WHEN FREE SPEECH AND PRIVACY COLLIDE: WHY STRICT SCRUTINY IS A POOR FIT FOR NONCONSENSUAL PORNOGRAPHY LAWS

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INTRODUCTION

While dating her boyfriend, Akhil Patel, of seven years, Nadia Hussain did what so many people of her generation have done:[1] she sent him emails with nude photos of herself and engaged in video sex via Skype.[2] Although she told him to delete the photos, he never did.[3] He betrayed her trust even further by secretly recording their video sessions.[4] After Nadia broke up with Patel, he started to lash out at her via text message, threatening to send the photos and videos to her parents, grandparents, friends, and coworkers if she did not comply with his demands to respond to him.[5] Patel harassed her like this for years, and when she refused to give in, he finally made good on his promise by posting the photos and videos to porn websites where they were viewed by, at minimum, several thousand people.[6]

This story is a variation on what has become an all-too-familiar theme in the age of social media and ubiquitous phone cameras. Many instances of so-called "revenge porn"[7] involve relationships that turn

1 Sexting, the act of "exchanging texts, photos and videos of a sexual nature," has become commonplace for Millennials. Melissa Meyer, *How Sexting Is Creating a Safe Space for Curious Millennials*, CONVERSATION (Mar. 21, 2016, 1:23 AM), http://theconversation.com/how-sexting-is-creating-a-safe-space-for-curious-millennials-56453 [https://perma.cc/F2YV-9LF3].

2 Patel v. Hussain, 485 S.W.3d 153, 158 (Tex. App. 2016).

3 *Id.*

4 *Id.*

5 *Id.* at 159–60, 162–64.

6 *Id.* at 165, 180. During this time, Patel also apparently gained remote access to Nadia's email and phone, overriding her phone's security features, constantly changing her passwords without her permission even after she had changed numbers and phone services, and in some cases physically tracking her whereabouts. *Id.* at 164–65, 168–69.

7 While this is the colloquial way to refer to the type of conduct resulting in one's intimate images or videos being shared without the consent of the person depicted, the more accurate term is nonconsensual pornography. *What Is 'Revenge Porn'?*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/welcome/about [https://perma.cc/JM8S-GTCS]. In their seminal article on the subject, Danielle Keats Citron and Mary Anne Franks define

sour, leading an individual to disseminate an intimate image captured during the course of the relationship in retaliation for some perceived wrong.[8] However, the circumstances leading one to commit an act of nonconsensual pornography can vary widely.[9]

When victims of revenge porn first started to come forward in the early aughts there was little law enforcement could do to help, owing both to the dearth of applicable laws and law enforcement's lack of understanding about how the internet and social media worked.[10] In the absence of any criminal law on point, victims were left with two main civil remedies: they could either sue perpetrators under privacy tort (if their state recognized such action), or they could try to copyright the image in question and sue for infringement to have it removed.[11] Recognizing the inadequacy of these alternatives in redressing the real and lasting harm to victims,[12] scholars Danielle Keats Citron and Mary

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nonconsensual pornography as "the distribution of sexually graphic images of individuals without their consent." Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014). In keeping with most scholarship on the subject and for the sake of ease, this Note will use the terms interchangeably.

8 *See, e.g.*, Litwin v. Hammond Hanlon Camp, LLC, 65 Misc.3d 1202(A) (N.Y. Sup. Ct. 2019) (plaintiff sued her ex-boyfriend after he shared nude photos she had sent during their relationship with his brother, who subsequently shared the photos with his employees); People v. Barber, 42 Misc.3d 1225(A) (N.Y. Crim. Ct. 2014) (defendant charged after posting nude photos of his ex-girlfriend to his Twitter account and sending them to her employer and sister); *Ex parte* Lopez, No. 09-17-00393-CR, 2019 WL 1905243 (Tex. Crim. App. Mar. 27, 2019) (defendant charged after posting nude photos he obtained from the victim on social media without her consent).

9 *See, e.g.*, State v. Casillas, 938 N.W.2d 74 (Minn. Ct. App. 2019) (defendant charged after disseminating intimate photos and videos of his ex-girlfriend, which he obtained after their relationship by accessing her wireless and television accounts); State v. Ahmed, No. A18-0891, 2018 WL 6595912 (Minn. Ct. App. Dec. 17, 2018) (defendant, an acquaintance of the victim, was charged after obtaining an image of the victim performing a sex act via another friend's Snapchat post, and subsequently posting it to her various social media pages); State v. Ravi, 147 A.3d 455 (N.J. Super. Ct. App. Div. 2016) (defendant charged after he secretly recorded his college roommate having sex with another man and sharing a link to the live video with his friends and Twitter followers).

10 Holly Jacobs's experience serves as an exemplar: when law enforcement did nothing to stop her ex from posting her intimate photos online, she took matters into her own hands and has worked to develop legal remedies for victims. *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1918–19 (2019) (describing Jacobs's experience); Citron & Franks, *supra* note 7, at 365–67 (describing some of the legal hurdles victims face in states with no laws specifically targeted to combat revenge porn); Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1267–69 (2017) (detailing Jacobs's experience).

11 Citron & Franks, *supra* note 7, at 357–60.

12 Victims report feelings of anxiety, depression, and humiliation, experience physical threats, loss of privacy, job loss and loss of future employment prospects, and in some instances become suicidal. *See* Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 584–87 (S.D.N.Y. 2018); *Ravi*, 147 A.3d at 468–69; People v. Ahmed, 102 N.Y.S.3d 421, 423 (N.Y. Crim. Ct. 2019); Citron, *supra*

Anne Franks, together with activist Holly Jacobs, have been at the forefront of publicizing this issue and laying the legal and theoretical framework for the criminalization of nonconsensual pornography.[13]

Through their important work and a paradigm shift that has begun to recognize pervasive sexual harassment and assault,[14] revenge porn is finally being acknowledged as an extreme invasion of privacy worthy of criminal condemnation.[15] While the passage of statutes criminalizing revenge porn in almost every state is a big step in the right direction, the battle is far from won.[16] Free speech advocates remain skeptical of any law they perceive as restricting individuals' free expression online.[17] Knowing this, drafters of nonconsensual pornography statutes include language intended to mitigate any First Amendment concerns by writing such laws narrowly.[18] State legislators have taken several approaches to ensure their revenge porn statutes will withstand constitutional scrutiny. For example, different legislatures include

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note 10, at 1891; Citron & Franks, *supra* note 7, at 351–54; Franks, *supra* note 10, at 1258–59, 1263–67; Quinta Jurecic, *The Humiliation of Katie Hill Offers a Warning*, ATLANTIC (Oct. 31, 2019), https://www.theatlantic.com/ideas/archive/2019/10/katie-hill-and-many-victims-revenge-porn/601198 [https://perma.cc/84UT-6JQQ].

