NOTES

CRIMINALIZING NONCONSENSUAL PORNOGRAPHY

Emma Burnett[*]

ABSTRACT

The digital age and the rise of social media have exacerbated both the occurrence and harm of nonconsensual pornography, i.e., the distribution of nude or sexually graphic images of individuals without their consent. Unsurprisingly, states only began legislating nonconsensual pornography, also known as revenge porn, a decade ago and there is no federally applicable law on the books. The statutes vary significantly in their approach from state-to-state, and many contain clear loopholes. The largest hoop to jump through in criminalizing nonconsensual pornography and upholding these laws are First Amendment challenges. Opponents of anti-revenge porn legislation argue that these laws are in tension with the free speech and press guarantees of the First Amendment. While many states have succeeded in defending their anti-revenge porn laws against such challenges, the state courts have struggled to find a place for the laws in First Amendment doctrine and have emerged with differing theories.

This Note reflects on the tension between criminalizing nonconsensual pornography and current First Amendment doctrine and argues that the present legal protections and remedies against nonconsensual pornography are inadequate. Ultimately, this Note argues that a national, uniform solution to nonconsensual pornography is needed and explores how federal anti-revenge porn legislation could fit into First Amendment doctrine—or rather, how the Supreme Court could rethink its free speech doctrine, while honoring and furthering the First Amendment's values and goals, to categorically exclude nonconsensual pornography from free speech protection.

[*] J.D., Boston University School of Law, 2023; B.A. Economics, University of Wisconsin-Madison, 2019. I would like to thank Professor Jay Wexler for inspiring my interest in First Amendment doctrine and advising me on this Note. I would also like to thank the *Boston University Law Review* editors and staff for their dedicated work and unwavering comradery.

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INTRODUCTION

One in eight adult social media users have fallen victim to nonconsensual pornography, also known as revenge porn.[1] Nonconsensual pornography ("NCP") is the distribution of sexually graphic images of individuals without their consent.[2] The images may have originally been obtained nonconsensually—such as by hacking social media and cloud accounts, or by using hidden cameras to record sexual acts or assaults—or consensually, within the context of an intimate relationship meant to be kept private.[3]

Nonconsensual pornography is certainly not a new phenomenon, but the digital age, particularly the rise of social media, has exacerbated not only the number of victims, but also the harms associated with NCP.[4] And no one is immune from the evils of NCP. In 2008, Michael David Barrett, a then forty-six-year-old Illinois insurance executive, followed successful sportscaster and reporter Erin Andrews to at least three cities, where he would call her hotel, ask which room she was staying in, book the room next to hers, and rig a peephole in her door to film her as she undressed.[5] The videos were posted online and widely shared.[6] In 2014, hackers stole thousands of private photos from hundreds of individuals' iCloud accounts and uploaded a large cache of nude photos to the message-board site 4Chan; from there, the photos were circulated on Reddit and other corners of the internet.[7] Among the victims were several dozen celebrities, including Jennifer Lawrence and Kate Upton.[8]

Legal doctrine in the United States has been slow to catch up to the new and particularly tech-savvy wave of online sexual abuses. Prior to 2013, only three states had criminal laws directly applicable to NCP.[9] While the pace has picked up significantly since then (as of February 2021, forty-eight states and the District of Columbia have enacted some form of anti-revenge porn legislation)

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[1] CYBER C.R. INITIATIVE, https://cybercivilrights.org/ [https://perma.cc/L6BP-ZUJ7] (last visited Sept. 29, 2023).

[2] *Frequently Asked Questions*, CYBER C.R. INITIATIVE, https://cybercivilrights.org/faqs/ [https://perma.cc/J9RP-2GX3] (last visited Sept. 29, 2023) [hereinafter *Frequently Asked Questions*].

[3] *Id.*

[4] *Id.*

[5] Sarah Kaplan, *The Ordeal of Sportscaster Erin Andrews: 'Oh, My God . . . I Was Naked All Over the Internet'*, WASH. POST (Mar. 1, 2016, 5:30 AM), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/01/the-ordeal-of-espns-erin-andrews-target-of-nude-peephole-videos-and-sexist-affronts/.

[6] *Id.*

[7] Caitlin Dewey, *A Comprehensive, Jargon-Free Guide to the Celebrity Nude-Photo Scandal and the Shadowy Web Sites Behind It*, WASH. POST (Sep. 2, 2014, 1:36 PM), https://www.washingtonpost.com/news/the-intersect/wp/2014/09/02/a-comprehensive-jargon-free-guide-to-the-celebrity-nude-photo-scandal-and-the-shadowy-web-sites-behind-it/.

[8] *Id.*

[9] *Frequently Asked Questions*, *supra* note 2.

there is still no federally applicable law on the books.[10] Furthermore, the state legislation is a varied patchwork of statutes that rely on different legal theories, and particularly, different approaches to First Amendment doctrine to criminalize NCP to some extent. The result is a "very confusing hodgepodge of statutes, many of them with clear loopholes."[11] The Violence Against Women Reauthorization Act of 2021, a proposed bill that has passed in the House, is a major step toward the federal criminalization of revenge porn.[12]

Part I of this Note explains the reasons behind NCP and the harms it causes, and provides an overview of how state courts have dealt with First Amendment challenges to state legislation criminalizing NCP. Part II explains why the current revenge porn legal protections and remedies are inadequate and discusses how criminalizing revenge porn does not align squarely with current First Amendment doctrine. Part III argues that a national solution to revenge porn is needed and explores how federal anti-revenge porn legislation could fit into First Amendment doctrine—or rather, how the Supreme Court could rethink First Amendment doctrine to afford little to no protection to revenge porn while honoring and furthering the amendment's values and goals.

I. BACKGROUND

A. *Reasons Behind Revenge Porn*

While NCP is familiarly known as revenge porn, even by the courts, "revenge" is not the best way to describe it. According to a 2017 nationwide Cyber Civil Rights Initiative ("CCRI") study, nearly eighty percent of perpetrators "are not motivated by revenge or by any personal feelings toward the victim."[13] Other motivations include entertainment, money, notoriety, or political agendas. For example, the perpetrator who filmed Erin Andrews claimed he was in a financial bind and targeted Andrews because her popularity as an attractive woman in a male-dominated field led him to believe he could make good money selling the footage.[14] Thus, although this Note will use the terms "NCP" and "revenge porn" interchangeably, it is important to keep in mind the range of possible motives behind these heinous assaults.

