NOTE

CRIMINALIZATION IN CONTEXT: INVOLUNTARINESS, OBSCENITY, AND THE FIRST AMENDMENT

Cynthia Barmore*

"Revenge porn," referring to the distribution of sexually explicit images without the consent of those featured, is a growing problem in the United States. New Jersey and California were the first states to criminalize the practice, but state legislatures around the country have been passing and considering similar laws in recent months. Proponents of legislation, however, are confronting critics who protest that the First Amendment precludes criminal liability for distributing lawfully acquired true material.

This Note provides the first in-depth analysis of how obscenity law can and should be used to criminalize revenge porn within the boundaries of the First Amendment. While no state legislature has characterized revenge porn as obscenity, this Note argues they should because the obscenity context provides the greatest insulation from a First Amendment challenge. If drafted to prohibit obscenity, such laws would enable states to robustly and constitutionally criminalize revenge porn, even when the photographer is the person objecting to distribution or the distributor acts without intent to cause serious emotional distress. The hope is this Note will guide legislatures to draft constitutionally responsible legislation to combat revenge porn.

* J.D. Candidate, Stanford Law School, 2015. I am especially grateful to Jane Schacter for her thoughtful guidance and feedback.

INTRODUCTION

On a Friday afternoon in July, Ian Barber posted naked pictures of his then-girlfriend to his Twitter account. He also sent copies to her employer and her sister. Seven months later, New York's first revenge porn prosecution wound its way to Judge Statsinger, who declared that while Barber's conduct was "reprehensible," it was not a crime in New York.[1] Sadly, Barber's conduct no longer appears even that uncommon. A 2013 study found that ten percent of eighteen- to fifty-four-year-olds with a former partner threaten to post risqué images of the former partner online, with nearly sixty percent of threats carried out.[2]

Involuntary pornography takes a variety of forms, each carrying a varying degree of criminality under state and federal law. Computer hackers obtain content illegally, triggering federal law that prohibits unauthorized access to computer files.[3] State-level Peeping Tom and invasion of privacy statutes typically prohibit secretly filming another person's sexual acts.[4] Child pornography laws outlaw all pornography featuring minors, whether purportedly consensual or not.[5] The least protected instance of involuntary pornography, however, occurs when sexual partners distribute intimate images of adults that were shared with the expectation they would remain private. This category, referred to as "re-

1. People v. Barber, 992 N.Y.S.2d 159, No. 2013NY059761, 2014 WL 641316, at *1 (N.Y. Crim. Ct. Feb. 18, 2014) (unpublished table decision).

2. *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, MCAFEE (Feb. 4, 2013), http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx.

3. *See* Andrew Blankstein, *'Revenge Porn' Site Creator, Alleged Hacker Charged with Computer Crime, ID Theft*, NBC NEWS (Jan. 23, 2014, 12:47 PM), http://investigations.nbcnews.com/_news/2014/01/23/22418229-revenge-porn-site-creator-alleged-hacker-charged-with-computer-crime-id-theft.

4. *See* Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), http://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide (discussing charges filed against Dharun Ravi and Molly Wei for secretly viewing Tyler Clementi's sexual encounter with another man).

5. *See, e.g.*, 18 U.S.C. § 2252A (2013).

venge porn," covers the distribution of images for which all adult partners consented to production but not distribution.[6] While types of involuntary pornography overlap, this Note focuses on revenge porn featuring adults who consented to production but not distribution—one of the least addressed problems in both the law and the academic literature.[7]

While the named phenomenon of revenge porn is relatively new, there is a clear imperative to fight its proliferation. Revenge porn is a growing problem, as websites dedicated to involuntary pornography have multiplied in recent years.[8] Sexually explicit pictures are often accompanied by the victim's name and address as well as links to social media profiles, leading to safety threats, job loss, and social harm.[9] One study suggests that 47% of victims of revenge porn consider suicide.[10] Despite the risks, people continue to share explicit images believing their loved ones will never betray them. In anticipation of Valentine's Day in 2013, one study found that 43% of men and 29% of women planned to send "sexy or romantic photos" to their partners via e-mail, text message, or social media to celebrate the holiday.[11]

This Note provides the first in-depth analysis of how revenge porn laws can be justified under the obscenity exception to the Free Speech Clause of the First Amendment and discusses the normative and legal implications of state

---

6. 4 IAN C. BALLON, E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS § 51.04[2] (2d ed. 2014).

7. Most of the literature focuses on involuntary pornography in the context of underage bullying where teenagers disseminate sexually explicit images of other teenagers. *See, e.g.*, Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357 (2013) (discussing bullying and harassment of gay teens); Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385 (2012) (arguing against criminal prohibitions on bullying).

8. Lorelei Laird, *Victims Are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent to*, A.B.A. J. (Nov. 1, 2013, 9:30 AM CDT), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c.

9. *Id.*; *see also* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 347, 350-51 (2014) (discussing harms flowing from revenge porn).

10. Charlotte Laws, *I've Been Called the "Erin Brockovich" of Revenge Porn, and for the First Time Ever, Here Is My Entire Uncensored Story of Death Threats, Anonymous and the FBI*, XOJANE (Nov. 21, 2013), http://www.xojane.com/it-happened-to-me/charlotte-laws-hunter-moore-erin-brockovich-revenge-porn (citing studies by the Cyber Civil Rights Initiative). This is significantly higher than the national average. According to the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services, 3.7% of adults had "serious thoughts of suicide" in 2008. Office of Applied Studies, U.S. Dep't of Health & Human Servs., *Suicidal Thoughts and Behaviors Among Adults*, NSDUH REP., Sept. 17, 2009, at 1, 1.

11. *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online*, *supra* note 2.

legislation.[12] It argues that states should model criminal prohibitions on obscenity law and follow New Jersey's approach to make nonconsensual distribution of pornography a crime regardless of who took the picture or the harm intended to be caused. Part I outlines existing laws on revenge porn, discusses trends in recently passed legislation, and explains why alternative criminal and civil penalties are inadequate to deter and punish perpetrators of revenge porn. Part II argues that revenge porn should be prohibited as obscenity, making the normative case for specific content in revenge porn laws and responding to the criticism that robust legislation violates the First Amendment. Part III explores alternative ways to justify the constitutionality of revenge porn laws and argues that obscenity law offers the safest course for statutes to withstand First Amendment challenge. Put simply, there is no constitutional right to distribute pornography without the consent of all participants.

I. CRIMINAL AND CIVIL PENALTIES FOR REVENGE PORN

Before 2014, just two states—New Jersey and California—criminalized revenge porn in the United States, but more have recently followed suit. State legislatures enacted a flurry of laws criminalizing revenge porn during the spring of 2014, others are debating draft legislation,[13] and Congress may soon consider its own federal bill.[14] There is little consistency across current legislation, however, with states adopting a range of approaches to criminalization. Notably, while varying state approaches reveal benefits and drawbacks of particular legislative content, not one state with a revenge porn law on the books models its legislation on traditional obscenity statutes, explored in Part II.

A. *State Laws Criminalizing Revenge Porn*

New Jersey is an accidental pioneer of revenge porn legislation. In 2004, New Jersey enacted a broad invasion of privacy law that, according to the New Jersey Office of the Attorney General, was intended to capture people who se-

12. Eugene Volokh briefly suggested that revenge porn may count as obscenity under the First Amendment, but there has been no exploration of that idea in the literature. *See* Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), http://www.volokh.com/2013/04/10/florida-revenge-porn-bill.

13. *State 'Revenge Porn' Legislation*, NAT'L CONF. ST. LEGISLATURES (Aug. 15, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx (providing the status of revenge porn bills under consideration in state legislatures).

14. Steven Nelson, *Federal 'Revenge Porn' Bill Will Seek to Shrivel Booming Internet Fad*, U.S. NEWS & WORLD REP. (Mar. 26, 2014, 6:01 PM EDT), http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-shrivel-booming-internet-fad.

cretly videotape sexual activity.[15] While the legislature never discussed revenge porn, it drafted broad language that brought revenge porn within its reach.[16] Under New Jersey law, it is a third-degree felony to disclose sexually explicit images unless the depicted individual consented to disclosure.[17] The only mens rea required by the statute is that the actor must "know[] that he is not licensed or privileged" to disclose the image.[18] By its plain language, the statute encompasses all nonconsensual distribution, whether the distributor acquired the image consensually or not, and independent of the reasons for distribution. The statute specifies only one affirmative defense, covering cases in which the distributor provides prior notice of intent to distribute and "act[s] with a lawful purpose."[19] While there is no explicit exception for distributing newsworthy images, the First Amendment gives that act an intrinsically lawful purpose.[20]

In 2013, California became the second state to criminalize revenge porn. In contrast to New Jersey, California enacted a significantly weaker statute, deemed "[t]he Swiss cheese of revenge porn laws."[21] California originally criminalized only a narrow subset of revenge porn, making it a misdemeanor for a photographer to distribute sexually explicit images of someone else that he or she recorded "under circumstances where the parties agree or understand that the image shall remain private," if the photographer intends to and does cause the depicted person "serious emotional distress."[22] California's original law criminalized only instances in which the distributor and photographer were

15. Suzanne Choney, *'Revenge Porn' Law in California Could Pave Way for Rest of Nation*, NBC NEWS (Sept. 3, 2013, 1:34 PM), http://www.nbcnews.com/tech/internet/revenge-porn-law-california-could-pave-way-rest-nation-f8C11022538.

16. *Id.*

17. N.J. STAT. ANN. § 2C:14-9(c) (West 2014) (making it a crime to "disclose[] any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure").

