

# FROM VETERAN TO VICTIM: AN IN-DEPTH ANALYSIS OF THE MILITARY’S NEW REVENGE PORN STATUTE

*Alicia Ferguson\**

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*So let me cut to the chase. When I hear allegations of Marines denigrating their fellow Marines, I don't think such behavior is that of true warriors or warfighters.*<sup>1</sup>

- General Robert B. Neller, former Commandant of the Marine Corps

### I. INTRODUCTION

“It is extremely widespread . . . . If it happened to me [it has] got to be happening to a lot of other females.”<sup>2</sup> Kally Wayne, a former Marine and one of the many victims of the Marines United Scandal, says it well in these short words.<sup>3</sup> As of 2016, revenge porn, also called nonconsensual image sharing, has threatened or victimized one in twenty-five Americans.<sup>4</sup> Revenge porn consists of “[r]evealing or sexually explicit images or videos of a person posted on the internet, typically by a former sexual partner, without the consent of the subject and in order to cause them distress or embarrassment.”<sup>5</sup> For example, in the case of Kally Wayne, her ex-boyfriend posted a private sex tape they had made together four years ago on a private Facebook page.<sup>6</sup>

In 2004, New Jersey became the first state to pass legislation criminalizing revenge porn.<sup>7</sup> Today, all but four states, Massachusetts, Mississippi, South Carolina, and Wyoming, have revenge porn laws.<sup>8</sup> Currently, there is no federal law regarding nonconsensual photo sharing for

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<sup>1</sup> U.S. Marines (@USMC), TWITTER, at 00:59 (Mar. 7, 2017), [https://twitter.com/USMC/status/839189581706723331?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fcdn.knightlab.com%2Flibs%2Ftimeline3%2Flatest%2Fembed%2Findex.html%3Fsource%3D1gX3INs\\_wXR4-D2vHp-rPQzUpw6S2EdpNo36Rcu3qqKU%26font%3DDefault%26lang%3Den%26initial\\_zoom%3D2%26height%3D650](https://twitter.com/USMC/status/839189581706723331?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fcdn.knightlab.com%2Flibs%2Ftimeline3%2Flatest%2Fembed%2Findex.html%3Fsource%3D1gX3INs_wXR4-D2vHp-rPQzUpw6S2EdpNo36Rcu3qqKU%26font%3DDefault%26lang%3Den%26initial_zoom%3D2%26height%3D650); Jared Keller, *The Commandant Has A Strong Message About 'Marines United' Everyone Needs To See*, TASK & PURPOSE (Mar. 7, 2017, 4:16 PM), <https://taskandpurpose.com/neller-marines-united-nude-photo-response>.

<sup>2</sup> Kelly McCarthy, *Alleged Victim of Marine Corps Nude Photo Scandal Speaks Out*, ABC NEWS (Mar. 8, 2017, 9:59 AM) (quoting Interview by Martha Raadtz with Kally Wayne (Mar. 2017)), <https://abcnews.go.com/US/alleged-victim-marine-corps-nude-photo-scandal-speaks/story?id=45985740>.

<sup>3</sup> *Id.*

<sup>4</sup> Lori Janjigian, *Nearly 10 Million Americans are Victims of Revenge Porn, Study Finds*, BUS. INSIDER (Dec. 13, 2016, 5:03 PM), <https://www.businessinsider.com/revenge-porn-study-nearly-10-million-americans-are-victims-2016-12>.

<sup>5</sup> *Revenge Porn*, LEXICO, [https://www.lexico.com/en/definition/revenge\\_porn](https://www.lexico.com/en/definition/revenge_porn) (last visited Dec. 27, 2020).

<sup>6</sup> McCarthy, *supra* note 2.

<sup>7</sup> Tal Kopan, *States Criminalize 'Revenge Porn'*, POLITICO (Oct. 10, 2013, 11:10 AM), <https://www.politico.com/story/2013/10/states-criminalize-revenge-porn-099082>; *see also* N.J. STAT. ANN. § 2C:14-9(b) (West 2004).

<sup>8</sup> *See 46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIV. RTS. INITIATIVE, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Dec. 27, 2020); *States With Revenge Porn Laws*, C.A. GOLDBERG VICTIM'S RIGHT L. FIRM, <https://www.cagoldberglaw.com/states-with-revenge-porn-laws/#1558635914029-7405b04a-e016> (last visited Dec. 27, 2020).

members of the general public.<sup>9</sup> In the years leading up to the Marines United Scandal, the armed forces had implemented various programs and protocols designed to respond to reports of sexual assault and harassment, but “Marine Corps officials confirmed that none include[d] procedures for dealing with sexual exploitation of this nature,” such as revenge porn.<sup>10</sup>

After the negative publicity surrounding the Marines United Scandal, Congress decided to send a message that this form of harassment was unacceptable for servicemembers.<sup>11</sup> In 2017, Congress enacted the National Defense Authorization Act for Fiscal Year 2018, which made amendments to the Uniform Code of Military Justice (“UCMJ”), the governing statutes for criminal offenses for federal military members.<sup>12</sup> One of those amendments, which took effect in January 2019, was Article 117a, UCMJ, “[w]rongful broadcast or distribution of intimate visual images.”<sup>13</sup> Along with clarifying what constitutes the wrongdoing, Article 117a contains definitions of specific terminology.<sup>14</sup>

This Comment will address three topics. Part II will examine the background of distributing explicit photos in the military, including the highly publicized Marines United Scandal. Part II will also discuss the already existing Article 120c, UCMJ, “[i]ndecent viewing, visual recording, or broadcasting,” and its pitfalls in addressing revenge porn, leaving a class of individuals still vulnerable to the distribution of sexually explicit images without their consent.<sup>15</sup> Part III will analyze the elements Article 117a in detail, explaining the significance and difficulties of each element, including the role Article 117a has for military order and discipline.

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<sup>9</sup> *Nonconsensual Pornography (Revenge Porn) Law in the United States*, BALLOTPEDIA, [https://ballotpedia.org/Nonconsensual\\_pornography\\_\(revenge\\_porn\)\\_laws\\_in\\_the\\_United\\_States](https://ballotpedia.org/Nonconsensual_pornography_(revenge_porn)_laws_in_the_United_States) (last visited Sept. 8, 2020).

<sup>10</sup> Thomas J. Brennan, *An Attack From Within: Male Marines Ambush Women In Uniform*, WAR HORSE (Mar. 7, 2017), <https://thewarhorse.org/newsroom-archive/an-attack-from-within-male-marines-ambush-women-in-uniform/>.

<sup>11</sup> Devon L. Suits, *Updates to UCMJ Criminalize Unauthorized Distribution of Sexual Imagery*, U.S. ARMY (Feb 13, 2018), [https://www.army.mil/article/200539/updates\\_to\\_ucmj\\_criminalize\\_unauthorized\\_distribution\\_of\\_sexual\\_imagery](https://www.army.mil/article/200539/updates_to_ucmj_criminalize_unauthorized_distribution_of_sexual_imagery).

<sup>12</sup> *See generally* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115–91 (2017). Those subject to the UCMJ include, but are not limited to, members of a regular component of the armed forces, cadets, aviation cadets, midshipmen, members of a reserve component, and Army and Air National Guard members when they are in Federal service. *See* 10 U.S.C. §802(a)(1)–(3).

<sup>13</sup> 10 U.S.C. § 917a; Collette Langos, Ph.D., *Reforming the Army’s Online Policies: An Opportunity for Leadership*, ARMY LAWYER, Issue 1 2019, at 49, 50.

<sup>14</sup> *See* 10 U.S.C. § 917a(b).

<sup>15</sup> *See id* § 920c(a).

