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## THE CRIMINALIZATION OF REVENGE PORN IN JAPAN

Shigenori Matsui<sup>†</sup>

*Abstract:* Revenge porn is the practice of posting and distributing sexually explicit images of an ex-partner on the Internet to seek revenge after a breakup. Because it brings serious damages to the victims, it has become a significant social issue in Japan, the United States, and around the world. An increasing number of U.S. states and other countries are now enacting statutes criminalizing revenge porn. Recently, Japan joined these jurisdictions in criminalizing revenge porn when the Diet, the Japanese national legislature, passed the Revenge Porn Victimization Prevention Act.

This article compares the Act with legislation in the United States and critically examines its constitutionality in light of protections for freedom of expression. This article argues that the Japanese anti-revenge porn legislation, being too ambiguous and overbroad, raises very serious questions as to its constitutionality due to its infringement upon freedom of expression. This examination will prove to be very meaningful for other states and countries that are facing the same revenge porn issue.

### I. INTRODUCTION

“Revenge porn” is the practice of posting and distributing sexually explicit images of an ex-partner on the Internet after a breakup. Because of the serious damages it brings to the victims, it has become a significant social problem in the United States, Japan, and elsewhere. As a result, an increasing number of U.S. states and other countries now criminalize revenge porn. Some jurisdictions, such as New Jersey, had criminal statutes applicable to revenge porn before it became such a serious problem.<sup>1</sup> As it grew into a major social issue in the 2010s, California followed New Jersey by enacting a criminal ban on revenge porn in 2013.<sup>2</sup> In 2014, at least 12 more states introduced criminal bans on revenge porn,<sup>3</sup> and California revised its ban to expand the scope of punishment.<sup>4</sup> Similar bills are now being reviewed by other state legislatures. Although revenge porn is still

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<sup>1</sup> See, e.g., N.J. REV. STAT. § 2C:14-9 (2004).

<sup>2</sup> See CAL. PENAL CODE § 647(j)(4) (West 2014).

<sup>3</sup> See ARIZ. REV. STAT. § 13-1425 (LexisNexis 2014); COLO. REV. STAT. § 18-7-107 (2014); DEL. CODE ANN. tit. 11, § 1335 (2014); GA. CODE ANN. § 16-11-90 (2014); HAW. REV. STAT. § 711-1110.9 (2014); IDAHO CODE ANN. § 18-6609 (2014); MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2014); N.Y. PENAL LAW § 250.55 (Consol. 2014); 18 PA. CONS. STAT. § 3131 (2014); UTAH CODE ANN. § 76-5b-203 (LexisNexis 2014); VA. CODE ANN. § 18.2-386.2 (2014); WIS. STAT. § 942.09(3m) (2014).

<sup>4</sup> See CAL. PENAL CODE § 647(j)(4) (West 2014).

legal in most parts of the United States,<sup>5</sup> a discernable national trend toward its criminalization is apparent. Anti-revenge porn legislation was also recently passed in Canada,<sup>6</sup> England, and Wales.<sup>7</sup>

Japan recently joined the list of nations that have enacted criminal bans on revenge porn. In 2014, the Diet, the Japanese national legislature, passed the Revenge Porn Victimization Prevention Act (“the Act”).<sup>8</sup> Despite being problematic legislation, the Diet took only two days to pass the Act. Although some may claim that the Act is insufficient to protect victims because it is too limited in scope and the degree of punishment is too lenient, such limitations are understandable. However, the Act may in fact be too ambiguous and overbroad, raising serious questions as to whether it unconstitutionally infringes upon freedom of expression.

Part I of this article supplies the background on Japan’s criminalization of revenge porn, including a recent, noteworthy example that spurred such criminalization. Part I also argues that extant criminal legislation may have provided adequate protection in some cases prior to the enactment of the Act. Part II examines the Act and compares it with similar state provisions passed in the United States. Finally, Part III of this article critically examines the Act in light of the constitutionally protected freedom of expression, inquiring whether the Act could be justified. This article argues that the Act is too ambiguous and overbroad and raises very serious constitutional questions that the Diet should have addressed more carefully before passing it. This examination aims to provide insights for other jurisdictions considering criminalizing revenge porn.

## II. BACKGROUND

### A. *Revenge Porn in Japan*

At issue is the practice of posting and distributing sexually explicit images of an ex-partner on the Internet after breakup. Most often, the victim

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<sup>5</sup> See Lucia Graves, *Revenge Porn Is Still Legal in Most of America*, NAT’L J. (July 1, 2014), <http://www.nationaljournal.com/politics/revenge-porn-is-still-legal-in-most-of-america-20140701>. It looks like Congress will introduce a bill to make revenge porn a federal crime. See Adam Clark Estes, *This Is the Revenge Porn Law We Need in America*, GIZMODO (Feb. 25, 2015), <http://gizmodo.com/this-is-the-national-revenge-porn-law-we-need-1686856437>.

<sup>6</sup> See Protecting Canadians from Online Crime Act, S.C. 2014, c. 13 (Can.) (An Act to Amend the Criminal Code, the Canada Evidence Act, the Competition Act, and the Mutual Legal Assistance in Criminal Matters Act).

<sup>7</sup> See generally Criminal Justice and Courts Act, 2015 (Eng.).

<sup>8</sup> See Shiji Seitoki Gazou Kiroku No Teikyotō Niyoru Higai No Boushi Nikansuru Hōritsu [Act on Prevention of Victimization Resulting from Provision of Private Sexual Image], Law No. 126 of 2014 (Japan).

is female.<sup>9</sup> In some cases, the images were made without consent. For example, when the ex-partner surreptitiously takes pictures or videotapes the individual or the couple having sex without the other partner's knowledge. In most cases, victims consent to taking the picture or video, or photographed or recorded herself and then gave the pictures or video to her partner, trusting that they would remain confidential. After a breakup, the ex-partner uploads these images to the Internet to embarrass or shame the victim.<sup>10</sup>

Revenge porn may also be a consequence of "sexting," the prevalent practice of sharing sexually explicit images via smart phones and social media.<sup>11</sup> Indeed, it was reported in the United States that 30 percent of teens sext self-made nude pictures to someone else.<sup>12</sup> Given how common sexting is, the ease of sharing pictures and videos online, and the perennial pattern of people making poor choices after a contentious breakup, it is not surprising that many private sexts show up on the Internet.

Revenge porn causes serious damage to the victim and has become a significant problem in the United States. The damage to the victim has been significantly aggravated as revenge porn websites, such as IsAnyoneUp.com or UgotPosted.com, have come into existence to encourage the distribution of revenge porn. Because of these websites, "revenge porn" has become a common term.<sup>13</sup> In particular, IsAnyoneUp.com, which was started by Hunter Moore in 2010, sought to maximize the impact of revenge porn by popularizing a system of allowing an ex-partner to upload an image with the name of the woman depicted, the name of her employer, her address, and links to her social network profiles.<sup>14</sup>

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<sup>9</sup> This article will refer to hypothetical victims as female.

<sup>10</sup> It must be noted that women can be also perpetrators. See Gerry Smith, *Now Women Are Getting Arrested for Revenge Porn*, HUFFINGTON POST (Oct. 21, 2014), [http://www.huffingtonpost.com/2014/10/21/revenge-porn-arrests\\_n\\_6016946.html](http://www.huffingtonpost.com/2014/10/21/revenge-porn-arrests_n_6016946.html).

<sup>11</sup> See Bianca Prieto, *Teens Learning There Are Consequences to "Sexting"*, SEATTLE TIMES (Mar. 11, 2009), <http://www.seattletimes.com/nation-world/teens-learning-there-are-consequences-to-sexting/>.

<sup>12</sup> See Patricia Reaney, *Sexting Common Behavior Among U.S. Teens—Study*, REUTERS (July 2, 2012), <http://www.reuters.com/article/2012/07/02/sexting-teens-study-idUSL2E8I26PF20120702>. A more recent study revealed that 20% of U.S. teens are still sexting nude pictures. See Bob Lever, *Sexting Still Prevalent Among US Teens: Researchers*, YAHOO NEWS (Oct. 9, 2014), <http://news.yahoo.com/sexting-still-prevalent-among-us-teens-researchers-205712142.html>. See also Heidi Strohmaier, Megan Murphy & David DeMatteo, *Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences*, 11 SEXUALITY. RES. & SOC. POL'Y 245, 245 (2014) (Research shows that 28% of U.S. teens have sent sexually explicit images.).

<sup>13</sup> See Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, ROLLING STONE (Nov. 13, 2012), <http://www.rollingstone.com/culture/news/the-most-hated-man-on-the-internet20121113#ixzz3T6vEz9ZV>.

<sup>14</sup> See *id.*

The damage caused by revenge porn is not limited to embarrassment or emotional distress.<sup>15</sup> The victim may endure stalking or harassment by people who saw or watched the posted revenge porn.<sup>16</sup> Victims might also face professional consequences, such as being harassed in the workplace, being fired or forced to quit, or having difficulty finding a job.<sup>17</sup> Some may need to change names or addresses to ease the effect of the violation and even cut ties with all of her friends and neighbors.<sup>18</sup> Some have sadly committed suicide as a direct result of being the victim of revenge porn.<sup>19</sup>

In Japan, revenge porn became well known in 2013 from what has been dubbed the Mitaka Stalker Murder case.<sup>20</sup> The assailant, 21-year-old Charles Thomas Ikenaga, and the victim, 18-year-old high school girl, Saaya Suzuki, became acquainted through social network sites.<sup>21</sup> They dated for about a year before breaking up when Suzuki went abroad to study.<sup>22</sup> After her return, she worked as an actress while attending high school. Ikenaga made repeated attempts to reconcile, but Suzuki refused to receive his calls. She contacted the local police when he began to stalk her.<sup>23</sup> The police tried to contact Ikenaga several times without any success before, tragically, he snuck into her house in Mitaka city and stabbed her to death.<sup>24</sup> Upon his

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<sup>15</sup> See Danielle Keats Citron, *'Revenge Porn' Should be a Crime in U.S.*, CNN (Jan. 16, 2014), <http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html>; Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/us/victim-s-push-laws-to-end-online-revenge-posts.html?pagewanted=all>.

<sup>16</sup> See Citron, *supra* note 15.

<sup>17</sup> See *id.*

<sup>18</sup> See Goode, *supra* note 15.

<sup>19</sup> See Miriam Berger, *Brazilian 17 Year Old Commits Suicide after Revenge Porn Posted Online*, BUZZFEEDNEWS (Nov. 20, 2013), <http://www.buzzfeed.com/miriamberger/brazilian-17-year-old-commits-suicide-after-revenge-porn-pos#.ag6yvyV5Z>.