18. *Id.*

19. *Id.* § 2C:14-9(d).

20. See Part II.D below for a discussion of the First Amendment implications of a newsworthy-content exception and the possibility that an exception like New Jersey's is unconstitutionally overbroad and vague.

21. Eric Goldman, *California's New Law Shows It's Not Easy to Regulate Revenge Porn*, FORBES (Oct. 8, 2013, 12:03 PM), http://www.forbes.com/sites/ericgoldman/2013/10/08/californias-new-law-shows-its-not-easy-to-regulate-revenge-porn.

22. Act of Oct. 1, 2013, ch. 466, sec. 1, § 647(j)(4)(A), 2013 Cal. Stat. 3897, 3899 (codified as amended at CAL. PENAL CODE § 647(j)(4)(A) (West 2014)) (making it a misdemeanor to "photograph[] or record[] by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private," if the photographer "subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress").

the same person, thereby excluding "selfies"[23] from its reach,[24] but the law was later widened to prohibit distribution even when the distributor is not the photographer.[25] The law's requirement of specific intent to cause serious emotional distress imposes a demanding level of proof on prosecutors and excludes instances of nonconsensual distribution that cause such harm and are equally worthy of prohibition but are motivated by financial or other considerations.[26]

State legislatures across the country have been increasingly willing to take up the issue of revenge porn. During 2014, Arizona, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, Pennsylvania, Utah, Virginia, and Wisconsin enacted legislation to criminalize revenge porn.[27] Those states adopted a range of approaches: some passed strong prohibitions that mirror New Jersey's, while others enacted more modest laws that resemble California's. There is no consensus among those states as to the best approach, and a fairly even split has developed between states broadly criminalizing revenge porn and others hinging prohibitions on intent to harass or cause emotional distress. Strikingly, not one of those states criminalized revenge porn under obscenity law. Furthermore, just two of those states—Colorado and Wisconsin—included an exception to criminal liability for distributing legitimately newsworthy images, and none expressly excluded selfies from protection.

Arizona, Delaware, Idaho, Illinois, and Wisconsin are in the camp of states enacting broad criminal laws against revenge porn. Arizona's statute is representative, lacking any requirement that the distributor intend to cause emotional harm.[28] The only required mens rea is one of negligence: to be criminally liable, the distributor at least "should have known that the depicted person has not consented to the disclosure."[29] Delaware and Illinois also prohibit nonconsensual distribution when the distributor "should have known" about the lack of consent, provided the circumstances give the depicted person a reasonable ex-

---

23. The Oxford American English Dictionary defines "selfie" as "[a] photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media." *Selfie Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/selfie (last visited Jan. 28, 2015).

24. See the discussion in Part II.B below, arguing that revenge porn laws should prohibit the nonconsensual distribution of selfies.

25. CAL. PENAL CODE § 647(j)(4)(A) (including in the definition of disorderly conduct "[a]ny person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse").

26. See the discussion in Part II.C below, arguing that revenge porn laws should *not* require specific intent to cause emotional distress.

27. *State 'Revenge Porn' Legislation*, *supra* note 13.

28. ARIZ. REV. STAT. ANN. § 13-1425(A) (2014) ("It is unlawful to intentionally . . . distribute . . . [an image] of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure.").

29. *Id.*

pectation of privacy.[30] Idaho enacted a similarly broad law that criminalizes dissemination of intimate images when the distributor "reasonably should have known" that "one . . . or both parties agreed or understood that the images should remain private."[31] Wisconsin's law is somewhat narrower, requiring actual knowledge about the lack of consent or that the image is "a private representation."[32] The laws of Arizona, Delaware, and Idaho do not contain an exception for the distribution of newsworthy material,[33] although Wisconsin's law does,[34] and Illinois's law exempts distribution that "serves a lawful public purpose."[35]

In contrast, Colorado, Georgia, Maryland, Pennsylvania, Virginia, Hawaii, and Utah took far narrower approaches to criminalization. The first five enacted statutes that criminalize revenge porn either partially or entirely as harassment. Colorado's and Georgia's laws are particularly similar, criminalizing nonconsensual distribution when done for either harassment or pecuniary gain.[36] For revenge porn to be harassment in Colorado, the distributor must intend to harass and inflict serious emotional distress, cause such distress, and distribute images either without consent or when the distributor should have known the depicted person had a reasonable expectation of privacy.[37] Harassment under Georgia's law entails "conduct directed at a depicted person that is intended to

30. DEL. CODE ANN. tit. 11, § 1335(a)(9) (2014); 720 ILL. COMP. STAT. 5/11-23.5(b)(3) (2015) (effective June 1, 2015).

31. IDAHO CODE ANN. § 18-6609(2) (2014) ("A person is guilty of video voyeurism when . . . [h]e either intentionally or with reckless disregard disseminates . . . any image . . . of the intimate areas of another person . . . without . . . consent . . . and he knows or reasonably should have known that one . . . or both parties agreed or understood that the images should remain private.").

32. WIS. STAT. § 942.09(3m)(a) (2014) ("Whoever does any of the following is guilty of a Class A misdemeanor: 1. Posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation. 2. Posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted.").

33. *See* ARIZ. REV. STAT. ANN. § 13-1425; IDAHO CODE ANN. § 18-6609.

34. WIS. STAT. § 942.09(3m)(b)(3) ("This subsection does not apply to . . . [a] person who posts or publishes a private representation that is newsworthy or of public importance.").

35. 720 ILL. COMP. STAT. 5/11-23.5(c)(4).

36. COLO. REV. STAT. §§ 18-7-107(1), -108(1) (2014); GA. CODE ANN. § 16-11-90(b) (2014).

37. COLO. REV. STAT. § 18-7-107(1)(a) ("An actor . . . commits the offense of posting a private image for harassment if he . . . distributes . . . any . . . image displaying the private intimate parts of an . . . identifiable person . . . : (I) With the intent to harass the depicted person and inflict serious emotional distress . . . ; (II)(A) Without the depicted person's consent; or (B) When the actor . . . should have known that the depicted person had a reasonable expectation that the image would remain private; and (III) The conduct results in serious emotional distress . . . .").

cause substantial emotional harm."[38] This means that general distribution of sexually explicit images, if not harassing and not resulting in financial harm, would not run afoul of either Colorado's or Georgia's law. In either instance, Colorado exempts distributors of images "related to a newsworthy event"—making it and Wisconsin the only states to include an exception for public interest content.[39] Georgia's statute exempts "[l]egitimate medical, scientific, or educational activities" but does not include a general public interest exception.[40]

Maryland, Pennsylvania, and Virginia similarly categorize revenge porn as harassment. Maryland prohibits distribution only where the distributor acts to cause serious emotional distress, provided the distributor knew the other person did not consent to distribution and the circumstances suggest a reasonable expectation of privacy.[41] Virginia similarly forbids dissemination if the distributor has "intent to coerce, harass, or intimidate" the depicted person and at least has "reason to know" that such dissemination was done without consent.[42] Pennsylvania likewise prohibits nonconsensual distribution if done "with intent to harass, annoy or alarm a current or former sexual or intimate partner."[43] Like the Georgia statute, the laws of Pennsylvania, Virginia, and Maryland lack a general public interest exception,[44] although an early draft of Maryland's bill exempted "images concerning matters of public importance."[45]

While Utah and Hawaii do not categorize revenge porn as harassment, they hinge prohibition on intent to cause emotional distress or harm. Utah criminalizes distribution where the distributor, having such intent, "knows that the depicted individual has not given consent" to distribution, the image was shared

---

38. GA. CODE ANN. § 16-11-90(a)(1); *id.* § 16-11-90(b) ("A person violates this Code . . . if he or she, knowing the content of a transmission or post, knowingly and without the consent of the depicted person . . . posts . . . a photograph or video which depicts nudity or sexually explicit conduct of an adult when the . . . post is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person . . . .").

39. COLO. REV. STAT. §§ 18-7-107(2), -108(2).

40. *See* GA. CODE ANN. § 16-11-90(e).

41. MD. CODE ANN., CRIM. LAW § 3-809(c) (LexisNexis 2014) ("A person may not intentionally cause serious emotional distress to another by intentionally placing on the Internet a[n] . . . image of the other person *that reveals the identity of the other person* with his or her intimate parts exposed or while engaged in an act of sexual contact: (1) knowing that the other person did not consent to the placement of the image on the Internet; and (2) under circumstances in which the other person had a reasonable expectation that the image would be kept private." (emphasis added)).

42. VA. CODE ANN. § 18.2-386.2(A) (2014) ("Any person who, with the intent to coerce, harass, or intimidate, maliciously disseminates . . . any . . . image created by any means whatsoever that depicts another person who is . . . in a state of undress . . . where such person knows or has reason to know that he is not licensed or authorized to disseminate or sell such . . . image is guilty . . . .").

43. 18 PA. CONS. STAT. § 3131(a)-(b) (2014).

44. *See* MD. CODE ANN., CRIM. LAW § 3-809; VA. CODE ANN. § 18.2-386.2.