## II. BACKGROUND

### A. *Something Borrowed, Nothing New*

The nonconsensual sharing of sexually explicit images is not a new problem. In Anthony Swofford's memoir, *Jarhead*, Swofford shared stories of his time in the Gulf War during the early 1990s.<sup>16</sup> In his memoir, Swofford told the tale of his then-girlfriend, Kristina, cheating on him while he was deployed in Saudi Arabia.<sup>17</sup> After learning of Kristina's cheating, and while shuffling through letters and photos, Swofford came across three seminude portraits of Kristina, covered only by a dress-blue blouse.<sup>18</sup> He wondered what to do with them.<sup>19</sup> In the platoon existed a "Wall of Shame," where photos of forty or more women were duct-taped to a six-foot-tall post.<sup>20</sup> On the duct tape were messages describing the events that supposedly earned these women their spots on the wall.<sup>21</sup> Swofford added the photos of Kristina to the collection and wrote: "I don't know but I've been told she's seeing someone new."<sup>22</sup>

### B. *Marines (Not) United*

Fast forward twenty-seven years. Thomas Brennan, a former Marine and reporter for *The War Horse*, made a big announcement.<sup>23</sup> He revealed that the Department of Defense ("DoD") was investigating hundreds of Marines who were a part of a Facebook page used to solicit and share hundreds, maybe even thousands, of naked photographs of female servicemembers and veterans.<sup>24</sup> The news became known as the "Marines United Scandal."<sup>25</sup>

#### 1. The Leak

The activity on a Facebook page called "Marines United" was uncovered by a nonprofit journalism news organization called *The War Horse*.<sup>26</sup> Brennan, the founder of the organization, first contacted the Marine Corps Headquarters on January 30, 2017.<sup>27</sup> Within a day, the social media

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<sup>16</sup> See generally Anthony Swofford, *JARHEAD: A MARINE'S CHRONICLE OF THE GULF WAR AND OTHER BATTLES* (2003).

<sup>17</sup> *Id.* at 68–69.

<sup>18</sup> *Id.* at 91.

<sup>19</sup> See *id.*

<sup>20</sup> *Id.* at 91–92.

<sup>21</sup> See *id.* at 92.

<sup>22</sup> *Id.* (italics omitted).

<sup>23</sup> See Brennan, *supra* note 10.

<sup>24</sup> *Id.*

<sup>25</sup> Jared Keller, *The Rise And Fall (And Rise) of 'Marines United'*, *TASK & PURPOSE* (Mar. 16, 2017, 11:20 AM), <https://taskandpurpose.com/rise-fall-rise-marines-united>.

<sup>26</sup> Brennan, *supra* note 10.

<sup>27</sup> Anna Hiatt, *How the Marines United Investigation and Scandal Unfolded*, *WAR HORSE* (July 11, 2017), <https://thewarhorse.org/how-the-marines-united-investigation-and-scandal-unfolded/>.

accounts associated with sharing photos were deleted by Facebook and Google, and a formal investigation by the Naval Criminal Investigative Service began.<sup>28</sup> The formerly active Google Drive folders linked to the Facebook page included files of women's "names, military branches, nude photographs, screenshots of their social media accounts, and images of sexual acts."<sup>29</sup> Many of the images seemed to come from consensual, but private, exchanges of sexually intimate images, some even taken by the women themselves.<sup>30</sup> However, the Marines United Facebook page was not deleted, and it did not take long for the page's activity to be revitalized—photos were again being posted in the Marines United group on February 16, 2017.<sup>31</sup>

After a continued push for the Pentagon to give more in-depth comments about the ongoing investigation, the Marine Corps Headquarters released a ten-page memo and gave it to about 100 generals.<sup>32</sup> The memo explained the nonconsensual photo sharing on the Marines United Facebook page and provided talking points, along with an outlined public relations strategy.<sup>33</sup> Fearful that the memo would undermine the story, *The War Horse* and *Reveal* released the full story of the Marines United Scandal.<sup>34</sup> In the following days, the story became headline news in more than a hundred media outlets, including *The New York Times* and *The Washington Post*.<sup>35</sup>

## 2. The Response

The following week, former Secretary of Defense, James Mattis, and former Commandant of the Marine Corps, General Robert Neller, made statements reprimanding the Marines involved in the nonconsensual photo sharing.<sup>36</sup> General Neller released a video sharing a strong message about the Marines United Facebook group, emphasizing the true meaning of being a Marine and the high standards to which they are called to adhere.<sup>37</sup> He condemned those Marines involved in the group, calling their acts selfish,

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<sup>28</sup> Brennan, *supra* note 10.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; Hiatt, *supra* note 27.

<sup>32</sup> Hiatt, *supra* note 27.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see also Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL (Mar. 4, 2017), <https://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/>.

<sup>35</sup> See, e.g., Dave Philipps, *Inquiry Opens Into How a Network of Marines Shared Illicit Images of Female Peers*, N.Y. TIMES (Mar. 6, 2017), [https://www.nytimes.com/2017/03/06/us/inquiry-opens-into-how-30000-marines-shared-illicit-images-of-female-peers.html?\\_r=0](https://www.nytimes.com/2017/03/06/us/inquiry-opens-into-how-30000-marines-shared-illicit-images-of-female-peers.html?_r=0); Thomas Gibbons-Neff, *'I'm Never Reenlisting': Marine Corps Rocked by Nude-Photo Scandal*, WASH. POST (Mar. 5, 2017, 8:41 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2017/03/05/im-never-reenlisting-marine-corps-rocked-by-nude-photo-scandal/>.

<sup>36</sup> Hiatt, *supra* note 27.

<sup>37</sup> See generally U.S. Marines (@USMC), *supra* note 1.

unprofessional, and embarrassing to the Marine Corps.<sup>38</sup> The DoD signed a new United States Marine Corps social media policy, making it explicit that the UCMJ unambiguously applies to sexual harassment on social media.<sup>39</sup>

On April 19, six weeks after the leak, Secretary of the Navy, Sean Stackley, “signed new regulations that criminalized distributing intimate photos without the subject’s consent in the Navy and the Marines.”<sup>40</sup> The Marines Corps separation manual was also updated, making it clear that service members who violate the new regulations risk dishonorable discharge because “any Marine convicted of the crime would face mandatory separation proceedings.”<sup>41</sup>

Meanwhile, members of Congress also began to take action in response to the scandal.<sup>42</sup> In May 2017, the House unanimously passed the Protecting the Rights of Individuals Against Technological Exploitation Act (“PRIVATE Act”), which would have criminalized sharing explicit images within the military without the subject’s consent.<sup>43</sup> The PRIVATE Act intended to amend Article 117 of the UCMJ by including a “prohibition on wrongful broadcast of intimate visual images.”<sup>44</sup> However, the PRIVATE Act failed in the Senate after it was referred to the proper committee.<sup>45</sup>

Senator Elizabeth Warren introduced a similar bill.<sup>46</sup> That bill was The Protecting Servicemembers Online Act of 2017 (“Protecting Servicemembers Act”) and was introduced in June.<sup>47</sup> The Protecting Servicemembers Act also would have criminalized the nonconsensual distribution of private sexual images by amending Article 120c of the UCMJ.<sup>48</sup> It further amended Article 117 of the UCMJ by criminalizing harassment.<sup>49</sup> However, the Protecting Servicemembers Act never made it past the Committee on Armed Services.<sup>50</sup>

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<sup>38</sup> *Id.*; Keller, *supra* note 1.

<sup>39</sup> Hiatt, *supra* note 27.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; Protecting the Rights of Individuals Against Technological Exploitation Act, H.R. 2052, 115th Cong. (as passed by the House, May 24, 2017).

<sup>44</sup> H.R. 2052. § 2.

<sup>45</sup> See *H.R. 2052 – PRIVATE Act*, CONG., <https://www.congress.gov/bill/115th-congress/house-bill/2052/all-actions> (last visited Dec. 22, 2020) (noting that the last action the PRIVATE Act received was a referral to the Senate Armed Services Committee).

<sup>46</sup> See generally *Protecting Servicemembers Online Act of 2017*, S. 1346, 115th Cong. (2017).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 2.