<sup>20</sup> See *Teenage Girl Stabbed to Death After Reporting Stalker to Police*, ASAHI SHIMBUN (Oct. 9, 2013), [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201310090051](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201310090051).

<sup>21</sup> See Shiori Aya, *Mitaka Sutōkō Satsujin Hatsu Kōhan, Hikoku Ga Kiso Naiyō Mitomeru [First Trial for Mitaka Stalker Murder: Defendant Plead Guilty to Charges]*, ASAHI SHIMBUN (July 22, 2014), <http://www.asahi.com/articles/ASG7Q320BG7QUTIL007.html>.

<sup>22</sup> See *Mitakasho/Suginamisho Joshikōsei Sutōkō 'Jūdai Jian' To Ninshiki Se Zu! Keisatsukanga Hitoridemo Iteireba? [Mitaka Police and Suginami Police Never Thought Female High School Student's Stalker was Serious Case: If One Police Officer Went to Check?]*, J-CAST NEWS (Oct. 10, 2013), <http://www.j-cast.com/tv/2013/10/10185878.html>.

<sup>23</sup> See *id.*

<sup>24</sup> The assailant was convicted and sentenced to imprisonment for twenty-two years. See *Stalker in Mitaka Murder Case Sentenced to 22 Years*, JAPAN TIMES (Aug. 2, 2014), <http://www.japantimes.co.jp/news/2014/08/02/national/crime-legal/stalker-in-mitaka-murder-case-sentenced-to-22-years/>; *Mitaka Joshikōsei Satsugai, Chōueki 22 Nen No Hanketsu: Ryōshin Wa Shitsubō, "Ribenjiporuno No Honshitsuwo Rikai Shiteinai" [22 Year Imprisonment Sentence for Murdering a Girl in Mitaka: Girl's Parents are Disappointed, Saying "The Court Did Not Understand the True Nature of Revenge Porn"]*, HUFFINGTON POST, (Aug. 2, 2014), [http://www.huffingtonpost.jp/2014/08/02/mitaka-adjudgment\\_n\\_5643607.html](http://www.huffingtonpost.jp/2014/08/02/mitaka-adjudgment_n_5643607.html) [hereinafter *22 Year Imprisonment Sentence*]. Although the defendant was never charged for a crime for publishing intimate pictures, the court considered this fact as an aggravating factor. The judgment was

arrest, it was discovered that he had uploaded intimate pictures of her onto the Internet.<sup>25</sup> The murder and related revenge porn was widely reported, increasing public awareness of the practice of disclosing confidential sexually explicit images in retaliation.<sup>26</sup> As a result, public opinion swung toward taking some kind of action against revenge porn in Japan.<sup>27</sup>

### B. *Civil Remedies Available for Victims of Revenge Porn*

Even prior to the enactment of the anti-revenge porn legislation, Japanese law provided several potential civil legal remedies for victims of revenge porn. When a victim discovers that a sexually explicit image of her has been uploaded on the Internet without her consent, she can seek tort damages under articles 709 and 710 of the Civil Code.<sup>28</sup> She might be even able to seek an injunction against her ex-partner.<sup>29</sup>

In order to seek damages or an injunction, the victim must show an invasion of privacy. Because such an image is likely to be considered private, it will be relatively easy for the victim to make the requisite showing. Even when one's privacy right is infringed, a stronger public interest in disclosure might justify the invasion as freedom of expression.<sup>30</sup> Since the publication of a revenge porn image is not likely to advance any public interest, however, it is highly unlikely that freedom of expression will justify publication in most cases.

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overturned by the High Court for effectively increasing the sentence for a crime never prosecuted. *See Ikenaga Hikokuno Ishin Hanketsu (Choueki 22 Nen) Wo Haki: Ribenjiporuno No Kadaihyouka Wa Ayamari* [Judgment Against Defendant Ikenaga, Imposing Imprisonment for 22 Years, Was Reversed: Putting Too Much Emphasis on Revenge Porn Was a Mistake], SANKEI NEWS (Feb. 6, 2015), <http://www.sankei.com/affairs/news/150206/afr1502060025-n1.html>.

<sup>25</sup> *See 22 Year Imprisonment Sentence*, *supra* note 24.

<sup>26</sup> *See id.*

<sup>27</sup> *See Hirogaru "Ribenjiporuno" [Spreading Victims of Revenge Porn]*, NHK NEWS (Nov. 21, 2013), <http://www.nhk.or.jp/ohayou/marugoto/2013/11/1121.html>; *Ribenjiporuno Ni Saikōde Chōueki 3 Nen: Jimintōga Shinhōan [Three Year Imprisonment for Revenge Porn: New Bill Prepared by the LDP]*, HUFFINGTON POST (Oct. 9, 2014), [http://www.huffingtonpost.jp/2014/10/09/revenge-porn\\_n\\_5957162.html](http://www.huffingtonpost.jp/2014/10/09/revenge-porn_n_5957162.html).

<sup>28</sup> *See* MINPŌ [MINPŌ] [CIV. C.] art. 709-10 (Japan); *see also* Saikō Saibansho [Sup. Ct.] Feb. 8, 1994, 48 SAIKŌ SAIBANSHO HANREISHU MINJI [MINSHŪ] 149 (Japan) [hereinafter the Gyakuten case] (holding that one can seek damages for the disclosure of private information).

<sup>29</sup> *See* Saikō Saibansho [Sup. Ct.] Sept. 24, 2002, 1802 HANREI JIHŌ [HANJI] 60 (Japan) [hereinafter the Ishini oyogu sakana case] (upholding the High Court judgment granting an injunction against the publisher based on the invasion of privacy after balancing the interests in privacy and freedom of expression).

<sup>30</sup> *Id.*; *see also* Saikō Saibansho [Sup. Ct.] Mar. 14, 2003, 57 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 229 (Japan) [hereinafter the Nagara River Series Murder Report case] (holding that the court needs to balance these interests; only when protecting privacy outweighs the public's interest in freedom of expression can the court order damages).

The victim must also prove to the satisfaction of a judge that the damages were caused by the conduct of the defendant; namely, that it was a particular ex-partner that posted the revenge porn.<sup>31</sup> This is especially difficult when the image was uploaded anonymously, or by using an anonymous username. However, if the victim can find out the IP address of the uploader and the name of the Internet Service Provider (ISP) used to upload the revenge porn, she may contact the ISP and demand that it reveal the identity of the uploader under the Provider Liability Limitation Act.<sup>32</sup> If the ISP refuses to reveal the uploader's identity, the victim can file suit for a court order requiring the ISP to do so.<sup>33</sup> If she can find out the identity of the uploader, she can then sue that person for damages or an injunction.<sup>34</sup>

The victim can also seek a damage award from the ISPs or website operators that carried the revenge porn. In the United States, section 230 of the Communication Decency Act<sup>35</sup> grants total immunity to ISPs and website operators.<sup>36</sup> However, the Japanese Provider Liability Limitation Act grants only limited immunity to ISPs and website operators. Essentially, an ISP or website operator will be held liable for information it is hosting only under certain circumstances: (a) when the ISP or website operator knew the rights of others were infringed by information it hosted, or when there is a reasonable basis to believe that it should have known that the rights of others might be infringed by information it knew that it was hosting; and (b) when it was technically possible for the ISP or website operator to prevent the transmission of the right-infringing information to unspecified persons.<sup>37</sup>

The ISP or website operator can take down content it hosts when there is a probable reason to believe that it infringes the rights of others without any liability to the person that uploaded the content.<sup>38</sup> Moreover, a victim of

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<sup>31</sup> See MINPŌ [CIV. C.] art. 709 (Japan).

<sup>32</sup> Tokutei Denkitsushin Ekimu Teikyousha No Songaibaishou Sekinin No Seigen Oyobi Hasshinsha Jouhou No Kaiji Nikansuru Hōritsu [Act on Limitation of Liability of Specified Telecommunication Service Provider and on Disclosure of Sender Information], Law No. 137 of 2001, art. 4, para. 1 (Japan).

<sup>33</sup> See Saikō Saibansho [Sup. Ct.] Apr. 8, 2010, 64 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 676 (Japan) (upholding the lower court's order for the ISP to disclose the identity of the sender of information to allow a lawsuit for defamation).

<sup>34</sup> The victim could bring a suit for damages against the ISP if it refused to disclose the sender's information. But the ISP would not be held liable for any damage resulting from its refusal unless the victim can prove intent or gross negligence on the part of the ISP. See Act on Limitation of Liability of Specified Telecommunication Service Provider and on Disclosure of Sender Information, Law No. 137 of 2001, art. 4, para. 4 (Japan).

<sup>35</sup> Communication Decency Act of 1996, 42 U.S.C. §230 (1998).

<sup>36</sup> *Zeran v. American Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

<sup>37</sup> Act on Limitation of Liability of Specified Telecommunication Service Provider and on Disclosure of Sender Information, Law No. 137 of 2001, art. 3, para. 1 (Japan).

<sup>38</sup> *Id.* at art. 3, para. 2, no. 1.

revenge porn can send a notice to the ISP or website operator demanding removal of invasive content, and, upon sending a notice to the uploader asking him to consent to removing the images, the ISP or website operator can then take down the content unless the uploader refuses to give consent within seven days.<sup>39</sup> The ISP or website operator owes no liability for damages to the uploader if it takes down information in these circumstances.

Practically speaking, therefore, if the victim sends a take-down request to the ISP or website operator, who then fails to comply with the request, the victim can claim that the ISP or website operator knew that it hosted right-infringing information. The victim can then seek damages for the website's refusal to take down the material. Furthermore, for websites soliciting revenge porn, a victim may seek damages even without demanding the images be taken down by claiming that there was a reasonable basis for the site to notice the existence of right-infringing information.<sup>40</sup> Thus, there are situations where victims may seek immediate legal remedies against the ISP or website operator of a revenge porn site. Moreover, victims can seek judicial injunctions against the ISPs or website operators, as the Provider Liability Limitation Act does not prevent courts from issuing such injunctions.

However, seeking damages or an injunction in the courts is a painstakingly long and costly process. Even when damages are granted, it will not be enough to compensate for the actual damage suffered. Moreover, the characteristics of the Internet make it difficult to provide effective remedies. Once an image is uploaded onto the Internet, it is virtually impossible to remove it completely. Images are easily copied and saved by third parties, only to be shared again once the original has been removed. Going after all of these individual users one after another is a time-consuming and likely futile exercise.<sup>41</sup> Consequently, although civil remedies were and are available for victims of revenge porn, it is questionable whether civil remedies are actually sufficient to give adequate redress.