45. H.D. 43, 2014 Gen. Assemb., Reg. Sess., sec. 1, § 3-809(B)(3) (Md. 2014) (as engrossed, Feb. 25, 2014).

in circumstances in which the depicted person had "a reasonable expectation of privacy," and distribution causes "actual emotional distress."[46] Similarly, Hawaii forbids nonconsensual disclosure only if the distributor has "intent to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships."[47] Utah and Hawaii likewise do not include any exception for the distribution of newsworthy images.[48]

Other states are currently considering similar legislation. The draft laws of those states reflect the broader trend of legislation recently enacted elsewhere, with about half of states considering broad prohibitions[49] and the other half debating narrower laws that would criminalize only harassing or intentionally emotionally harmful conduct.[50] Other state legislatures, including those of Ala-

---

46. UTAH CODE ANN. § 76-5b-203(2) (LexisNexis 2014) ("An actor commits the offense . . . if the actor, with the intent to cause emotional distress or harm, knowingly or intentionally distributes to any third party any intimate image of an individual . . . if: (a) the actor knows that the depicted individual has not given consent to the actor to distribute the intimate image; (b) the intimate image was created by or provided to the actor under circumstances in which the individual has a reasonable expectation of privacy; and (c) actual emotional distress or harm is caused . . . as a result . . . .").

47. HAW. REV. STAT. § 711-1110.9(b) (2014).

48. *See id.*; UTAH CODE ANN. § 76-5b-203.

49. *See* H.R. 3924, 188th Gen. Court, Reg. Sess. § 106(b)-(c) (Mass. 2014) ("Whoever willfully discloses visual material depicting another, identifiable person who is nude . . . or engaged in a sexual act, and, at the time of the disclosure, knew or should have known that the person so depicted did not consent to the disclosure, shall be punished . . . . [This] shall not apply to a person who discloses visual material for the purposes of . . . any . . . bona fide and lawful public purpose."); S. 5949, 236th Leg., Reg. Sess., sec. 1, § 250.70 (N.Y. 2013) ("A person is guilty of non-consensual disclosure . . . when he . . . intentionally and knowingly discloses . . . [an] image of another person whose intimate parts are exposed or who is engaged in an act of sexual contact without such person's consent, when a reasonable person would have known that the person depicted would not have consented to such disclosure, and under circumstances in which the person has a reasonable expectation of privacy. . . . This section shall not apply to . . . disclosures made for a legitimate public purpose."); H.R. 714, 2013-2014 Gen. Assemb., Reg. Sess., sec. 1, § 2605(c) (Vt. 2014) ("No person shall intentionally or knowingly display or disclose . . . [an image] of another person whose intimate areas are exposed or who is engaged in sexual conduct under circumstances in which a person has a reasonable expectation of privacy without the subject's knowledge and consent to the . . . disclosure.").

50. *See* H.R. 1334, 97th Gen. Assemb., 2d Reg. Sess., sec. A, § 573.045(1) (Mo. 2014) ("A person commits the crime . . . when he . . . knowingly receives and republishes . . . the image of the intimate body . . . parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image . . . with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress."); H.R. 238, 51st Leg., 2d Sess. § 1 (N.M. 2014) ("Unauthorized distribution of sensitive images consists of distributing . . . sensitive images of a person . . . without that person's consent and with the intent to: (1) harass, humiliate or intimidate that person; (2) incite another to harass, humiliate or intimidate that person; (3) cause that person to reasonably fear for . . . safety; (4) cause that person to suffer unwanted physical contact or injury; and (5) cause that person to suffer substantial

bama,[51] Connecticut,[52] Florida,[53] Kentucky,[54] Rhode Island,[55] Tennessee,[56] and Washington,[57] saw their bills fail in 2014.[58] Strikingly, not one state is currently considering draft legislation that would prohibit revenge porn as obscenity.

B. *Other Potentially Applicable Criminal Laws*

Other criminal laws have little applicability to revenge porn. New York's first revenge porn prosecution, *People v. Barber*,[59] provides a window into how prosecutors have tried—and failed—to bring revenge porn under the purview of existing criminal law. First, there was no indication that Ian Barber surreptitiously obtained the sexually explicit images that he posted to Twitter. Accordingly, his actions did not constitute "dissemination of an unlawful surveillance image."[60] Revenge porn that involves nonconsensual *distribution* rather than nonconsensual *production* is thus entirely outside the scope of such laws.

Second, the prosecution charged Barber with harassment, but the typical revenge porn distributor likely escapes the usual terms of harassment laws. As the court held in *Barber*, "the mere posting of content, however offensive, on a social networking site" is not harassment.[61] In New York and elsewhere, harassment typically requires the perpetrator to directly contact the victim or induce others to do so. In revenge porn, however, a distributor posts images to the Internet but generally does not send them directly to the victim. Harassment and related stalking laws often also require a persistent "course of conduct" that

---

emotional distress."); H.R. 4842, 120th Gen. Assemb., 2d Reg. Sess., sec. 1, § 16-15-260(A) (S.C. 2014) ("It is unlawful for a person, with the intent to cause emotional distress or embarrassment . . . and absent a clear public purpose, to disseminate . . . any . . . visual depiction . . . that depicts another person in a state of sexually explicit nudity . . . when the: (1) person knows or has reason to know that he is not licensed or privileged to disseminate . . . the . . . visual depiction . . . ; and (2) depicted person suffers emotional distress or embarrassment.").

51. H.R. 515, 2014 Leg., Reg. Sess. (Ala. 2014).

52. S. 489, 2014 Gen. Assemb., Feb. Sess. (Conn. 2014).

53. H.R. 475, 116th Leg., Reg. Sess. (Fla. 2014); S. 532, 116th Leg., Reg. Sess. (Fla. 2014).

54. H.R. 130, 2014 Leg., Reg. Sess. (Ky. 2014).

55. S. 2644, 2014 Gen. Assemb., Reg. Sess., sec. 2, § 11-64-3 (R.I. 2014).

56. S. 2086, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2014).

57. H.R. 2257, 63d Leg., Reg. Sess. (Wash. 2014).

58. *State 'Revenge Porn' Legislation*, *supra* note 13.

59. 992 N.Y.S.2d 159, No. 2013NY059761, 2014 WL 641316 (N.Y. Crim. Ct. Feb. 18, 2014) (unpublished table decision).

60. *Id.* at *2-4 (capitalization altered).

61. *Id.* at *4.

is not established by a one-off revenge porn posting.[62] Where the distributor includes contact information and suggests third parties approach the victim, revenge porn may rise to the level of harassment, but mere dissemination of sexually explicit images to willing recipients will not.[63]

The *Barber* court dismissed the final charge of public display of offensive sexual material. Incredibly, the court held that posting images to Twitter does not constitute "public display," characterizing Twitter as a "subscriber-based social networking service."[64] Similarly, the court found e-mailing pictures to a small number of people to be a private act.[65] The court's reasoning, however, reveals a broader concern that suggests its characterization of Twitter was not merely a misunderstanding of Twitter's public reach. Rather, the court recognized that the purpose of New York's public display statute is to protect *the public*, an unwilling audience, from having offensive material thrust upon it.[66] This and other public display statutes thus mirror the Supreme Court's decisions upholding speech restrictions that protect unwilling listeners from unwanted speech.[67] Consistent with the purpose of those statutes, similar attempts to apply public display laws to revenge porn cases may fail as contrary to the legislature's intent in enacting such laws.

C. *The Inadequacy of Civil Penalties to Deter and Punish Perpetrators of Revenge Porn*

States without criminal prohibitions on revenge porn offer civil remedies that may provide some redress for victims. Critics of revenge porn legislation often argue criminal laws are unnecessary, suggesting current privacy and copyright laws provide sufficient remedies for victims. As Jeff Hermes, director of Harvard's Digital Media Law Project, commented, revenge porn legislation operates "in a field which is already heavily regulated—privacy—and where there are court remedies. But the question is whether the criminal penalties are necessary to achieve the aims already provided by existing law."[68] Despite the potential availability of civil suits, criminal law offers cheaper, faster, and more effective redress for victims.

A preliminary challenge for civil litigation is the burden it places on victims to actively assert their right to be free from malicious privacy intrusions.

---

62. For example, the federal cyberstalking statute, 18 U.S.C. § 2261A (2013), bans any harassing "course of conduct" over an "interactive computer service." *See also* Citron & Franks, *supra* note 9, at 365-66 (discussing § 2261A).

63. *See Barber*, 2014 WL 641316, at *5-6.

64. *Id.* at *7.

65. *Id.* at *7-8.

66. *Id.*

67. *See, e.g.*, Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970) (upholding a ban on future unwanted mailings, noting that "no one has a right to press even 'good' ideas on an unwilling recipient").

68. Choney, *supra* note 15 (internal quotation mark omitted).

The primary goal of victims and society is to prevent involuntary pornography and remove it from the public domain, rather than simply compensate victims for violations.[69] Criminal laws could lead to faster takedowns while avoiding the privacy and financial costs of civil suits to victims.[70] As one attorney noted of his clients fighting revenge porn, victims often want to avoid filing suit and incurring the attendant attention, citing websites that retaliate for civil lawsuits by further disseminating images.[71]

The legal system also lacks capacity to meaningfully respond to demands for representation by civil litigants. In November 2013, one lawyer working in revenge porn representation estimated that only four or five attorneys in the United States work in the practice area.[72] Accordingly, he reported turning away ninety percent of potential clients due to capacity constraints.[73] The low supply of lawyers likely stems from the unremunerative nature of victim representation, since most defendants lack significant financial resources.[74] Accordingly, many revenge porn cases are taken on a pro bono basis.[75]

Copyright law is one example of a civil remedy that provides a facially attractive but inadequate solution for revenge porn victims. Victims automatically own copyright to self-portraits (i.e., selfies), and the Digital Millennium Copyright Act enables victims to send takedown notices to website operators even without registering a copyright.[76] It is inexpensive to notify operators of a copyright violation, and hosting offending content opens sites to liability for infringement.[77] Despite these advantages, relying on copyright law has several drawbacks. A victim must first own copyright to the disseminated image to have a legal claim for infringement, which is not automatic for non-self-portraits.[78] Section 230 of the Communications Decency Act of 1996 permits website operators to refuse takedown demands from victims who do not own copyright.[79] For victims who threaten or obtain an injunction, website hosts can and sometimes do ignore copyright notices, believing liability risks are small if they operate overseas, are otherwise judgment-proof, or are shielded from lia-

69. *See* Laird, *supra* note 8 (citing Mary Anne Franks's belief that "criminal laws are the best approach because they . . . would provide quick takedowns rather than financial damages").