<sup>49</sup> *Id.* § 3.

<sup>50</sup> See *S. 1346 – Protecting Servicemembers Online Act of 2017*, CONG., <https://www.congress.gov/bill/115thcongress/senatebill/1346?q=%7B%22search%22%3A%5B%22s.+1346%22%5D%7D&s=2&r=1> (last visited Dec. 22, 2020) (noting that last action the Protecting Servicemembers Online Act of 2017 received was a referral to the Senate Armed Services Committee).

### 3. The Consequences

In the aftermath of the leak, actions were taken against those servicemembers who participated in the Marines United Facebook group.<sup>51</sup> One of the difficulties in punishment and accountability, specifically under the UCMJ, stemmed from the language of Article 120c. Under Article 120c, called “[o]ther sexual misconduct”—which falls under the broader umbrella of Article 120, “[r]ape and sexual assault generally”—a person who knowingly broadcasts or distributes any such recording is guilty of an offense.<sup>52</sup> However, the recording must be made under the circumstances described in paragraphs (1) or (2) of Article 120c, which read:

(1) knowingly and wrongfully views the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy; (2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy.<sup>53</sup>

This means nonconsensual photo sharing is not punishable for those images that servicemembers either receive or take with the consent of the other person in the image, which was a common situation for the victims of the Marines United Scandal.<sup>54</sup> Along with the policies and regulations implemented by the Marines Corps, the ineffective tool of Article 120c more than likely led to so few courts-martial and mostly administrative discharges.

Due to the limitations of Article 120c, prosecutors and commanders had to get creative with the specifications of the Articles available to them. A few examples would serve to demonstrate this creativeness. First, one servicemember was convicted under Article 127 for threatening to distribute sexually explicit photos and a video unless he “received something valuable.”<sup>55</sup> As a result of this conviction, and other unrelated charges, he was given a bad conduct discharge and was reduced in rank to private.<sup>56</sup> Another servicemember received a bad conduct discharge, ninety days confinement, and reduction in rank to private after he was convicted at a

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<sup>51</sup> See Shawn Snow, *Seven Marines Court-Martialed in Wake of Marines United Scandal*, MARINE CORPS TIMES (Mar. 1, 2018), <https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/>.

<sup>52</sup> 10 U.S.C. §§ 920, 920c.

<sup>53</sup> *Id.* § 920c(a)(1)–(2).

<sup>54</sup> See Brennan, *supra* note 10.

<sup>55</sup> Snow, *supra* note 51.

<sup>56</sup> *Id.*

special court-martial under Article 80 for conspiracy to distribute a recording.<sup>57</sup> Surprisingly, one individual was convicted at a special court-martial under Article 120c for filming and broadcasting of a sex act.<sup>58</sup> As a result, his rank was reduced to private, and he received a bad conduct discharge and thirty days confinement.<sup>59</sup>

Other courts-martial stemming from the Marines United Scandal included convictions for posting images of a victim's private area; attempted wrongful viewing of a victim's private area without consent; and attempting to distribute and broadcast a victim's private area.<sup>60</sup> All three courts-martial resulted in bad conduct discharges, confinement, and a reduction to private.<sup>61</sup>

At the Center for Strategic and International Studies in January 2018, and after he was asked about the Marine Corps's progress towards solving the issue, General Neller stated: "There's been accountability, probably not to the satisfaction of some."<sup>62</sup> As of March 1, 2018, the Marine Corps carried out eighty dispositions of cases linked to the enforcement of the new regulations and policies enacted after the Marines United Scandal.<sup>63</sup> This included fourteen non-judicial punishments, six administrative separations, twenty-eight adverse administrative actions, and only seven courts-martial.<sup>64</sup>

Apart from the limited recourse available in criminal law, a victim's access to civil remedies is also limited. All too often, victims find it difficult to seek relief through other avenues, such as copyright or tort law, because they are hard cases to win, attorneys are expensive, and victims do not wish to face publicity.<sup>65</sup> Additionally, the Communications Decency Act ("CDA") is a giant barrier to victims who wish to go after the internet site that houses the visual images.<sup>66</sup> Under the CDA, websites and internet service providers generally have immunity from the actions of individuals who post intimate images of someone without that person's consent.<sup>67</sup> The existing law was neither a deterrent for the perpetrators nor a remedy for the victims.<sup>68</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *See, e.g.,* *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26, 30–31 (2d Cir. 2012) (holding that the safe harbor provision of the Digital Millennium Copyright Act requires actual knowledge of infringing material); *Smith v. Amedisys Inc.*, 298 F.3d 434, 450 (5th Cir. 2002) (holding plaintiff did not suffer emotional distress that was "unendurable," as required for liability for intentional infliction of emotional distress).

<sup>66</sup> *See generally* 47 U.S.C. § 230.

<sup>67</sup> *See id.* at (c)(1); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App. 2014) (holding that GoDaddy acted only as a service provider, and thus could not be liable to plaintiff).

<sup>68</sup> For further discussion on the theory of civil remedies and the CDA, see Amanda L. Cecil, Note, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513,

### C. UCMJ Amended

To deter future misconduct of this degree, Congress sought out a solution. Through the National Defense Authorization Act for Fiscal Year 2018, they did just that.<sup>69</sup> Under section 533 of the Act, a punitive article was added to the UCMJ for “wrongful broadcast or distribution of intimate visual images or visual images of sexually explicit conduct.”<sup>70</sup> The Article, came into effect in January 2019, was inserted after Article 117, and became known as Article 117a.<sup>71</sup>

Article 117a contains four elements and is similar to the language of the failed PRIVATE Act.<sup>72</sup> The first one requires the person to knowingly broadcast or distribute an intimate visual image of someone who is at least eighteen years of age, is identifiable from the image, and does not consent to the broadcast or distribution.<sup>73</sup> The second element requires one to know, or to have reasonably known, that the intimate visual image was made under circumstances in which the person depicted in the image had a reasonable expectation of privacy regarding the broadcast or distribution of the image.<sup>74</sup> The third is also a mens rea element, which requires the person to know, or to have reasonably known, the broadcast or distribution is likely to harm or cause harm.<sup>75</sup> The fourth element requires the conduct to have a “reasonably direct and palpable connection to a military mission or military environment.”<sup>76</sup> The enacted statute further includes a “visual image of sexually explicit conduct” following “intimate visual image” within the first three elements.<sup>77</sup> After the elements, Article 117a defines certain words in the statute, such as “broadcast,” “distribution,” and others.<sup>78</sup>

### III. ANALYSIS

The following discussion analyzes, in detail, Article 117a. This Comment dives into the “why” for each element, its strengths and weaknesses, and what it looks like in action in real cases.

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2517 (2014); Zak Franklin, Note, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CALIF. L. REV. 1303, 1313–14 (2014).

<sup>69</sup> See National Defense Authorization Act for Fiscal Year 2018, 131 Stat. 1283 (2017).

<sup>70</sup> *Id.* § 533.

<sup>71</sup> *Id.* § 533(a).

<sup>72</sup> Compare 10 U.S.C. § 917a(a) with Protecting the Rights of Individuals Against Technological Exploitation Act, H.R. 2052, 115th Cong. (as passed by the House, May 24, 2017).

<sup>73</sup> 10 U.S.C. § 917a(a)(1).

<sup>74</sup> *Id.* § 917a(a)(2).

<sup>75</sup> *Id.* § 917a(a)(3).

<sup>76</sup> *Id.* § 917a(a)(4).

<sup>77</sup> *Id.* § 917a(a)(1)–(3).

<sup>78</sup> See *id.* § 917a(b).