[10] *See Nonconsensual Pornography (Revenge Porn) Laws in the United States*, BALLOTPEDIA, https://ballotpedia.org/Nonconsensual_pornography_(revenge_porn)_laws_in_the_United_States [https://perma.cc/6LCW-4MRS] (last visited Sept. 29, 2023); Lisa Aronson Fontes, *Revenge Porn Meets the Law: Federal Protections for Victims*, DOMESTIC SHELTERS (Sept. 13, 2021), https://www.domesticshelters.org/articles/in-the-news/revenge-porn-meets-the-law-federal-protections-for-victims# [https://perma.cc/RX4A-LZER].

[11] Maclen Stanley, *Criminalizing "Revenge Porn" Could Save Women's Lives*, MS. MAG. (Aug. 12, 2021), https://msmagazine.com/2021/08/12/revenge-porn-violence-against-women-act-vawa-congress/ [https://perma.cc/8CSC-9SHM].

[12] Aronson Fontes, *supra* note 10.

[13] *Frequently Asked Questions*, *supra* note 2.

[14] Kaplan, *supra* note 5.

B. *Why Revenge Porn Is Harmful*

NCP is just one kind of cyber offense. It falls under the broad umbrella of online abuse, a category that includes cyber harassment, cyber stalking, cyber hacking, identity theft, and cyber bullying.[15] While all cyber offenses can be despicable, revenge porn exposes victims in a particularly atrocious way and inflicts long-lasting, serious harms. "Nonconsensual pornography can destroy victims' intimate relationships, as well as their educational and employment opportunities. Victims are routinely threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools."[16] Some victims have taken or attempted to take their own lives. Damilya Jossipalenya jumped out of her apartment window to her death after her ex-boyfriend sent a video of her performing a sex act on him to several friends and threatened to send it to her family members.[17] Annmarie Chiarini attempted suicide after an ex-boyfriend vowed to "destroy her" and posted her nude photos and videos for sale on eBay, as well as sent them to her boss, her son's kindergarten teacher, and several of her friends.[18]

NCP is also often a form of domestic violence. [A]busers threaten to expose intimate pictures to prevent a partner from exiting a relationship, reporting abuse, or obtaining custody of children . . . sex traffickers [use]compromising images to trap unwilling individuals in the sex trade, [and perpetrators of sexual assault record or capture images of the assault] to further humiliate victims [and] discourage them from reporting the crime."[19] NCP's harm is long lasting, not only because of the deep emotional trauma it causes, but also because of the difficulty in completely removing anything from the internet once it has been posted.[20] In 2016, eight years after the naked videos of Andrews were widely shared on the internet, she testified

> This happens every day of my life, either I get a tweet or somebody makes a comment in the paper or somebody sends me a still of the video to my Twitter or someone screams it at me in the stands and I'm right back to this . . . I feel so embarrassed and I am so ashamed.[21]

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[15] Aronson Fontes, *supra* note 10.

[16] *Frequently Asked Questions*, *supra* note 2.

[17] Shanti Das, *Damilya Jossipalenya Case: Broken by Revenge Porn, My Beautiful Girl Killed Herself, Says Her Father*, SUNDAY TIMES (Aug. 4, 2019, 12:01 AM), https://www.thetimes.co.uk/article/damilya-jossipalenya-case-broken-by-revenge-porn-my-beautiful-girl-killed-herself-says-her-father-vflxgqhc6.

[18] Annmarie Chiarini, *I Was a Victim of Revenge Porn. I Don't Want Anyone Else To Face This*, GUARDIAN (Nov. 19, 2013, 7:30 AM), https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change [https://perma.cc/MQ7B-PDY6].

[19] *Frequently Asked Questions*, *supra* note 2.

[20] *See* Kaplan, *supra* note 5.

[21] *Id.*

Thus, in the face of these particularly destructive and long-lasting harms, adequate protection of victims and curtailing of future offenses is critical.

C. *Anti-Revenge Porn Legislation and Free Speech*

While it may seem backwards to some that there is a possible free speech right to disseminate NCP, opponents of anti-revenge porn legislation argue that these laws are in tension with the free speech and press guarantees of the First Amendment.[22] Three predominant theories have been used by the Supreme Court to justify the protection of free speech: (1) to effect a marketplace of ideas; (2) to reinforce participatory democracy; and (3) to promote individual autonomy.[23] The "marketplace of ideas" theory proposes that protecting freedom of speech fosters a marketplace of ideas by allowing all opinions to be expressed, thereby enabling the search for the truth. "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[24] The "participatory democracy" theory argues that freedom of speech facilitates democratic government in two ways.[25] First, freedom of speech enables the press to report on public affairs and the platforms and backgrounds of political candidates, thereby providing citizens with the information necessary to elect the best-suited political officials.[26] Second, it encourages participation in the democratic process by allowing everyone to speak their mind about their government.[27] And under the "individual autonomy" theory, freedom of speech promotes individual autonomy by advancing self-realization and self-determination.[28] But like most constitutional rights, freedom of speech is not absolute.

D. *Free Speech Doctrine: Unprotected Categories of Expression*

In free speech doctrine, certain categories of expression are unprotected by the First Amendment because "the prevention and punishment of [them] have never been thought to raise any Constitutional problem," and because such categories are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from

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[22] *See* Stanley, *supra* note 11; Jeremy Saland, *Revenge Porn Legislation and the First Amendment*, AM. BAR ASS'N (Oct. 20, 2020), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2020/september-october/revenge-porn-legislation-first-amendment/.

[23] Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 966 (2009).

[24] New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (citation omitted).

[25] Corbin, *supra* note 23, at 969.

[26] *Id.*

[27] *Id.*

[28] *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 143-44 (1989).

them is clearly outweighed by the social interest in order and morality."[29] For instance, obscenity, libel, and fighting words are among these unprotected categories.[30] Importantly, these categories are "well-defined and narrowly limited,"[31] and the Supreme Court is reluctant to find new categories of unprotected speech.[32] The question of whether revenge porn is protected speech has not gone before the Supreme Court.

Under First Amendment doctrine, the analysis of restrictions on speech outside unprotected categories generally depends on whether the restriction is so-called content based or content neutral. Restrictions "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."[33] The Supreme Court has noted this definition "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."[34] Content-based restrictions are presumptively invalid.[35] Accordingly, if a court determines that a restriction is content based, the government almost always loses because content-based restrictions can only survive if they pass rigorous strict-scrutiny review, which requires proof that the restriction (1) furthers a compelling governmental interest concerning a real problem in need of solving, and (2) is narrowly tailored to achieve that interest, i.e., a less restrictive alternative that would serve the governmental interest does not exist.[36]

A restriction is content neutral if it "impose[s] burdens on speech without reference to the ideas or views expressed,"[37] and the principal inquiry in determining whether a restriction is content neutral is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[38] Thus, a regulation "is content neutral so long as it is justified without reference to the content of the regulated speech."[39] Content-neutral restrictions are also referred to as "time, place, and manner" restrictions. Content-neutral regulations are subject to an intermediate level of scrutiny because they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[40] In the realm of First Amendment challenges, to survive

[29] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[30] *Id.*

[31] *Id.* at 571.