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *See id.* (quoting an attorney who observed that perpetrators generally are "not wealthy" but rather are "young men" who "think it's funny" (internal quotation marks omitted)).

75. *Id.*

76. *See* 17 U.S.C. § 512(c) (2013).

77. *See id.*

78. For self-portraits, the photographer owns copyright automatically. *See id.* § 102.

79. 47 U.S.C. § 230 (2013).

bility by section 230.[80] Section 230 broadly immunizes website operators from legal attacks based on users' speech.[81] Congress may soon consider a bill to criminalize revenge porn that would remove barriers to website operator liability under section 230, but it has yet to be introduced.[82] Even if one website removes the content, digital images easily spread across the Internet, whether inadvertently or deliberately by the original poster or website operator, angry at the threat of a copyright lawsuit.[83] Furthermore, copyright lawsuits will not yield statutory damages unless victims register a copyright within ninety days of first publication, a requirement most cannot meet, adding another hurdle to obtaining legal representation.[84]

Tort claims for invasion of privacy also offer facially attractive remedies. They target the heart of why revenge porn is objectionable by punishing the privacy invasion that occurs when sexually explicit images are distributed without consent. Relevant statutes prohibit persons from "giv[ing] publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[85] One drawback of relying on existing privacy torts, particularly the tort of publication of private facts, is that courts vary in how they define "publication." States typically require distribution to "more than one or two people" to satisfy the publication standard.[86] The Internet context provides new opportunities for variation in judicial approaches, particularly when information is posted to social media websites, because content is readily viewable but seen by an unknown number of people. For example, a Minnesota court held that uploading content to MySpace constituted publication of private facts.[87] In New York's first revenge porn case, in contrast, the court found that placing content on Twitter was not publication.[88] Admittedly, there may be similar definitional challenges in the criminal context, and legislatures should clarify their intent as to the standard of publication for courts applying revenge porn laws. The broader objection to relying on privacy claims is simply the

80. *See* Laird, *supra* note 8.

81. *See* 47 U.S.C. § 230.

82. Nelson, *supra* note 14.

83. *See* Laird, *supra* note 8.

84. *See* 17 U.S.C. § 412 (2013).

85. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking*,*"* 107 NW. U. L. REV. 731, 759 (2013) (quoting RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

86. Anita L. Allen, *First Amendment Privacy and the Battle for Progressively Liberal Social Change*, 14 U. PA. J. CONST. L. 885, 922 (2012).

87. Yath v. Fairview Clinics, N.P., 767 N.W.2d 34, 43 (Minn. Ct. App. 2009) ("[A] post[ing] on a public MySpace.com webpage . . . . is materially similar in nature to a newspaper publication or a radio broadcast . . . available to the public at large.").

88. *See supra* note 64 and accompanying text.

burden that all civil remedies place on victims to seek redress for malicious wrongs better deterred by society at large.[89]

II. HOW TO BEST CRIMINALIZE REVENGE PORN WITHOUT VIOLATING THE FIRST AMENDMENT

The First Amendment is one of the most common grounds on which opponents object to criminalizing revenge porn. The only California state senator to vote against California's revenge porn bill, Leland Yee, cited concern that the law "could potentially be used inappropriately to censor free speech."[90] There is a general concern in First Amendment scholarship that restricting speech *about* a person, rather than speech *to* a particular individual, unconstitutionally limits communication to willing listeners. This danger rests on the assumption that restricting a message will silence "constitutionally valuable communication" in excess of the "constitutionally valueless communication" that speech prohibitions target.[91] Historically, the Court has overturned bans on speech as overbroad when there is a risk of blocking a flow of information from reaching willing listeners, even if the content is objectionable to some.[92]

Arguments against revenge porn laws rely on traditional notions that offensive content should not be the basis for criminalizing true speech. One underlying rationale is that some truthful content is legitimately newsworthy, such as photographs revealing former Congressman Anthony Weiner's habit of texting sexually explicit images of himself. Another recognizes that the person distributing images has an interest in fully telling his or her personal story.[93] The Free Speech Clause protects speech beyond its utility as a tool for governance and debate, and the Court recognizes that self-expression carries value inherent in the benefits accrued to the speaker.[94] Intimate pictures often reflect the consenting distributor's romantic history as well as that of the nonconsenting participant, and the distributor has an interest in publicly expressing the narrative of his or her own behavior. By distributing explicit images, the speaker says

89. *See* Citron & Franks, *supra* note 9, at 357-59. *But see* Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. (forthcoming 2015) (manuscript at 11-31), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385620 (proposing options in contract and tort law to punish revenge porn).

90. Choney, *supra* note 15 (internal quotation mark omitted).

91. *See* Volokh, *supra* note 85, at 743.

92. *See*, *e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971) (overturning an injunction against the peaceful distribution of informational literature critical of a real estate broker).

93. Goldman, *supra* note 21.

94. *See* United States v. Stevens, 559 U.S. 460, 479 (2010) ("*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." (quoting 18 U.S.C. § 48(b)); *see also* Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 573-74, 580-82 (2011).

that the person featured was part of his or her sexual history, and implicit in that message are current feelings of disdain or indifference for that person.

As critics rightly note, revenge porn statutes are content-based restrictions.[95] When prohibitions are based on the primary effect of speech—distress felt by the audience as a result of that speech, or harms that flow therefrom, including later assaults on featured victims—they target the content of that speech.[96] Revenge porn laws prohibit involuntary pornography precisely because the content is socially harmful and violates nonconsenting victims' privacy rights. For such a content-based speech restriction to survive First Amendment scrutiny, the law typically must satisfy strict scrutiny, fall within a categorical exception to the Free Speech Clause, or incidentally burden speech in furtherance of a legitimate legislative purpose.[97] Revenge porn laws are best justified under the categorical exception for obscenity.

A. *Bringing Revenge Porn Under the Umbrella of Obscenity*

Obscenity has long been a historical exception to the First Amendment.[98] When the Court held that the First Amendment does not protect obscenity, it defined "[o]bscene material" as that "which deals with sex in a manner appealing to prurient interest."[99] In *Miller v. California*, the Court developed a three-pronged test to separate constitutionally protected pornography from obscenity.[100] To be obscene, a work must first, taken as a whole, "appeal[] to the prurient interest" of an average person under "contemporary community standards."[101] Second, the work must show sexual conduct "in a patently offensive way," defined under state law.[102] Finally, the work must "lack[] serious literary, artistic, political, or scientific value."[103] Under the *Miller* test, material appeals to "prurient interest" when it has "a tendency to excite lustful thoughts"

---

95. *See, e.g.*, John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 22-23, 52 (2012).

96. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992) (overturning an ordinance prohibiting bias-motivated demonstrations intended to prevent victimization, finding it content-based because "[l]isteners' reactions to speech are not . . . 'secondary effects'" (quoting Boos v. Barry, 485 U.S 312, 321 (1988) (plurality opinion)) (internal quotation mark omitted)); Texas v. Johnson, 491 U.S. 397, 412 (1989) (holding that a restriction on flag burning is "content based" when based on the "emotive impact of speech on its audience" (quoting *Boos*, 485 U.S. at 321 (plurality opinion))).

97. Humbach, *supra* note 95, at 24-25, 89.

98. *See* Roth v. United States, 354 U.S. 476, 481-85 (1957) (discussing the common law tradition of exempting obscenity from the First Amendment).

99. *Id.* at 487.

100. 413 U.S. 15, 24 (1973).

101. *Id.* (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (per curiam)) (internal quotation mark omitted).

102. *Id.*

103. *Id.*

through "a shameful or morbid interest in nudity, sex, or excretion."[104] What is "patently offensive" may be defined by local community standards.[105]

An ideal revenge porn statute would expressly incorporate *Miller*'s three elements and define prohibited content with specificity. The *Miller* Court identified several examples of sexually explicit images that could qualify as "patently offensive," and states should accordingly build on those examples to provide notice of the types of images that implicate the law and to avoid constitutional challenges for vagueness or overbreadth. For example, the Court approved obscenity prohibitions on depictions of ultimate sexual acts, masturbation, excretion, and lewdly displayed genitals.[106] Many states are prohibiting similar types of images in their statutes and draft laws,[107] and they should continue to do so.

An ideal law would also require the distributor to have known or had reason to know that at least one person shown engaging in sexually explicit activity did not consent to distribution. Legislatures are not free to make revenge porn a strict liability crime.[108] Rather, the Court demands scienter of the factual contents at issue in an obscenity prosecution.[109] Requiring perpetrators to have had reason to know the person shown did not consent to distribution would broadly promote prosecution for revenge porn, while staying within the bounds the Court has set. Arizona and Idaho, for example, provided this standard for culpability in their recently enacted revenge porn statutes,[110] and other states should follow their example.