13 *CCRI Board of Directors*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/ccri-board [https://perma.cc/64DJ-GJ4A]. *See generally* Citron, *supra* note 10; Citron & Franks, *supra* note 7; Franks, *supra* note 10. Franks drafted the first model nonconsensual pornography statute and has worked with state legislatures across the country as they work to pass revenge porn laws. CYBER C.R. INITIATIVE, *supra*; Franks, *supra* note 10, at 1269.

14 *See, e.g.*, Anna North, *7 Positive Changes that Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00AM), https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019 [https://perma.cc/8AGP-QGCX].

15 *48 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws [https://perma.cc/5NHC-HAGJ].

16 Despite the criminal laws now on the books in forty-eight states, D.C., and Guam, and overall increased awareness, the conduct persists. *See, e.g.*, Aaron Hegarty, *Man Accused of 'Revenge Porn' in Local Campaign Faces Federal Charges*, 3 NEWS NOW OMAHA (Jan. 6, 2020, 6:56 PM), https://www.3newsnow.com/news/local-news/man-accused-of-revenge-porn-in-local-campaign-faces-federal-charges [https://perma.cc/Z7JZ-SXND]; Caitlin Kelly, *Facebook's Anti-Revenge Porn Tools Failed to Protect Katie Hill*, WIRED (Nov. 18, 2019, 11:30 AM), https://www.wired.com/story/katie-hill-revenge-porn-facebook [https://perma.cc/GU3Z-JAXK].

17 Complaint for Declaratory and Injunctive Relief at 2–5, Antigone Books, LLC v. Horne, (D. Ariz. Sept. 23, 2014) (No. 2:14-cv-02100); Franks, *supra* note 10, at 1327–33; Patrick Anderson, *Civil Libertarians, Media Oppose 'Revenge Porn' Bill*, PROVIDENCE J. (Apr. 4, 2018, 6:03 PM), https://www.providencejournal.com/news/20180404/civil-libertarians-media-oppose-revenge-porn-bill [https://perma.cc/GB2R-QY4A]; Cathy Reisenwitz, *Revenge Porn Is Awful, but the Law Against It Is Worse*, TALKING POINTS MEMO (Oct. 16, 2013, 5:35 AM), https://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse [https://perma.cc/Z4Y4-BTWB].

18 *See infra* Section II.A.

provisions that either require: a specific intent to harm,[19] proof of actual harm to the victim,[20] proof the individual depicted had a reasonable expectation of privacy in the image,[21] a narrow definition of who counts as a "covered recipient" of such an image,[22] or some combination of such provisions.[23]

Nonetheless, recent cases brought under the new nonconsensual pornography laws reveal another possible hurdle to victims seeking redress: the courts themselves.[24] When faced with First Amendment challenges to nonconsensual pornography statutes, most courts apply strict scrutiny to determine whether such laws may be upheld.[25] However, strict scrutiny is not an appropriate standard to measure the constitutionality of revenge porn laws, which do not implicate the kind of public speech the First Amendment traditionally protects. Strict scrutiny is also inappropriate here because revenge porn laws are necessary to protect private expression, and thus should be treated differently under the First Amendment than regulations aimed at protecting other interests.

This Note argues that courts confronted with constitutional challenges to nonconsensual pornography laws should employ intermediate scrutiny, adopting an approach similar to that proposed by Justice Breyer, which "asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives."[26] This method provides for careful consideration of the complex issues implicated when free speech and privacy intersect. In other words, Justice Breyer's approach would allow courts to weigh the effects of enforcing such laws against the consequences of not doing so. While First Amendment proponents

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19 *E.g.*, CAL. PENAL CODE § 647(j)(4) (West 2021); D.C. CODE ANN. § 22-3052 (West 2021); HAW. REV. STAT. ANN. § 711-1110.9 (West 2020); MO. ANN. STAT. § 573.110 (West 2020); N.Y. PENAL LAW § 245.15 (McKinney 2021); OR. REV. STAT. ANN. § 163.472 (West 2020); TEX. PENAL CODE ANN. § 21.16 (West 2019); WASH. REV. CODE ANN. § 9A.86.010 (West 2021).

20 *E.g.*, COLO. REV. STAT. ANN. § 18-7-107 (2021); GA. CODE ANN. § 16-11-90 (2021); KY. REV. STAT. ANN. § 531.120 (West 2021); TENN. CODE ANN. § 39-17-318 (2021); UTAH CODE ANN. § 76-5b-203 (West 2021).

21 *E.g.*, ARIZ. REV. STAT. ANN. § 13-1425 (2021); KAN. STAT. ANN. § 21-6101 (West 2021); LA. STAT. ANN. § 14:283.2 (2021); MD. CODE ANN., CRIM. LAW § 3-809 (West 2021); NEV. REV. STAT. ANN. § 200.780 (West 2021); N.J. STAT. ANN. § 2C:14-9 (West 2021); OHIO REV. CODE ANN. § 2917.211 (West 2021); WIS. STAT. ANN. § 942.09 (West 2021).

22 N.Y.C. ADMIN. CODE § 10-180.

23 *See* statutes cited *supra*, notes 19–21.

24 *See infra* Part II.

25 *See, e.g.*, State v. Casillas, 952 N.W.2d 629 (Minn. 2020); *Ex parte* Jones, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. Crim. App. May 16, 2018); State v. VanBuren, 214 A.3d 791 (Vt. 2019).

26 Reed v. Town of Gilbert, 576 U.S. 155, 179 (2015) (Breyer, J., concurring).

focus on the chilling effects nonconsensual pornography laws may have on the people who disseminate the images, Justice Breyer's balancing approach would allow room to consider the chilling effects on victims' free expression if their intimate photos may be shared without consent or consequence.