### A. *Definitional Issues*

Article 117a provides definitions for many of the words and phrases contained within each element of the statute, some of which need to be understood before application of the elements themselves can be understood.<sup>79</sup>

#### 1. “Broadcast” and “Distribute”

Article 117a defines “broadcast” and “distribute,” either of which is a necessary act to violate the statute.<sup>80</sup> First, “broadcast” means to “electronically transmit a visual image with the intent that it be viewed by a person or persons.”<sup>81</sup> While “distribute” means “to deliver to the actual or constructive possession of another person, including transmission by mail or electronic means.”<sup>82</sup>

In *United States v. Davis* (“*Davis*”), a defendant’s Article 120c charge was dismissed for failure to “broadcast” the recording in accordance with the statute’s definition.<sup>83</sup> In *Davis*, the defendant showed a fellow soldier a cell phone recording he had made of the victim’s buttocks without her consent while she was engaging in intercourse with him.<sup>84</sup> The defendant asserted that “the mere act of playing [a] video recording of [the victim] on his cell phone in front of one other physically present soldier does not constitute ‘broadcasting’ . . . .”<sup>85</sup> The court agreed, ruling that an electronic transmission was required, which requires both “an electronic device to send the transmission and an electronic device to receive the transmission.”<sup>86</sup>

The *Davis* court also addressed the definition of “distribute” to further its argument.<sup>87</sup> It stated that distributing allows both physical and electronic transferences, whereas broadcasting is limited to only electronic transfers.<sup>88</sup> By concluding that Congress must have intentionally offered only one mode of transference for “broadcast,” the court concluded there was “no basis for finding that Congress intended the definition of ‘broadcast’ to include the mere physical act of displaying a video to one other physically present soldier.”<sup>89</sup> Thus, the defendant did not “electronically transmit” and therefore

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<sup>79</sup> The statute also defines “reasonable expectation of privacy” which will be discussed below. *See infra* Part III.C.

<sup>80</sup> 10 U.S.C. § 917a(a)(1), (b)(1)–(2).

<sup>81</sup> *Id.* § 917a(b)(1).

<sup>82</sup> *Id.* § 917a(b)(2).

<sup>83</sup> No. ARMY 20160069, 2018 CCA LEXIS 417, at \*24–28 (A. Ct. Crim. App. Aug. 16, 2018). The definition for “broadcast” under 120c is identical to Article 117a’s definition. *Compare* 10 U.S.C. § 920c(d)(4) *with* 10 U.S.C. § 917a(b)(1).

<sup>84</sup> *Davis*, 2018 CCA LEXIS 417 at \*3–4.

<sup>85</sup> *Id.* at \*24.

<sup>86</sup> *Id.* at \*25.

<sup>87</sup> *See id.* at \*25–26.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at \*26.

did not “broadcast” the recording to another person.<sup>90</sup>

This raises the question: Were Anthony Swofford and other members of his platoon broadcasting or distributing the photos they shared on the “Wall of Shame?”<sup>91</sup> Based on the analysis from the *Davis* court, the platoon members’ actions would not be a “broadcast” because they did not involve electronic transmissions.<sup>92</sup> However, it could be argued that they did “distribute” the photos because, by putting them on the “Wall of Shame,” they were giving constructive possession of the photos to other members of the platoon.<sup>93</sup> The members who put the photos on the wall gave up their actual possession in order to give someone else the opportunity to view it. This is distinguishable from *Davis*, where neither the photo, nor a copy of the photo, did not leave the defendant’s possession.<sup>94</sup>

## 2. “Intimate Visual Image” and “Visual Image of Sexually Explicit Conduct”

Article 117a specifically limits its reach to an “intimate visual image of another person or a visual image of sexually explicit conduct . . . .”<sup>95</sup> The statute further defines what each of those are. A “visual image” is defined to be any of the following:

(A) Any developed or undeveloped photograph, picture, film, or video. (B) Any digital or computer image, picture, film, or video made by any means, including those transmitted by any means, including streaming media, even if not stored in a permanent format. (C) Any digital or electronic data capable of conversion into a visual image.<sup>96</sup>

A “visual image” becomes intimate when it involves the private area of a person.<sup>97</sup> “Sexually explicit conduct” is any “actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact . . . or sadistic or masochistic abuse.”<sup>98</sup>

A hypothetical was presented in *People v. Austin* (“*Austin*”).<sup>99</sup> In *Austin*, the circuit court suggested that the Illinois revenge porn statute “would

<sup>90</sup> *Id.* at \*27.

<sup>91</sup> *See id.* at \*25–27; Swofford, *supra* note 16, at 91–92.

<sup>92</sup> *See Davis*, 2018 CCA LEXIS 417 at \*25; Swofford, *supra* note 16, at 91–92.

<sup>93</sup> *See Davis*, 2018 CCA LEXIS 417 at \*25–26; Swofford, *supra* note 16, at 91–92.

<sup>94</sup> *Compare Davis*, 2018 CCA LEXIS 417 at \*24–27 with Swofford, *supra* note 16, at 91–92.

<sup>95</sup> 10 U.S.C. § 917a(a)(1).

<sup>96</sup> *Id.* § 917a(b)(7).

<sup>97</sup> *Id.* § 917a(b)(3). A “private area” is defined as “the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.” *Id.* § 917a(b)(4).

<sup>98</sup> *Id.* § 917a(b)(6).

<sup>99</sup> *See No. 123910*, 2019 IL 123910, at ¶ 96 (Ill. Oct. 18, 2019) (LEXIS).

impose criminal liability on a person who discovers and shares with other family members nude sketches of his or her grandmother that were created by his or her grandfather but were discovered in an attic after her death.”<sup>100</sup> Entertaining the circuit court’s Titanic-esque scenario, the Illinois Supreme Court referred back to the purpose of the law, stating that the statute is obviously “intended to protect living victims from the invasion of privacy and potential threat to the health and safety that is intrinsic in the disclosure of a private sexual image.”<sup>101</sup> Thus, the court rejected the premise of the lower court’s hypothetical.<sup>102</sup>

### 3. Mens Rea

For the first three elements, a mens rea requirement is attached to each one.<sup>103</sup> There is “knowingly and wrongfully” in the first element and “knows or reasonably should have known” in the second and third.<sup>104</sup> Courts have generally found “wrongful” to be a sufficient description of culpability because “there is no difficulty in separating ‘wrongful’ from ‘innocent’ conduct.”<sup>105</sup>

“‘[Knows] or reasonably should have known’ reflects not distinct elements, but alternative theories of liability. They represent two possible means of possessing the statutorily-defined mens rea to establish criminality.”<sup>106</sup> In an appeal from an Article 120(b)(3)(A), sexual assault charge, the United States Coast Guard Court of Criminal Appeals stated “knows” was an actual knowledge standard and “reasonably should have known” was a negligence standard.<sup>107</sup> “A scienter of ‘reasonably should have known’ and a mens rea of simple negligence are complementary.”<sup>108</sup> Due to the nature of the statute and its proximity to First Amendment issues, a military judge must “clearly articulate the critical distinction between permissible and prohibited behavior from the constitutional standpoint.”<sup>109</sup> This guidance on First Amendment concerns should also be applied to Article 117a cases.

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<sup>100</sup> *Id.* The Illinois statute defines “image” as “a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body.” 720 ILL. COMP. STAT. ANN. 5/11-23.5(a) (West 2015).

<sup>101</sup> *Austin*, 2019 IL 123910 at ¶ 96.

<sup>102</sup> *See id.*

<sup>103</sup> *See* 10 U.S.C. § 917a(a)(1)–(3).

<sup>104</sup> *Id.*

<sup>105</sup> *See, e.g.,* *United States v. Chance*, No. Army 20140072, 2016 CCA LEXIS 241, at \*9 (A. Ct. Crim. App. Apr. 18, 2016); *United States v. Rapert*, 75 M.J. 164, 168 (C.A.A.F. 2015) (holding that the mens rea requirement of “wrongful” in 10 U.S.C. § 934, communicating a threat against the President of the United States, was sufficient).