Typically, revenge porn readily satisfies the first and third prongs of the *Miller* test, appealing to prurient interests and lacking serious literary, artistic, political, or scientific value. *Miller*'s second prong, however, warrants a closer look. In order to qualify as obscenity, revenge porn must be "patently offensive." The difficulty is that the typical revenge porn case involves the distribution of images that may not seem patently offensive on their face. In other

---

104. *Roth*, 354 U.S. at 487 n.20 (quoting MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6, 1957)).

105. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124-25 (1989); *Miller*, 413 U.S. at 30.

106. *Miller*, 413 U.S. at 25.

107. *See, e.g.*, UTAH CODE ANN. § 76-5b-203(1)(b) (LexisNexis 2014) (defining "[i]ntimate image").

108. *See* Smith v. California, 361 U.S. 147, 154-55 (1959) (forbidding strict liability for obscenity); *see also* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1643-44 (2013) (stating that obscenity requires knowledge or recklessness to criminalize under Supreme Court precedent).

109. *See* Ginsberg v. New York, 390 U.S. 629, 643-44 (1968) (upholding an obscenity statute requiring "reason to know" as containing an adequate scienter requirement, reasoning that "[t]he constitutional requirement of *scienter*, in the sense of knowledge of the contents of material, rests on the necessity 'to avoid the hazard of self-censorship of constitutionally protected material . . .'" (quoting Mishkin v. New York, 383 U.S. 502, 511 (1966))).

110. ARIZ. REV. STAT. ANN. § 13-1425(A) (2014); IDAHO CODE ANN. § 18-6609(2)(b) (2014).

words, because nudity alone does not render an image obscene,[111] a simple nude image distributed without consent would not appear obscene out of context. Can the context of nonconsensual distribution make an image "patently offensive" that otherwise would not be?

The Court's precedent suggests that context can indeed provide the basis for finding an image "patently offensive," even if the image does not appear so on its face. In *Ginzburg v. United States*, the Court held that pornography, even if not "obscene in the abstract," is nevertheless "obscene in a context which brands [it] as obscene."[112] In so holding, the Court recognized that context is relevant for determining what content satisfies *Miller*'s second prong. In *Ginzburg*, the Court confronted the distribution of books that were sold through the course of "pandering," such that they were openly advertised for their erotic appeal.[113] The Court assumed the books at issue were not obscene on their own, but reasoned that the way they were advertised, presented, and distributed revealed their obscene nature.[114] Rather than declare all extrinsic evidence irrelevant to the obscenity determination, the Court reasoned that "the circumstances of presentation and dissemination of material are equally relevant" to the analysis.[115] As the Court explained, "the defendants had not disseminated [the obscene materials] for their 'proper use, but . . . woefully misused them, and it was that misuse which constituted the gravamen of the crime.'"[116] That context "heighten[ed] the offensiveness of the publications."[117] Nearly four decades later, Chief Justice Rehnquist similarly reasoned that context matters, asserting that material "promoted as conveying [one] impression" can be prohibited, while that same material, "promoted in a different manner," might be protected.[118]

The basic intuition that most people have about revenge porn is that it *feels* patently offensive. That intuition is rooted in the context in which revenge porn arises and the resulting violation of the core principle in intimate relationships that all aspects of sexual activity should be founded on consent. That violation occurs whenever a sexually explicit image is disseminated against the will of one party. In *Ginzburg*, the Court gave such intuitions a legitimate place in obscenity jurisprudence by recognizing that context matters. It is context that

---

111. Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards.").

112. 383 U.S. 463, 474-75 (1966).

113. *Id.* at 467.

114. *See id.* at 470-73.

115. *Id.* at 470.

116. *Id.* at 473 (alteration in original) (quoting United States v. Rebhuhn, 109 F.2d 512, 515 (2d Cir. 1940)); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 257-58 (2002) (reaffirming that context is relevant to determining obscenity).

117. *Ginzburg*, 383 U.S. at 470.

118. *Free Speech Coal.*, 535 U.S. at 272 (Rehnquist, C.J., dissenting) (citing *Ginzburg*, 383 U.S. at 474-76).

gives obscenity its "color and character,"[119] and revenge porn is patently offensive because the distributor's conduct, in context, offends the fundamental principle of consent in sexual relationships. Accordingly, while nudity in revenge porn may not be abstractly obscene, the lack of consent renders it so under the Court's directive to evaluate material "as a whole."[120]

Beyond *Ginzburg*, the Court has confirmed through its directive to judge offensiveness by local community standards that context is central to determining whether sexually explicit images are patently offensive.[121] In *Sable Communications of California, Inc. v. FCC*, the Court confirmed that there is no constitutional requirement to measure obscenity by "uniform national standards."[122] Rather, the Court explained that communications may be "obscene in some communities under local standards even though they are not obscene in others."[123] As the Court recognized in *Miller*, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi" condone images "found tolerable in Las Vegas, or New York City."[124]

If images were obscene only in a vacuum, without respect to how or why people react to them, there would be no need for regional variation in what counts as patently offensive. A juror in an obscenity prosecution may "draw on knowledge of the community . . . from which he comes" in deciding whether an image is patently offensive.[125] If it matters in obscenity law who views an image and how a person in a given community reacts to it, so too should the context of dissemination matter. An average juror, applying local community standards regarding the role of consent in sexual relationships, could well decide that an image is patently offensive once he knows that the depicted person never consented to its distribution. Whether in Mississippi or New York City, there is no sound reason to blind jurors from the true reasons why they and those in their communities might be most patently offended by the dissemination of a particular image.

Chief Justice Warren warned that context is critical when evaluating obscenity for another reason as well. Without context, courts are left with a task they are ill suited to perform: abstract judgment of art and literature. In that vein, Chief Justice Warren urged that context may be even *more* relevant than the inherent qualities of allegedly obscene material. He urged that obscenity must be judged in context according to its "manner of use," with the focus on

---

119. Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring in the result).

120. Miller v. California, 413 U.S. 15, 24 (1973).

121. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124-26 (1989) (confirming that obscenity is judged by local community standards).

122. *Id.* at 125 (quoting Hamling v. United States, 418 U.S. 87, 106 (1974)).

123. *Id.* at 125-26.

124. 413 U.S. at 32.

125. *Hamling*, 418 U.S. at 105.

the conduct of the distributor.[126] As he argued, "the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene."[127] Otherwise, courts might improperly come to judge artistic merit where they should instead judge the conduct of defendants. Objecting to an injunction against the distribution of allegedly obscene material, he urged that courts should not place a "book on trial" but should instead judge "the conduct of the individual."[128] There is no way to properly judge that conduct without considering the context in which a defendant acts.

Focusing on the context surrounding revenge porn reveals that the state's core reason to criminalize revenge porn is *not* the desire to silence an opinion or viewpoint but rather the need to reaffirm the centrality and importance of consent within sexual relationships. The Court has repeatedly emphasized that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[129] It is not the speaker's *opinion* about a depicted individual that is objectionable here. The abstract content and message—sexually explicit images that convey feelings of dislike and sexual history—are not what is offensive about revenge porn. Rather, involuntary pornography is offensive for the extreme violation of consent within intimate relationships. That harm exists independent of the speaker's motivation, opinion, or idea, and it justifies restricting revenge porn as patently offensive speech for which the rights of the speaker must yield to the rights of third parties. The speaker's opinions are simply tangential to most of the information such images convey and the dignitary harm that results.[130]

The idea that nonconsensual distribution makes revenge porn obscene—that context itself can make an image patently offensive—follows states' historical ability to prohibit "nonconsensual depictions of nudity" as obscenity.[131] For example, laws prohibiting the distribution of child pornography are constitutional partly because they serve the compelling state interest of preventing child abuse and sexual exploitation through the depiction of nonconsensual acts.[132] As the Court noted in *New York v. Ferber*, a central harm of child por-

126. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 446 (1957) (Warren, C.J., dissenting) ("It is the conduct of the individual that should be judged, not the quality of art or literature.").

127. Jacobellis v. Ohio, 378 U.S. 184, 201 (1964) (Warren, C.J., dissenting).

128. *Kingsley Books*, 354 U.S. at 445-46 (Warren, C.J., dissenting).

129. Texas v. Johnson, 491 U.S. 397, 414 (1989).

130. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1094 (2000) (arguing that "photographs of people naked or having sex" published without consent "are embarrassing because these poses are conventionally seen as lacking in dignity").

131. Volokh, *supra* note 12.

132. *See* New York v. Ferber, 458 U.S. 747, 757 (1982).

nography that justifies its restriction is the damage that accrues to the child victims through circulation of their images.[133] As the Court reasoned, "distribution of the material violates 'the individual interest in avoiding disclosure of personal matters.'"[134] While the production of revenge porn may be consensual, its distribution is not, and related harm accrues as a result. The context in which revenge porn is circulated—principally the violation of consent—is the heart of what renders it obscene.

Those who risk being censored by revenge porn laws are free to express their ideas to the public in other ways. Statements of public criticism and ridicule containing the same ideas embedded in revenge porn retain constitutional protection as personal expression.[135] As the Court recognized in *Frisby v. Schultz*, the availability of "alternative channels" for public expression weighs in favor of upholding restrictions on speech.[136] Someone angry at the turn of a relationship is free to write a blog post about it, gossip with mutual friends, or post scathing messages on social media.[137] Admittedly, "[t]o 'show' is almost always more powerful than merely to 'say,'" and recorded documentation can have a more powerful "emotive impact" than words.[138] The line between narrative and abuse, however, is wide enough to protect the speech rights of the speaker. The opinions that the speaker has an interest in expressing are *not* the details of precisely how a partner looks while engaged in sexual acts. There is room for expression that adequately fulfills one person's need to tell a story without disseminating sexually explicit images of someone without consent.