[32] Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 683 (2014).

[33] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

[34] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (internal citation omitted).

[35] Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

[36] *See Reed*, 576 U.S. at 163, 171; Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813, 826 (2000).

[37] *Turner Broad. Sys.*, 512 U.S. at 643.

[38] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[39] *Id.* (internal quotations omitted) (emphasis omitted).

[40] *Turner Broad. Sys.*, 512 U.S. at 642.

intermediate scrutiny, the restriction generally must (1) serve an important or substantial governmental interest unrelated to the suppression of free speech; and (2) be narrowly tailored to serve that interest, i.e., it must not burden significantly more speech than necessary to further that interest.[41]

The Supreme Court has, on occasion, also recognized a category of restrictions that, though content based on their face, are considered content-neutral regulations because they "are justified without reference to the content of the regulated speech" and do "not contravene the fundamental principle that underlies our concern about content-based speech regulations: that government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[42] Specifically, when the Court has determined that a facially content-based restriction is aimed at combatting the "undesirable secondary effects" of the particular speech, it has applied intermediate scrutiny to sometimes uphold the restriction.[43] Notably, however, the Supreme Court has only ever applied this secondary effects doctrine in the context of evaluating restrictions on adult entertainment businesses.[44] Furthermore, in *City of Renton v. Playtime Theatres, Inc.*, the Court found that because the ordinance at issue did not outright ban adult theaters, but merely prohibited them from locating close to certain sensitive locations, the law should be analyzed as a time, place, and manner regulation.[45] Then, the Court held that because the ordinance was not aimed at the content of the material shown at the adult theaters, but rather at the secondary effects the theaters brought to the surrounding neighborhood, such as increasing crime, decreasing property values, and impairing the character and quality of the community, it was content neutral.[46]

E. *First Amendment Challenges to Anti-Revenge Porn Laws*

The biggest challenges to state NCP laws have involved First Amendment claims. Most state courts have rejected the argument that revenge porn is the constitutional equivalent of obscenity, and thus can be prohibited without

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[41] *Ward*, 491 U.S. at 791, 799; Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[42] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) (quoting Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95-96 (1972)).

[43] *Id.* at 49 (holding city may enact zoning ordinance regulating adult theaters because of adverse effects on surrounding area created by such theaters).

[44] The Supreme Court has not explicitly said the secondary effects doctrine only applies to regulations of adult entertainment businesses and has discussed (but not applied) the secondary effects doctrine in the context of other types of regulations. *See* Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1213-14 (2002).

[45] *City of Renton* 475 U.S. 41, 46 (1986).

[46] *Id.* at 47-49.

running afoul of the First Amendment.[47] The Supreme Court held in *Roth v. United States*[48] that obscene material is outside the scope of protections afforded by the First Amendment, and thus states may freely regulate and even completely ban obscenity.[49] After almost two decades of confusion over what exactly rises to the level of obscenity, the Court held in *Miller v. California*[50] that restrictions on so-called obscene material must be limited to works that "depict[] or describe[], in a patently offensive way, sexual conduct specifically defined by the applicable . . . law," which, "taken as a whole, lacks serious literary, artistic, political, or scientific value," and "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[51]

Under this standard, it is clear to see how revenge porn statutes, if limited to obscene images, would be ineffective. Not all revenge porn depicts sexual conduct—it includes images taken by a hidden camera of someone changing, or a picture of an individual's breasts or buttocks sent to an intimate partner privately, or any number of pornographic images that do not depict sexual conduct, or at least do not do so in a patently offensive way. But all revenge porn may cause extreme harm to the victim.[52] Thus, it is unsurprising that most states have not limited their revenge porn statutes in such a way.

In *State v. VanBuren*,[53] a critical first test case to examine the First Amendment issues of state revenge porn statutes, the Supreme Court of Vermont rejected the State's attempt to fit its statute into the unprotected obscenity category. The Court conceded that it "agree[d] with the State's assertion that the privacy invasion and violation of the consent of the person depicted in revenge porn are offensive," but noted that this is not analogous to the way obscenity is offensive because "the *viewer* of the images need not know that they were disseminated without the consent of the person depicted," and thus revenge porn

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[47] *See, e.g.*, State v. Katz, 179 N.E.3d 431, 452 (Ind. 2022); State v. Casillas, 952 N.W.2d 629, 638-39 (Minn. 2020); *see also* Roth v. United States, 354 U.S. 476, 485 (1957).

[48] 354 U.S. at 485.

[49] *Id.*

[50] 413 U.S. 15, 24 (1973).

[51] *Id.* at 24, 39 (internal quotations omitted).

[52] *See* State v. VanBuren, 214 A.3d 791, 810-11 (Vt. 2019) ("The harm to the victims of nonconsensual pornography can be substantial. Images and videos can be directly disseminated to the victim's friends, family, and employers; posted and 'tagged' . . . so they are particularly visible to members of a victim's own community; and posted with identifying information such that they catapult to the top of the results of an online search of an individual's name. In the constellation of privacy interests, it is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person's genitals, anus, or pubic area, that the person has not consented to sharing publicly. The personal consequences of such profound personal violation and humiliation generally include, at a minimum, extreme emotional distress."); *Frequently Asked Questions*, *supra* note 2 (explaining victims of NCP are routinely threatened with sexual assault, stalked, fired from jobs, and forced to change schools, and some have committed suicide).

[53] 214 A.3d 791 (Vt. 2019).

is not always inherently offensive without context.[54] The categories of expression that are unprotected by the First Amendment are few, well-defined, and narrow.[55] Pornography that is not obscene (and that does not depict minors) is not among these unprotected categories.[56]

State courts have also declined to categorize revenge porn as a new category of unprotected speech.[57] The Supreme Court has made it clear that it is extremely reluctant to create new categories of unprotected speech,[58] and it has not yet addressed the question of whether revenge porn could be such a category. While some state courts have recognized the persuasiveness of the argument that revenge porn should be categorically excluded from the full protections of the First Amendment, and some have even engaged in an analysis of the Supreme Court's standard for creating new exempted categories, all have ultimately declined to declare a new category in the face of the Supreme Court's high standard and emphatic rejection of attempts to name new unprotected categories whose restriction is not part of a long historical tradition.[59] As discussed further below, revenge porn has great potential to fit into the current framework of categorical exclusion from full First Amendment protection, despite the Court's extreme reluctance to create new categories.