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<sup>39</sup> *Id.* at art. 3, para. 2, no. 2.

<sup>40</sup> The immunity granted is applicable only when the ISP or website operator is hosting the information uploaded by other users. *Id.* at art. 3, para. 1. It is not applicable when the ISP or website operator itself is a sender. *Id.* at art. 3, para. 2. There is a possibility that an ISP or website operator that actively solicited the uploading of revenge porn could be regarded as a sender and could be held liable for damages.

<sup>41</sup> A victim might be able to file a suit against major search engines, such as Google, to delete the website address where the image was hosted from search results. Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Oct. 9, 2014, unreported (Japan) (ordering Google to remove a website that infringed the personality right of the claimant from search results).



### C. Possibility of Imposing Criminal Punishment

In Japan, most revenge porn was already covered by existing criminal provisions before the introduction of the Act. Japan's then-existing criminal laws were equipped to deal with revenge porn in several ways. First, such content could be categorized as "obscene," and therefore publication could be criminalized. Second, depictions of underage persons were covered by child pornography laws. Third, Japan's criminal defamation laws allowed prosecution of revenge pornographers. Finally, criminal prosecution for copyright violation could be available in some cases.

First, nude revenge porn could be regarded as "obscene," and its publication could be subject to criminal punishment under Article 175 of the Criminal Code.<sup>42</sup> According to Article 175, any distribution and public display of obscene materials, as well as the electronic distribution of electronic data of obscene images, is subject to imprisonment for not more than two years or a fine of not more than 2.5 million yen (US \$25,000).<sup>43</sup>

According to the definition used by the Supreme Court of Japan in the *Lady Chatterley's Lover* case,<sup>44</sup> material is obscene if it "wantonly excites or stimulates sexual desire," "invades the normal sense of sexual shame of the ordinary person," and "violates good sexual morality."<sup>45</sup> Under this definition, images of sexual intercourse,<sup>46</sup> genitals,<sup>47</sup> or pubic hair<sup>48</sup> are obscene. Consequently, criminal punishment can attach to the distribution and public display of revenge porn simply because it is obscene, even absent the intent to harass or to cause emotional distress. This is more restrictive than in the United States. Under the standards adopted in *Miller v.*

<sup>42</sup> KEIHŌ [KEIHŌ] [PEN. C.] 1907, art. 175, para. 1 (Japan).

<sup>43</sup> *See id.*

<sup>44</sup> *See* Saikō Saibansho [Sup. Ct.] Mar. 13, 1957, 11 SAIKŌ SAIBANSHO KEIJI HANREIHU [KEISHŪ] 997 (Japan).

<sup>45</sup> *See id.*

<sup>46</sup> *See* Saikō Saibansho [Sup. Ct.] Mar. 8, 1983, 37 SAIKŌ SAIBANSHO KEIJI HANREISHU [KEISHŪ] 15 (Japan) (holding that the picture depicting sexual intercourse was obscene).

<sup>47</sup> *See id.* (holding the blurring of sexual organs insufficient). The Supreme Court of Japan, in a case involving the importation of a book of photographs taken by Robert Mapplethorpe, held that the work was not obscene despite the inclusion of some photographs showing men's genitals. *See* Saikō Saibansho [Sup. Ct.] Feb. 19, 2008, 62 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 445 (Japan) [hereinafter the "Mapplethorpe case"]. According to the Supreme Court of Japan, the pictures showing genitals occupied only a small portion of the entire book, and the work as a whole has a high artistic value. *Id.* It is unlikely that the same reasoning will exonerate a person who posts revenge porn showing sex organs.

<sup>48</sup> *See* Tokyo Kōtō Saibansho [Tokyo High Ct.] Dec. 24, 1981, 1024 HANREI JIHO [HANJI] 23 (holding the pictures clearly showing pubic area and pubic hair as obscene). The legal status of publishing images of pubic hair is unclear, as the police have not arrested nor filed charges in some cases when someone published pictures showing pubic hair. Nevertheless, the police still make arrests and file charges in some cases, and the police have never officially acknowledged that the publication of pictures showing pubic hair is not banned.

*California*,<sup>49</sup> only work which, when taken as a whole, appeals to the prurient interest, depicts or describes sexual conduct (as specifically defined by the applicable state law) in a patently offensive way, and lacks serious literary, artistic, political, or scientific value is regarded as obscene, and it is only hardcore pornography that can be prohibited under the First Amendment.<sup>50</sup> Under this definition, only “patently offensive” sex acts or “lewd exhibition of the genitals” are regarded as obscene and can be prohibited under the First Amendment.<sup>51</sup> The human body is not obscene, and therefore nude pictures are not obscene in the United States. The approach is completely different in Japan, where any nude pictures showing sex organs are obscene.

Second, images of children under the age of 18, which are not uncommon with revenge porn, constitute child pornography—the distribution, provision, and possession of which is subject to criminal punishment under the Child Prostitution Prohibition Act.<sup>52</sup> The definition of child pornography is very broad: any picture of a child engaging in sexual conduct, or totally or partially undressed, is classified as child pornography.<sup>53</sup> Therefore, as far as minors are concerned, any sexually explicit image is likely to be regarded as child pornography, and its provision is subject to imprisonment for not more than three years or a fine of not more than 3 million yen (US \$30,000).<sup>54</sup> Its dissemination or distribution to unspecified or many people is subject to imprisonment for not more than five years or a fine of not more than 5 million yen (US \$50,000).<sup>55</sup>

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<sup>49</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>50</sup> *Id.* at 27 (“Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive “hard core” sexual conduct specifically defined by the regulating state law.”).

<sup>51</sup> *See id.*

<sup>52</sup> *See* *Jidou Porn Nikakawaru Kouitō No Kisei Oyobi Shobatsu Narabini Jidouno Hogotō Nikansuru Hōritsu* [Act on Regulation and Punishment on Conduct related to Child Prostitution and Child Pornography and on Protection of the Child], Law No. 52 of 1999, art. 7 (Japan).

<sup>53</sup> Under art. 2, para. 3 of the Child Prostitution Prohibition Act, any picture, electronic recording medium, or other material that depicts an image of a child falling under the types listed below is child pornography:

- (i) image of a child engaging in sexual intercourse or sexual intercourse analogous conduct;
- (ii) image that shows someone touching sex organs and other parts of a child, or a child touching sex organs and other parts of someone, that excites or stimulates sexual desire; or
- (iii) image of a child totally or partially undressed that purposefully exposes or emphasizes the child’s intimate parts (sex organs and other parts, their adjacent parts, buttocks, or breast), and that excites or stimulates sexual desire.

This definition is certainly broad enough to encompass almost all sexually explicit images of a child under the age of 18. *Id.* at art. 2, para. 1.

<sup>54</sup> *Id.* at art. 7, para. 2.

<sup>55</sup> *Id.* at art. 7, para. 6.

Third, the distribution of sexually explicit images could constitute criminal defamation against the person depicted. Any information that might harm the social reputation of another person by publishing such facts could be defamation and could be subject to criminal punishment. Criminal defamation is punishable by imprisonment or confinement of not more than three years, or a fine of not more than 500,000 yen (US \$5,000).<sup>56</sup> If the distribution of revenge porn would damage the reputation of the person depicted, it could constitute criminal defamation.<sup>57</sup> A defendant in a defamation case can avoid punishment by proving that the published facts were a matter of public concern, the purpose of publication was solely for the purpose of advancing the public interest, and that the published facts were true or at least there were reasonable grounds to believe that they were true.<sup>58</sup> In the case of revenge porn, however, it is highly unlikely that a defendant could prove that the facts were a matter of public concern or that the publication was solely for the purpose of advancing the public interest. Therefore, even if an image is genuine, it is unlikely that the defendant that uploaded such image could avoid criminal punishment.

Lastly, when a woman takes a picture of herself, it is quite likely that she holds a copyright on the image.<sup>59</sup> Even if she provides that image to her partner, she retains the copyright. Thus, if her partner uploads the image after they break up, that conduct would constitute a copyright infringement<sup>60</sup> and could trigger criminal punishment with imprisonment for not more than 10 years or a fine of not more than 10 million yen (US \$100,000).<sup>61</sup>

As a result, most forms of revenge porn were already covered by one or more then-current provisions imposing criminal punishment. Moreover, in Japan, an ISP or website operator can be charged for a criminal offense as an offender or as an accessory. For instance, when the ISP or website operator is actively soliciting the uploading of obscene pictures on its server,

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<sup>56</sup> KEIHŌ [PEN. C.] 1907, art. 230, para. 1 (Japan).

<sup>57</sup> At least one court has held that the distribution of a secretly-recorded videotape showing women naked in an open air bath at bookstores and video stores constituted criminal defamation against those women. *See* Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Mar. 14, 2002, available at [http://www.courts.go.jp/app/files/hanrei\\_jp/855/005855\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/855/005855_hanrei.pdf) (Japan).

<sup>58</sup> *See* KEIHŌ [PEN. C.] 1907, art. 230-2 (Japan); Saikō Saibansho [Sup. Ct.] June 25, 1969, 23 SAIKŌ SAIBANSHO HANREISHU KEIJI [KEISHŪ] 975 (Japan) [hereinafter the Evening Wakayama Newspaper case].

<sup>59</sup> *See* Chosakukenhō [Copyright Act], Law No. 48 of 1970, art. 10, para. 1 (Japan).

<sup>60</sup> Uploading revenge porn will infringe the rights of reproduction and public transmission, including the right to make work transmittable. *See id.* at art. 21, 23. When an image has not been published, uploading it will also infringe the right of publication included in the moral rights of the copyright holder. *See id.* at art. 18.

<sup>61</sup> *Id.* at art. 119, para. 1.

it could be held liable for a violation of Article 175 of the Criminal Code.<sup>62</sup> The same reasoning holds the ISP or website operator criminally liable for actively soliciting the posting of revenge porn when the posting itself is illegal. If the ISP or website operator profits from increased illegal postings, the courts would be more likely to hold it liable.<sup>63</sup>

Despite the various forms of criminal liability available for the prosecution of revenge porn perpetrators, a variety of social and practical factors contributed to the enactment of anti-revenge porn legislation. For one, some revenge porn may not be covered by pre-existing laws. For instance, a picture of a seminude adult female or of an adult female engaging in sexually explicit conduct, where the sex organs or pubic hair cannot be seen, might not be covered by such laws. Therefore, it can be argued that it was necessary to introduce a criminal ban specifically targeting revenge porn in order to prohibit it. The same kinds of arguments have also been made in the United States.<sup>64</sup> Additionally, it could be argued that revenge porn deserves specific, and possibly enhanced, punishment. With the exception of child pornography—for which one can be sentenced to imprisonment for not more than five years—the other criminal punishment is relatively lenient. The criminal punishment for copyright infringement would probably carry the stiffest sentence. For these reasons, and in light of the serious harm caused by revenge porn, people came to call for enactment of specific anti-revenge porn legislation.

