

# Revenge Porn Legislation and the First Amendment

By Jeremy Saland

Joseph Campbell, a mid-20th-century scholar of comparative religion credited by George Lucas for influencing *Star Wars*, poignantly wrote, “We must let go of the life we have planned, so as to accept the one that is waiting for us” (<https://tinyurl.com/y5khn1ga>). Although quite relatable to the changing landscape and uncertainty of the COVID-19 world in which we find ourselves, Campbell’s advice is no less valuable in a multitude of contexts, including times of grief, sorrow, and despair precipitated by failed relationships and unrequited love. In contrast to Campbell, Grammy Award-winning

musician Frank Ocean advocated a more aggressive and “eye-for-an-eye” approach when it comes to jilted lovers. Ocean asserted, “If someone breaks your heart, just punch them in the face. Seriously. Punch them in the face and go get some ice cream” (<https://tinyurl.com/y62q8kg2>). Even though the latter attitude is starkly different than the former, neither reaction to anger, sadness, and despair is likely unique to these two men, nor their respective contemporaries.

What is of grave concern, however, is that the consequences of the Oceanic philosophy are potentially far more insidious and permeating than the undeniably ugly and unacceptable

bruised eye or bloodied lip. Buoyed by our nation’s obsession with social media, “me first” culture, and insatiable desire for instant gratification with little thought about the ramifications of our actions, abusers have a new vehicle to inflict overwhelming emotional and psychological harm, among other injuries, to the subjects of their jealousy and frustration. Commonly referred to as revenge porn, this form of online harassment allows a scorned lover—emboldened by a cowardly sense of security due to remoteness and lack of person-to-person interaction—to unleash with a simple click of a button an untold number of intimate images of a former lover or partner on the

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Internet or flood the e-mail inboxes of that person's employer, friends, or family members with recordings and other humiliating images and videos.

While hoping mutual respect and restraint is a silver lining to the COVID-19 pandemic, wishful thinking and optimism only get us so far. Optimism alone is no cure to revenge porn's propagation. Add the ubiquity of the Internet and camera phones, as well as the speed and potential permanency with which revenge porn is uploaded and proliferated, and you are left with a sickening public health crisis demanding its own vaccine and cure. In fact, as far back as 2014, studies have shown that 10 percent of ex-partners threatened to post these kinds of compromising and private photos or videos on the Internet, and about 60 percent of those followed through on those threats (*Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, McAfee, 2013; <https://tinyurl.com/y5envkvk>). Unfortunately, just as these figures have undoubtedly increased since that time, there are few uniform plans to combat this conduct. Instead, victims are left with a cocktail of federal, state, and local laws to safeguard them from the contagions of shame, harassment, sextortion, and other ills. Fortunately, however, the Uniform Civil Remedies for Unauthorized Disclosure of Intimate Images Act (CRUDIIA), drafted by the Uniform Law Commission (ULC) in 2018, has, in part, attempted to provide a common and unified approach to legislation that our elected representatives across the United States could use as guidance to codify revenge porn laws.

## THE DYNAMICS OF REVENGE PORN

Before addressing CRUDIIA and other revenge porn statutes, for the few unfamiliar with the violative conduct that necessitated criminalization and civil liability, imagine a typical situation involving your jealous ex-partner angry over your romantic relationship that ran its course. Unable to move on, this ex decides not to confront you, for example, by

The ramifications of revenge porn can be catastrophic to the victim's career and relationships.

keying your car or showing up at your workplace. Although such actions would unquestionably be frightening, your ex instead sets fire to your privacy interests and professional life by posting your intimate photos or videos to the Internet. Whether these images were taken with consent or surreptitiously without permission is of no consequence when colleagues, friends, and family now gaze—without filter—on your private life, naked body, and sexuality. Emotionally debilitating, and with no guarantee the Internet will ever be scrubbed of these images, the ramifications can be catastrophic to your career, relationships, and mental health.

