id. at 111.
simply hold a defendant to his word. Making revenge porn a crime for a nonconsensual disclosure parallels privacy-related civil remedies, but instead of focusing on betrayal, these criminal laws focus on consent. Simply because a revenge porn victim voluntarily shared a photo with another individual does not mean that they relinquished privacy or confidentiality interest. “Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves.” Consent is thus context-specific.

The legislative findings stated in section 784.049(1) indicate that the Florida Legislature is focusing on the contextual nature of consent as well as the expectation of confidentiality. Section 784.049(2)(c) focuses on the injury that arises from a breach of an agreement to keep the photos private—substantial emotional distress—which the risk of such injury arises only from a circumstance where confidentiality is assumed or stated. If that element is missing, there is no crime. One can post online a sexually explicit photo of another individual with his or her consent and there would be no crime because the aspect the state seeks to protect—making sure individuals live up to their assurance—is no longer at issue. Enforcing generally applicable laws, such as contract law, does not encroach upon First Amendment

298 Cohen, 501 U.S at 669-70.
299 Larkin, supra note 267, at 97.
300 Id. at 86 (“[I]t is a mistake to treat privacy as an all-or-nothing decision—that is, to treat information as private or confidential only if no one else is aware of it.”).
301 Charles Fried, Privacy, 77 Yale L.J. 475, 482 (1968).
302 Laird, supra note 55 (“Just as a boxer hasn’t consented to be punched outside the ring, someone who sends a naughty picture to a lover has not consented to have that picture distributed online.”).
304 Id. § 784.049(2)(c).
305 See Larkin, supra note 267, at 84 (“Betrayal is the key to the proper legal analysis of revenge porn. The essence of revenge porn is the Internet-posting of nude photographs of a former intimate partner for the purpose of subjecting her to public humiliation. That conduct is accomplished, however, through a betrayal of the trust that the victim had in her partner that he would never publicize the photographs.”).
306 § 784.049(2)(c) (requiring that the photos be publicized “without the depicted person’s consent”).
307 See id.
freedoms even if there is an incidental effect on speech. Revenge porn laws focused on confidentiality are less troublesome as to the First Amendment because the regulation penalizes "the breach of an assumed or implied duty rather than the injury caused by publication of words . . . [and] enforces . . . promises and shared expectations." Additionally, proponents of section 784.049 and revenge porn laws would argue that the affected speech adds little to First Amendment values, such as contributing to public debate or issues of public interest and, therefore, should receive less protection. As such, section 784.049 could be considered a state law that applies generally to everyone that "simply requires those making promises to keep them." Such law should not infringe on someone's First Amendment right because the parties themselves defined the scope of their contractual obligation and any restriction on their freedom of expression was simply "self-imposed."

2. Strict Scrutiny: Content-Based Regulation

Critics of section 784.049 would argue that this statute is a content-based regulation on speech and, due to the language of this statute, it is possible a court will too. Although a court may find that this is a content-based regulation subject to strict scrutiny, the language of section 784.049 may stand a chance against a First Amendment challenge. However, this will not be easy since surviving strict scrutiny review is challenging. In order for the statute to survive strict scrutiny review, it must be narrowly tailored to promote a compelling state interest, where there is no other less restrictive option available to accomplish the state interest. Here, the state interest is safeguarding the psychological and physical well-being of victims

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308 See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991); see also Larkin, supra note 267, at 105-06.
309 CITRON, supra note 57, at 211.
310 See, e.g., Larkin, supra note 267, at 84, 113.
311 Cohen, 501 U.S. at 671.
312 Id.
313 See Humbach, supra note 12.
314 Id.
315 See CITRON, supra note 57, at 199.
depicted in these revenge porn images.317

"Interests are compelling if they lie at the core of government’s ability to maintain order and protect the rights or well-being of others."318 Here, the focus of the state’s interest stems from the unique characteristic of the Internet that makes the Internet dangerous and an uncontrollable forum.319 When an individual sexually cyberharasses another through revenge porn they take advantage of the uniqueness of the Internet in a way that encumbers the victims right to privacy and cripples the well-being of the victim.320 Victims of revenge porn suffer significant psychological harm when an individual maliciously and willfully disseminates, through the Internet, photos of these victims’ private nudity or private sexual conduct.321 By publishing the photo on Internet websites, for no legitimate purpose other than to harass and cause substantial emotional harm, the poster creates a permanent record easily reproduced, shared, and viewed indefinitely by persons worldwide.322 Since the Internet allows for anonymity, revenge porn quickly turns a reluctant individual into a sex show for strangers.323 This anonymity allows the poster to include, along with a private photo, the subject’s contact information and physical address.324 These posts lead to victims being harassed, stalked, and threatened with sexual attacks.325