<sup>106</sup> *United States v. Shermot*, 77 M.J. 742, 745 (C.G. Ct. Crim. App. 2018) (italics omitted).

<sup>107</sup> *Id.*

<sup>108</sup> *United States v. Ferguson*, 40 M.J. 823, 831 (N-M.C.M.R. 1994) (italics omitted).

<sup>109</sup> *United States v. King*, No. ARMY 20130808, 2015 CCA LEXIS 321, at \*3 (A. Ct. Crim. App. July, 31 2015).

### B. *The Conduct*

The first element of Article 117a explains that the law applies to anyone:

who knowingly and wrongfully broadcasts or distributes an intimate visual image of another person or a visual image of sexually explicit conduct involving a person who—(A) is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created; (B) is identifiable from the intimate visual image or visual image of sexually explicit conduct itself, or from information displayed in connection with the intimate visual image or visual image of sexually explicit conduct; and (C) does not explicitly consent to the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct.<sup>110</sup>

The age requirement distinguishes this Article from the UCMJ’s child pornography Article, where the age requirement is under the age of eighteen, regardless of consent to the individual depicted in the image.<sup>111</sup> While the age sub-element is not the subject of great debate, the other pieces of the element have their own unique intricacies.

#### 1. Identifiability

The person must be identifiable from either the image itself or from the information displayed in connection with the image.<sup>112</sup> This sub-element boils down to an issue of authentication of evidence: Is the victim the actual person depicted in the image in question? Authentication or identification of an item of evidence—or a person—must be supported by “evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>113</sup> The Military Rules of Evidence outlines examples of sufficient evidence, such as witness testimony, distinctive characteristics, or opinion about a voice.<sup>114</sup>

The facts in *United States v. Lee* (“*Lee*”) show one of the easiest ways to establish the identity of a person in a visual image: facial recognition.<sup>115</sup> In *Lee*, the admissibility of a video recording was appealed under authentication

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<sup>110</sup> 10 U.S.C. § 917a(a)(1)(A)–(C).

<sup>111</sup> *See id.* § 943 (subjecting members of the armed forces to punishment by a court martial for certain federal offenses, including child pornography under 18 U.S.C. § 2252A).

<sup>112</sup> *Id.* § 917a(a)(1)(B); 18 U.S.C. § 2256(1), (8).

<sup>113</sup> MIL. R. EVID. 901(a).

<sup>114</sup> *Id.* § 901(b)(1), (4), (5).

<sup>115</sup> *See generally* No. ACM 38888, 2017 CCA LEXIS 185 (A.F. Ct. Crim. App. Mar. 14, 2017).

issues.<sup>116</sup> After it was shared with many people, the recording was given to law enforcement the day after it was made and after the victim had reported the assault.<sup>117</sup> The first one to receive the video, MT, attended the party and testified that he had seen the victim at the party, and later in the backseat of the car where the video was recorded.<sup>118</sup> MT recognized the victim in the video being the same person he saw in the backseat of the car.<sup>119</sup> Another recipient of the video also identified the victim as the person in the video.<sup>120</sup> When a third witness saw the video, she identified the Appellant by his voice, a portion of his face, and a tattoo on his right arm.<sup>121</sup>

Appellant argued that “no witness testified that the recording accurately depicted the events as they occurred” and that the court should apply the “silent witness” theory, which authenticates a videotape through the process by which the videotape was taken.<sup>122</sup> The court, however, held that the “silent witness” theory generally applies only “to circumstances in which government actors or private security cameras generate the recording at issue.”<sup>123</sup> Therefore, “when the facts demonstrate that [a] recording was found in a defendant’s possession, it should not be ‘subject to the same [authentication] requirements’” applied to government agents or informants.<sup>124</sup> Appellant admitted to making the recording and sending it to MT.<sup>125</sup> With Appellant’s admission and the testimonies from several witnesses, the court held the trial judge did not err in determining a sufficient foundation was established for the recording’s admissibility.<sup>126</sup>

Identifying a person in an image may not always be as simple as facial recognition. Identification may be compromised when a person’s face has been blurred or even blocked. However, based on a rudimentary reading of the Military Rules of Evidence, distinctive characteristics can be used to identify a person.<sup>127</sup> In *Lee*, the appellant was identified through voice recognition, a portion of his face, and a tattoo on his arm.<sup>128</sup> A prosecutor should be prepared to get creative with evidence to prove the identity of the

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<sup>116</sup> *Id.* at \*8.

<sup>117</sup> *Id.* at \*8–9.

<sup>118</sup> *Id.* at \*9.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*11. Under the “silent witness” theory:

a videotape is authenticated by establishing the process by which the videotape was taken, i.e. the installation of the camera, use and security of the camera, testing, and removal of the film and testimony as to the chain of custody. Upon establishing this foundation, it is admissible . . . without corroborative eyewitness.

*Id.* (quoting *United States v. Reichart*, 31 M.J. 521, 523–24 (A.C.M.R. 1990)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*11–12 (quoting *United States v. Kandiel*, 865 F.2d 967, 973 (8th Cir. 1989)).

<sup>125</sup> *Id.* at \*12.

<sup>126</sup> *Id.* at \*12–13.

<sup>127</sup> MIL. R. EVID. 901(b)(4).

<sup>128</sup> *Lee*, 2017 CCA LEXIS 185 at \*9.

person in an otherwise unidentifiable image.<sup>129</sup>

## 2. Consent

Wrongful broadcast or distribution of an intimate visual image involves a person who “does not *explicitly* consent to the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct.”<sup>130</sup> Merriam-Webster defines “explicit” as “fully revealed or expressed without vagueness, implication, or ambiguity: leaving no question as to meaning or intent.”<sup>131</sup> In other words, if one does not have a verbal “yes” from the person in the image to distribute or broadcast the image, they could be subject to potential Article 117a charges.

### C. *A Reasonable Expectation of Privacy*

Article 117a requires the defendant:

know[] or reasonably should have known that the intimate visual image or visual image of sexually explicit conduct was made under circumstances in which the person depicted in the intimate visual image or visual image of sexually explicit conduct retained a reasonable expectation of privacy regarding any broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct.<sup>132</sup>

Article 117a goes on further to define “reasonable expectation of privacy” as “circumstances in which a reasonable person would believe that a private area of the person, or sexually explicit conduct involving the person, would not be visible to the public.”<sup>133</sup> Mary Anne Franks, president of Cyber Civil Rights Initiative, raises the right question: “Why do we not think of naked photos as being as deserving of privacy protection as things like our medical records?”<sup>134</sup>

However, a reasonable expectation of privacy is not yet one of the recognized categories of speech excluded from First Amendment

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<sup>129</sup> A hypothetical question raised by this Author is how would identification occur if the victim’s head was photoshopped onto the body of another person’s nude body? Although this Comment will not analyze potential answers, this Author finds such hypothetical useful to readers.

<sup>130</sup> 10 U.S.C. § 917a(a)(1)(C) (emphasis added).

<sup>131</sup> *Explicit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/explicit> (last visited Dec. 27, 2020).

<sup>132</sup> 10 U.S.C. § 917a(a)(2).

<sup>133</sup> *Id.* § 917a(b)(5).