### III. REVENGE PORN VICTIMIZATION PREVENTION ACT

#### A. *The Criminal Ban on Revenge Porn*

The Diet passed the Revenge Porn Victimization Prevention Act, officially the Act on the Prevention of Victimization Resulting from the Provision of Private Sexual Image,<sup>65</sup> on November 19, 2014. Members of the House of Representatives' ruling Liberal Democratic Party (LDP), not

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<sup>62</sup> See Yokohama Chihō Saibansho [Yokohama Dist. Ct.] Jan. 17, 2008, unreported (Japan) (upholding the conviction of a bulletin board manager who actively promoted the uploading of obscene pictures on the bulletin board).

<sup>63</sup> See Kyoto Chihō Saibansho [Kyoto Dist. Ct.] Sept. 24, 1997, 1638 HANREI JIHO [HANJI] 160 (Japan); Osaka Kōtō Saibansho [Osaka High Ct.] Aug. 26, 1999, 1064 HANREI TAIMUZU [HANTA] 239 (Japan) (holding the bulletin board manager criminally liable for soliciting users to upload obscene pictures for the purpose of increasing profit).

<sup>64</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 361-65 (2014).

<sup>65</sup> See Shiji Seitoki Gazou Kiroku No Teikyotō Niyoru Higai No Boushi Nikansuru Hōritsu [Act on Prevention of Victimization Resulting from Provision of Private Sexual Image], Law No. 126 of 2014 (Japan).

the Cabinet, prepared the bill,<sup>66</sup> introducing it into the House on November 18th. It took only two days for the Diet to pass the bill.<sup>67</sup>

The Act's primary purpose is to criminalize publicizing "private sexual image[s]" that disturb the tranquility of someone's private life.<sup>68</sup> In its own words, the Act focuses on the protection of privacy. According to Article 2, a "private sexual image" is "either an electronic record or other record depicting the following types of images of a person":

- a. Images of a person participating in sexual intercourse or analogous conduct;
- b. Images of a person whose sex organs and other parts (genitals, anus, or nipple) are touched by another person, or a person who is touching the sex organs and other parts of another person and that excites or stimulates sexual desire; or
- c. Images of a person totally or partially undressed that purposefully expose or emphasize intimate parts (sex organs and other parts, their adjacent parts, buttocks or breasts) of a person and that excite or stimulate sexual desire.<sup>69</sup>

Excluded are "those the recording of which were voluntarily consented to or were recorded by the person depicted with the understanding that a person other than the person who recorded it, the person depicted, or the person who received it from the person depicted would see or watch it."<sup>70</sup> On the other hand, materials such as pictures, electronic recording mediums, and others, which record one of these images, are defined as "materials recording private sexual image."<sup>71</sup>

<sup>66</sup> See *Ribenjiporuno Shobatsu Hōan: Saikō Chōueki 3nen, Konkokkai Teishutsue* [Revenge Porn Punishment Bill: Imposing the Maximum Penalty of Imprisonment up to Three Years—To Be Introduced this Term], ASAHI SHIMBUN (Oct. 10, 2014), <http://www.asahi.com/articles/DA3S11394959.html>; Ryo Aibara, *LDP Seeks Harsh Penalties for "Revenge Porn" Postings*, ASAHI SHIMBUN (Oct. 10, 2014), [http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201410100052](http://ajw.asahi.com/article/behind_news/social_affairs/AJ201410100052).

<sup>67</sup> Shugi-in [House of Representatives], Shuhō dai187kokkai Shiji Seitoki Gazouno Teikyotō Niyoru Higaino Boushi Nikansuru Hōritsuan: Gian shingi keika joho [HR 187 Diet, Bill Information: Act on Prevention of Victimization Resulting from Provision of Private Sexual Image Bill], [http://www.shugiin.go.jp/internet/itdb\\_gian.nsf/html/gian/keika/1DBC6C6.htm](http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/keika/1DBC6C6.htm). This was a result of the anticipated dissolution of the House of Representatives by Prime Minister Shinzo Abe on November 21st. Many bills were submitted and passed without much discussion before the dissolution.

<sup>68</sup> Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014, art. 1 (Japan).

<sup>69</sup> *Id.* at art. 2, para. 1.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at art. 2, para. 2.

The Act seeks to prohibit the distribution of such images by criminalizing three specific avenues of dissemination:

- a. The provision of private sexual images through a telecommunications line to unspecified persons or to many persons in a way that a third party could identify a person depicted will be subject to imprisonment for not more than three years or to a fine of not more than 500,000 yen (US \$5,000).<sup>72</sup>
- b. The provision of materials recording private sexual images to unspecified persons or to many persons or their public display in a way that a third party could identify a person depicted will be subject to the same punishment as provided in the previous paragraph,<sup>73</sup> and
- c. The provision of private sexual images through a telecommunications line or the provision of materials recording private sexual images for the purpose of inducing conduct covered by the previous two paragraphs will be subject to imprisonment for not more than one year or a fine of not more than 300,000 yen (US\$3,000).<sup>74</sup>

The prosecutor cannot file a charge unless the victim files a complaint.<sup>75</sup> The law even reaches the conduct of Japanese citizens abroad.<sup>76</sup>

As discussed above, the ISP or website operator can take down the image that infringes upon the rights of others under the Provider Liability Limitation Act.<sup>77</sup> A victim can also request the ISP or website operator to take down uploaded images. The ISP or website operator would notify the uploader of the request and can take down the images involved unless the uploader refuses to give consent within seven days.<sup>78</sup> The Revenge Porn Victimization Prevention Act intended to make it much easier for the provider to remove revenge porn. When a victim who claims that their reputation or privacy was infringed upon by the distribution of a private

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<sup>72</sup> *Id.* at art. 3, para. 1.

<sup>73</sup> *Id.* at art. 3, para. 2.

<sup>74</sup> *Id.* at art. 3, para. 3.

<sup>75</sup> *Id.* at art. 3, para. 4.

<sup>76</sup> *Id.* at art. 3, para. 5.

<sup>77</sup> Tokutei Denkitsushin Ekimu Teikyousha No Songaibaishou Sekinin No Seigen Oyobi Hasshinsha Jouhou No Kaiji Nikansuru Hōritsu [Act on Limitation of Liability of Specified Telecommunication Service Provider and on Disclosure of Sender Information], Law No. 137 of 2001, art. 2, para. 2, no.1 (Japan).

<sup>78</sup> *See id.* at para. 2, no. 2.

sexual image (or, if the person depicted has passed away, the surviving spouse, direct lineal ascendants, descendants, or siblings) requests the ISP or website operator to take down the image, the provider will ask the uploader to consent to removal, and the ISP or website operator can take down the content (unless the uploader refuses to give consent within two days) without incurring liability to the uploader.<sup>79</sup> In other words, not only the victim but also the family members can demand removal of revenge porn and the ISP or website operator can take it down after two days rather than the regular seven days after sending notice to uploader.

*B. Comparison with State Legislation in the United States*

A comparison of the Japanese Act with anti-revenge porn legislation already enacted in the United States provides several illuminating similarities and differences. First, unlike most state legislation in the United States amending the General Code or Criminal Code, the Japanese Act is special legislation. Second, with respect to its purpose, like some state legislation in the United States, the Japanese Act was purported to protect privacy of the person depicted in the revenge porn. However, the Japanese Act is a bit ambiguous. Third, with respect to protected images, although most state legislation in the United States and the Japanese Act are meant to protect images of intimate parts of the body and images of sexual conduct, the two differ in the scope of images that they criminalize. Fourth, with respect to prohibited conduct, unlike some legislation in the United States, the Japanese Act is not limited to online distribution of revenge porn. Fifth, unlike some state legislation, the Japanese Act punishes distribution of sexually explicit images in a way that the person depicted could be identified. Sixth, with respect to consent, unlike most state legislation in the United States, the Japanese Act imposes the burden of proof on the defendant to prove affirmative consent as a defense. Seventh, with respect to intent and consequence as a requirement for imposing punishment, unlike some state legislation in the United States, the Japanese Act does not require any intent to harass or harm the person depicted, or any consequential harm or damage to the person depicted. Eighth, with respect to exemptions, unlike most state legislation in the United States, the Japanese Act does not have any exemptions. Ninth, with respect to civil remedies, like most state legislation in the United States, the Japanese Act does not provide for any

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<sup>79</sup> See Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014, art. 1, 4 (Japan).

cause of action against revenge porn. However, it made it easier for the ISPs and website operators to remove revenge porn and allowed the family member to demand take-down when the victim passed away. The differences will be examined below.

First, the Japanese Act, unlike similar legislation in U.S. states amending the general code or criminal code,<sup>80</sup> is special legislation.<sup>81</sup> But like all state legislation,<sup>82</sup> it does not use the term “revenge porn” to impose criminal punishment.<sup>83</sup>

Second, with respect to the purpose of the prohibition, by enacting anti-revenge porn legislation, some of the states in the United States intended to impose criminal punishment on invasions of privacy,<sup>84</sup> while others intended to create another sex crime<sup>85</sup> or to include revenge porn as a crime of harassment.<sup>86</sup> The Japanese Act is ambivalent in this regard. Although the declared purpose is to protect the privacy of the victims, the requirement that the image of sexual touching or intimate parts must excite or stimulate sexual desire in order to impose punishment suggests that the Act was meant to create another sex crime.<sup>87</sup>

Third, with respect to protected images, similar to most state legislation in the United States,<sup>88</sup> the Japanese Act also intends to impose

<sup>80</sup> N.J. REV. STAT. § 2C:14-9 (2004); CAL. PENAL CODE § 647(j)(4) (West 2014); ARIZ. REV. STAT. § 13-1425 (West 2014); COLO. REV. STAT. § 18-7-107 (2014); DEL. CODE ANN. tit. 11, § 1335 (2014); GA. CODE ANN. § 16-11-90 (2014); HAW. REV. STAT. § 711-1110.9 (2014); IDAHO CODE ANN. § 18-6609 (2014); MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2014); N.Y. PENAL LAW § 250.55 (Consol. 2014); 18 PA. CONS. STAT. § 3131 (2014); UTAH CODE ANN. § 76-5b-203 (LexisNexis 2014); VA. CODE ANN. § 18.2-386.2 (2014); WIS. STAT. § 942.09(3m) (2014).