## STATE REVENGE PORN LEGISLATION

Even though most states have long criminalized non-consensual photography or video recording

of the sexual or intimate parts of another person, these laws did not strike at revenge porn's heart. Take, for example, the crime of unlawful surveillance found in the New York Penal Law. Originally enacted in 2003, this statute, like many of its kind, only applied to instances where a perpetrator made a recording without the targeted individual's knowledge. Problematically, the statute did not address instances



of consensual recording nor did it criminalize the distribution of pictures no matter how or when they were secured. To remedy this enforcement issue, New York State legislated a new offense in 2014, dissemination of an unlawful surveillance image, thereby making it illegal to share or sell these unlawfully obtained recordings. Sure, district attorneys could now prosecute offenders who secretly placed cams in bathrooms and later distributed the images, but these and similar statutes highlighted a glaring hole in law enforcement's ability to combat revenge porn in its far more common form—when the depicted person consented to the initial recording but not the later distribution.

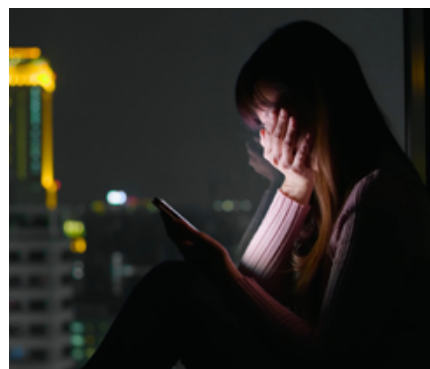
In large part due to the activism of their constituents to remedy the growing revenge porn epidemic, state legislatures

came around and recognized the failings of their otherwise well-intentioned efforts. For example, on the heels of New York City's revenge porn law for its five boroughs, New York State made the unlawful dissemination or publication of an intimate image a misdemeanor in 2019. At the time of this writing, 46 states and the District of Columbia also have laws on the books criminalizing revenge porn, with only Wyoming, Mississippi, South Carolina, and Massachusetts having failed to enact such legislation. Eleven states, including

legislation, attempted to remedy some of these issues and create a framework for future statutes. Not immune from First Amendment encroachment, however, the ULC has run into roadblocks of its own. Proposed in 2018, CRUDIIA would allow litigants to secure actual damages, statutory damages, attorney's fees, punitive damages, and disgorgement of profits should plaintiffs prevail in their respective revenge porn lawsuits. Despite the drafters' noble intent, organizations including the American Civil Liberties Union (ACLU), Electronic

legislation addressing revenge porn must, given the nature of the conduct, look to the substance and content of what the speaker is conveying, as opposed to the time or place of that speech. This kind of content-based restriction subjects the legislation to "strict scrutiny" by the courts, rather than more permissive and lenient review. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015). There are, of course, already well-established categories of exceptions to the First Amendment when it comes to content-based restrictions, such as "obscene" material and child pornography. While these examples may fall out of the First Amendment box, all is not clear sailing for CRUDIIA. Right or wrong, there is no similarly established exception for truthful speech that includes private and embarrassing recordings based on a portrayed party's lack of consent.

To the credit of the ACLU and others, irrespective of CRUDIIA's otherwise worthy rationale, it would be extremely difficult for any legislation to survive the kind of strict scrutiny mandated by the U.S. Supreme Court for a new content-based restriction on speech. First, such restrictions are presumptively unlawful, and the burden would be on the state to overcome the various hurdles to carving out a new area of exception to the First Amendment. Additionally, there is a relative wealth of law striking down statutes that are similarly aimed at protecting privacy interests at the cost of free speech, such as New York's 1967 invasion of privacy law. Perhaps most critically, a state would have to demonstrate that CRUDIIA, or



## Does criminalizing revenge porn violate the First Amendment's protection of free speech?

New Jersey, Illinois, and Texas, have even gone so far as to pass legislation making this kind of conduct a felony or punishable in a similar capacity.