While state courts also reject the theory that revenge porn statutes avoid First Amendment difficulties by classifying NCP as unprotected, either because it is its own unprotected category or it fits into the obscenity category, that is not the end of the First Amendment inquiry. The critical question, then, becomes: does the First Amendment nonetheless allow the restriction on speech that revenge porn statutes encompass? In answering this question, state courts vary in their analysis of how these statutes survive First Amendment challenges.

State v. VanBuren, the aforementioned critical test case on the survivability of state revenge porn statutes against First Amendment challenges, readily assumed the statute at issue was content based, but nonetheless upheld it against strict scrutiny review.[60] In *Ex parte Jones*,[61] the Court of Criminal Appeals of Texas found that the statute at issue was content based on its face, but carefully considered whether it should nonetheless be subject to intermediate scrutiny because of the time, place, and manner doctrine or the secondary effects doctrine.[62] The court ultimately rejected both theories because it felt that the

[54] *Id.* at 801.

[55] Virginia v. Black, 538 U.S. 343, 358-59 (2003).

[56] *See* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 594 (1986).

[57] *See, e.g.*, *VanBuren*, 214 A.3d at 801-02 ("[W]e decline to identify a new categorical exclusion from the full protections of the First Amendment when the Supreme Court has not yet addressed the question.").

[58] Calvert, *supra* note 32, at 684.

[59] *See, e.g.*, *VanBuren*, 214 A.3d at 801-05.

[60] *Id.* at 811.

[61] No. PD-0552-18, 2021 WL 2126172, at *6-7 (Tex. Crim. App. May 26, 2021).

[62] *Id.*

justification for the statute—to prevent harm to the victim—could not be justified without reference to the content of the regulated speech: "[t]he sexually explicit nature of the images is inextricable from the regulation; the harm results from the intimate nature of the content."[63] However, the court nonetheless upheld the statute under strict scrutiny review, finding it narrowly tailored to the compelling governmental interest of protecting sexual privacy.[64] In *State v. Casillas*,[65] the Supreme Court of Minnesota held that it need not determine whether the revenge porn statute at issue was content based or content neutral because it survived the more rigorous strict scrutiny analysis.[66] In *State v. Katz*,[67] the Supreme Court of Indiana held that the revenge porn statute at issue was plainly content based, but again held that it survived strict scrutiny.[68] The courts in both *Katz* and *Casillas* noted the paramount importance of the issue and the substantial privacy interests that NCP violates, as well as the fact that by enacting these statutes, the states were "working through [their] well-recognized authority to safeguard [their] citizens' health and safety."[69] Furthermore, in finding that the revenge porn statutes passed strict scrutiny review, the courts in *Katz*, *VanBuren*, and *Casillas* all emphasized that the statutes encompass purely private speech, and quoted the Supreme Court's language identifying restrictions of speech on public matters as the true heart of First Amendment values and protections, as opposed to restrictions of speech on purely private matters, which do not implicate the same constitutional concerns.[70]

Other state courts have upheld revenge porn statutes under the theory that the statutes are content neutral. For instance, in *People v. Austin*,[71] the Supreme Court of Illinois acknowledged that the revenge porn statute at issue targeted a specific category of speech—sexual images—but nonetheless held the statute was content neutral.[72] The court found critical that the statute's criminalization of the dissemination of sexual images turned on whether the disseminator knew or should have known that the material was to remain private, and that the person in the image had not consented to the dissemination; there would be no criminal liability for the distribution of the exact same image if done with the consent of the person depicted.[73] Thus, it is the "*manner* of the image's acquisition and

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[63] *Id.* at *6.

[64] *Id.* at *17.

[65] 952 N.W.2d 629, 641 (Minn. 2020).

[66] *Id.*

[67] 179 N.E.3d 431, 454-58 (Ind. 2022).

[68] *Id.*

[69] *See id.* at 458; *Casillas*, 952 N.W.2d at 641.

[70] *See Katz*, 179 N.E.3d at 456; *Casillas*, 952 N.W.2d at 644; *VanBuren*, 214 A.3d at 808-09.

[71] 155 N.E.3d 439, 457 (Ill. 2019).

[72] *Id.*

[73] *Id.* at 457-58.

publication, and not its *content*" that is "crucial to the illegality of its dissemination."[74]

II. ISSUES WITH THE CURRENT NCP LEGAL LANDSCAPE

A. *The Hodgepodge of State Legislation is Inadequate*

The patchwork of state laws criminalizing NCP is inadequate to address the problem. First, several laws require that the perpetrator explicitly intended to cause the victim "serious emotional distress," or otherwise intended to cause the victim some type of harm.[75] As discussed above, not all perpetrators are motivated by causing any harm to the victim. Second, there are "wildly different" penalties for NCP perpetrators across different states, ranging from a felony offense with a potential seven-year prison sentence to a misdemeanor with a maximum penalty of six months.[76] Two states, Massachusetts and South Carolina, have not even passed laws addressing NCP yet.[77] In addition, "[m]any state laws also fail to address jurisdiction, which can leave state authorities powerless if an offender proves that a photo was taken out-of-state or the victim does not live within the state."[78] Furthermore, some states only criminalize the distribution of NCP originally *obtained* without consent.[79] As discussed above, this fails to encompass nearly all NCP.[80] Several states also exempt websites or forums from criminal liability, making the owners and operators of the many nefarious platforms that "exist for the sole purpose of posting revenge porn and actively solicit[ing] users to contribute" immune from prosecution.[81]

Finally, states are not consistent in their exclusions from criminal liability, and some exceptions prove unsatisfactory. For example, former congresswoman and revenge porn victim Katie Hill had her lawsuit against the Daily Mail for

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[74] *Id.*

[75] Stanley, *supra* note 11; *see, e.g.*, TEX. PENAL CODE ANN. § 21.16 (West 2019) (requiring "intent to harm"); ALA. CODE § 13A-6-240 (2023) (requiring "intent to harass, threaten, coerce, or intimidate the person depicted"); ALASKA STAT. ANN. § 11.61.120 (West 2019) (requiring "intent to harass or annoy"); ARIZ. REV. STAT. ANN. § 13-1425 (2022) (requiring "intent to harm, harass, intimidate, threaten or coerce the depicted person"); FLA. STAT. ANN. § 784.049 (West 2022) (requiring "intent of causing substantial emotional distress to the depicted person"); MONT. CODE ANN. § 45-8-213 (West 2019) (requiring "purpose to terrify, intimidate, threaten, harass, or injure").

[76] Stanley, *supra* note 11 (noting different states "impose wildly different penalties for revenge porn offenders," such as how Missouri treats it as felony punishable by up to seven years in prison, whereas California treats it as misdemeanor punishable by up to only six months in prison).