Part I of this Note begins by looking at the history of revenge porn, the initial legal response, and the movement to establish criminal laws to prohibit such conduct. Part I then underscores the theoretical basis for such criminal laws as integral to protecting the right to sexual privacy. Part I also outlines the First Amendment challenges facing nonconsensual pornography laws, and the three predominant analytical approaches courts may take when grappling with such challenges. Part II addresses the elements of Franks's model nonconsensual pornography statute and analyzes the nonconsensual pornography statutes in three states by comparing them to Franks's model statute. With this framework, Part II then examines the different approaches taken by courts in each state in recent cases confronting constitutional challenges to these new laws. Part III proposes that courts confronting First Amendment challenges to nonconsensual pornography statutes should decline to employ strict scrutiny analysis, with its strong presumption against constitutionality, to these laws. Rather, courts should look to Justice Breyer's balancing approach, as well as the Illinois Supreme Court's opinion in *People v. Austin*,[27] as models for how to analyze such statutes in light of the competing interests at stake.

Given the proliferation of nonconsensual pornography statutes in almost every state, more constitutional challenges are sure to follow. This Note is an effort to provide a guide to state courts that will inevitably wrestle with the decision of whether such laws can withstand constitutional scrutiny.

I. BACKGROUND

A. *The Rise of Revenge Porn and the Legal Response*

The act of sharing an intimate photo or video without the consent of the depicted individual is not novel,[28] and the underlying misogyny

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27 People v. Austin, 155 N.E.3d 439 (Ill. 2019).

28 Franks, *supra* note 10, at 1254–55 (discussing Hustler magazine's long-running feature "Beaver Hunt," which publishes intimate images from unsuspecting, and unconsenting, subjects).

motivating much of it is a tale as old as time.[29] But the rise of the internet coupled with the prevalence of smartphones have proliferated the practice, which according to a study from 2016 has affected nearly four percent of internet users, or roughly ten million people.[30] Indeed, even though most states now have statutes prohibiting nonconsensual pornography,[31] the practice continues.[32]

But when the first wave of (what may now in most states be termed) crimes involving the dissemination of nonconsensual pornography washed over the United States, victims found themselves at a loss for how to respond.[33] Simply posting an image to some online platform did not rise to the level of harassment required under most state laws, even when it was a recognizable image accompanied by the name and contact information of the person depicted.[34]

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29 *See* Cynthia J. Najdowski, *Legal Responses to Nonconsensual Pornography: Current Policy in the United States and Future Directions for Research*, 23 PSYCH. PUB. POL'Y & L. 154, 155 (2017) (arguing for a reframing of nonconsensual pornography as an extension of "violence against women" in an effort to overcome the "structural patriarchy" that has influenced the existing policy surrounding the issue); Citron, *supra* note 10, at 1890 ("The relationship between sexual privacy and gender, racial, sexual, and economic equality is undeniable."); Moira Aikenhead, *A "Reasonable" Expectation of Sexual Privacy in the Digital Age*, 41 DALHOUSIE L.J. 273, 280 (2018) ("The sexual objectification at the core of the Sexual Privacy Offences arises out of structural gender hierarchization and social scripts of male entitlement to women's bodies."). Of course, men are also victims of nonconsensual pornography, and women the perpetrators. *Compare* State v. Ravi, 147 A.3d 455 (N.J. Super. Ct. App. Div. 2016) (defendant charged after he secretly recorded his freshman year college roommate having sex with another man), *with Austin*, 155 N.E.3d 439 (defendant was the wife of the man whose lover's photos were exposed), *and VanBuren*, 214 A.3d 791 (defendant was a female friend of the person the victim intended to send an intimate image to). But as Citron notes, such conduct has a disproportionate impact on "women, sexual minorities, and nonwhites," in other words, the very same groups traditionally subjugated by structural patriarchy. Citron, *supra* note 10, at 1891.

30 *See* Amanda Lenhart, Michele Ybarra & Myeshia Price-Feeney, *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* DATA & SOC'Y RSCH. INST. 1, 4–5 (2016), https://c-7npsfqifvt34x24ebubtpdjfuzx2eofu.g00.cnet.com/g00/3_c-7x78x78x78.dofu.dpn_/c-7NPSFQIFVT34x24iuuqtx3ax2fx2febubtpdjfuz.ofux2fqvctx2fpix2fOpodpotfotvbm_Jnbhf_Tibsjoh_3127.qeg_$/$/$/$?i10c.ua=1&i10c.dv=13 [https://perma.cc/8CS7-LESL].

31 CYBER C.R. INITIATIVE, *supra* note 15.

32 *See* sources cited *supra* note 16.

33 *See* Franks, *supra* note 10, at 1267–69 (describing Holly Jacobs's struggle to get help from law enforcement when her ex posted her nude images all over the internet along with her identification and contact information); Jessica Testa, *Revenge Porn Lawyer Carrie Goldberg Has Taken on Psychos, Stalkers, and Trolls. Now She Confronts Her Own Worst Demons*, ELLE (July 17, 2019), https://www.elle.com/culture/books/a28401678/carrie-goldberg-nobodys-victim-interview [https://perma.cc/3A6Q-BACF] (explaining why Carrie Goldberg "became a 'revenge porn lawyer' because that was the kind of attorney she needed" after an ex tried to ruin her career and disrupt her life by disseminating intimate photos of her).

34 *See* People v. Barber, 42 Misc.3d 1225(A) (N.Y. Crim. Ct. 2014).

Harassment generally requires a continuing "course of conduct,"[35] which does not encompass a single online post—even if it induces those who view it to contact the individual depicted in droves, looking for sex.[36] Harassment also typically describes speech or conduct directed to a particular person, whereas most instances in which an actor disseminates nonconsensual pornography consist of "one-to-many" speech that is typically within the protection of the First Amendment.[37] Although victims experience harassment when contacted and physically confronted by strangers responding to (what was understood to be) an invitation for sex, existing harassment laws offered them neither redress from such abuse nor recourse against the perpetrator who posted the initial image.[38] Anti-stalking laws are inadequate for similar reasons, and anti-voyeur statutes do not sufficiently cover the full scope of nonconsensual pornography scenarios because in many cases the images are created and initially shared by the victim him or herself.[39]

And while some states, like Texas, recognize certain privacy torts that allow victims like Nadia Hussain to pursue civil remedies against their abusers,[40] other states like New York do not.[41] The two privacy torts most relevant in the nonconsensual pornography context are intrusion upon seclusion and public disclosure of a private fact.[42] The former proscribes intrusion upon the (1) solitude or seclusion of another, if (2) such intrusion would be highly offensive to a reasonable person.[43] Liability for the disclosure of a private fact attaches where one

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35 Citron & Franks, *supra* note 7, at 345.