<sup>81</sup> See Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014 (Japan).

<sup>82</sup> N.J. REV. STAT. § 2C:14-9 (2004); CAL. PENAL CODE § 647(j)(4) (West 2014); ARIZ. REV. STAT. § 13-1425 (West 2014); COLO. REV. STAT. § 18-7-107 (2014); DEL. CODE ANN. tit. 11, § 1335 (2014); GA. CODE ANN. § 16-11-90 (2014); HAW. REV. STAT. § 711-1110.9 (2014); IDAHO CODE ANN. § 18-6609 (2014); MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2014); N.Y. PENAL LAW § 250.55 (Consol. 2014); 18 PA. CONS. STAT. § 3131 (2014); UTAH CODE ANN. § 76-5b-203 (LexisNexis 2014); VA. CODE ANN. § 18.2-386.2 (2014); WIS. STAT. § 942.09(3m) (2014).

<sup>83</sup> See Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014, art. 1 (Japan).

<sup>84</sup> See N.J. REV. STAT. § 2C:14-9 (2004); CAL. PENAL CODE § 647(j)(4) (West 2014); DEL. CODE ANN. tit. 11, § 11-1335(a)(9) (2014).

<sup>85</sup> See COLO. REV. STAT. § 18-7-107(1) (2014); 18 PA. CONS. STAT. § 3131 (2014) (sexual offenses).

<sup>86</sup> See MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2014) (stalking and harassment).

<sup>87</sup> See Jidou Porn Nikakawaru Kouitō No Kisei Oyobi Shobatsu Narabini Jidouno Hogotō Nikansuru Hōritsu [Act on Regulation and Punishment on Conduct related to Child Prostitution and Child Pornography and on Protection of the Child], Law No. 52 of 1999, art. 7 (Japan); KEIHŌ [PEN. C.] 1907, art. 230 (Japan) (defining child pornography as sexually explicit material that excites or stimulates sexual desire).

<sup>88</sup> See N.J. REV. STAT. § 2C:14-9 (2004); 18 PA. CONS. STAT. § 3131 (2014); WIS. STAT. § 942.09(3m) (2014). Some states only ban the distribution of images depicting intimate parts of the body.



criminal punishment on the distribution of images of intimate parts of the body or nude bodies, and of images of a person engaging in sexual activities or sexual touching.<sup>89</sup> However, there are some noteworthy differences.

With respect to images of intimate parts of the body, for example, the Japanese Act only refers to images of a person totally or partially undressed, showing “intimate parts.”<sup>90</sup> The Act defines “intimate parts” to mean “sex organs and other parts, their adjacent areas, buttocks, or breasts.”<sup>91</sup> Most state statutes in the United States include in “intimate parts” the sex organs, genitals, anus (or buttocks), and female breasts (below the top of the areola),<sup>92</sup> and perhaps the pubic area.<sup>93</sup> It is unclear how far the Japanese provision could be extended, as it presents certain quirks as currently written. The term “adjacent areas” is especially ambiguous. Moreover, in Japan, male breasts are covered under the definition of “intimate parts.”<sup>94</sup> On the other hand, because only an image of a person totally or partially undressed is prohibited, an image of a person wearing not fully opaque clothing would probably not be considered a prohibited image. This is different from some state legislation in the United States that prohibits the distribution of an image of a person if not fully opaquely covered.<sup>95</sup> The image of a person wearing underwear or lingerie also might not be covered under the Act.<sup>96</sup> Only images that purposefully expose or emphasize

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IDAHO CODE ANN. § 18-6609(2)(b) (2014). New York legislation is limited to dissemination of images of intimate parts illegally obtained by surveillance. See N.Y. PENAL LAW § 250.55 (Consol. 2014).

<sup>89</sup> See Shiji Seiteki Gazou Kiroku No Teikyotō Niyoru Higai No Boushi Nikansuru Hōritsu [Act on Prevention of Victimization Resulting from Provision of Private Sexual Image], Law No. 126 of 2014, art. 2, para. 1 (Japan).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See, e.g., ARIZ. REV. STAT. § 13-1425(D) (LexisNexis 2014) (citing ARIZ. REV. STAT. § 11-811(14)-(18) (LexisNexis 2013)).

<sup>93</sup> *Id.*; see also COLO. REV. STAT. § 18-7-107(6)(b) (2014); DEL. CODE ANN. tit. 11, § 1335(a)(9) (2014); GA. CODE ANN. § 16-11-90(a)(2) (2014); IDAHO CODE ANN. § 18-6609(1)(d) (2014) (including the genital area); MD. CODE ANN., CRIM. LAW § 3-809(a)(2) (LexisNexis 2014). See also VA CODE ANN. § 18.2-386.2.A (2014). The Georgia legislation even includes the depiction of covered male genitals in a discernibly turgid state. GA. CODE ANN. § 16-11-90(a)(2) (2014).

<sup>94</sup> See Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014, art. 2, para. 1 (Japan).

<sup>95</sup> See ARIZ. REV. STAT. § 13-1425(D) (2014) (citing ARIZ. REV. STAT. § 11-811(14)-(18) (LexisNexis 2013)); CAL. PENAL CODE § 311.3(b) (West 1996); GA. CODE ANN. § 16-11-90(a)(1)(A)&(B). See also HAW. REV. STAT. § 711-1110.9(1)(b) (2014) (citing HAW. REV. STAT. § 712-1210 (2005)).

<sup>96</sup> See Ribenjiporuno Kisei Hōande Higaiwa Fusegeru No Ka? Jimin Hirasawa Tokumei Iin Chōni Kiku [Could the Victimization Be Prevented by the Anti-Revenge Porn Bill?], THE PAGE (Oct. 31, 2014), <http://headlines.yahoo.co.jp/hl?a=20141031-00000008-wordleaf-pol/> [hereinafter Hirasawa statement] (statement of Katsuhide Hirasawa, main sponsor of the bill, indicating that the ban would not be applied to pictures of women wearing underwear).

intimate parts and that excite or stimulate sexual desire are covered under the Act in Japan.<sup>97</sup>

With respect to images of a person engaging in sexual conduct, the Japanese Act refers to “sexual intercourse and analogous conduct,” and touching of “sex organs and other parts.”<sup>98</sup> In Japan, sexual intercourse is viewed as penetration of the male genitals into the female genitals. However, the Act provides no definition of “sexual intercourse analogous conduct.” Counterpart U.S. state legislation defines sexual conduct to include not only sexual intercourse, but also oral sex, anal sex, sexual touching,<sup>99</sup> and even bondage, bestiality, masturbation, and excretion.<sup>100</sup> It is thus unclear how far the concept of “sexual intercourse analogous conducts” could be extended in Japanese courts. “Sex organs and other parts” for the purpose of sexual touching is defined as “sex organs, anus, and nipples.”<sup>101</sup> It is hard to predict whether the law contemplates sexual touching of these intimate parts over clothing. Once again, it must be noted that nipples of an adult male person are also included. However, only an image of sexual touching that excites or stimulates sexual desire is covered.

Fourth, with respect to scope of prohibition, unlike some state legislation in the United States that is designed to impose criminal

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<sup>97</sup> See Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014, art. 2, para. 1 (Japan).

<sup>98</sup> See *id.*

<sup>99</sup> See MD. CODE ANN., CRIM. LAW §3-809 (LexisNexis 2014); DEL. CODE ANN. tit. 11, § 1335(a)(9) (2014).

<sup>100</sup> See ARIZ. REV. STAT. § 13-1425(D) (LexisNexis 2014) (citing ARIZ. REV. STAT. § 11-811(14)-(18) (LexisNexis 2013)). See also GA. CODE ANN. § 16-11-90(a)(3) (2014) (citing GA. CODE ANN. §16-12-100(a)(4) (1996) (defining sexually explicit conduct as “actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, and oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) lewd exhibition of the genitals or pubic area of any person; (E) flagellation or torture by or upon a person who is nude; (F) condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude; (G) physical contact in an act of apparent sexual stimulation or gratification with any person's unclothed genitals, pubic area, buttocks, or with a female's nude breasts; (H) defecation or urination for the purpose of sexual stimulation of the viewer; or (I) penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure)); UTAH CODE ANN. § 76-5b-203(1) (LexisNexis 2014) (An “intimate image” in Utah’s legislation includes an individual engaged in sexually explicit conduct, meaning actual or simulated: (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, and oral-anal, whether between persons of the same or opposite sex; (ii) masturbation; (iii) bestiality; (iv) sadistic or masochistic activities; (v) exhibition of the genitals, pubic region, buttocks, or female breast of any individual; (vi) visual depiction of nudity or partial nudity; (vii) fondling or touching of the genitals, pubic region, buttocks, or female breast; or (viii) explicit representation of the defecation or urination functions.); HAW. REV. STAT. § 711-1110.9 (2014) (Hawaii’s legislation also includes physical contact with a person's clothed genitals, pubic area, buttocks, or the breast of a female for the purpose of sexual stimulation, gratification, or perversion in the definition of sexual conduct.).

<sup>101</sup> See Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014, art. 2, para. 1 (Japan).

punishment only for posting revenge porn on the Internet,<sup>102</sup> the Japanese Act is meant to be applied to both distribution in the real world as well as the virtual world. If someone sends a picture of an ex-partner for publication in a magazine, then he or she will be similarly subject to criminal punishment. In this sense, the Japanese Act is not specifically targeting online revenge porn.

Fifth, the Japanese Act punishes the distribution of sexually intimate images only when the images were distributed in a way such that the victim is identifiable. While some states in the United States require that the picture depicts an identifiable person,<sup>103</sup> some states such as Arizona, on the other hand, impose punishment even when the person depicted is unidentifiable.<sup>104</sup> The Japanese Act adopted the middle position. This means that even if the image itself does not identify the person depicted, punishment is possible for the uploader when the person depicted can be identified by accompanying information.

It is somewhat unclear whether these new provisions that prohibit distribution of revenge porn will be applied not only to ex-partners who post such content but also to ISPs and website operators who allow them to post such images on their websites. In the United States, section 230 of the Communication Decency Act left the issue of liability under federal criminal statutes completely untouched.<sup>105</sup> As a result, there is ambiguity as to whether it was meant to preclude state criminal liability of ISPs and website operators. The possibility of conflict with the federal law may be one of the reasons why many U.S. state legislators decided to exclude its application to ISPs and website operators.<sup>106</sup> However, as discussed above, there is nothing to prevent holding an ISP or website operator criminally liable in Japan, which is probably the reason why Japanese legislators did not find it necessary to provide for any criminal liability of an ISP or website operator.