[77] *Nonconsensual Distribution of Intimate Images*, CYBER C.R. INITIATIVE https://cybercivilrights.org/nonconsensual-pornagraphy-laws/ (last visited Sept. 29, 2023).

[78] Stanley, *supra* note 11.

[79] *See, e.g.*, LA. STAT. ANN. § 14:283 (2021) (requiring "person has not consented to the specific instance of observing, viewing, photographing, filming, or videotaping").

[80] Saland, *supra* note 22, at 5-6.

[81] Stanley, *supra* note 11.

violating California's revenge porn laws dismissed because the judge ruled that Hill's case fell into the exception to sharing if in the "public interest" because the revenge porn related to her character and qualifications as a member of Congress.[82] Adding insult to injury, the court then ordered Hill to pay over $200,000 in attorney's fees.[83] Similar exceptions were also applied to reporting on former congressman Anthony Weiner's sexting with minors.[84] Yet Weiner's illegal sexual interaction with underage women seems relevant to his character and qualifications as a member of Congress, and thus, the public interest, while Hill's privately shared intimate photos do not.

As discussed, NCP does not fit neatly into a category of unprotected speech, and state courts disagree on how anti-NCP legislation fits into First Amendment doctrine. Thus, NCP's place in First Amendment doctrine needs clarity.

B. *Civil Remedies and Copyright Law are Inadequate Solutions*

Opponents of anti-NCP legislation may point to civil and copyright remedies already available to victims of NCP. Indeed, in some of the state litigation over revenge porn statutes, defendants have argued that a criminal penal statute is not the least restrictive means of accomplishing the governmental interests at stake.[85] The court in *People v. Austin* rejected this argument, holding that both civil actions and copyright law are inadequate to remedy the harm or deter the conduct, and that each actually exacerbate the victim's harm and exposure.[86] But keep in mind that *Austin* applied intermediate scrutiny, so the "narrowly tailored" prong did not require the regulation be the least speech-restrictive means of advancing the governmental interest; rather, the regulation had to promote the interest, such that it would be achieved less effectively absent the regulation.[87]

Civil actions are an inadequate remedy for revenge porn victims. "[M]any civil remedies are not only insufficient or unrealistic, but also counterintuitive in terms of their supposed redress for the harm victims suffer."[88] Scholars have noted:

> Civil suits based on privacy violations are problematic. Most victims want the offensive material removed and civil suits almost never succeed in removing the images due to the sheer magnitude of dissemination. Highly

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[82] Kylie Cheung, *Understanding the Shock Katie Hill Ruling: She Must Pay Outlets that Published Nude Photos*, SALON (June 4, 2021, 5:50 AM), https://www.salon.com/2021/06/04/understanding-the-shock-katie-hill-ruling-she-must-pay-outlets-that-published-nude-photos/ [https://perma.cc/C7TK-YA79].

[83] *Id.*

[84] *Id.*

[85] *See, e.g.*, *Austin*, 155 N.E.3d at 462.

[86] *Id.* at 463-64.

[87] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

[88] Diane Bustamante, *Florida Joins the Fight Against Revenge Porn: Analysis of Florida's New Anti-Revenge Porn Law*, 12 FIU L. REV. 357, 368 (2017).

> publicized trials often end in re-victimization. Civil litigation is expensive and time-consuming, and many victims simply cannot afford it. It is difficult to identify and prove who the perpetrator is for legal proceedings because it is so easy to anonymously post and distribute revenge porn. Even when victims can prove who the perpetrator is in court and win money damages, many defendants are judgment-proof so victims cannot collect.[89]

Copyright law is only a viable option for a victim to remove nonconsensual pornography from the internet if the victim created the material herself, as she is then considered the copyright owner and would be entitled to protection under federal copyright law.[90] As discussed earlier, this would not cover all NCP. And even for the NCP it would cover, copyright remedies are also inadequate, because registering the copyright requires the victim to be exposed all over again—this time to the government. So, ironically, to copyright an image and stop strangers from seeing their nude pictures, victims would have to send more pictures of their naked body to more strangers: the individuals at the U.S. Copyright Office.[91] Although a successful registration can effectuate a takedown from an identified website hosting the registered images, the registered images are sent to the U.S. Copyright Office and appear in the Library of Congress's public catalog alongside copyright owners' names and image descriptions.[92]

Thus, it is clear that criminalization is necessary to combat the evils of NCP.

III. PROPOSED SOLUTION

In the face of the inconsistent jumble of state anti-revenge porn legislation, the inadequacy of civil remedies and copyright law in combatting NCP, and revenge porn's uncertain place in First Amendment doctrine, it is clear that a national, uniform approach to criminalizing revenge porn is needed. Importantly, a uniform national approach would signal to revenge porn victims that this heinous crime is taken seriously. This Note proposes that the proper solution is two-fold.

First, the Supreme Court must clarify where anti-revenge porn legislation fits into First Amendment doctrine. It is clear from the various state court decisions involving First Amendment challenges to anti-revenge porn laws that there is confusion surrounding the First Amendment analysis with respect to such laws, but unanimous agreement that revenge porn can be criminalized without

[89] Adrienne N. Kitchen, *The Need To Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 251-52 (2015) (footnotes omitted).

[90] Erica Souza, "*For His Eyes Only": Why Federal Legislation Is Needed To Combat Revenge Porn*, 23 UCLA WOMEN'S L.J. 101, 115-16 (2016).

[91] *Id.*

[92] *Id.*

offending the Constitution.[93] If a First Amendment challenge to an anti-revenge porn law comes before the Supreme Court, the Court would have an opportunity to carve out a new category of unprotected speech or even expand the secondary effects doctrine.

Second, federal legislation criminalizing revenge porn is necessary. Federal legislation could smooth out the inconsistencies and loopholes between the current state laws. It could also better deter revenge porn.[94]

A. *New Category of Unprotected Speech*

In his article, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, Clay Calvert posits that in the aftermath of recent decisions such as *United States v. Stevens*,[95] *Brown v. Entertainment Merchants Association*,[96] and *United States v. Alvarez*,[97] it is highly improbable that the Supreme Court would carve out a new category of unprotected expression for revenge porn.[98] In *Stevens*, the Court rejected the invitation to carve out a new category of unprotected expression for depictions of animal cruelty, holding there was no American tradition of forbidding the *depiction* of animal cruelty, although states have long outlawed *committing* it.[99] In *Brown*, the Court rejected the invitation to carve out a new category for violent video games aimed at minors, holding there is no longstanding tradition of restricting minors' access to depictions of violence.[100] And in *Alvarez*, it rejected the invitation to carve out a new category for any and all false statements.[101] In *Stevens*, Chief Justice Roberts opined for the majority:

> Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech

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[93] *See, e.g.*, State v. Katz, 179 N.E.3d 431, 461 (Ind. 2022) (finding although revenge porn statute "involve[d] protected speech . . . the legislature acted within its authority to safeguard the health and safety of its citizens from this unique and serious crime," and statute thus did not violate First Amendment (citations omitted)); State v. Casillas, 952 N.W.2d 629, 646 (Minn. 2020) (holding to address "serious problem" of revenge porn, "government is allowed to protect the lives of its citizens without offending the First Amendment as long as it does so in a narrow fashion").