317 See Krischer v. McIver, 697 So. 2d 97, 107 (Fla. 1997) (Overton, J., concurring).
318 Id. at 114 (Kogan, J., dissenting).
319 See FLA. STAT. § 784.049(1)(c)-(f) (2015).
320 See id. § 784.049(1)(f).
321 See id. § 784.049(1)(e).
322 See id. § 784.049(1)(c)-(d).
324 See, e.g., Chiarini, supra note 68 (describing personal experience with revenge porn where the poster made a profile of her with her nude image, which included her full name, city and state she lived in, and the name of the college where she worked).
325 Citron & Franks, supra note 8, at 350. “Studies have shown that victims of revenge porn are harassed, stalked, threatened, they lose jobs, are forced to change schools and some commit suicide.” Loretta Park, Layton Revenge Porn Case Draws Utah Legislature’s Interest, STANDARD EXAMINER (Jan. 29, 2014, 4:25 PM), http://e.standard.net/stories/2014/01/28/layton-revenge-porn-case-draws-utah-legislatures-interest.
The legislature recognized that a reasonable individual could expect that sexually intimate images, taken with their consent and shared confidentially, will remain private.326 "Sharing sensitive personal information . . . with a reasonable expectation of confidentiality does not waive all privacy expectations regarding that information."327 The First Amendment protects sexual expression, so long as it is not obscene.328 However, when an ex-lover "revenges" on another by posting these intimate photos, it "significantly hinders private expression."329 Disclosing these photos has no value to public issues of public concern, but instead creates a fear that inhibits an individual's readiness to "express intimacy through tangible mediums."330 A court should consider the chilling effect revenge porn has on a victim's own private speech along with whether revenge porn discloses matters of public concern.331

Similar to issues with cyberbullying and the like, critics of this form of legislation argue that we are attempting to regulate conduct that is a moral wrong, but not a legal one.332 While some of these critics agree the conduct is reprehensible, they argue that legislation will open "Pandora's box" and that the Constitution does not protect us from verbal abuse.333 Some believe that criminal laws combating revenge porn are attempting to protect women from mere hurt feelings, regret,
and embarrassment.\textsuperscript{334} While these are valid concerns, it is important to note that the harm caused by revenge porn is well past the point of hurt feelings, regret, and embarrassment.\textsuperscript{335} Victims of revenge porn face a real threat of physical harm because they are sometimes solicited, approached, and attacked by people who believe these victims want it.\textsuperscript{336} Regardless if one is against the criminalizing of this behavior, to ignore these sorts of facts is reckless. The gravity of harm to a victim’s physical and psychological well-being, and the significant disregard for privacy rights creates a valid state interest.\textsuperscript{337} A court could find this interest to be compelling.\textsuperscript{338} However, this will be the state’s biggest hurdle since laws subject to strict scrutiny are presumptively invalid.\textsuperscript{339}

If the state can demonstrate that it has a compelling state interest, strict scrutiny requires that it be narrowly tailored to achieve that interest, and in doing so, it is the least restrictive means.\textsuperscript{340} Here, section 784.049 meets those two requirements.\textsuperscript{341} Section 784.049 narrowly tailors the law to criminalize only those acts that meet certain elements (1) publishing sexually explicit photos, (2) on the Internet, (3) without consent of the person depicted, and (4) done so willfully and maliciously.\textsuperscript{342} This statute also represents an intent to restrict its reach to discrete types of sexual cyberharassment used to cause substantial emotional distress.\textsuperscript{343} Section 784.049 addresses only posts of sexually explicit content published on the Internet without the consent of the person depicted.\textsuperscript{344} The statute further constrains criminal liability with