Sixth, with respect to consent of the person depicted, it is likely that—but unclear whether—the Japanese Act allows for and requires a defense of

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<sup>102</sup> See, e.g., COLO. REV. STAT. §18-7-107(1)(a) (2014); GA. CODE ANN. §16-11-90(b) (2014); MD. CODE ANN., CRIM. LAW § 3-809(c) (LexisNexis 2014).

<sup>103</sup> See CAL. PENAL CODE §647(j)(4)(A) (West 2014); COLO. REV. STAT. §18-7-107(1)(a) (2014); HAW. REV. STAT. § 711-1110.9(1)(b) (2014); MD. CODE ANN., CRIM. LAW § 3-809(c) (LexisNexis 2014).

<sup>104</sup> See ARIZ. REV. STAT. § 13-1425(A), (C) (LexisNexis 2014).

<sup>105</sup> Communication Decency Act, 47 U.S.C. § 230(e)(1) (exempting ISPs from criminal liability under 47 U.S.C. §223 (obscene and harassing telephone call), 18 U.S.C. § 71 (obscenity), 18 U.S.C. §110 (sexual exploitation of minor), or any other federal criminal statute).

<sup>106</sup> See ARIZ. REV. STAT. § 13-1425(B)(4) (LexisNexis 2014); COLO. REV. STAT. §18-7-107(5) (2014); HAW. REV. STAT. § 711-1110.9(1)(b)(ii) (2014); IDAHO CODE ANN. § 18-6609(4) (2014); MD. CODE ANN. CRIM., LAW § 3-809(b)(2) (LexisNexis 2014); UTAH CODE ANN. § 76-5b-203(4) (LexisNexis 2014); VA. CODE ANN. § 18.2-386.2(A) (2014).

consent. The Japanese Act excludes images when the person depicted consented to being recorded or did so with the understanding that third parties might see the image.<sup>107</sup> If prosecuted under the Act, a defense of consent would likely require the defendant to prove affirmative consent from the person depicted. This is somewhat different from most U.S. state legislation requiring the absence of consent as an element of the crime.<sup>108</sup> Under such legislation, a prosecutor would be required to prove the absence of consent or the defendant's knowledge of absence of consent. Some U.S. states impose punishment only when one or both parties agreed or understood that the image should remain private.<sup>109</sup> Then, a prosecutor would need to prove the expectation of the parties, especially the expectation of the person depicted. Such showing is not required in Japan.

Seventh, with respect to intent and consequence to impose criminal punishment, the Japanese Act does not require any specific intent to harass or harm the victim or any consequential harm or damage to the victim in order to impose punishment. In this regard, the Japanese Act does not target only revenge porn. Any distribution of a sexually explicit image without the depicted person's consent will be subject to punishment. This is different from some U.S. state legislation, which requires the intent of harassment or resulting harm as a condition for punishment.<sup>110</sup>

Eighth, there are no explicit exemptions provided for in the Japanese Act. On the other hand, most U.S. state legislation has certain exemptions. Most states exempt the practice of lawful law enforcement activities, medical treatment, and voluntary exposure in a public or commercial setting.<sup>111</sup> Some states also make an exception when the image is related to

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<sup>107</sup> See *Shiji Seiteki Gazou Kiroku No Teikyotō Niyoru Higai No Boushi Nikansuru Hōritsu* [Act on Prevention of Victimization Resulting from Provision of Private Sexual Image], Law No. 126 of 2014, art. 2, para. 1 (Japan).

<sup>108</sup> See N.J. REV. STAT. § 2C:14-9 (2004); COLO. REV. STAT. §18-7-107(1)(a) (2014); DEL. CODE ANN. tit. 11, § 1335(a)(9) (2014); GA. CODE ANN. §16-11-90(b) (2014); HAW. REV. STAT. § 711-1110.9(1)(b) (2014). *But see* 18 PA. CONS. STAT. § 3131(b) (2014) (allowing the defendant to invoke consent as a defense).

<sup>109</sup> See CAL. PENAL CODE §647(j)(4)(A) (West 2014). *See also* IDAHO CODE ANN. § 18-6609(2)(b) (2014) (imposing punishment only when the defendant published the image without the consent of such other person or persons and when he knows or reasonably should have known that one or both parties agreed or understood that the image should remain private); MD. CODE ANN., CRIM. LAW § 3-809(c) (LexisNexis 2014); UTAH CODE ANN. § 76-5b-203(2) (LexisNexis 2014).

<sup>110</sup> See COLO. REV. STAT. §18-7-107(1)(a) (2014); GA. CODE ANN. §16-11-90(b) (2014); HAW. REV. STAT. § 711-1110.9(1)(b) (2014); 18 PA. CONS. STAT. § 3131(a) (2014); VA. CODE ANN. §18.2-386.2(A) (2014).

<sup>111</sup> See ARIZ. REV. STAT. § 13-1425(B) (LexisNexis 2014); CAL. PENAL CODE §647(j)(4)(C)(West 2014); DEL. CODE tit. 11, § 1335(a)(9) (2014); HAW. REV. STAT. § 711-1110.9(1)(b)(i) (2014); MD. CODE ANN., CRIM. LAW § 3-809(b) (LexisNexis 2014); UTAH CODE ANN. § 76-5b-203(3) (LexisNexis 2014).

a newsworthy event.<sup>112</sup> In Japan, it is not illegal for business professionals to conduct lawful business activities under article 35 of the Criminal Code, and this provision might be applied in certain circumstances, such as lawful practice of a medical profession.<sup>113</sup> But the potential exemptions to the Act might be narrower in Japan.

Ninth, with respect to civil remedies, like most U.S. state legislation,<sup>114</sup> the Act did not create any cause of action against an ex-partner who posts revenge porn. The legislature probably did not find any necessity for providing for a civil remedy because, as discussed above, under current tort law doctrine, a victim has ample opportunity to seek relief.<sup>115</sup> Moreover, under the Japanese Provider Liability Limitation Act, the ISP and website operator could be held liable in failing to take down the revenge porn when requested by the victim.<sup>116</sup> That is likely the reason why the Act made it easier for an ISP to take down revenge porn after receiving notice from a victim, and allows family members to demand it be taken down if the victim has passed away by committing suicide, for instance.

#### IV. REVENGE PORN AND FREEDOM OF EXPRESSION

##### A. *Freedom of Expression and Revenge Porn*

Article 21 of the Constitution of Japan guarantees freedom of expression.<sup>117</sup> It is a very broad freedom, and includes all expressive activity.<sup>118</sup> Freedom of expression includes the publication of private images of another person.<sup>119</sup> However, the protection of freedom of

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<sup>112</sup> See COLO. REV. STAT. § 18-7-107(2) (2014); WIS. STAT. § 942.09(3m)(b)(3) (2014).

<sup>113</sup> See KEIHŌ [PEN. C.] 1907, art. 35 (Japan).

<sup>114</sup> See COLO. REV. STAT. § 18-7-107(4) (2014); 42 PA. CONS. STAT. § 8316 (2002). See also CAL. CIV. CODE § 48.95 (West 2014).

<sup>115</sup> See MINPŌ [CIV. C.] art. 709-10 (Japan); see also the Gyakuten case, 48 SAIKŌ SAIBANSHO HANREISHU MINJI [MINSHŪ] 149 (Japan); the Ishini oyogu sakana case, 1802 HANREI JIHŌ [HANJI] 60 (Japan).

<sup>116</sup> See Tokutei Denkitsushin Ekimu Teikyousha No Songaibaishou Sekinin No Seigen Oyobi Hasshinsha Jouhou No Kaiji Nikansuru Hōritsu [Act on Limitation of Liability of Specified Telecommunication Service Provider and on Disclosure of Sender Information], Law No. 137 of 2001, art. 3 (Japan).

<sup>117</sup> See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21 (Japan).

<sup>118</sup> See Saikō Saibansho [Sup. Ct.] Mar. 13, 1957, 11 SAIKŌ SAIBANSHO HANREIHU KEIJI [KEISHŪ] 997 (Japan) (assuming that obscene publication is protected as freedom of expression while rejecting the constitutional challenge against a ban on publication of obscene materials).

<sup>119</sup> See, e.g., the Ishini oyogu sakana case, 1802 HANREI JIHŌ [HANJI] 60 (Japan) (assuming that the publication of private information is protected as freedom of expression while rejecting the constitutional challenge against judicial injunction).

expression is not absolute. It is subject to necessary restrictions in order to protect the public welfare.<sup>120</sup>

The Supreme Court of Japan has historically sustained restrictions when the legislature finds it necessary to restrict the freedom of expression.<sup>121</sup> It has never inquired as to whether a restriction is justified by an important interest, let alone a compelling interest, or whether the restriction is the least restrictive alternative. The Supreme Court of Japan is willing to defer to the judgment of the legislature and accept its position on the necessity of a restriction as well as the choice of means.<sup>122</sup> This is a far cry from the United States Supreme Court, which generally requires that the restriction on freedom of expression, especially based on the content, be justified by a compelling governmental interest, and that the means must be narrowly tailored to achieve such interests.<sup>123</sup> It is as though the Japanese courts are using the rational basis test in all freedom of expression cases with strong deference to the judgment of the legislature.

Even based on the framework adopted by the Supreme Court of Japan, however, the restriction on freedom of expression needs to be justified as a necessary and reasonable restriction to achieve a rational interest. Moreover, the Diet is not allowed to use ambiguous language in imposing criminal punishment against violation of the restriction on freedom of expression.<sup>124</sup> This is a very lenient standard but some restrictions on freedom of expression could fail to satisfy this standard of review.

Such a lenient standard of review is troublesome for freedom of expression cases. Freedom of expression is important not only to realize self-fulfillment or to allow pursuit of the truth, but also to allow public participation in public decision-making.<sup>125</sup> Freedom of expression is, in other words, essential for democracy. Even the Supreme Court of Japan recognizes this.<sup>126</sup> It is a freedom that cannot be entrusted to the representatives of the people. This article argues that it is a fundamental

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<sup>120</sup> Saikō Saibansho [Sup. Ct.] Mar. 13, 1957, 11 SAIKŌ SAIBANSHO HANREISHU KEIJI [KEISHŪ] 997 (Japan) (holding the ban on publication of obscene materials as necessary restriction to achieve public welfare).