36 *See* Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 584–87 (S.D.N.Y. 2018); Citron & Franks, *supra* note 7, at 345.

37 *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 740–42 (2013).

38 *See Herrick*, 306 F. Supp. 3d at 584; Citron & Franks, *supra* note 7, at 345; Franks, *supra* note 10, at 1267–69.

39 *See Barber*, 42 Misc. 3d 1225(A); Franks, *supra* note 10, at 1301; Volokh, *supra* note 37, at 739–42.

40 *See* Patel v. Hussain, 485 S.W.3d 153, 157–58 (Tex. App. 2016). Nadia brought claims against Patel including intrusion upon seclusion and public disclosure of a private fact. Filing her lawsuit against Patel was the first time Nadia was able to get relief from his relentless threats and harassment. *Id.* at 157, 169.

41 Messenger v. Gruner + Jahr Printing & Publ'g, 727 N.E.2d 549, 551–52 (N.Y. 2000) ("New York does not recognize a common-law right of privacy. In response to *Roberson*, the Legislature enacted Civil Rights Law §§ 50 and 51, which provide a limited statutory right of privacy. . . . [W]e have underscored that the statute is to be narrowly construed and 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person.'" (citations omitted)).

42 Appropriation of name or likeness is also relevant when contending with the issue of deep fakes, however this aspect of cyber harassment is beyond the scope of this Note.

43 RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

publicizes a private matter that (1) would be highly offensive to a reasonable person and (2) is not of legitimate concern to the public.[44]

Without the availability of the public disclosure of private fact tort, or any criminal statute specifically prohibiting the dissemination of nonconsensual pornography, the court in *People v. Barber*[45] dismissed all charges against Ian Barber, even though he posted nude photos of his girlfriend to his Twitter feed and also sent the images to her sister and employer without his girlfriend's consent or knowledge.[46] New York State charged him with several counts, the most relevant one being the dissemination of an unlawful surveillance image (essentially an anti-voyeur statute).[47] To qualify under this statute, a defendant must have obtained the image or recording surreptitiously under circumstances where the victim had a reasonable expectation of privacy and did not consent to the recording.[48] But because the State failed to sufficiently allege how Barber had obtained the images, this charge was dismissed along with the others.[49] Even where similar voyeur charges would be sufficiently supported by the evidence filed in a criminal complaint, not all acts of nonconsensual pornography would be covered by such laws.[50]

Attempts to use copyright law to shield victims from the ravages of having their intimate photos posted online proved similarly fruitless.[51] One can only assert copyright ownership over an image if they can prove they actually took the photo.[52] Thus, any photo a voyeur takes surreptitiously or one's partner takes with initial consent would not be protected.[53] And even if the person depicted could prove they did take the photo, they would need to register it with the Copyright Office before demanding that it be removed from any offending website.[54] This

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44 *Id.* § 652D.

45 42 Misc.3d 1225(A) (N.Y. Crim. Ct. 2014).

46 *Id.* at *1.

47 *Id.*

48 *Id.* at *3–4.

49 *Id.* at *4–5.

50 For example, in situations where the person depicted consented to the capture of the original image, or voluntarily shared the image with someone in confidence. This is because anti-voyeur statutes typically require the image or video be captured without the knowledge or consent of the person depicted. *See, e.g.*, N.Y. PENAL LAW §§ 250.55, 250.45 (McKinney 2021); *see also* Citron & Franks, *supra* note 7, at 346–47. Therefore, anti-voyeur statutes alone would not be sufficient to counteract all instances of nonconsensual pornography.

51 Citron & Franks, *supra* note 7, at 349; Mitchell J. Matorin, *In the Real World, Revenge Porn Is Far Worse than Making It Illegal*, TALKING POINTS MEMO (Oct. 18, 2013 2:00 AM) https://talkingpointsmemo.com/cafe/our-current-law-is-completely-inadequate-for-dealing-with-revenge-porn [https://perma.cc/RYZ7-R4GU].

52 Matorin, *supra* note 51.

53 *Id.*

54 *Id.*

process can lead to a perverse game of whack-a-mole as the photos disappear and then reappear on different sites; even a successful petition to have Google remove the links to any such sites cannot ensure the photos are removed from the internet for good.[55] Additionally, by filing the image with the government, the person depicted must reveal the image to more people in an effort to keep it private.[56]

Finally, Section 230 of the Communications Decency Act makes it all but impossible to hold third-party platforms—what the statute calls "interactive computer services"—liable for the dissemination of images containing nonconsensual pornography.[57] Because Section 230 prevents interactive computer services from being "treated as the publisher or speaker" of the information users post to such sites, such platforms are afforded broad immunity.[58] Advocates of Section 230 hail it as the guardian of free speech and innovation online.[59] It is what has allowed sites like Facebook, Twitter, YouTube, Craigslist, Reddit, 4chan, etc., to proliferate; without Section 230, so the conventional wisdom goes, the internet as we know it would cease to exist.[60]

It is also the reason apps like Grindr have no reason to comply with requests to take down fake profiles purporting to belong to the target of a revenge porn scheme,[61] and why the web-hosting company GoDaddy is immune from suit brought by plaintiffs whose nude images were posted to revenge porn sites it hosted.[62] Given that removal of the images from the internet is the number one objective of revenge porn

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55 *Id.* Courts have also acknowledged the lasting damage that occurs when such images are posted online, realizing the near-impossibility that every trace of the image will truly disappear. Patel v. Hussain, 485 S.W.3d 153, 182 (Tex. App. 2016); State v. VanBuren, 214 A.3d 791, 795 (Vt. 2019). Indeed, this is part of what motivated Akhil Patel: he knew his punishment of Nadia would be long-lasting, if not permanent. *Patel*, 485 S.W.3d at 182 ("[P]ornography shared on the internet can exist forever and circulate indefinitely.").