<sup>134</sup> Lorelei Laird, *First Amendment Defense Claims Could Threaten ‘Revenge Pornography’ Statutes*, ABA J. (Dec. 2019, 6:30 AM), <http://www.abajournal.com/web/article/first-amendment-defense-claims-could-threaten-revenge-pornography-statutes>.

protections.<sup>135</sup> The Supreme Court has stated that it “in no sense suggest[s] that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.”<sup>136</sup> Without a holding from the Supreme Court on the constitutionality of revenge porn statutes, states are split as to whether an expectation of privacy element in statutes is constitutional.<sup>137</sup>

In *State v. Ahmed*, the State of Minnesota appealed a district court’s order that dismissed three counts of felony nonconsensual dissemination of private sexual images against the Respondent for lack of probable cause.<sup>138</sup> On appeal, the court reviewed the dismissal based on the legal question on what the statute actually prohibited.<sup>139</sup> Focusing on the phrase “reasonably should have known,” the court held that the statute did not require that Respondent have actual knowledge that the victim had a reasonable expectation of privacy.<sup>140</sup> To support its reasoning, the court referred to the state supreme court’s understanding of “reason to know” in the context of child pornography, where the language is a recklessness standard meaning “that the possessor is subjectively aware of a substantial and unjustifiable risk that the work involves a minor.”<sup>141</sup> The court held there was sufficient evidence to support the conclusion that the Respondent reasonably should have known that the victim had a reasonable expectation of privacy when the photo was obtained or created, and that the image itself “depicts nothing negating the ordinary expectation of privacy that attends sexual activity.”<sup>142</sup> One year later, the very same court held that the statute carried a mens rea of negligence and that the statute was constitutionally invalid.<sup>143</sup>

Illinois has taken a different view on a person’s reasonable expectation of privacy. It has deemed the speech at issue as a “purely private matter” and is subject only to intermediate scrutiny.<sup>144</sup> Restricting speech on private matters does not raise the same concerns as restricting speech on public matters, such as self-censorship and interference with the marketplace of ideas.<sup>145</sup>

Military courts have “explored the boundaries of a person’s

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<sup>135</sup> *State v. Casillas*, 938 N.W.2d 74, 83 (Minn. Ct. App. 2019).

<sup>136</sup> *Connick v. Myers*, 461 U.S. 138, 147 (1983).

<sup>137</sup> See Laird, *supra* note 134.

<sup>138</sup> *State v. Ahmed*, No. A18-0891, 2018 Minn. App. Unpub. LEXIS 1048, at \*1 (Minn. Ct. App. Dec. 17, 2018).

<sup>139</sup> *Id.* at \*5.

<sup>140</sup> *Id.* at \*8–9.

<sup>141</sup> *Id.* at \*8 (citing *State v. Mauer*, 741 N.W.2d 107, 115 (Minn. 2007)).

<sup>142</sup> *Id.* at \*11.

<sup>143</sup> *State v. Casillas*, 938 N.W.2d 74, 85 (Minn. Ct. App. 2019). The statute was held constitutionally invalid not for its inclusion of a privacy element, but for the absence of an intent-to-harm element. See *id.* at 77; see also *infra* Section III.D.

<sup>144</sup> *People v. Austin*, No. 123910, 2019 IL 123910, at ¶ 53 (Ill. Oct. 18, 2019) (LEXIS).

<sup>145</sup> *Id.* at ¶54 (citing *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

reasonable expectation of privacy.”<sup>146</sup> In *United States v. Raines* (“*Raines*”), the appellant video-recorded his sexual encounters with multiple women without their consent.<sup>147</sup> Appellant argued that the women should have noticed the camera and that by agreeing to have sex, they implicitly agreed to the recording.<sup>148</sup> The Navy-Marine Corps Court of Appeals called this argument “patently ridiculous” and held that “agreeing to have sex with another person does not remove all reasonable expectations of privacy.”<sup>149</sup>

In *Davis*, the court held the victim did not lose her reasonable expectation of privacy even when she engaged in sex with two individuals in the presence of a third person who was passed out nearby and unaware of the sexual activity occurring in the room.<sup>150</sup> She also retained that reasonable expectation of privacy while engaging in the sexual intercourse behind a locked door in a motel room.<sup>151</sup>

The Appellant in *Lee* made two arguments in favor of why the victim did not have a reasonable expectation of privacy when the recording was made in the backseat of a car: (1) the victim did not have a possessory interest in the car where the recording was made and (2) the victim was voluntarily naked in the car in what he asserted was a public area.<sup>152</sup> With respect to the first argument, the court rejected the Appellant’s attempt to incorporate the Fourth Amendment’s definition of “reasonable expectation of privacy” because Article 120c itself defines the term.<sup>153</sup> However, the court reiterated that the victim’s “belief that she could disrobe in privacy or that her private area would not be visible to the public must still be reasonable under the circumstances.”<sup>154</sup> The facts of *Lee* established that the Appellant and victim left a party and went to the parked car with the intent to engage in sexual intercourse *in private*.<sup>155</sup> Although other partygoers eventually found the two engaging in intercourse and watched them, this did not preclude a finding that the victim still had a reasonable expectation of privacy.<sup>156</sup> While all three of these cases illustrate reasonable expectations of privacy in the context of nonconsensual recording, the principles are transferable with respect to a

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<sup>146</sup> *United States v. Davis*, No. ARMY 20160069, 2018 CCA LEXIS 417, at \*22 (A. Ct. Crim. App. Aug. 16, 2018) (internal quotations omitted); *see also* *United States v. Raines*, No. NMCCA 201400027, 2014 CCA LEXIS 600 (N-M Ct. Crim. App. Aug. 21, 2014).

<sup>147</sup> 2014 CCA LEXIS 600, at \*3.

<sup>148</sup> *Id.* at \*13.

<sup>149</sup> *Id.*

<sup>150</sup> 2018 CCA LEXIS 417 at \*3, \*22–23.

<sup>151</sup> *Id.* at \*23.

<sup>152</sup> No. ACM 38888, 2017 CCA LEXIS 185, at \*14 (A.F. Crim. App. Mar. 14, 2017).

<sup>153</sup> *Id.* at \*15.

<sup>154</sup> *Id.* at \*16.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*17.

reasonable expectation of privacy in nonconsensual image sharing.

#### D. Harm

A person charged with Article 117a must:

know[] or reasonably should have known that the broadcast or distribution of the intimate visual image or visual image of sexually explicit conduct is likely—(A) to cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate visual image or visual image of sexually explicit conduct; or (B) to harm substantially the depicted person with respect to that person’s health, safety, business, calling, career, financial condition, reputation, or personal relationships.<sup>157</sup>

Seventeen states that have laws prohibiting nonconsensual dissemination of private sexual images have some sort of intent-to-harm element.<sup>158</sup> By providing an element that addresses the effects of the prohibited conduct, Article 117a bolsters its defense against First Amendment challenges. The issue, however, may arise in the mens rea of this element—“knows or reasonably should have known.”<sup>159</sup>

In *Austin*, the Illinois Supreme Court held that an intent-to-harm element is unnecessary.<sup>160</sup> The court observed that “the motive underlying an intentional and unauthorized dissemination of a private sexual image has no bearing on the resulting harm suffered by the victim. A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator’s objective.”<sup>161</sup> The court held that the lack of consent and the expectation of privacy concerning the dissemination of a private sexual image was “presumptively harmful.”<sup>162</sup>

Conversely, Minnesota holds that the intentional conduct is “counterbalanced by the absence . . . of any requirement that the victim actually suffer any harm.”<sup>163</sup> It held that without an actual harm requirement, the legislature has criminalized behavior that will have no impact on the statutory purpose of preventing harm.<sup>164</sup>

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<sup>157</sup> 10 U.S.C. § 917a(a)(3)(A)–(B).

<sup>158</sup> See *People v. Austin*, No. 123910, 2019 IL 123910, at ¶ 103 n.1 (Ill. Oct. 18, 2019) (LEXIS) (listing states that prohibit nonconsensual dissemination of private sexual images with an intent-to-harm element).

<sup>159</sup> 10 U.S.C. § 917a(a)(3).

<sup>160</sup> See generally 2019 IL 123910, at ¶ 101–08.

<sup>161</sup> *Id.* at ¶ 102.

<sup>162</sup> *Id.* at ¶ 108.

<sup>163</sup> *State v. Casillas*, 938 N.W.2d 74, 85 (Minn. Ct. App. 2019) (omission in original) (quoting *In re Welfare of A.J.B.* 929 N.W.2d 840, 861 (Minn. 2019)).