[94] Stanley, *supra* note 11 ("Federal authorities have more power, more resources, and statistically more success in prosecuting crimes. The mere fear of a potential federal charge might outweigh the insidious satisfaction a would-be offender stands to gain from posting revenge porn.").

[95] 559 U.S. 460 (1954).

[96] 564 U.S. 786 (2011).

[97] 567 U.S. 709(2012).

[98] Calvert, *supra* note 32, at 684.

[99] *Stevens*, 559 U.S. at 472.

[100] *Brown*, 564 U.S. at 793-94.

[101] *Alvarez*, 567 U.S. at 718-19.

> that have been historically unprotected but have not yet been specifically identified or discussed as such in our case law.[102]

The Court also declined to engage in a "simple cost-benefit analysis" as the basis for identifying new categories of speech outside the protection of the First Amendment.[103] In fact, it described such a balancing test that weighs the value of a particular category of speech against its social costs as a "startling and dangerous" proposition.[104] And it reiterated in both *Brown* and *Alvarez* that "without persuasive evidence that a novel restriction on content is part of a long (if hereto unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'"[105]

In *New York v. Ferber*,[106] the Supreme Court held that regardless of whether it is obscene or not, child pornography is not entitled to First Amendment protection.[107] The Court acknowledged that states have a compelling interest in preventing the sexual exploitation and abuse of children and that this interest is served by restrictions on child pornography which protect children from the harm that results from the distribution and circulation of such material.[108] In this way, the interests served by exempting child pornography from First Amendment protection are similar to those that would be served by exempting revenge porn. While the Court has repeatedly identified the interest in regulating obscenity as protecting the sensibilities of individuals who are unwillingly exposed to such material,[109] the interest in regulating revenge porn is primarily protecting the victim's privacy, safety, and integrity.

But the Court made clear in *Stevens* that its decision in *Ferber* did not rest on the balance of competing interests alone; rather, *Ferber* was a "special case: the market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'"[110]

Furthermore, in both *Stevens* and *Brown*, the Court rejected attempts to make the regulations at issue fit into the obscenity category, further indicating that NCP would not escape First Amendment protection as an obscenity regulation.[111]

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[102] *Stevens*, 559 U.S. at 472.

[103] *Id.* at 471.

[104] *Id.* at 470.

[105] *Brown*, 564 U.S. at 792 (quoting *Stevens*, 559 U.S. at 470); *see also Alvarez*, 567 U.S. at 722.

[106] 458 U.S. 747 (1982).

[107] *Id.* at 764.

[108] *Id.* at 756-59.

[109] *See, e.g.*, *id.* at 756; Miller v. California, 413 U.S. 15, 24 (1973); Ashcroft v. ACLU, 542 U.S. 656, 667 (2004).

[110] *Stevens*, 559 U.S. at 471 (quoting New York v. Ferber 458 U.S. 747, 747 (1982)).

[111] *See id.*; Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792-93 (2011).

This trio of recent decisions seems to suggests that the Supreme Court would not create a new category of unprotected speech for NCP. As noted earlier, legislation prohibiting NCP has only popped up within the last decade; there is no longstanding tradition of proscription. And while a compelling argument can be made about the harms associated with NCP and its lack of social value, the Court would certainly reject such a cost-benefit analysis.

However, the fact that many state courts have indicated support for NCP to be named a new category of unprotected speech and have upheld revenge porn statutes against strict scrutiny indicates that NCP is a compelling candidate for categorical exclusion from First Amendment protection. While the Court disavows a cost-benefit analysis, this is in tension with its acknowledgement in *Ferber* that, within the existing categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[112]

Some NCP is similar to child pornography in that the distribution of it is an "integral part" of its unlawful production, but not all *production* of NCP is nonconsensual; it is the *distribution* of it that makes it NCP. For example, in Andrews's situation, the production of the material was a crime in itself, and the distribution of it was certainly an integral part of its unlawful production. However, this is not the case in the classic example of NCP, in which a sexual image is produced and shared consensually and privately with an intimate partner and later distributed nonconsensually.

For the Court to create a new category of unprotected speech, there must be "persuasive evidence that a novel restriction on [the] content is part of a long (if heretofore unrecognized) tradition of proscription."[113] But history should not matter as much in the digital age. Technological developments in society will continue to reinvent expression. As discussed earlier, the advent of the internet and the rise of social media has greatly exacerbated the problem of NCP, and state legislation has only caught up to tackling this problem in the last ten years. But the fact that forty-eight states and the District of Columbia have now passed such legislation should be enough to constitute a "tradition of proscription."[114] Do we have to wait until such legislation has existed for several decades before it can constitute a tradition of proscription for purposes of categorical exclusion? This would seem illogical. And as the Court has recognized, "whatever the challenges of applying the Constitution to ever advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[115]

Furthermore, the constitutional right of free expression:

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[112] *Ferber*, 458 U.S. at 763-64.

[113] *Brown*, 564 U.S. at 792.

[114] *Id.*

[115] *Id.* at 790 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

> Is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[116]

As several state courts have pointed out, NCP is not a matter for the arena of public discussion; it concerns purely private matters. NCP is clearly in tension with the spirit of promoting individual dignity. Thus, NCP does not advance values underlying the First Amendment, including the search for the truth in the marketplace of ideas, enhancing individual autonomy, or promoting participatory democracy.

B. *Careful Construction of NCP as Unprotected Speech*

The Supreme Court carefully carved out obscenity as an unprotected category of speech, and it could do the same for NCP. As discussed earlier, the Court, in establishing that obscenity is unprotected, specifically defined obscenity as material that "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable [] law," which "taken as a whole, lacks serious literary, artistic, political, or scientific value," and "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."[117] The Court could specifically define revenge porn as well. First, just as required in the realm of obscenity, the Court could require regulation around NCP to specifically define the type of content being regulated. Second, the nonconsensual dissemination of the content should be the key part of the definition. Whether the material was obtained consensually or not should not matter. Third, there must be certain exceptions for the very limited dissemination to, for example, healthcare providers and law enforcement, for specifically defined purposes.