56 *How to Copyright an Image*, UPCOUNSEL (July 13, 2020), https://www.upcounsel.com/how-to-copyright-an-image [https://perma.cc/G34U-VYQU] (explaining the process of registering a photo with the Copyright Office); *see also* Matorin, *supra* note 51.

57 *See* Communications Decency Act (CDA) of 1996, 47 U.S.C. § 230.

58 *Id.*; *see also* Citron & Franks, *supra* note 7, at 359; Matorin, *supra* note 51. But note that where the site owner directly solicits or creates the message it posts, the veil of immunity may be pierced. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008).

59 *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 [https://perma.cc/RMG3-62J9].

60 *See id.*

61 *See* Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018).

62 GoDaddy.com, LLC v. Toups, 429 S.W.3d 752 (Tex. App. 2014).

victims seeking redress,[63] Section 230 has frustrated those seeking civil remedies.[64]

B. *The Need for Criminal Statutes*

Given the real and lasting harm to victims of nonconsensual pornography,[65] and the inadequacy of existing tort or copyright law to provide redress,[66] most states have now responded with some form of a criminal statute.[67] Even if the civil remedies outlined above could effectively redress the harm caused by nonconsensual pornography, bringing a lawsuit is an expensive and time-consuming endeavor unavailable to most victims.[68] And in any case, the specter of civil litigation is not so menacing that it will sufficiently deter perpetrators—especially those who are judgment-proof; only the threat of criminal sanction and possible jail time can achieve this.[69]

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63 Citron & Franks, *supra* note 7, at 358–59. Although, it is more accurate to say victims' number one priority would be to prevent such images from being posted in the first place. Franks, *supra* note 10, at 1303–04.

64 Such frustration has led attorney Carrie Goldberg to refer to the law as "the single greatest enabler of every asshole, troll, psycho, and perv on the internet." Testa, *supra* note 33.

65 *See* State v. Ravi, 147 A.3d 455, 468 (N.J. Super. Ct. App. Div. 2016) (defendant's roommate jumped off a bridge after finding out defendant and his friends had spied via webcam on his sexual encounters with another man); Patel v. Hussain, 485 S.W.3d 153, 169–71 (Nadia experienced such fear and humiliation she had to move out of the house she shared with her parents into an apartment where she was afraid to open the blinds, she withdrew from her Muslim community, and would have a physical reaction of terror when she thought Patel was near); Citron & Franks, *supra* note 7, at 351–53; Testa, *supra* note 33 (describing how Goldberg became suicidal after her ex posted her nude photos online and tried to ruin her legal career by spreading rumors she slept with judges to achieve favorable rulings).

66 *See supra* Section I.A.

67 CYBER C.R. INITIATIVE, *supra* note 15. There is also a federal statute pending. Franks, *supra* note 10, at 1281–82; Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act of 2021, H.R. 1620, 117th Cong. § 1413 (2021). The current iteration of the federal bill is part of the Violence Against Women Act Reauthorization Act of 2021, which the House passed 244 to 172 on March 17, 2021. *H.R. 1620—Violence Against Women Act Reauthorization Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/1620 [https://perma.cc/T3Y2-LYCP]. It is now pending in the Senate. *Id.*

68 Citron & Franks, *supra* note 7, at 358; Franks, *supra* note 10, at 1299.

69 Citron & Franks, *supra* note 7, at 358, 361; Franks, *supra* note 10, at 1293. Citron and Franks acknowledge the problem of mass incarceration in the United States but push back on the argument that therefore we "should not criminalize certain behavior because too many other kinds of behavior are already criminalized . . . ." Citron & Franks, *supra* note 7, at 362. Instead, they argue that:

> [C]riminalization should be a question about the seriousness of the harm caused and whether such harm is adequately conceptualized as a harm only to individuals, for

Take Holly Jacobs, the founder of the Cyber Civil Rights Initiative (CCRI). CCRI serves as a resource for matching victims with legal representation, conducts research, and partners with legislatures across the country in an effort to pass legislation criminalizing the dissemination of revenge porn.[70] Jacobs was herself a victim of revenge porn after photos she had shared with her long-distance boyfriend in confidence surfaced on hundreds of websites, along with her name and contact information.[71] She struggled to have the images removed and had to explain to her friends and employer what was happening.[72] Once she thought she had succeeded at removing the images from the web, they quickly resurfaced; she ultimately had to change her name to distance herself from the search results.[73] When she realized there was nothing law enforcement could do to help her, she made it her mission to fight back and make sure others would not have to follow in her footsteps by changing the law.[74] Carrie Goldberg, a lawyer who became the victim of revenge porn in 2013 when a "psycho" ex posted her photos online and tried to ruin her career, similarly decided to make it her mission to "become the lawyer [she] needed" for others.[75] Goldberg works with the CCRI, and has made a career of representing survivors—mostly women—of cyber-harassment crimes.[76]

While the CCRI also works with tech companies to advocate for the use of technology-based solutions like hashing,[77] this does nothing to address the initial conduct. Removing the images from the internet is an urgent goal of individuals who have had their photos disseminated.

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which tort remedies are sufficient, or should be conceptualized as a harm to both individuals and society as a whole for which civil penalties are not adequate, thus warranting criminal penalties.

Id. Ultimately, Franks asserts that "the primary focus of legal intervention against nonconsensual pornography should be on deterrence," and that "[t]he ideal effect of a criminal law is to discourage perpetrators from becoming perpetrators in the first place." Franks, *supra* note 10, at 1303–04.

70 *About Us*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/welcome [https://perma.cc/6TBT-XNND].

71 *Id.*; Franks, *supra* note 10, 1267–68.

72 Franks, *supra* note 10, at 1267–68.

73 *Id.*

74 *Id.*; CYBER C.R. INITIATIVE, *supra* note 13.

75 Testa, *supra* note 33.

76 *Id.*; CYBER C.R. INITIATIVE, *supra* note 13.

77 Franks, *supra* note 10, at 1273 ("PhotoDNA uses 'robust hashing,' which calculates the particular characteristics of a given digital image—its digital fingerprint or 'hash value'—to match it to other copies of that same image. After . . . assign[ing] PhotoDNA 'signatures' to known images of abuse, those signatures can be shared with online service providers, who can match them against the hashes of photos on their own services, find copies of the same photos and remove them." (internal quotation marks and citation omitted)).