<sup>164</sup> *Id.* at 90–91.

Article 117a lands somewhere in the middle of these two conflicting viewpoints because it has a negligence standard tied to the intent-to-harm element. Although there is only a subtle difference between purpose and knowledge, recklessness and negligence are lower levels of culpability that have rendered criminal statutes unconstitutional on First Amendment grounds.<sup>165</sup> By having a negligence theory of culpability, Congress leaves Article 117a more vulnerable to a facial challenge based on overbreadth, because the Article could encompass constitutionally protected speech. However, until the Supreme Court renders a decision on the constitutionality of any revenge porn statute, it is unknown whether even the highest level of culpability is constitutional.

#### *E. Military Connection*

The last element under Article 117a makes one guilty of the offense if their conduct, “under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment.”<sup>166</sup> This element, which is common in many UCMJ Articles, is based on a running practice of limiting the speech of military members in order to maintain good military order and discipline.<sup>167</sup> In the Supreme Court case, *Parker v. Levy*, the Court noted the uniqueness speech rights for members of the military:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.<sup>168</sup>

If the speech is of the type protected by the First Amendment but has “a reasonably direct and palpable connection” to the military mission or military environment, then a court need only “determine whether the criminalization of that speech is justified despite First Amendment concerns.”<sup>169</sup> This practice of restricting military members’ speech is

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<sup>165</sup> See, e.g., *id.* at 77 (finding that the statute prohibiting nonconsensual dissemination of private sexual images violated the First Amendment because its negligence mens rea requirement).

<sup>166</sup> 10 U.S.C. § 917a (a)(4).

<sup>167</sup> See, e.g., *id.* § 934; JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL IV-135-51 (2019), [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610) (explaining the offenses punishable under Article 134, many of which contain the requirement of the conduct to “prejudice [the] good order and discipline of the armed forces.”).

<sup>168</sup> 417 U.S. 733, 758 (1974).

<sup>169</sup> *United States v. Wilcox*, 66 M.J. 442, 449 (C.A.A.F. 2008).

commonly known as the Doctrine of Military Necessity.<sup>170</sup>

The element of a military connection is not easily met based on assumptions and conclusory statements. In *United States v. Wilcox*, a servicemember was convicted under Article 134 for disobeying an officer, for violating an Army regulation by distributing extremist literature, and making a false official statement, among others.<sup>171</sup> Specifically, the servicemember was accused of identifying himself online as an Army Paratrooper and advocating “racial intolerance by counseling and advising individuals on racist views” which “under the circumstances . . . was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit to the armed forces . . . .”<sup>172</sup> On appeal, the sole issue was whether the evidence was legally sufficient to support the charged offense.<sup>173</sup>

The evidence presented by the Government at trial consisted of the testimony of one individual who gathered evidence in the course of her online conversations and expert testimony that confirmed the servicemember’s online statements were consistent with the white supremacist movement.<sup>174</sup> However, no evidence was introduced to prove the actual or potential discredit to the armed forces.<sup>175</sup> The Government argued that the offense was proven because “the accused, while holding himself out as a member of the United States Army . . . recruited others into activities involving racial intolerance.”<sup>176</sup> On the other hand, the defense introduced evidence from soldiers in the servicemember’s unit that the servicemember had a “good working relationship[] with minorities in the unit and there was no evidence that his racist views adversely affected his military performance or his unit.”<sup>177</sup> The court held that although military members may have less protective First Amendment rights, the evidence was legally insufficient to support the conviction.<sup>178</sup> It was pure speculation that the racist comments were viewed, or would be viewed, by other servicemembers or be perceived by the public as an expression of Army or military policy.<sup>179</sup> Lastly, the court held there was no evidence his statements had a “reasonably direct and palpable effect on the military mission or military environment.”<sup>180</sup> There was no proof that the profiles were directed at other members of the military

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<sup>170</sup> Bill Kenworthy, *Military Speech*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/military-speech/> (Feb. 2010).

<sup>171</sup> *Wilcox*, 66 M.J. at 443.

<sup>172</sup> *Id.* at 443–44 (alterations in original).

<sup>173</sup> *Id.* at 445.

<sup>174</sup> *Id.* at 445–46.

<sup>175</sup> *Id.* at 446.

<sup>176</sup> *Id.* (internal quotations omitted).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 450.

<sup>180</sup> *Id.* at 451.

or that any other servicemember ever stumbled across them.<sup>181</sup>

This element in Article 117a is aimed at maintaining the constitutionality of the criminal offense on speech, despite the split decisions on the speech in question in state supreme courts. So long as a prosecutor can provide sufficient evidence that there is a direct and palpable connection to the military mission or military environment, appellate courts will generally uphold the conviction.<sup>182</sup>

#### F. Article 117a Enforced

Since its enactment, there has been at least one known conviction under the Article 117a—*United States v. Roman-Cummins* (“*Roman-Cummins*”).<sup>183</sup> Defendant and victim, both servicemembers, were in a relationship when the victim took an intimate visual image of herself on the defendant’s phone.<sup>184</sup> On August 8, 2018, after the victim broke up with defendant “without explanation,” defendant then sent the photo to a fellow Airman through the victim’s Facebook account, believing the Airman and victim to be involved in an ongoing relationship.<sup>185</sup> The defendant had logged into the victim’s Facebook account through his phone without her consent.<sup>186</sup>

Through a guilty plea, the defendant admitted that the elements and definitions of Article 117a correctly and accurately described what he did.<sup>187</sup> In response to the military judge’s questions, the defendant admitted that the victim did not agree that the image would be visible to the public and knew the victim was at least eighteen years of age.<sup>188</sup> The victim was also identifiable in the image because one could see her face in the image.<sup>189</sup> The defendant also described the photo to be of a private nature between him and the victim.<sup>190</sup> He admitted that he knew sending the photo to the other Airman was likely to cause embarrassment due to its private nature and believed sending the photo would cause friction in the relationship between the victim

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<sup>181</sup> *Id.*

<sup>182</sup> See, e.g., *Parker v. Levy*, 417 U.S. 733, 760–61 (1974); *United States v. Brown*, 45 M.J. 389, 398 (C.A.A.F. 1996); *United States v. Priest*, 21 C.M.A. 564, 571–72 (C.M.A.1972).

<sup>183</sup> See Transcript of Record, *United States v. Roman-Cummins* (May 20, 2019) (Special Order AB-1) (on file with author). This is an unpublished case. A Freedom of Information Act request was submitted to the Department of the Air Force. In this request, the Author asked for the transcript and charge sheet of the case. The request was approved on February 6, 2020, and the Author received both documents. The victim’s and witnesses’ names have been redacted for privacy purposes. The Author was also present for the sentencing of Airman First Class Roman-Cummins while a summer intern with the Air Force.

<sup>184</sup> *Id.* at 10–12.

<sup>185</sup> *Id.* at 11–12.

<sup>186</sup> *Id.* at 12.

<sup>187</sup> *Id.* at 11–12.

<sup>188</sup> *Id.* at 12. These facts fulfill parts A and C of element one.

<sup>189</sup> *Id.* This fact fulfills part B of element one.