The Court's unwillingness to extend the obscenity exception beyond the pornography domain should reassure skeptics that revenge porn laws will not lead to creeping restrictions on legitimate or otherwise controversial—but protected—speech. The Court has explicitly stated that only "works which depict or describe sexual conduct" fall within the state's power to regulate obscene materials.[139] Additionally, modern obscenity law upholds censorship only in the context of "pornography that is very distantly removed from the communication of facts or ideas."[140] In recent years, the Court has refused to uphold prohibitions on other forms of objectionable content, notably violent speech,

133. *Id.* at 759 & n.10.

134. *Id.* at 759 n.10 (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)).

135. *See* Volokh, *supra* note 85, at 748.

136. 487 U.S. 474, 483-84, 488 (1988) (upholding a prohibition on picketing in front of residences).

137. While some commentators argue that similar forms of online reputational harm should be prohibited, *see, e.g.*, THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 3-5 (Saul Levmore & Martha C. Nussbaum eds., 2010), these arguments are controversial and have yet to be fully embraced by the Court. Part III.A explores the possibility of relying on privacy to justify revenge porn laws and argues the obscenity context provides a safer and more limited approach to curtailing offensive speech.

138. Humbach, *supra* note 95, at 53.

139. Miller v. California, 413 U.S. 15, 23-24 (1973).

140. Volokh, *supra* note 85, at 761.

demonstrating its commitment to restricting the obscenity exception to the traditional context of pornography.[141] Prohibiting revenge porn fits squarely within that tradition.

B. *The Case for Criminalizing the Nonconsensual Distribution of "Selfies"*

In the debate over what to criminalize, there has been resistance over whether it should be a crime to distribute sexually explicit pictures received consensually. Should the law protect people who voluntarily send pornographic pictures or videos of themselves to others but never intend for those images to enter the public domain? While state legislatures recently criminalizing revenge porn have uniformly said yes, other observers sometimes argue the answer should be no, on the basis that senders should know better than to expect that those pictures will remain private. One drafter of California's legislation allegedly called people "stupid" for taking intimate pictures of themselves.[142] A police officer was reported to have responded similarly to a victim complaint by asking, "Why would you take a picture like this if you didn't want it on the Internet?"[143]

These objections to strong revenge porn laws inappropriately focus blame on victims rather than perpetrators and ignore clear pragmatic reasons to include self-taken images in revenge porn legislation. Eighty percent of revenge porn consists of nonconsensual distribution of images taken by the victim.[144] If laws decline to protect against the posting of such images, they will fail to reach the vast majority of cases. The hesitation to criminalize the nonconsensual distribution of selfies also reflects a broader rape culture that often blames victims for taking inadequate precautions against abuse.[145] Blaming victims for sharing intimate images ignores the context within which that sharing occurred. Mary Anne Franks envisions the issue as one of "consent in context," analogiz-

---

141. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) (refusing to extend the obscenity exception to depictions of violence, stating that "the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct'" (quoting *Miller*, 413 U.S. at 24)); United States v. Stevens, 559 U.S. 460, 479, 482 (2010) (overturning a ban on depictions of animal cruelty, intended to prohibit videos in which women crush animals to death, as overbroad).

142. Jessica Roy, *California's New Anti-Revenge Porn Bill Won't Protect Most Victims*, TIME (Oct. 3, 2013), http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims (internal quotation marks omitted).

143. Laws, *supra* note 10 (internal quotation marks omitted).

144. Roy, *supra* note 142 (citing a survey by the Cyber Civil Rights Initiative).

145. *See, e.g.*, Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 981-82 (2004) ("Juries are hyper-critical of a victim's behavior and tend to blame her for the rape itself.").

ing the issue to a boxer who only consents to being punched in the ring, not outside of it.[146]

In the context of modern sexual relationships, in which sharing digital images is increasingly common, the answer cannot entirely be that romantic partners must always assume their trust will be violated.[147] Such a focus places the onus for preventing undesirable activity entirely on victims, rather than acknowledging the role played by distributors. Revenge porn is patently offensive due to the violation of consent in context, regardless of how the distributor obtained the image. Two advocates, describing revenge porn as "high-tech rape," highlight the normative problem of diverting attention from perpetrators to victims:

> When we teach women not to walk alone in public after dark, not to wear particular kinds of clothing, not to engage in consensual acts like taking nude photos or making sex tapes, we're saying that women can expect to be victims because they are women, and that it is more important to limit a victim's participation in public life than it is to remedy the systemic injustices that lead to victimization in the first place.[148]

Accordingly, the First Amendment conversation often ignores the expressive interests of people who want to share intimate images with their romantic partners. Greater privacy protections allow people to openly express their personalities and values.[149] In the context of sexuality and identity, protections against nonconsensual distribution could facilitate sharing within intimate relationships, allowing people to express themselves more fully with the understanding that explicit images will remain private. While revenge porn laws will never fully insulate partners from the risks of such sharing, they can at least focus the law's deterrent power on the real action that causes social harm—nonconsensual distribution—rather than consensual sharing.

The First Amendment does not uniquely protect the nonconsensual distribution of selfies any more than it protects revenge porn generally. The identity of the photographer does not make the image any less obscene when the patently offensive quality is its involuntary distribution. Opponents of criminalization, such as former Judge Andrew Napolitano, frame the issue as one of taste, arguing against "[c]riminalizing the distribution of that which was freely given

---

146. Laird, *supra* note 8.

147. Emily Shire, *New York Can't Kick Its Revenge Porn Habit*, DAILY BEAST (Feb. 25, 2014), http://www.thedailybeast.com/articles/2014/02/25/i-heart-revenge-porn-new-york-fails-its-first-revenge-porn-case.html.

148. Dylan Love, *It Will Be Hard to Stop the Rise of Revenge Porn*, BUS. INSIDER (Feb. 8, 2013, 7:00 PM), http://www.businessinsider.com/revenge-porn-2013-2 (internal quotation mark omitted) (reproducing comments of founder Robert Leshner and policy director Samantha Leland at the privacy company Safe Shepherd).

149. Anita L. Allen, Professor of Law & Philosophy, Univ. of Pa., What Must We Hide: The Ethics of Privacy and the Ethos of Disclosure (Sept. 25, 2012), *in* 25 ST. THOMAS L. REV. 1, 5-6 (2012) (arguing that privacy rights increase opportunities for self-expression).

and freely received."[150] This mischaracterizes the nature of the harm and the fundamental invasion of privacy that occurs when one's sexually explicit images, often taken in the home, are distributed without consent. The context of distributing selfies without consent makes it as patently offensive as the nonconsensual distribution of sexually explicit images taken by any other photographer.

C. *The Case for Not Requiring Specific Intent to Cause Emotional Distress*

While revenge porn gets its name from the malicious intent that often accompanies involuntary pornography, it is unwise to require proof of that intent within prohibitions. More than half of the states that recently criminalized involuntary pornography, including California, have laws that include intent to cause emotional distress as an element of the crime.[151] Organizations such as the American Civil Liberties Union, concerned that revenge porn laws will be overly broad and deter legitimate speech, lobby for such clauses to limit the reach of legislation.[152] Involuntary pornography, however, causes the same harm to victims regardless of whether the poster intended to cause distress or financially profit. Furthermore, such intent is difficult to prove without the distributor's confession or "smoking gun" evidence.[153]

Obscenity does not demand specific intent to cause emotional distress before a state can criminalize it. The Electronic Frontier Foundation has argued generally against criminalizing speech, highlighting the constitutional need for requiring actual harm in legislation to "minimize[] collateral impact."[154] But statutes requiring specific intent to cause emotional distress are still content-based speech restrictions when that emotional distress arises *because of* the content.[155] Consider *Snyder v. Phelps*, in which the Court reversed an award of tort damages based on the intentional infliction of emotional distress.[156] There, the First Amendment protected anti-gay protesters at a military funeral in part because the outrageousness of their conduct "turned on the content and viewpoint of the message conveyed."[157] If revenge porn legislation is unconstitu-

150. Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013, 1:08 PM), http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9 (internal quotation mark omitted).

151. *See supra* Part I.A.

152. *See* CAL. D. RULES COMM., BILL ANALYSIS, S.B. 255, 2013 Sess., at 5, *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_255_cfa_20130703_114233_sen_floor.html.

153. Goldman, *supra* note 21.

154. Laird, *supra* note 8.

155. Volokh, *supra* note 85, at 768-69.

156. 131 S. Ct. 1207, 1219 (2011).

157. *Id.*

tional, it will likely be unconstitutional regardless of whether the speaker intended to inflict emotional distress. As members of the Court have recognized, "[u]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection."[158]

D. *The Case for Including a Public Interest Exception in the Law*

A primary First Amendment concern about revenge porn laws is that they might stifle legitimate speech. As Jeff Hermes, director of Harvard's Digital Media Law Project, commented, "You need to be extraordinarily careful in criminalizing privacy law because of the risk you're going to deter legitimate speech," objecting to an early version of the California bill that did not exempt legitimately newsworthy material.[159] Derek Bambauer agrees, arguing that revenge porn laws that lack an exception for newsworthy content are "almost certainly unconstitutional," posing the hypothetical distribution of an image featuring Monica Lewinsky and Bill Clinton engaged in a sexual act.[160] Such images prompt social discourse about political figures' credibility and decisionmaking capabilities.[161] The Free Speech Clause undoubtedly protects such a distributor from criminal prosecution,[162] just as it protects one from civil liability for true speech about public figures.[163] Of states that criminalize revenge porn, only New Jersey, Wisconsin, Illinois, and Colorado currently exempt such images.[164]

The challenge is to craft a public interest exception to the law that does not fail for vagueness or overbreadth.[165] For example, the Court has found other obscenity statutes too vague to form the basis of criminal liability when they lack an objective exception for material with "serious literary, artistic, political,

158. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007) (plurality opinion) (quoting MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001)) (internal quotation marks omitted); *see also* Volokh, *supra* note 85, at 754 (noting narrow exceptions, such as incitement, which do depend on the speaker's intent).