But what these people want more than anything is for the images to have never been exposed in the first place.[78]

Laws that criminalize the nonconsensual sharing of intimate images serve as a deterrent, sending a clear message that such conduct is a gross invasion of privacy and will not be tolerated.[79] Reddit's response to the possibility it had inadvertently distributed child pornography as a result of the 2014 celebrity hack that fueled r/TheFappening is a clear illustration of the power of criminal sanctions: while the site was the hub for unabashedly sharing leaked nude photos of celebrities, it swiftly and urgently removed images depicting one celebrity when she was underage.[80] The CCRI receives on average one hundred requests for help from new victims each month.[81] Revenge porn is a complicated problem requiring a multi-pronged approach, and criminal laws are an integral piece of the puzzle.[82]

C. *Nonconsensual Pornography Statutes as First and Foremost Privacy Laws*

Citron and Franks frame nonconsensual pornography statutes as first and foremost aimed at protecting individual privacy.[83] Privacy laws may be viewed from two predominant angles: one that encompasses the (negative) right to be left alone,[84] and the other engendering a (positive) right to exert autonomy over one's personal information.[85] Laws aimed at preventing the nonconsensual disclosure of intimate images involve both types of privacy rights; the initial disclosure may be viewed as a breach of the right to have autonomy over one's private personal information, and the ensuing fallout from having one's intimate images disseminated can lead to the type of harm harassment and stalking laws are meant to prevent.

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78 *Id.* at 1303–04.

79 *See* Citron & Franks, *supra* note 7, at 389–90.

80 *Id.* at 1304–05.

81 *Id.* at 1263.

82 *See generally* Citron, *supra* note 10; Citron & Franks, *supra* note 7; Franks, *supra* note 10.

83 *See* Citron & Franks, *supra* note 7, at 346–48.

84 For example, the intrusion upon seclusion tort. RESTATEMENT (SECOND) OF TORTS § 652B, *supra* note 43.

85 For example, the public disclosure of private fact tort, RESTATEMENT (SECOND) OF TORTS § 652D, *supra* note 44, as well as newer regulations like the California Consumer Privacy Act of 2018 (CCPA), 1.81.5 § 1798.100, and the General Data Protection Regulation (GDPR) 2016/679 (EU).

Given the existence of many other regulations meant to safeguard private personal information,[86] revenge porn statutes should not be controversial. Lawmakers, courts, and the public at large can clearly grasp the idea that consent to share certain types of personal information is contextual and sharing in one context with a limited audience does not translate to sharing with the entire world.[87] This theory of contextual consent is the same principle Citron and Franks apply to the phenomenon of revenge porn.[88]

Citron has further elaborated on what she deems "sexual privacy" as a fundamental privacy right.[89] Both a descriptive and normative term, she defines sexual privacy as the ability to assert autonomy over our physical and emotional boundaries.[90] According to Citron, sexual privacy is necessary to give people the space for identity-formation, which can be achieved only when they have autonomy to decide what private personal information they will share with others in forming intimate relationships.[91] When an act of nonconsensual pornography undermines this autonomy, the effects of such a breach can be world-shattering for the victim, making it difficult or impossible to achieve the kind of trust required to engage in future intimate relationships.[92]

Relatedly, Franks argues freedom of speech and privacy are not at odds with each other, and that we need to protect privacy to safeguard

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86 *E.g.*, Privacy Act, 5 U.S.C. § 552a (2018); Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–81x (2012); Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–06 (2012); Gramm-Leach-Bliley Financial Services Modernization (GLB) Act, 15 U.S.C. §§ 6801–09 (2012); Electronic Communications Privacy Act, Title I (Wiretap Act), 18 U.S.C. §§ 2510–23 (2012); Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191 (104th Cong. 1996).

87 People v. Austin, 155 N.E.3d 439, 452 (Ill. 2019); State v. VanBuren, 214 A.3d 791, 811 (Vt. 2019).

88 Citron, *supra* note 10, at 1882–83; Citron & Franks, *supra* note 7, at 348; Franks, *supra* note 10, at 1276–77.

89 Citron, *supra* note 10, at 1874–75.

90 *Id.* at 1882–88. Citron argues sexual privacy "warrants recognition and protection as a foundational privacy interest," in safeguarding nothing short of "autonomy, intimacy, and equality." *Id.* at 1877–78. In framing sexual privacy as a positive, civil right that must be understood and protected, Citron lays the theoretical framework for an expanse of legal protections applicable to voyeurism, deep-fakes, sextortion, bathroom bills, nonconsensual pornography, and domestic abuse. *See generally id.*

91 *Id.* at 1897–99.

92 *Id.* at 1899. Given the disproportionate effect of sexual privacy invasions on women, sexual minorities, and people of color, recognition and protection of the right is also integral to achieving equality. *Id.* at 1890–93. While drawing on the existing scholarship of others, Citron has articulated a distinct set of privacy rights, creating a framework for courts and lawmakers to draw upon when facing the challenges wrought by emerging digital and surveillance technologies. *See id.*

free speech.[93] Proponents of the First Amendment are worried about the free expression of individuals who may be prosecuted for violating nonconsensual pornography laws.[94] However, they fail to acknowledge the free speech rights of the victims of nonconsensual pornography, and the chilling effects on their free expression if the nonconsensual sharing of intimate images is allowed to proliferate.[95]

A familiar, knee-jerk response to stories of people affected by nonconsensual pornography is that the victim should simply refrain from sharing such images if they did not want them widely disseminated.[96] Aside from the fact that not all instances of revenge porn involve images originally shared by the person depicted, this is the same kind of blame-the-victim rhetoric used to protect perpetrators of sexual assault.[97] If Citron is right about the self-actualization power of private sexual expression, to allow the nonconsensual dissemination of intimate images to go unanswered is to deny those victims access to the self-expression necessary to their identity-formation.[98]

D. *First Amendment Concerns*

The biggest hurdle facing nonconsensual pornography laws are constitutional challenges rooted in the First Amendment. The First Amendment prohibits the government from "abridging the freedom of speech."[99] The Supreme Court construes First Amendment protections broadly, and is particularly concerned with ensuring the free flow of ideas involving matters of public concern.[100] Over time, the Court's First

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93 Mary Anne Franks, *Why* Hulk vs. Gawker *Is Not About Privacy vs. Free Speech*, HUFFPOST (Mar. 24, 2017), https://www.huffpost.com/entry/why-hulk-versus-gawk-is-n_b_9527786 [https://perma.cc/5RZZ-GCAH]; *see also* Franks, *supra* note 10, at 1337.