\textsuperscript{334} See, e.g., CITRON, supra note 57, at 74.
\textsuperscript{335} See Mary A. Franks, Why revenge porn must be a crime, N.Y. DAILY NEWS (Feb. 26, 2014, 3:03 PM), http://www.nydailynews.com/opinion/revengeporncrimearticle1.1702725.
\textsuperscript{336} See supra Section II.C.
\textsuperscript{338} See Scheller, supra note 337.
\textsuperscript{341} FLA. STAT. § 784.049 (2)(c), (3) (2015).
\textsuperscript{342} Id.
\textsuperscript{343} Id. § 784.049(2)(c).
\textsuperscript{344} Id.
the specific-intent condition requiring the perpetrator to post these photos with the "intent to cause substantial emotional distress to the depicted person."345

Additionally, section 784.049 is narrowly tailored and the least restrictive on speech because it requires that the image also "contains or conveys the personal identification information."346 As discussed earlier, the definition for "personal identification information" in section 784.049 is much narrower than the definition of "identifiable person," which was a requirement under the 2014 bills addressing revenge porn criminalization in Florida.347 It was possibly the intent of the legislature to closely draft this statute in order to address the harm caused by revenge porn without impeding upon a defendant’s First Amendment rights.348 Thus, a court could find that the statute adequately restricts its reach to discrete types of sexual cyberharassment designed to cause psychological and emotional harm to victims by posting sexually explicit photos of victims on the Internet without their consent. Additionally, section 784.039 furthers a compelling state interest, and it is narrowly tailored to achieve that interest. Therefore, a court could find that it is constitutional.

3. Obscenity

Proponents of revenge porn legislation argue that revenge porn may fall within the categorical exception of obscenity.349 Miller v. California is the guiding case on obscenity where the Court laid out the following test to determine whether material is obscene

(a) Whether "the average person, applying contemporary community standards" would find that work, taken as a

345 Id.
346 Id.
347 See supra Section III.B.1.
348 Simmons v. State, 944 So. 2d 317, 323 (Fla. 2006). There may be an issue that the statute may be too narrowly drawn that it essentially does not cover much and brings into question how compelling the interest must be if it is this restrictive. However, the legislature may simply be attempting to respect the First Amendment rights as much as possible while still addressing the harm caused by these actions.
349 Citron & Franks, supra note 8, at 384.
whole appeals to the prurient interest . . . (b) whether the
work depicts or describes, in a patently offensive way,
sexual conduct specifically defined by the applicable
state law; and (c) whether the work, taken as a whole,
lacks serious literary, artistic, political, or scientific
value.\footnote{Miller v. California, 413 U.S. 15, 24 (1973).}

However, the \textit{Miller} test is difficult to apply in cases such as
revenge porn involving modern Internet pornography since it is difficult
to see how the Court will define “contemporary community
standards.”\footnote{See Shannon Creasy, \textit{Defending Against a Charge of Obscenity in the Internet
Age: How Google Searches Can Illuminate Miller’s “Contemporary Community
Standards,”} 26 GA. ST. U. L. REV. 1029, 1033 (2010).} Nonetheless, defendants would argue that nudity does
not equal obscenity.\footnote{See David L. Hudson, \textit{Pornography \& obscenity}, FIRST AMEND. CTR. (Sept. 13,
2002), http://www.firstamendmentcenter.org/pornographyobscenity.} The Supreme Court recognized in \textit{Jenkins v. Georgia} that “nudity alone [was] not enough to make material legally
obscene under the Miller standards.”\footnote{Jenkins v. Georgia, 418 U.S. 153, 161 (1974).} Revenge porn came into being
because of the increase in technology within relationships.\footnote{See supra Section II.A.} Studies in
2010 indicated that the sexting craze had forty-three percent of teens
and twenty-eight percent of parents engaged in sexting behavior.\footnote{Stephanie Steinberg, \textit{‘Sexting’ Surges Nationwide, and It’s Not Just Teens Doing
technology into their relationships as a way to “spice up” their sex
lives.\footnote{See supra note 35 and accompanying text.} As such, a court can conceivably believe that these photos are
not patently offensive because what the image depicts does not change simply because it is on the Internet.

On the other hand, proponents of classifying revenge porn as
obscenity argue that revenge porn qualifies as obscene simply because
the picture was posted without the person’s consent.\footnote{Citron \& Franks, \textit{supra} note 8, at 385.} Publishing
sexually-explicit photos of another person without their consent serves
no legitimate public interest or concern.\textsuperscript{358} Citron and Franks argue that photos depicting an individual with their private areas exposed, or while engaging in sexual conduct, which are later published without their consent, could qualify as "patently offensive."\textsuperscript{359} Although this is a valid argument, especially concerning the little First Amendment value these photos have, there is a chance that a court may not see it that way. An image taken in one context is still the same image in the next context. There is nothing different about what the viewer will see. Overall, there is a valid argument for classifying revenge porn as obscene, but there is a conceivable possibility that a court may not agree.