<sup>190</sup> *Id.* at 11. This fact fulfills element two.

and the other Airman.<sup>191</sup> The military judge accepted the guilty plea.<sup>192</sup>

The sentencing hearing took place on May 20, 2019.<sup>193</sup> Multiple witnesses from the defendant and victim's squadron were called to testify by the prosecution.<sup>194</sup> One witness was one of the unit's supervisors, who testified on how the defendant's actions made a negative impact on the unit.<sup>195</sup> Since both the defendant and victim worked in the same section, the supervisor described how one of them had to be moved to another work area.<sup>196</sup> Further, the supervisor testified that she had to "deal with rumor control" amongst the Airmen in the unit for multiple hours on a daily basis, affecting her ability to perform her other duties.<sup>197</sup> On cross-examination and redirect examination, the supervisor also discussed having to speak with both the defendant and victim about not talking about the situation with other personnel in the office.<sup>198</sup>

Both victim and defendant gave unsworn statements.<sup>199</sup> In the victim's unsworn statement, she expressed the defendant's actions made her feel "shameful, embarrassed, disgusted and angry," and that she had "lost [her] trust in [her] fellow [A]irmen."<sup>200</sup> The defendant apologized for his actions and asked that the court allow him to return to serve his country.<sup>201</sup> After closing remarks and deliberation, a panel of members ordered the defendant to a reduction to the grade of E-1, forfeiture of two-thirds pay per month for three months, and confinement for thirty days.<sup>202</sup>

*Roman-Cummins* gives a clear illustration of the elements of Article 117a. Beginning with the first element, the defendant clearly "distributed" the photo within the context of Article 117a's definition because he electronically transmitted the image to another airman via a social media platform.<sup>203</sup> The image was also an intimate visual image because it was a digital image and revealed the victim's "nude upper body and her hand holding [the defendant's] penis."<sup>204</sup> Identifiability of the person in the visual

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<sup>191</sup> *Id.* at 11–12. These facts fulfill element three.

<sup>192</sup> *Id.* at 15. Facts that pertain to the fourth element were addressed at the sentencing hearing, but it is assumed that this element was admitted during the defendant's arraignment, although not expressly discussed in the transcript. Otherwise, the military judge would not have accepted the guilty plea.

<sup>193</sup> *Id.* at 17.

<sup>194</sup> *See id.* at 19–24.

<sup>195</sup> *Id.* at 23–24.

<sup>196</sup> *Id.* at 24.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See id.* at 25–28.

<sup>200</sup> *Id.* at 25.

<sup>201</sup> *Id.* at 27–28.

<sup>202</sup> *Id.* at 30; AIR FORCE JUDGE ADVOC. GEN.'S CORPS, Air Force Court-Martial Summaries - May 2019 (2019), [https://www.afjag.af.mil/Portals/77/documents/CM\\_Summaries/CM\\_Summaries\\_May\\_19.pdf?ver=2019-06-17-124720-113](https://www.afjag.af.mil/Portals/77/documents/CM_Summaries/CM_Summaries_May_19.pdf?ver=2019-06-17-124720-113).

<sup>203</sup> Transcript of Record, *supra* note 183, at 11–12.

<sup>204</sup> *Id.* at 11.

image was also met because the victim's face was visible in the image.<sup>205</sup> The defendant's admission that he did not receive the victim's permission to send the image establishes a lack of explicit consent required by Article 117a.<sup>206</sup> The defendant's mens rea would have been established through his purposeful login to the victim's Facebook account in order to transmit the visual image to the Airman.<sup>207</sup> These facts show that the first element was met.

For element two, the defendant again admitted to knowing that the image was made under circumstances where the person depicted in the image retained a reasonable expectation of privacy.<sup>208</sup> Similar to the victims in *Raines*, *Davis*, and *Lee*, this victim retained a reasonable expectation of privacy because the photo was taken with her ex-boyfriend's phone while in a private location with him.<sup>209</sup> A reasonable person would expect a photo such as this one to remain between her and the defendant. The phone can be compared to the car in *Lee*, because although she does not have a possessory interest in the phone, the Fourth Amendment definition does not apply because the term is defined by the statute.<sup>210</sup>

Element three was also met both by admission and evidence. The defendant's responses show not only that he knowingly, but that he purposefully, intended to cause harm. His intent to cause embarrassment and create friction between the victim and the other Airman meets element three because it "harm[s] substantially the depicted person with respect to the that person's . . . reputation, or personal relationships."<sup>211</sup> The victim's unsworn testimony at the sentencing hearing also reveals that actual harm was caused by the defendant's actions.<sup>212</sup> Coupled with this, an argument could be made that the defendant reasonably should have known that sending an intimate visual image of one Airman to another Airman would cause some harm to the Airman-victim.

Lastly, *Roman-Cummins* creates a strong example where one's conduct "had a reasonably direct and palpable connection to a military mission or military environment."<sup>213</sup> Such a connection was made by the supervisor's testimony. Changes in the unit's functions had to be made and gossip filtered throughout, which cost the supervisor time that could have

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<sup>205</sup> *Id.* at 11–12.

<sup>206</sup> *Id.* at 11; see 10 U.S.C. § 917a(a)(1)(C).

<sup>207</sup> Transcript of Record, *supra* note 183, at 12.

<sup>208</sup> *Id.* at 11–12.

<sup>209</sup> *Id.*

<sup>210</sup> See 10 U.S.C. § 917a(b)(5); *United States v. Lee*, No. ACM 38888, 2017 CCA LEXIS 185, at \*15 (A.F. Crim. App. Mar. 14, 2017).

<sup>211</sup> 10 U.S.C. § 917a(a)(3)(B).

<sup>212</sup> See generally Transcript of Record, *supra* note 183, at 25.

<sup>213</sup> 10 U.S.C. § 917a(a)(4).

been spent elsewhere.<sup>214</sup> This affected the supervisor's mission and the unit's mission. The sort of gossip surrounding revenge porn weighs heavily not only on military environments, but any work environment. Although not every case will be as simple as this one, *Roman-Cummins* is the textbook case for the sort of actions Article 117a aims to deter.

#### IV. CONCLUSION

In today's connected world, society must decide where the limits lie with sharing content and what to do when those lines are crossed. The enactment of Article 117a has been society's response to those questions for our nation's servicemembers. After the Marines United Scandal and the lack of justice that followed, we said "no more." Commanders now have a new tool to combat inappropriate behavior amongst their soldiers, airmen, sailors, and marines. However, it is not overbearing on a servicemember's rights because the Article was carefully tailored to address First Amendment concerns.

Article 117a carefully defines key terms utilized throughout the statute, creating transparency on what sort of conduct and speech is prohibited.<sup>215</sup> The mens rea requirements within each element are fair, because it distinguishes wrongful conduct from innocent conduct.<sup>216</sup> Requiring evidence of the person's identity in the image and the lack of their *express* consent to the broadcast or distribution reiterates that Article 117a is meant to protect victims.<sup>217</sup>

Defining the conduct and speech is only half the battle. A reasonable expectation of privacy must be violated. Although not a recognized category of unprotected speech outside the First Amendment, Congress deemed it necessary in its legislation to narrow its breadth.<sup>218</sup> State courts are also split as to whether legislation should extend into the private matters of nonconsensual photo sharing.<sup>219</sup> Article 117a's definition of "reasonable expectation of privacy," coupled with the multiple cases which address this issue, creates precedent to clarify the context of this element.

An intent-to-harm element bolsters the statute's standing against First Amendment claims, narrowing the statute to punish only conduct which revenge porn statutes aim to prevent.<sup>220</sup> However, negligence may not be a sufficient level of culpability to survive constitutional challenges.<sup>221</sup> What it

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<sup>214</sup> Transcript of Record, *supra* note 183, at 23–24.

<sup>215</sup> See *supra* Part III.A.1–2.

<sup>216</sup> See *supra* Part III.A.3.

<sup>217</sup> See *supra* Part III.B.1–2.

<sup>218</sup> See *supra* Part III.C.

<sup>219</sup> See *supra* Part III.C.

<sup>220</sup> See *supra* Part III.D.

<sup>221</sup> See *supra* Part III.D.

will come down to is Article 117a's requirement of a "direct and palpable connection to a military mission or military environment."<sup>222</sup> As history shows, Congress has wide discretion in restricting servicemembers' speech; however, its boundaries do exist.<sup>223</sup> Until the Supreme Court speaks on this unprecedented issue, this is what we know to be true: A veteran turned victim to revenge porn can seek justice through Article 117a.

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<sup>222</sup> 10 U.S.C. § 917a(a)(4).

<sup>223</sup> *See supra* Part III.E.