Minnesota's NCP law is a good example of the level of specificity the Supreme Court could use to define NCP. It makes it a crime

> [T]o intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when: (1) the person is identifiable:(i) from the image itself, by the person depicted in the image or by another person; or (ii) from personal information displayed in connection with the image; (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and (3) the image was obtained or created under circumstances in which the disseminator knew or reasonably should have known the person depicted had a reasonable expectation of privacy.[118]

[116] Cohen v. California, 403 U.S. 15, 24 (1971).

[117] Miller v. California, 413 U.S. 15, 24 (1973) (internal quotations omitted).

[118] MINN. STAT. ANN. § 617.261 (2016).

The law also provides that "it is not a defense to a prosecution under this section that the person consented to the capture of possession of the image."[119]

Finally, Minnesota's law provides several exceptions to criminal liability, including if the dissemination is made for the purpose of (1) a criminal investigation or prosecution, (2) reporting unlawful conduct, (3) seeking medical or mental health treatment, (4) legitimate scientific research or educational purposes, or if the image (5) involves exposure in public or was obtained in a commercial setting for the purpose of the legal sale of goods or services, or (6) relates to a matter of "public interest and dissemination serves a lawful public purpose".[120] These exceptions prevent the chilling of expression that relates to matters of public concern and does not inflict the personal harms typically associated with NCP. Of course, these exceptions should be drafted with precision; the last exception, for material relating to the public interest, is quite vague, especially considering the specificity of the other exceptions, which arguably all relate to the public interest.

C. *Federal Legislation*

Recently passed federal legislation criminalizing revenge porn has been added as an amendment to the Violence Against Women Act, a reauthorization of a 1994 bill intended to protect victims of domestic abuse, sexual assault, dating violence, and stalking.[121] To its credit, the federal legislation is also a worthy example of the level of specificity the Court could use to define NCP. It avoids many of the inadequacies and loopholes of the state laws. And most importantly, it provides a uniform framework for criminalizing revenge porn.

The federal law makes it unlawful to "knowingly" distribute an "intimate visual depiction of an individual," "with knowledge of or reckless disregard for" both "the lack of consent of the individual to the distribution" and "the reasonable expectation of the individual that the depiction would remain private" and "without an objectively reasonable belief that such distribution touches upon a matter of public concern."[122] Thus, it avoids the mistake many state laws make by requiring that an offender explicitly intend to cause a victim harm or emotional distress.

It provides a detailed description of NCP, describing "intimate visual depiction" as any visual depiction

> (A) of an individual who is reasonably identifiable from the visual depiction itself or information displayed in connection" with it, (B) in which the individual "is engaging in sexually explicit conduct" or "the naked genitals, anus, pubic area or post-pubescent female nipple of the individual are

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[119] *Id.*

[120] *Id.*

[121] Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. § 1413.

[122] *Id.* § 1413(b).

visible," "(C) in which the content described in subparagraph (B) is not simulated; and (D) in original or modified format.[123]

The measure further provides a specific definition of "sexually explicit conduct."[124]

Furthermore, website owners and operators can face criminal liability if they "intentionally solicit, or knowingly and predominantly distribute" NCP.[125] Some scholars have praised this as "strik[ing] a fair balance between shielding most websites from liability while bringing to justice those that exist for the purpose of soliciting or disseminating revenge porn."[126]

The federal law also provides further exceptions for purposes relating to law enforcement, providing that it does not prohibit (A) "any lawful law enforcement, correctional, or intelligence activity;" (B) "an individual acting in good faith to report unlawful activity"; and (C) "document production or filing associated with a legal proceeding."[127] As federal law applies throughout the nation, the complicated problem of jurisdiction in interstate, online communications is avoided. The federal law even provides for "extraterritorial federal jurisdiction," allowing prosecution of perpetrators who post NCP while outside the United States if the perpetrator or victim is a U.S. citizen or permanent resident.[128] It also merely proscribes expression that is of purely private concern, leaving exceptions for matters of legitimate public concern,[129] which are at the core of First Amendment values. Categorically excluding NCP from First Amendment protection with a careful definition of NCP similar to this would eliminate any potential chilling of speech.

D. *Careful Definition of Matters of Public Concern*

While both Minnesota's law and the new federal law are the best examples of the level of specificity that could justify categorical exclusion from First Amendment protection, this Note argues they both suffer from one significant deficiency: they leave the general exception for material of public concern too vague and thus open for misuse. As discussed earlier, one of the main oppositions to anti-revenge porn laws is that they run afoul of the First Amendment by preventing journalists from publishing newsworthy material about politicians.[130] But of course, the federal legislation assuages this concern, as it does not apply to any content that "touches upon a matter of public concern."[131] There are two primary issues with such an exception.

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[123] *Id.* § 1413 (a)(3).

[124] *Id.* § 1413 (a)(4).

[125] *Id.* § 1413(d)(2).

[126] Stanley, *supra* note 11.

[127] H.R. 1620, 117th Cong. § 1413(d)(1).

[128] *Id.* § 1413(f).

[129] *Id.* § 1413(b)(2).

[130] Saland, *supra* note 22.

[131] H.R. 1620, 117th Cong. § 1413 (b)(2).

First, even if the content or context of a particular instance of NCP may be of interest to the public or politically relevant, the pornographic images themselves do not need to be shown and published to accomplish the goals underlying the First Amendment. As such, the vague, general exception for material of public concern should be limited to respect the individual autonomy of the person depicted, no matter how publicly relevant the person depicted makes the material. The images do not need to be exposed for the public to engage in a robust discussion of the issue.

Second, without a more precise definition of what constitutes a matter of public concern, this exception is at risk of being applied arbitrarily. As discussed above, similar exceptions in state laws have been applied to the cases of politicians such as Weiner and Hill.[132] Yet, these two cases are drastically different. The NCP that depicted Weiner was a product of him sexting underage girls.[133] The illegality and exploitation of power dynamics involved in this conduct, committed by a holder of a publicly elected position, is undeniably relevant to his status and decision-making abilities and is thus a matter of public concern. On the other hand, the NCP that depicted Hill was a product of privately shared photos with an intimate partner.[134] Yet in throwing out Hill's suit against the publishers of the images, the judge held that the images reflected on Hill's "character, judgment and qualifications for her Congressional position."[135] It is easy to see how subjective the "matter of public concern" judgment can become in such situations. While many would disagree that such images reflect on qualifications for a congressional position, the reputational damage was severe, and Hill ultimately was driven to resign.[136]

It is important to note that whether we like it or not, sharing intimate content with romantic partners is now the norm, considering that as many as sixty-one percent of U.S. adults have taken a nude photo or video of themselves and shared it with someone else,[137] and that Americans send approximately 1.8 million of these "nudes" per day (twenty per second).[138] Taking into account that the next generation of leaders will have grown up in the digital age, it seems only natural that this number will increase, and in the near future, perhaps the majority of the candidates running for elected offices will have sent nudes in the past and could become victims of NCP. In fact, because their status will likely encourage potential perpetrators, they may be extremely likely to become victims. As Hill's

[132] Cheung, *supra* note 82.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Revenge Porn Statistics*, CYBER C.R. INITIATIVE https://www.cybercivilrights.org/wp-content/uploads/2014/12/RPStatistics.pdf [https://perma.cc/ZNV2-VB6M] (last visited Sept. 29, 2023).