4. True Threats

The First Amendment does not protect "true threats" or threats that "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."\textsuperscript{360} True threats do not receive First Amendment protection because of their low value to free speech principles and their propensity to cause serious harm and create "profound fear."\textsuperscript{361} In Virginia v. Black, the seminal case addressing true threats with respect to hate speech, the Court addressed the constitutionality of a state statute banning cross burning done with the intention of intimidating another person or group.\textsuperscript{362} The Court held that such conduct was constitutionally unprotected as a "virulent form of intimidation" if it is aimed at a specific individual with the intention of instilling fear of bodily harm.\textsuperscript{363} Additionally, the majority of appellate courts apply an objective, reasonable person standard when determining whether a statement evidences a serious

\hspace{1cm}\textsuperscript{358} Id. at 357 (citing caselaw upholding disclosure claims where a newspaper published a photo of an accidentally exposed woman because there was "nothing of legitimate news value in the photograph" and it could be categorized as obscenity (citing Daily Times Democrat v. Graham, 162 So. 2d 474, 477-78 (Ala. 1964))).

\hspace{1cm}\textsuperscript{359} Id. at 385.

\hspace{1cm}\textsuperscript{360} Virginia v. Black, 538 U.S. 343, 359 (2003).

\hspace{1cm}\textsuperscript{361} CITRON, supra note 57, at 201.

\hspace{1cm}\textsuperscript{362} Black, 538 U.S. at 347.

\hspace{1cm}\textsuperscript{363} Id. at 363.
intent to cause bodily harm by the poster.\textsuperscript{364}

As for section 784.049, it is unlikely that a court will find that this statute covers true threats even though the conduct unquestionably causes fear.\textsuperscript{365} The language of section 784.049 does not specifically address posts that say or imply a physical attack.\textsuperscript{366} Although in certain circumstances revenge posts do threaten physical attacks, the focus of this statute is on the dissemination of these photos without the consent of the person depicted.\textsuperscript{367} The legislature focused this statute on sexually explicit posts that were disseminated without the person’s consent.\textsuperscript{368} Although the text provides for a specific-intent requirement to cause substantial emotional distress,\textsuperscript{369} this is not what the Supreme Court has classified as a true threat.\textsuperscript{370}

5. Speech Integral to Criminal Conduct

"In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone."\textsuperscript{371} As such, if the speech constitutes the means of carrying out a particular criminal conduct then the First Amendment does not protect it.\textsuperscript{372} Recently there have been two federal cases that have prosecuted revenge porn defendants under 18 U.S.C. § 2261A, the federal antistalking statute—\textit{United States v. Osinger} and \textit{United States v. Petrovic}.\textsuperscript{373} In both of these cases, the defendants engaged in courses of conduct that were done with the intent to harass, intimidate, and cause emotional distress.\textsuperscript{374} The conduct consisted of

\textsuperscript{364} \textit{Citron}, \textit{supra} note 57, at 314 n.36 (citing United States v. Syring, 522 F. Supp. 2d 125, 129 (D.D.C. 2007)).
\textsuperscript{365} \textit{See, e.g., Fla. Stat.} § 784.049 (2015).
\textsuperscript{366} \textit{Id.}
\textsuperscript{367} \textit{Id.} § 784.049(2)(c).
\textsuperscript{368} \textit{Id.}
\textsuperscript{369} \textit{Id.}
\textsuperscript{371} \textit{United States v. Osinger}, 753 F.3d 939, 946 (9th Cir. 2014) (citing United States v. Meredith, 685 F.3d 814, 820 (9th Cir. 2012)).
\textsuperscript{372} \textit{United States v. Petrovic}, 701 F.3d 849, 854-55 (8th Cir. 2012).
\textsuperscript{373} \textit{See Osinger}, 753 F.3d. at 939; \textit{Petrovic}, 701 F.3d. at 849.
\textsuperscript{374} \textit{See Osinger}, 753 F.3d at 942; \textit{Petrovic}, 701 F.3d at 852-53.
Casals

375 Disseminating sexually explicit material of the victims. The integral point, however, was that they constituted a “course of conduct,” which is integral to the crime of stalking.