159. Choney, *supra* note 15 (internal quotation marks omitted).

160. Matthew Hendley, *Arizona Revenge-Porn Bill "Almost Certainly Unconstitutional," UA Law Professor Says*, PHX. NEW TIMES VALLEY FEVER (Jan. 30, 2014, 9:21 AM), http://blogs.phoenixnewtimes.com/valleyfever/2014/01/arizona_revenge-porn_bill_almo.php (internal quotation marks omitted).

161. *See* Goldman, *supra* note 21.

162. Hendley, *supra* note 160.

163. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (prohibiting civil liability for false speech about a public official's official conduct unless the statement was made with knowledge of or reckless disregard for its falsity); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (prohibiting civil liability for a patently offensive caricature of a public figure that was intended to and did inflict emotional distress).

164. *See supra* notes 19, 34, 35, 39.

165. *See* Volokh, *supra* note 12.

or scientific value."[166] Similarly, Eugene Volokh has argued that simply allowing prohibition of publications that "lack . . . legitimate public concern" would be unconstitutionally vague *and* overbroad.[167] Such a standard would depend on varying normative judgments, as people disagree about whether "being homosexual, being transsexual, having an affair, [or] suffering from an illness" is of legitimate public concern.[168] Any attempt to remedy the statute by excluding "constitutionally protected speech" also could fail for overbreadth if the statute chilled the legitimate speech of those wary of raising the First Amendment as an affirmative defense in court.[169]

Obscenity law offers a clear solution for drafting legislation that exempts legitimate content. Legislatures should include an exception for images with "serious literary, artistic, political, or scientific value," a standard the Court has repeatedly held satisfies the First Amendment.[170] The Court reaffirmed that standard in 2010, declaring that "'serious' value shields depictions of sex from regulation as obscenity."[171] Including that exception adequately addresses the concern that revenge porn legislation will criminalize protected distribution, explicitly shielding speech that is truly "a tool for advancing the search for truth, marketplace of ideas, or self-government."[172]

A public interest exception in revenge porn legislation may be unnecessary due to the rarity of instances in which nonconsensual distribution might contribute to public debate.[173] As the Court has recognized, a speech restriction is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[174] A facial challenge to a revenge porn law, based on the few unconstitutional applications that might result, would fail if the law were not *substantially* overbroad.[175] Despite this possibility, tracking *Miller*'s obscenity definition is useful, particularly in the absence of any hard empirical data about the prevalence of politically or artistically valuable depictions. The Court recently invalidated an obscenity-motivated statute that did not track *Miller*'s language, implying

166. *See* Reno v. ACLU, 521 U.S. 844, 872-73 (1997) (overturning for vagueness a statute that complied with *Miller*'s "patently offensive" standard but not with *Miller*'s remaining two elements, in particular the lack of an objective exception for material with "serious literary, artistic, political, or scientific value" (quoting Miller v. California, 413 U.S. 15, 24 (1973)) (internal quotation mark omitted)).

167. *See* Volokh, *supra* note 130, at 1116.

168. Volokh, *supra* note 85, at 760 (footnote omitted).

169. *Id.* at 765-66.

170. *See, e.g.*, *Miller*, 413 U.S. at 24.

171. United States v. Stevens, 559 U.S. 460, 479 (2010) (quoting *Miller*, 413 U.S. at 24).

172. Volokh, *supra* note 85, at 744.

173. *See* Volokh, *supra* note 12.

174. *Stevens*, 559 U.S. at 473 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)) (internal quotation marks omitted).

175. *See* Volokh, *supra* note 12.

legislatures would be prudent to draft laws that clearly incorporate the Court's obscenity standard.[176] Such an exception would also alleviate critics' concerns that revenge porn laws will be used to attack protected speech.

III. THE RISKS OF DRAFTING REVENGE PORN LAWS AS ANYTHING BUT OBSCENITY PROHIBITIONS

It is striking that no state has chosen to frame its revenge porn law as an obscenity statute. This is not just a question of labeling. Rather, the Court's post-*Miller* jurisprudence clearly signals that it will not uphold speech prohibitions as bans on obscenity unless they track *Miller*'s three requirements of appealing to prurient interests, being patently offensive, and lacking serious literary, artistic, political, or scientific value.[177] Significantly, the Court has repeatedly refused to carve out new categorical exceptions to the First Amendment, subjecting speech prohibitions to strict scrutiny unless they fit within a historical exception. The danger of failing to track the obscenity standard in revenge porn laws is that the Court will subject those laws to strict scrutiny. It is not at all clear that advocates of revenge porn laws would win that battle.

The Court's recent decision striking down a law against virtual child pornography illustrates how narrowly the Court confines the obscenity exception to the Free Speech Clause. In *Ashcroft v. Free Speech Coalition*, the Court considered whether the Child Pornography Prevention Act of 1996 (CPPA) violated the First Amendment by prohibiting simulated child pornography produced without real children.[178] Noting that child pornography is an exception to the "general rule" that "pornography can be banned only if obscene," the Court criticized the CPPA for making "no attempt to conform to the *Miller* standard."[179] Rather, the CPPA simply prohibited "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct,"[180] or that "conveys the impression" of "a minor engaging in sexually explicit conduct."[181] Reasoning the CPPA was so broad it prohibited works that did not appeal to prurient interests, contravene community standards, or lack literary or artistic value, the Court concluded "the CPPA *cannot be read to prohibit obscenity*, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity."[182]

---

176. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 249, 251 (2002) (invalidating a statute prohibiting virtual depictions of child pornography in part because it did not fall within the obscenity exception, reasoning that its language did not track the obscenity standard).

177. *See, e.g.*, *id.*

178. *Id.* at 239.

179. *Id.* at 240.

180. *Id.* at 241 (quoting 18 U.S.C. § 2256(8)(B)) (internal quotation marks omitted).

181. *Id.* at 242 (quoting 18 U.S.C. § 2256(8)(D)) (internal quotation marks omitted).

182. *Id.* at 246-49 (emphasis added).

An emerging literature on revenge porn argues that current state laws are defensible on grounds other than obscenity under the First Amendment, either as targeting the publication of purely private facts warranting less protection or under strict scrutiny.[183] They may well be. This Part, however, seeks to show the risks of relying on privacy arguments or gambling on strict scrutiny. The ultimate lesson is that obscenity law offers a far safer route for advocates hoping to draft statutes that will withstand Supreme Court review.

A. *Defending Revenge Porn Laws as Prohibiting Publication of Purely Private Facts*

Some academics argue that revenge porn laws are consistent with the First Amendment because they prohibit only the publication of purely private facts.[184] This argument draws support from dicta in the Court's decision in *Bartnicki v. Vopper*[185] and other cases in which the Court has hinted at a limited right to privacy. There, the Court struck down a damages award based on a newspaper's publication of facts that it lawfully received from a third party who obtained the information illegally, relying on the public interest nature of the content.[186] In so reasoning, the Court distinguished private from public matters, reserving for the future the question of whether the state could punish the disclosure of "information of purely private concern."[187] The Court similarly suggested in *Snyder v. Phelps* that speech about private matters deserves less protection than speech about public issues.[188] As the Court reasoned, "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."[189]

There is a strong normative argument that one should have a right to privacy in sexually explicit images of oneself.[190] Intimate sexual activity concerns the most private of activities one does in the home, and revelations of those images may be so intimate that they shock the community's conscience. Revenge porn may resonate as so offensive and such an unwarranted privacy intrusion as to lead the Court to embrace the principle it articulated in *Time, Inc. v. Hill* when it reserved the question of liability for revelations that are "so intimate

183. *See, e.g.*, Citron & Franks, *supra* note 9, at 374-86; Larkin, *supra* note 89 (manuscript at 26-40).

184. *See* Citron & Franks, *supra* note 9, at 374-77.

185. 532 U.S. 514 (2001).

186. *See id.* at 533-35.

187. *Id.* at 532-34 ("Privacy of communication is an important interest . . . . Moreover, the fear of public disclosure of private conversations might well have a chilling effect on private speech.").

188. 131 S. Ct. 1207, 1215 (2011).

189. *Id.*

190. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (arguing for a general right to privacy); *see also* Allen, *supra* note 149, at 5-7 (enumerating the benefits of strong protections for privacy).

and so unwarranted . . . as to outrage the community's notions of decency."[191] Perhaps the Court would find the privacy interests at stake to be so fundamental that they would overcome the speech interests in disclosing purely private facts.

The privacy argument is undoubtedly attractive. The risk of relying on that theory, however, is that the Court has never carved out a First Amendment exception for speech that discloses purely private information about third parties.[192] Instead, its holdings in recent years suggest a desire *not* to carve out any new categorical exceptions to the Free Speech Clause.[193] As the Court declared in *United States v. Stevens*, there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[194] While the Court has hinted it might be receptive to treating truly private speech differently, it has never squarely faced the question. It is impossible to know the Court's answer until it does.