94 *See infra* Section I.D.1.

95 Franks, *supra* note 10, at 1321.

96 *Id.* at 1321 ("Consider the typical advice meted out to those who fear falling prey to nonconsensual pornography: 'Just don't take pictures!' In addition to blaming the victim, such a response literally instructs those most likely to be victimized by this practice—that is, women—to refrain from certain forms of expressive conduct, namely, the use of image-capturing technology in their sexual expression. Such an approach is openly hostile to freedom of expression.").

97 Franks, *supra* note 10, at 1321–22; *see The Woman Defending Harvey Weinstein*, N.Y. TIMES: THE DAILY (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/podcasts/the-daily/weinstein-trial.html [https://perma.cc/4WZU-D8BQ] (suggesting that Harvey Weinstein's defense lawyer, Donna Rotunno, implies women who are sexually assaulted by male acquaintances hold ultimate responsibility for their victimization).

98 Citron, *supra* note 10, at 1897–99.

99 U.S. CONST. amend. I.

100 *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 533–34 (2001).

Amendment jurisprudence has calcified into three main categories of analysis, each burdened with a different level of scrutiny.[101] While these categories are helpful in providing a framework to courts confronted with First Amendment challenges to statutes or other state action, Justice Breyer has voiced concern that such a rigid approach runs the risk of oversimplifying matters and imposing "judicial management [on] ordinary government regulatory activity."[102]

1. Content-Based Restrictions Triggering Strict Scrutiny

Content-based restrictions are "those that target speech based on its communicative content"—in other words, laws that "appl[y] to particular speech because of the topic discussed or the idea or message expressed."[103] Content-based restrictions typically trigger strict scrutiny, meaning they are presumptively unconstitutional and the party seeking to uphold the law has the burden of showing the law is narrowly tailored to serve a compelling state interest.[104] Strict scrutiny is a high bar, and although it is presumably possible for the government to meet this burden,[105] once a statute triggers strict scrutiny the government rarely prevails.[106]

Proponents of the First Amendment assume that because nonconsensual pornography statutes prohibit the dissemination of images or videos depicting specified content, they are content-based restrictions on speech that must trigger strict scrutiny.[107] However, while there appears to be agreement among this cohort regarding the characterization of such statutes as content-based,[108] they differ in their approach to crafting a revenge porn law capable of surviving a constitutional challenge.[109]

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101 *See infra* Section I.D.

102 Reed v. Town of Gilbert, 576 U.S. 155, 177 (2015) (Breyer, J., concurring).

103 *Id.* at 163.

104 *Id.*

105 United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 846 (2000) (Breyer, J., dissenting) ("First Amendment standards are rigorous. They safeguard speech. But they also permit Congress to enact a law that increases the costs associated with certain speech, where doing so serves a compelling interest that cannot be served through the adoption of a less restrictive, similarly effective alternative. Those standards at their strictest make it difficult for the Government to prevail. But they do not make it impossible for the Government to prevail.").

106 *Id.* at 818 (majority opinion).

107 John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 221 (2014); Volokh, *supra* note 37, at 769; Complaint, *supra* note 17, at 2, 5, 20, 29.

108 *See* sources cited *supra* note 107.

109 *See* Humbach, *supra* note 107, at 249–50; Volokh, *supra* note 37, at 793–94; Complaint, *supra* note 17, at 29.

The ACLU insists nonconsensual pornography statutes require an intent-to-harass provision to pass constitutional muster,[110] and this argument has been successful in a number of states.[111] Conversely, First Amendment scholars like Eugene Volokh and John Humbach argue the inclusion of such a motive provision actually makes these laws more vulnerable to attack on free speech grounds.[112] And, where Volokh holds the door open for the possibility that a narrowly tailored law aimed at prohibiting the distribution of nude images without the subject's consent could withstand First Amendment scrutiny,[113] Humbach does not appear to agree there is any room for such a content-based prohibition.[114]

2. Content-Neutral Time, Place, and Manner Restrictions & Intermediate Scrutiny

In contrast, restrictions that are actually "'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[115] Unlike strict scrutiny, intermediate scrutiny only requires the government to prove the regulation is necessary to serve a substantial state interest that is not motivated by a desire to restrict free speech, and that it is sufficiently narrowly tailored to serve that interest without unduly

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110 *See* Complaint, *supra* note 17.

111 Lee Rowland, *VICTORY! Federal Judge Deep-Sixes Arizona's Ridiculously Overbroad 'Nude Photo' Law*, ACLU (July 10, 2015, 6:45 PM), https://www.aclu.org/blog/free-speech/internet-speech/victory-federal-judge-deep-sixes-arizonas-ridiculously-overbroad [https://perma.cc/9DBF-8DCT]; *see* State v. Casillas, 938 N.W.2d 74 (Minn. Ct. App. 2019) (holding Minnesota's nonconsensual pornography statute could not survive strict scrutiny in part because it lacks a specific intent-to-harm element).

112 Volokh, *supra* note 37, at 773–81 (explaining that speech intended with "[b]ad [p]urpose" is still entitled to constitutional protections); Humbach, *supra* note 107, at 246 (noting that "truthful speech that is otherwise protected under the First Amendment does not lose that protection merely because it was prompted by bad motivations. The reason is that, even when an ill-motivated speaker does speak out of hatred, the 'utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.'" (quoting Hustler Magazine, Inc. v. Falwall, 485 U.S. 46 (1988)) (footnote omitted)).

113 Volokh, *supra* note 37, at 762, 793–94. Additionally, Volokh appears to have endorsed Franks's model federal nonconsensual pornography statute as sufficiently narrow. Tracy Clark-Flory, *Bill that Would Make Revenge Porn Federal Crime to Be Introduced*, VOCATIV (July 14, 2016, 10:25 AM), https://www.vocativ.com/339362/federal-revenge-porn-bill [https://perma.cc/2RFL-CZ48].