Florida’s stalking statute defines harassment and cyberstalking, and both require a course of conduct. Revenge porn is in a unique situation because a single post on the Internet can cause destructive harm on the victim. The Internet suffers from a dynamic known as “information cascade,” which is the concept that a post can go viral instantly when social bookmarking services and blogs pick them up. Thus, one post will suddenly turn into thousands within days. Section 784.049 seeks to regulate sexual cyberharassment; however, there is no separate crime. Sexual cyberharassment is the crime, and what makes it a crime is the expression. Whereas in Osinger and Petrovic, the expressions in those cases were a part of what was essential to the commission of a crime. Unfortunately, the definitions for “harass” and “cyberstalk” within Florida’s cyberstalking and harassment statutes are not written to encompass revenge porn instances where the defendant only made one post. The legislature was probably aware of this when they drafted section 784.049 because it has no mention of a “course of conduct” requirement. However, as written, section 784.049 will likely not fall under the exception for speech integral to criminal conduct.

375 See Osinger, 753 F.3d at 942; Petrovic, 701 F.3d at 852-53.
378 Citron & Franks, supra note 8, at 366.
379 CITRON, supra note 57, at 66.
380 Id.
381 See Fla. Stat. § 784.049(3), (5).
382 See id. § 784.049(1)(a), (d).
383 See United States v. Osinger, 753 F.3d 939, 942 (9th Cir. 2014); United States v. Petrovic, 701 F.3d 849, 852-53 (8th Cir. 2012).
384 See § 784.048(1)(a), (d).
385 Id. § 784.049.
V. CONCLUSION

Overall, revenge porn legislation is a very complicated issue with strong and valid arguments on both sides.\(^{387}\) The harm suffered by revenge porn victims is severe and concerning, as such it is understandable why advocates are pushing for this legislation.\(^{388}\) It is irrelevant whether one believes that victims could avoid the harm suffered by not taking (or posing) for such revealing pictures; taking nude photos of one self, or consenting to someone taking them, is legal and a form of expression.\(^{389}\) However, the First Amendment is a beloved and cherished right.\(^{390}\) As such, society “must endure speech they do not like, [because it] is a necessary cost of freedom.”\(^{391}\) Section 784.049 will face constitutional challenges when the State charges someone for sexual cyberharassment.\(^{392}\) The State’s best argument will likely be that they do need to regulate the content of the photo but simply seek to enforce an agreement of confidentiality and hold one to their assurances.\(^{393}\) Defendants will argue that section 784.049 is a content-based restriction on their freedom of speech.\(^{394}\) Therefore, it should be subject to strict scrutiny review.\(^{395}\) This will simply make the State’s position much more difficult because they will be facing a presumption of invalidity.\(^{396}\) As written, section 784.049 could stand a chance of surviving constitutional scrutiny. The toughest part for the State would be to make a solid argument for a compelling state interest.\(^{397}\) If the State can successfully do so, a court may find that it serves a compelling state interest, and the means chosen to achieve that interest are narrowly tailored to that interest and is the least restrictive on speech.\(^{398}\)

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387 See, e.g., Osinger, 753 F.3d at 942; Petrovic, 701 F.3d at 852-53.
388 See supra Section II.C.
389 See § 784.049.
392 See, e.g., Osinger, 753 F.3d at 942; Petrovic, 701 F.3d at 852-53.
393 See supra Section IV.B.1.
394 See supra Section IV.B.2.
395 See supra Section IV.B.2.
396 See supra Section IV.B.2.
397 See supra Section IV.B.2.
398 See supra Section IV.B.2.
If section 784.049 does not survive a First Amendment challenge this does not mean that legislators can never criminalize revenge porn. The harm suffered and public concern of deterring this behavior is valid. 399 However, an individual’s freedom of speech is just as important, and preventing impediments to that freedom is valid as well. 400 As such, it is imperative that legislators construct laws enacted to punish this conduct in a way that protects, or at least does not impede upon, First Amendment rights and do so while still adequately addressing the State’s concerns with revenge porn. 401 This will be the only way these statutes will have a fighting chance against the First Amendment.

399 See supra Section II.C.1.
400 See supra Section IV.B.
401 See supra Section IV.B.