<sup>121</sup> See, e.g., Saikō Saibansho [Sup. Ct.] Apr. 6, 1955, 9 SAIKŌ SAIBANSHO HANREISHU KEIJI [KEISHŪ] 819 (Japan) (upholding a ban on door-to-door canvassing for election campaigning as a necessary and reasonable restriction).

<sup>122</sup> SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 196-211 (2011).

<sup>123</sup> See generally *United States v. Stevens*, 559 U.S. 460, 471 (2010); *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2738 (2011).

<sup>124</sup> See Saikō Saibansho [Sup. Ct.] Sept. 10, 1975, 29 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 489 (Japan).

<sup>125</sup> See T.I. EMERSON, *SYSTEM OF FREEDOM OF EXPRESSION* (1970).

<sup>126</sup> See Saikō Saibansho [Sup. Ct.] June 11, 1986, 40 SAIKŌ SAIBASHO MINJI HANREISHŪ [MINSHŪ] 872 (Japan).

principle of freedom of expression that the courts need to employ non-deferential strict scrutiny for restriction of freedom of expression. The Supreme Court of Japan's deference to the legislature's judgment regarding the restriction of freedom of expression is a denial of this fundamental principle of the Constitution.

It is therefore imperative that the Supreme Court of Japan impose much stricter scrutiny on any restriction of freedom of expression, especially a restriction based on the content of the expression,<sup>127</sup> such as a ban on revenge porn. It could be sustained when the restriction is necessary to protect compelling interests, and the means chosen is narrowly tailored and the least restrictive to protect those interests. Otherwise, the restriction on freedom of expression would not be justified.<sup>128</sup>

When we examine the constitutionality of the Japanese anti-revenge porn legislation in light of these suggested requirements, there are some very serious concerns.

#### *B. Insufficient Data on the Necessity of Criminal Ban*

First of all, the necessity of a criminal ban on revenge porn has not been adequately shown to justify the encroachment onto freedom of speech. Even though the protection of a victim of revenge porn is surely legitimate and could be considered a compelling interest, there is no ground to believe that the criminal ban on all distribution of intimate images is necessary. When the image was taken or recorded without the consent of the person depicted, there is all the more reason to prohibit its distribution and public

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<sup>127</sup> See *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46-47 (1986) (distinguishing between content-based restriction and content-neutral time, place, and manner regulation of speech).

<sup>128</sup> The United States Supreme Court has excluded certain narrow categories of speech from freedom of expression protected by the First Amendment. See *Miller v. California*, 413 U.S. 15 (1973) (allowing state regulation of obscene materials); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (allowing state regulation of abusive, derisive or annoying speech). But it is reluctant to expand the scope of excluded categories of speech. See *United States v. Alvarez*, 132 S.Ct. 2537 (2012) (denying to include falsity as unprotected speech). It upheld the constitutionality of a ban on child pornography in light of the fact that child pornography has only de minimis value as freedom of expression in *New York v. Ferber*, 458 U.S. 747 (1982). However, the Supreme Court struck down the expanded definition of child pornography that would include sexually explicit pictures of adult models posing as minors in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The United States Supreme Court suggested that the speech on matters of private affairs could be treated differently from matters of public concern and could be subjected to restriction much more easily. See *Snyder v. Phelps*, 131 S.Ct. 1207 (2011). As a result, there is a possibility that it might use a more lenient standard of review for a ban on revenge porn. However, since the distribution of intimate pictures may implicate a public interest in certain circumstances, the United States Supreme Court might not be willing to employ such a lenient standard of review for a blanket ban on revenge porn.

display.<sup>129</sup> But when the person depicted gave consent for the picture to be taken or made, or when the person depicted provided the image or recording voluntarily, it is debatable whether there is always a compelling reason to ban its distribution and public display. Probably, it is only very intimate and sensitive private images distributed for the purpose of harassment or intimidation that could be prohibited without explicit consent. But it is hard to say that distribution of all pictures without consent need to be prohibited.

Moreover, the question can be raised whether it was necessary to introduce a specific criminal ban on revenge porn. An informed piece of legislation on revenge porn would be based on legislative findings to support the necessity of such a ban; those findings were lacking from the Act. First of all, there is no reliable data on how popular sexting is and whether people in Japan are actually sharing sexually explicit images. There is also no reliable data to indicate how often revenge porn is actually posted. Moreover, there is very little data to show that the availability of civil remedies against the person who posted the content or against the ISP or website operator is not sufficient. Furthermore, as discussed above, most instances of revenge porn were likely already covered by pre-existing criminal provisions.<sup>130</sup>

Maybe the criminal ban has more of a symbolic meaning that clearly stipulates that, because of the crime's seriousness, revenge porn is specifically illegal, even though the crime was already functionally prohibited by other laws. Maybe there is a necessity to specifically punish the ex-partner for the crime of posting revenge porn in a way that other legal remedies cannot reach. In such instances, it may not matter whether there is a need to introduce a criminal ban. If this is the case, we need to seriously consider whether it is worthwhile to introduce additional criminal punishment only to showcase the seriousness of revenge porn. One especially needs to consider the possible chilling effect of bringing in another criminal ban on legitimate freedom of expression, and the possibility that the enacted ban can be arbitrarily applied. It is questionable whether it is worth introducing a criminal ban only to showcase the commitment to protect the victim.

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<sup>129</sup> New York legislation is limited to the dissemination of an image of intimate parts illegally obtained. *See* N.Y. PENAL LAW § 250.55 (Consol. 2014).

<sup>130</sup> *See supra* Part II.C. The distribution of sexually explicit pictures of the female victim in the Mitaka Stalker Murder case could have been deemed the distribution of child pornography if the pictures were sexually explicit, but the defendant was not charged for the distribution of child pornography. *See generally supra* note 24 and accompanying text.



C. *Concern that the Act is Not Broad Enough is Misplaced*

Supporters of criminalization may have been disappointed to see the final version of the Act because they argue that it is under-inclusive. Specifically, they argue that the Act does not go far enough in its content restrictions, does not address surreptitious recordings, limits its scope to identifiable victims, and imposes lenient punishments.<sup>131</sup>

The Act's prohibited content is limited to images of sexual intercourse and analogous conduct, images of a person touching "sex organs and other parts," and images of undressed "intimate parts." Images which may not be classified as an image of "sexual intercourse" or "analogous conduct" or sexual touching of sex organs and other parts could be immune from punishment. Also, images of a person wearing not fully opaque clothing or underwear may not be covered by the Act. Moreover, only images of sexual touching and images of undressed intimate parts that excite or stimulate sexual desire are covered by the Act. Non-stimulating images of sexual touching and pictures of undressed intimate parts thus may not be covered even if the image may be embarrassing to the person depicted. Some supporters of criminalization wanted to remove all of these limitations and have the Act cover all embarrassing images.<sup>132</sup>

Moreover, there is no general ban on the secret recording of intimate parts or private sexual conduct without consent in Japan.<sup>133</sup> Thus, if a person or someone else secretly takes a nude picture or records the nude image of his/her partner or a couple having sexual intercourse in his/her residence or in a hotel room, that conduct does not trigger any criminal punishment. In comparison, other forms of invasion of privacy carry some kinds of penalties. For example, under the current law, peeping into a house,

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<sup>131</sup> See Hirasawa statement, *supra* note 96.

<sup>132</sup> See *id.*

<sup>133</sup> Taking pictures or recording sexually explicit images of children could be deemed the production of child pornography and could be subject to punishment. Jidou Porn Nikakawaru Kouitō No Kisei Oyobi Shobatsu Narabini Jidouno Hogotō Nikansuru Hōritsu [Act on Regulation and Punishment on Conduct related to Child Prostitution and Child Pornography and on Protection of the Child], Law No. 52 of 1999, art. 4, para. 3 (Japan). Additionally, asking a child to pose in a sexually explicit manner for the purpose of taking pictures or recording, or secretly taking pictures or recording sexually explicit images of children, are also specifically prohibited. *Id.* at art. 7, para. 4, 5. Secret photo-taking and recording in the washroom or dressing rooms open to the public is prohibited by local ordinances. See, e.g., Koushuni Ichijirushiku Meiwaku Wo Kakeru Bouryokuteki Huryukouitō No Boushi Nikansuru Jourei [Ordinance on Prevention of Aggressive Conducts to Annoy the Public], Tokyo Metropolitan Government Ordinance No. 103 of 1962, art. 5, para. 1, no. 2 (Japan) (prohibiting taking pictures using a camera, directing a camera to take pictures, or installing a camera to take pictures of underwear or body parts generally covered by the clothing in public washroom, public bath, public dressing room, other places where people take off clothing, or on public transportation).

bathroom, dressing room, restroom, or other places where people regularly undress is a misdemeanor punishable by penal detention of up to 30 days or a monetary sanction of not more than 10,000 yen (US \$100).<sup>134</sup> Entry into a house or room without consent for peeping, secret photo-taking, or recording is trespassing, which is punishable by imprisonment for not more than three years or a fine of not more than 100,000 yen (US \$1,000).<sup>135</sup> Opening a sealed letter is punishable by imprisonment for not more than one year or a fine of not more than 200,000 yen (US \$2,000),<sup>136</sup> and tapping a telephone or eavesdropping on a telecommunication is punishable by imprisonment for not more than two years or a fine of not more than one million yen (US \$10,000).<sup>137</sup> Hacking into a protected computer to steal confidential information such as secret nude photos could be punishable by imprisonment for not more than three years or a fine of not more than one million yen (US \$10,000).<sup>138</sup> Some supporters of the Act may want all surreptitious recordings to be covered by the criminal ban. They may cite, as an example, U.S. states that impose criminal punishment on secret photo taking or recording, as well as disclosure or publication of sexually explicit images without consent, as an invasion of privacy.<sup>139</sup>

The Act also imposes criminal punishment only when a person distributes a prohibited image in a way that others could identify the person depicted. This means that criminal punishment is not applicable when the person depicted cannot be identified. Some supporters of criminalization might want to prohibit revenge porn even in such a circumstance, like the Arizona statute.<sup>140</sup>

Furthermore, with punishments of not more than three years' imprisonment, the Act may be criticized as too lenient. It is certainly a bit stiffer compared to the two years' imprisonment for the publication of obscene materials, but it is equal to the three years' imprisonment for the provision of child pornography or for defamation. The punishments are more lenient than the five years' imprisonment for the distribution of child pornography, and are far more lenient than the ten years' imprisonment for copyright infringement. Victims of revenge porn feel like their dignity has

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<sup>134</sup> Keihanzaihō [Misdemeanor Act], Law No. 39 of 1948, art. 1, no. 23 (Japan).