[138] Sean Jameson, *Send Nudes: 1,058 People on How Often They Send & Receive Nudes*, BAD GIRLS BIBLE (Oct. 26, 2020), https://badgirlsbible.com/naked-ethics [https://perma.cc/966C-AJSP].

attorney put it, "[a]nybody who dares enter the public eye should now have a legitimate concern that old nude and sexual images can be shared widely and published by any person or media purporting to have journalistic intentions."[139] With a general exception to matters of public concern encompassing materials depicting political figures, it follows naturally that a feature of the near-future political landscape will be navigating through all the NCP published depicting these figures. Will a topic of political debate be whose nudes reflect more poorly on their ability to hold a public office? Will the fear of being a victim of NCP prevent promising leaders from running for public office? In our search for the truth in the marketplace of ideas, this fear would certainly prevent some of the best ideas from rising to the top.

In light of the many deficiencies and inconsistencies of state laws, a uniform national approach to NCP is needed, and the federal legislation defines the offense with near-appropriate specificity to make a compelling framework for categorical exemption of First Amendment protection for NCP. However, the exception for matters of public concern must be defined precisely not only to protect the individual autonomy of victims of NCP, but also to prevent the chilling of speech from promising future public leaders and to promote the values underlying the First Amendment.

E. *A Case for the Expansion of the Secondary Effects Doctrine?*

The Court made clear that listeners' reactions to speech and the impact of speech on its audience do not constitute secondary effects for purposes of the secondary effects doctrine.[140] For example, it stated that if the zoning ordinance at issue in *Renton*:

> was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.[141]

Because the ordinance at issue in *Renton* was instead justified by the city's desire to preserve certain qualities of the neighborhood, it was analyzed as a content-neutral measure.[142] Thus, the secondary effects doctrine does not apply to regulations that are "justified *only* by reference to the content of speech."[143] Furthermore, "[t]he emotive impact of speech on its audience is not a 'secondary effect.'"[144] Therefore, at first blush, it may appear that anti-revenge porn laws cannot pass constitutional scrutiny under a secondary effects theory. However,

[139] Cheung, *supra* note 82.

[140] Boos v. Barry, 485 U.S. 312, 321 (1988).

[141] *Id.*

[142] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[143] *Barry*, 485 U.S. at 321.

[144] *Id.*

the emotive impact or psychological damage inflicted by revenge porn on its *audience* is not the reason behind regulating it. As discussed, it is the harm to the victim—the person depicted—and the interest in protecting them and preventing that harm, that motivates anti-revenge porn legislation. Furthermore, in the sense that the ordinances at issue in *Renton* and *Alameda Books* are not justified only by reference to the content of the speech, neither are anti-revenge porn laws. For example, in *Barry* the Court clarified that, in *Renton*, the regulation at issue was "properly analyzed as content neutral," on the premise that "the justifications for [the] regulation [had] nothing to do with the content, *i.e.*, the desire to suppress crime ha[d] nothing to do with the actual films being shown inside adult movie theaters."[145] Following this, the justifications for criminalizing revenge porn have nothing to do with its content, *i.e.*, the desire to protect victims has nothing to do with the nude or sexual nature of the images, but rather is rooted in the nonconsensual manner in which they were disseminated.

Of course, one might argue that without the nude or sexual nature of the images, the desire to protect those depicted vanishes. But the same could be said of the ordinance at issue in *Renton*. Without the "adult" content of the films being shown inside adult movie theaters, they would not be adult movie theaters, and thus there would be no desire to prevent crime, maintain property values, and protect residential neighborhoods. And the fact remains that in both situations, the desire is not to suppress sexually explicit material.

Zoning laws or other restrictions on physical, brick-and-mortar adult entertainment venues are no longer of consequence in the digital age with respect to pornography. *Renton* and *Alameda Books* emphasized that the zoning ordinances did not outright ban adult entertainment stores, but merely limited where they could be located.[146] Similarly, anti-revenge porn laws do not flat out prohibit the dissemination of a certain type of content. Rather, they limit the dissemination of that content to only include the content in which the person depicted has given their consent to its dissemination. In this way, both the ordinances at issue in *Renton* and *Alameda Books* and anti-revenge porn laws can be considered time, place, or manner regulations.

Of course, while the Supreme Court has not explicitly said that the secondary effects doctrine only applies to regulations of adult entertainment establishments and has discussed (but not applied) the secondary effects doctrine in the context of other types of regulations,[147] it is important to note that the recent cases applying the doctrine are "fractured so badly that it is often difficult even to

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[145] *Id.* at 320.

[146] *See City of Renton*, 475 U.S. at 45; City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002).

[147] *See* Andrew, *supra* note 44, at 1213-14.

identify the plurality opinion."[148] And while the Court appears to be willing to extend the secondary effects doctrine beyond cases involving adult entertainment establishments, "[t]he concurring and dissenting opinions in *Alameda Books* show that a number of members of the Court are treating the evidentiary burden [of proving that the secondary effects really exist] seriously and are aware that the application of the doctrine to new areas will be more difficult and require more thought than the plurality gave to the matter in its opinion."[149] Thus, while anti-revenge porn laws may have a place in the secondary effects analysis, it appears unlikely that the Court would expand the doctrine in this way.

CONCLUSION

This Note examined the agglomeration of state anti-revenge porn laws and critiqued their inadequacy to address the true harms of nonconsensual pornography. It proposed a national, uniform framework that would not only define and criminalize nonconsensual pornography, but also categorically exclude it from First Amendment protection. Despite the Supreme Court's stubborn reluctance to create new categories of unprotected speech, particularly with respect to speech that does not have a tradition of proscription, the issue of nonconsensual pornography has been exacerbated by the digital era, particularly the rise of social media. This presents a compelling case for categorical exclusion from free speech protection.

[148] Daniel R. Aaronson, Gary S. Edinger & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741, 744 (2009); *see id.* at 744 n.17 ("Legal commentators have been unanimous in pointing out the near impossibility of applying these fractured opinions to actual cases.").

[149] Andrew, *supra* note 44, at 1219.