### CRUDIIA AND THE FIRST AMENDMENT

Despite the admirable efforts by state legislators to protect their constituents from revenge porn's intrusive and unconscionable invasions of privacy, the laws have their limitations. That is, criminalizing or creating civil liability for this type of conduct raised, and continues to raise, legitimate concerns involving the First Amendment's protection of free speech. The ULC, an organization composed of attorneys, judges, and legislators providing states with draft

Frontier Foundation, and Media Coalition, Inc., continue to voice concerns over CRUDIIA due to what they believe are conflicts with the First Amendment. One of their primary contentions is that, as written, the draft legislation does not require a would-be defendant to have any malicious intent or knowledge of the privacy infringement. Furthermore, CRUDIIA does not mandate a plaintiff to show actual harm as a result of an alleged wrongdoer's conduct in the sharing and distribution of the intimate image.

Setting aside its objective and merits, when analyzing the language baked into the proposed statutory guidance, it is critical to recognize that it intends to impose a content-based restriction on speech. That is, any



the form in which it was enacted, is narrowly tailored to address the legitimate interest of protecting people from revenge porn.

Examining the above factors, CRUDIIA, in its present form, appears to fail the narrowly tailored test. Such a law would impose liability even in the absence of actual damages, the absence of any awareness of a lack of consent, and the absence of any malicious intent. In practical terms, if legislatures adopted and enacted CRUDIIA, the person who does not get crystal clear, explicit consent from the depicted person prior to sharing an intimate image with a third-party may be nonetheless liable even where there was no actual harm to the depicted person. While reasonable people could argue in the abstract whether this is an appropriate standard by which to hold a sharer of private, explicit, or intimate recordings, CRUDIIA's provisions appear to run afoul of the narrow tailoring required to satisfy the First Amendment threshold that the Supreme Court will no doubt review.

Should the Supreme Court, or other courts, find a violation of the First Amendment, it would not be the first time a court determined as much. As recently as December 2019, the Minnesota Court of Appeals found its state's revenge porn law unconstitutional for this very reason. *State of Minnesota v. Casillas*, 938 N.W.2d 74 (Minn. Ct. App. 2019). The court even held that it was not merely unconstitutional as applied but was such a broad violation of free speech protections that the court struck it down in its entirety. In what was likely not such an atypical or exceptional circumstance, the defendant in this case had used

the victim's passwords to obtain compromising sexual photos and videos. The defendant later threatened to publish them after the relationship came to an end. Ultimately, the defendant followed through on that threat, sending the materials to at least 44 other people and posting it on a website. Although the lower court sentenced the defendant to 23 months in prison and the appeals court called the defendant's conduct "abhorrent," the fact that selfishly ugly behavior

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can cause very real damage to an undeserving person does not insulate a statute from constitutional protections. With this in mind, the Minnesota Court of Appeals found that the state's law, as written, criminalized First Amendment-protected speech.

## CONCLUSION

American culture continues to shift dramatically with respect to the importance, or lack of importance, placed on privacy interests and concerns of individuals. Can

a society simultaneously have innumerable people posting near-nude photos of themselves on Instagram or other platforms, and then have those same people recovering statutory and punitive damages from an ex-partner who shares similar "personal" photos with the depicted person's friends, family, or even strangers? If not, what about the many people who do not opt in to this decidedly less private society, and who still care deeply about their privacy despite wanting to capture intimate moments with their partner using the incredibly accessible technology available to us all? It is precisely when these kinds of new, difficult, and complex issues arise that the Constitution truly shines.

There is no doubt that states and the federal government must protect victims of revenge porn and punish those who would cause harm to others to ensure abusers are unable to victimize former partners unfettered. Yet, whether one wrongfully follows the Oceanic school of thought over the Campbellian, federal, state, and local governments must nonetheless stay away from infringing on fundamental civil liberties even to inoculate us from the persistence of and pestilence that is revenge porn. With both fortitude and a commitment to eradicating this epidemic, they must continue pursuing the cure and enacting the right statutes to do just that. ■



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