<sup>135</sup> KEIHŌ [PEN. C.] 1907, art. 130 (Japan).

<sup>136</sup> *Id.* at art. 133.

<sup>137</sup> Denki Tsushin Jigyohō [Telecommunication Business Act], Law No. 86 of 1984, art. 179, para. 1 (Japan).

<sup>138</sup> Husei Access No Kinsi Ni Kansuru Hōritsu [Act on Prohibiting Unlawful Access], Law No. 128 of 1999, art. 3, 11 (Japan).

<sup>139</sup> See, e.g., N.J. REV. STAT. § 2C:14-9 (2004); CAL. PENAL CODE § 647(j)(1), (2), (3) (West 2014); VA. CODE ANN. § 18.2-386.1(A) (2014).

<sup>140</sup> See Hirasawa statement, *supra* note 96 (indicating that the bill was criticized as not sufficient).

been shattered by the publication of their image. They may rightly question why their dignity deserves less protection than a copyright infringement.

These limitations may be justified, however, as a means to narrow the potential reach of the criminal ban. If no one can identify the person depicted, there would be no significant infringement of privacy and criminal punishment would not be justified. Whether any clothing worn is fully opaque is also very ambivalent. Surely not all embarrassing and uncomfortable images should be covered by criminal punishment. Limiting coverage to images of sexual intercourse and analogous conduct, images of sexual touching, and undressed intimate parts are ways to narrow down the reach of criminal punishment. Without these limitations, more serious constitutional questions could be raised against the Act.

*D. The Act May be Criticized as too Ambiguous and Overbroad*

Even with the limitations described above, however, the Act may be criticized as ambiguous and overbroad. In other words, the Act could be criticized for being ambiguous in its purpose, ambiguous and overbroad in its scope of protected information, problematic in its treatment of absence of consent, and problematic in its absence of exemptions.

First, the ambiguity of the purpose of the criminal ban is troublesome. As discussed above, although the declared purpose is to protect privacy, only images of sexual touching and intimate parts of the body that excite or stimulate sexual desire are covered. This might give the impression that this crime is a sexual crime. U.S. states split on this precise question,<sup>141</sup> highlighting an ambiguity verging on arbitrariness as to revenge porn criminalization's ultimate purpose.

Second, even when limited to the distribution of an image in a way that could identify the person depicted, the scope of punishment may be too ambiguous and too overbroad. Absent a statutory definition of "sexual intercourse analogous conduct," we do not have any clues on how far "analogous conduct" could be extended. It is settled that the legislature is not allowed to use ambiguous language in restricting freedom of expression and imposing criminal punishment against its violation. The use of such ambiguous and unclear language thus raises a very serious question as to its constitutionality.

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<sup>141</sup> See N.J. REV. STAT. § 2C:14-9 (2004); CAL. PENAL CODE § 647(j)(4) (West 2014); DEL. CODE ANN. Tit. 11, §11-1335(a)(9) (2014); COLO. REV. STAT. § 18-7-107(1) (2014); MD. CODE ANN., CRIM. LAW § 3-809 (LexisNexis 2014).

Similarly, “sex organs and other parts” and “intimate parts” are ambiguous terms. The Act defines “sex organs and other parts” to mean “sex organs, anus, or nipples” and defines “intimate parts” to mean “sex organs and other parts, their adjacent areas, the buttocks, or breasts.”<sup>142</sup> The legislature adopted a similar definition in the Child Prostitution Prohibition Act.<sup>143</sup> Even so, “adjacent areas, the buttocks, and breasts” is ambiguous. Moreover, if any of those parts are partially undressed, then the publication could lead to criminal punishment. The employment of ambiguous terms may be overbroad and infringe upon freedom of speech, as noted above. Furthermore, unlike in the case of a child, there would probably be no reason to protect the breasts or nipples of an adult man.<sup>144</sup> This will raise a serious question as to the Act’s reach. Some of the U.S. states that have already passed revenge porn legislation have a much more specific definition.<sup>145</sup> A comparison with such legislation in the United States presented above suggests that the Japanese definition might be too ambiguous and overbroad.

It is only the most sensitive images that can justify criminal punishment for their disclosure and distribution, and in this regard the scope of the ban needs to be narrowly limited. That is the reason why the scope of prohibited images is limited to images of intimate parts of the body and sexual activity. For the same reason, intimate parts of the body and sexual activity need to be defined more precisely, and limited to the most sensitive ones. Nevertheless, such limitation is critically lacking in the Act. Even under the framework adopted by the Supreme Court of Japan, such use of ambiguous and overbroad language should be viewed as questionable.

Thirdly, the Act does not require the absence of consent as an element of crime, which would force the defendant to prove that the person depicted consented to taking the image or recording or took the image or recording with the understanding that other persons would see or watch it. This provision is premised upon an assumption that when the person depicted

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<sup>142</sup> See *Shiji Seiteki Gazou Kiroku No Teikyotō Niyoru Higai No Boushi Nikansuru Hōritsu* [Act on Prevention of Victimization Resulting from Provision of Private Sexual Image], Law No. 126 of 2014 (Japan).

<sup>143</sup> *Jidou Porn Nikakawaru Kouitō No Kisei Oyobi Shobatsu Narabini Jidouno Hogotō Nikansuru Hōritsu* [Act on Regulation and Punishment on Conduct related to Child Prostitution and Child Pornography and on Protection of the Child], Law No. 52 of 1999, art. 2, para. 3, no. 3 (Japan).

<sup>144</sup> See ARIZ. REV. STAT. § 13-1425(D) (West 2014). Most state legislation adopted in the United States does not ban the distribution of an image of the breasts of an adult man.

<sup>145</sup> See *id.*; see also GA. CODE ANN. §16-11-90(a)(3) (2014). Some commentators have questioned the constitutionality of revenge porn legislation in the United States, suggesting that it is overbroad. See, e.g., Samantha H. Scheller, *A Picture Is Worth A Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551 (2015); Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHICAGO-KENT L. REV. 247 (2015).

gave consent to the defendant for taking the picture or recording or when the person depicted took the picture or video and gave it to the defendant, she did not give consent for publication. But even with respect to sexually explicit images, a substantial number of teens who have received nude pictures from their partners forwarded them to others.<sup>146</sup> Apparently, teens are sharing these pictures not only with their partners but also with their friends. Thus, it would be much more sensible to assume that when someone consents to his/her photo being taken or to being recorded, or gives his/her partner a nude image, most teens know or should know that they are sharing that image with others.<sup>147</sup> Perhaps it is, therefore, only when both parties agreed that the image would remain private, or at least when the defendant knows or should have known that his ex-partner had an expectation that the image would remain private, that we can require the defendant to seek consent for publication in advance.<sup>148</sup> In that case, the expectation of the ex-partner should be proven by the prosecutor and the burden of proof should not be placed on the defendant to prove the absence of that expectation. Moreover, even if the person depicted did not give consent for publication at the time the picture was taken or recorded, she may give consent before publication. Imposing criminal punishment even in such a case will be highly questionable.

Moreover, the absence of exemptions or defenses is extremely problematic. Especially if there is an overriding public interest in disclosure, any invasion of privacy might be justified. Although it might be rare, there is a possibility that the defendant can prove such an overriding public interest in disclosure.<sup>149</sup> A blanket ban without exception will chill the exposure of legitimate and valuable information.

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<sup>146</sup> Strohmaier, Murphy & DeMatteo, *supra* note 12, at 250 (revealing that 26% of the respondents who received sexts shared them with good friends).

<sup>147</sup> *Id.* (revealing that 11% of survey respondents knew that a sent sext would be forwarded or shared with others).

<sup>148</sup> Some states actually require this. See CAL. PENAL CODE §647(j)(4)(A) (West 2014). At the least, the absence of consent should be an element of the crime for the prosecutor to prove, and the burden of proving consent should not be placed on the defendant.

<sup>149</sup> For instance, House of Representatives member Anthony Weiner had to resign because it was revealed that he was sending sexually explicit pictures to women in 2011. When he attempted to return to politics once again, he lost a New York mayoral election for the same kind of scandal. Chris Cuomo, Chris Vlasto & Devin Dwyer, *Rep. Anthony Weiner: 'The Picture Was of Me and I Sent It'*, ABC NEWS (June 6, 2011), <http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605>; Carl Campanile, *Weiner Caught Sending Dirty Messages and Photos a Year after His Sexting Scandal*, NY POST (July 24, 2013), <http://nypost.com/2013/07/24/weiner-caught-sending-dirty-messages-and-photos-a-year-after-his-sexting-scandal/>. In such a case, a public interest in disclosing sexually explicit images might exist. Otherwise, a woman who received such a picture may have to go to jail if she sent the picture to the media; in addition, news reporters and editors might be subject to criminal punishment when they publish the picture.

It is questionable, therefore, whether the Act can be justified as a necessary and reasonable restriction under the current constitutional standard adopted by the Supreme Court of Japan. It is even more questionable whether it could be justified as a narrowly tailored means to protect compelling interests under the standard that should be adopted in this kind of case. Supporters of the Act may argue that since revenge porn has little or very limited value as freedom of expression, the necessary restriction should be more easily sustained. However, allowing the government to restrict freedom of expression on the ground that it has only little or very limited value is dangerous. Such an approach would allow the restriction of speech disliked by the majority of society, and it is such unpopular expression that needs to be protected the most. Moreover, in some cases the disclosure of sexually explicit images might serve the public interest, and it is wrong to assume that all disclosure has no value as freedom of expression. Even when most revenge porn has no significant value, the legislature should not be allowed to impose criminal punishment based on the premise that all revenge porn has no value as freedom of expression.

## V. CONCLUSION

In November 2014, the Japanese Diet passed the anti-revenge porn legislation after only two days of debate. When compared with analogous statutes in the United States, the Act is quite troublesome. The sentiment that the law does not go far enough to harshly punish offenders may be misplaced, particularly in light of the serious constitutional issues raised by its ambiguous limits on freedom of expression. Thus, courts may find difficulty in sustaining the constitutionality of the Act when it is applied. All of this will prompt us to consider whether there are alternative ways to cope with revenge porn. After all, the best way to prevent revenge porn may be to discourage people from sharing such sexually explicit images without thinking about how those images might be used in the future.

It is highly disappointing that it took only two days for the Diet to pass this anti-revenge porn statute. It is hoped that the Japanese Diet will revisit this issue and reconsider the Act. Otherwise, the courts need to scrutinize the constitutionality of the Act when it is actually applied. It is also hoped that Japan's experience in passing this Act will provide meaningful lessons for other states and countries considering this kind of legislation.