The primary reason the Court might reject the privacy argument is that a victim's interest in censoring revenge porn looks very similar to the interest in blocking other forms of true speech that damage one's reputation. A variety of speech embarrasses the person it is about. Gossip and criticism damage reputations, but the First Amendment protects that speech, despite the privacy interests at stake and the dearth of public interest content.[195] When the Court struck down a ban on depictions of animal cruelty, it observed that "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation."[196] Indeed, the speech and privacy interests at stake are in tension precisely because many people care more about their neighbors' activities than they do about matters of public concern.[197] Images of sexual intimacy may resonate as more deeply private than, say, the mere fact that someone is a liar, a cheat, or a philanderer, but publishing such facts clearly violates the subject's privacy in a real way. The danger is the Court would see the line between gossip and revenge porn as too arbitrary to protect against creeping restrictions on true speech.

---

191. 385 U.S. 374, 383 n.7 (1967) (quoting Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940)) (internal quotation mark omitted) ("This case presents no question whether truthful publication of such matter could be constitutionally proscribed.").

192. *See* Volokh, *supra* note 85, at 758.

193. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) (refusing to extend the obscenity exception to depictions of violence); United States v. Stevens, 559 U.S. 460, 472 (2010) (declining to create a new exception for depictions of animal cruelty); Ashcroft v. Free Speech Coal., 535 U.S. 234, 246, 250-53 (2002) (declining to create a new categorical exception for virtual child pornography).

194. 559 U.S. at 472.

195. Volokh, *supra* note 85, at 790.

196. *Stevens*, 559 U.S. at 479.

197. *See* Humbach, *supra* note 95, at 67-68 (favoring First Amendment protection for private facts).

B. *Defending Revenge Porn Laws as Narrowly Tailored to Achieve Compelling State Interests*

If the Court declines to treat revenge porn differently as speech about purely private facts, it will subject revenge porn statutes to strict scrutiny. The test is demanding enough that it should give legislators pause before drafting revenge porn laws as anything other than obscenity prohibitions. The Court has asserted that content-based speech restrictions are rarely permissible.[198] Outside the obscenity context, the Court has repeatedly prioritized free expression above privacy interests,[199] declaring it "startling and dangerous" to hinge the First Amendment "upon a categorical balancing of the value of the speech against its societal costs."[200] To uphold a presumptively unconstitutional content-based restriction under strict scrutiny, the government has the burden to show the speech restriction is (1) justified by a compelling governmental interest,[201] shown by real harm that the restriction would materially alleviate,[202] and (2) narrowly tailored to achieve that goal.[203]

Despite the uphill battle, states could argue that compelling governmental interests justify limits on involuntary pornography. Those laws protect victims from real physical and reputational harms caused by revenge porn as well as uphold the fundamental sexual privacy interests of their citizens and reaffirm the state's commitment to promoting consent in all aspects of sexual relationships. Narrowly tailored laws that exempt public interest content avoid chilling legitimate speech about public figures. Those laws, states can argue, are no more extensive than necessary to protect victims from the material and dignitary harms that involuntary pornography causes.[204]

There is a real possibility, however, that the Court would find these interests insufficient to uphold revenge porn laws. Consider first the risk of violence that arises when revenge porn is accompanied by a victim's name and address. The state's argument is akin to claiming revenge porn incites violence. While incitement to violence is indeed a categorical exception to the Free Speech Clause, the Court has taken a narrow view of how directly speech must encour-

---

198. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2738 ("It is rare that a regulation restricting speech because of its content will ever be permissible." (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000)) (internal quotation marks omitted)).

199. *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) (shielding a newspaper from liability for publishing a rape victim's name); *see also* Humbach, *supra* note 95, at 29.

200. *Stevens*, 559 U.S. at 470 (quoting Brief for the United States at 8, *Stevens*, 559 U.S. 460 (No. 08-769)) (internal quotation mark omitted).

201. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2738.

202. Edenfield v. Fane, 507 U.S. 761, 771 (1993).

203. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2738.

204. *See* Laird, *supra* note 8 (noting that Jody Westby, chair of the ABA's Privacy and Computer Crime Committee, has observed that "[t]here is not a least intrusive means of stopping someone who is harming someone by sending private photos around" (internal quotation marks omitted)).

age violence to fall within that category. For example, the Court protected the NAACP's publication of the names of African Americans not joining a boycott, even though some of them were assaulted based on that information.[205] Including a victim's name, her address, and directions to her house alongside her sexually explicit images may facilitate assault, but unless the distributor directly and overtly encourages viewers to attack her, any resulting violence typically will not be so intentionally promoted as to constitute incitement to violence. As Eugene Volokh has argued, "[t]hat speech harshly criticizes its target does not strip it of protection, even if some listeners might react to the speech by attacking or threatening the target."[206]

The Court's decision in *Ashcroft v. Free Speech Coalition* is illustrative of how the Court weighs harm in the pornography context. There, the Court rejected the state's argument that distribution of virtual child pornography would increase risks to children by facilitating sexual abuse, in part because that risk was too attenuated.[207] As the Court asserted, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[208] Rather, the Court distinguished virtual from actual child pornography, reasoning that "the CPPA prohibits speech that records no crime and creates no victims by its *production*."[209] Declining to create a new categorical exception for virtual child pornography, the Court rejected the government's asserted justifications that virtual child pornography is rarely valuable speech and makes pedophiles more likely to sexually abuse children.[210] In concurrence, Justice Thomas noted that the government's most persuasive rationale for the CPPA was that producers of real child pornography could escape prosecution by claiming their pornography was simulated, but that in light of the government's inability to identify a single acquittal based on such a defense, that interest was insufficient to support a ban.[211]

Much has been written about the harms that accrue to victims of revenge porn.[212] The risks of depression and suicide, in particular, are profound.[213] The Court may find those harms to be sufficiently concrete to justify a speech restriction. Because those harms are not linked to production, however, and arise exclusively from distribution, the Court may reject an analogy to contexts like child pornography, in which the Court has upheld restrictions on speech that

205. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 904-05, 933-34 (1982).

206. *See* Volokh, *supra* note 85, at 754.

207. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002).

208. *Id.*

209. *Id.* at 250 (emphasis added).

210. *See id.* at 250-53.

211. *Id.* at 259 (Thomas, J., concurring in the judgment).

212. *See, e.g.*, Citron & Franks, *supra* note 9, at 347-48.

213. *See* Laws, *supra* note 10 (citing studies by the Cyber Civil Rights Initiative indicating that forty-seven percent of victims consider suicide).

are intrinsically linked to otherwise illegal acts.[214] Given the Court's reluctance to balance speech interests against societal costs,[215] legislators should be wary of drafting laws that will ask the Court to do precisely that, especially when obscenity law offers a clear alternative.

CONCLUSION

The speaker's interests in revenge porn immediately run up against those of the person who never consented to distribution of his or her sexually explicit images. Unlike other speech that harms the person it is about, revenge porn visually communicates, in extreme detail, the most private of facts: how someone looks engaged in sexual acts. The speaker's interest in communicating disgust toward the victim is minute compared to the vast quantity of private information actually conveyed. This type of pornography, patently offensive for the violation of consent within sexual relationships rather than for the speaker's ideas, fits squarely within the Court's tradition of regulating obscenity. As the Court stated more than forty years ago, "to equate the free and robust exchange of ideas and political debate with . . . exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom."[216] The First Amendment does not create a right to publicly distribute sexually explicit images without the consent of those depicted.

A general law against nonconsensual distribution might have benefits beyond revenge porn. For example, scholars criticize the application of child pornography laws to teenagers who take, send, or receive sexually explicit images.[217] Teenagers disseminate such images at school or online, often to bully the depicted person, leading to many of the same concerns raised in the adult context. Rather than prosecute teenagers under child pornography laws, states could use laws against nonconsensual distribution to directly address the primary harm caused by involuntary pornography in the juvenile context. Indeed, New Jersey has applied its law in just this way to bring charges in juvenile court against a minor accused of distributing nude photographs of a fifteen-

214. *See Free Speech Coal.*, 535 U.S. at 250 (distinguishing *Ferber*'s affirmation of a ban on child pornography from the CPPA because no harm to children accrued in the production of virtual child pornography, reasoning that "the CPPA prohibits speech that records no crime and creates no victims by its *production*" (emphasis added)).

215. *See* United States v. Stevens, 559 U.S. 460, 470 (2010).

216. Miller v. California, 413 U.S. 15, 34 (1973).

217. *See, e.g.*, Mary Graw Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues—Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VA. J. SOC. POL'Y & L. 486 (2010). Laws against cyberbullying often also provide an alternative to child pornography prosecutions in this context. *See* Sameer Hinduja & Justin W. Patchin, Cyberbullying Research Ctr., State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies (Jan. 2015), http://www.cyberbullying.us/Bullying-and-Cyberbullying-Laws.pdf.

year-old.[218] Revenge porn laws would allow states to target the conduct they truly wish to deter for adults and minors alike. Regardless of broader implications, however, it is imperative that states take a strong stance against revenge porn. Doing so will affirm the fundamental importance of consent in sexual relationships and protect victims from those who wish to violate that principle.

218. *See* Rivera v. Hopatcong Borough Police Dep't, No. 08-2721 (JLL), 2010 WL 446040 (D.N.J. Feb. 3, 2010) (dismissing civil suit for a prosecution based on probable cause under New Jersey's law against nonconsensual distribution of sexually explicit images), *aff'd*, 420 F. App'x 154 (3d Cir. 2011).