114 Humbach, *supra* note 107, at 249–51.

115 City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

infringing on First Amendment freedoms.[116] To qualify for intermediate scrutiny, the law must have only "incidental" effects on free expression, and the justification for such law must be based on something other than content-moderation.[117]

In *City of Renton v. Playtime Theatres*, the Court found that because the ordinance at issue did not impose a complete ban on adult movie theaters, but merely restricted where such theaters may be located, it was properly analyzed under the less exacting standard of intermediate scrutiny, and upheld the law.[118] Though the Court acknowledged that the ordinance treats theaters showing a particular kind of content differently from others, it justified the application of intermediate scrutiny on the theory that the ordinance was not aimed at suppressing certain disfavored speech, but rather was an effort to quell the unwanted "secondary effects" of placing such theaters in certain neighborhoods.[119] Because the effects on speech were therefore "incidental,"[120] the Court was comfortable affording the town a more generous measure of deference than would have been available under a strict scrutiny analysis.

Franks argues nonconsensual pornography statutes may be analyzed as content-neutral time, place, and manner restrictions because they do not prevent an actor from sharing an image or video depicting the content described, as long as they have consent to do so.[121] Because the government does not need to show the law is the least restrictive means of serving the state interest in safeguarding individuals' sexual privacy, the "narrowly-tailored" burden is lower and it is more likely the state would be able meet it.[122]

3. Categories of Unprotected Speech & Rational Basis

Finally, it is possible, if unlikely, that courts may characterize nonconsensual pornography as falling outside First Amendment protections altogether.[123] Under this route, the presumption lies in favor

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116 People v. Austin, 155 N.E.3d 439, 456–57, 459, 462 (Ill. 2019); Franks, *supra* note 10, at 1317–18; Humbach, *supra* note 107, at 248–49.

117 *Austin*, 155 N.E.3d at 459, 462; Franks, *supra* note 10, at 1318; Humbach, *supra* note 107, at 248–50.

118 *Playtime Theatres*, 475 U.S. at 46.

119 *Id.* at 47.

120 Humbach, *supra* note 107, at 249.

121 Franks, *supra* note 10, at 1318. Thus, "[n]onconsensual pornography laws based on [her] model statute restrict no message, only the manner of distribution." *Id.*

122 *Austin*, 155 N.E.3d at 462; Franks, *supra* note 10, at 1318.

123 Franks, *supra* note 10, at 1312–17; Humbach, *supra* note 107, at 234–36.

of upholding the statute, and the government need only show a rational basis between the reason for the law and its intended effect.[124] To prevail under this theory, the government would either need to show how revenge porn belongs to an existing category of unprotected speech, such as obscenity or fighting words,[125] or make the argument that the court should create a new category of speech falling outside First Amendment protections.[126] However, the former route is unlikely,[127] and lower courts are not apt to create an entirely new category of unprotected speech without a clear ruling from the Supreme Court.[128]

II. ANALYSIS

A. *Franks's Model Statute*

According to Franks, the ideal nonconsensual pornography statute would always proscribe the following elements: "(1) the disclosure of private, sexually explicit photos or videos of an identifiable person, (2) without the consent of the person depicted."[129] Under Franks's model, the disclosure element should require a purposeful or knowing mens rea,[130] and the consent provision should require no more than a recklessness mens rea.[131]

Notably, Franks does not require the inclusion of a reasonable expectation of privacy provision in her model statute.[132] However, she

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124 Humbach, *supra* note 107, at 219, 235.

125 Franks, *supra* note 10, at 1312–17.

126 *Id.*

127 Franks, *supra* note 10, at 1313–15; Humbach, *supra* note 107, at 234–36; Volokh, *supra* note 37, at 760–61.

128 *See* People v. Austin, 155 N.E.3d 439, *cert. denied*, 141 S. Ct. 233 (2020); State v. Casillas, 938 N.W.2d 74 (Minn. Ct. App. 2019), *rev'd on other grounds*, 952 N.W.2d 629 (Minn. 2020); State v. VanBuren, 214 A.3d 791 (Vt. 2019).

129 Franks, *supra* note 10, at 1283.

130 *Id.* at 1284. A purposeful or knowing mens rea means the actor has the "conscious object" to achieve the prohibited result or is aware his conduct is "practically certain" to cause such result. MODEL PENAL CODE § 2.02(2)(a)–(b) (AM. L. INST. 1962). Such a high standard means purely accidental disclosures would not be subject to liability under the law. Franks, *supra* note 10, at 1284.

131 Franks, *supra* note 10, at 1284. Meaning, for liability to attach the actor would need to have disregarded a substantial and unjustifiable risk that the person depicted did not consent to disclosure. *Id.*

132 MARY ANNE FRANKS, DRAFTING AN EFFECTIVE "REVENGE PORN" LAW: A GUIDE FOR LEGISLATORS 10 & n.61 (2016), https://www.cybercivilrights.org/guide-to-legislation [https://perma.cc/2JHS-QMND]. Such a provision increases the state's burden because it forces

does offer such a provision as an option in an apparent effort to allay concerns the statute would be vulnerable to attack on overbreadth grounds without it.[133] The statute should include exceptions for images captured as a result of the depicted person's voluntary exposure in a public or commercial setting, as well as for disclosures made in the public interest—e.g., for law enforcement or medical purposes.[134] Franks is adamant that these laws should not include a separate motive provision requiring an intent to harm, as free speech advocates like the ACLU would like to see incorporated.[135]

B. *Constitutional Challenges to Nonconsensual Pornography Laws*

Using Franks's model statute as a guide, the following Sections analyze the nonconsensual pornography statutes of Vermont, Illinois, and Minnesota. Then, these Sections evaluate how the courts in each state have approached First Amendment challenges to these statutes. This analysis reveals how the biggest threat facing revenge porn laws is constitutional challenges based in First Amendment concerns.

1. Vermont & *State v. VanBuren*

The Vermont legislature passed its nonconsensual pornography statute in 2015,[136] which contains the main disclosure and consent elements, as well as several exceptions, that are in line with Franks's model statute.[137] In contravention of Franks's model, the Vermont statute includes an intent-to-harm provision, and a requirement that a reasonable person would suffer harm as a result of the nonconsensual disclosure.[138] The statute also incorporates a reasonable expectation of privacy provision in one of the exceptions to the law.[139] The Vermont Supreme Court also offered its own narrowing provision in *State v.*

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the state to prove, in addition to the elements mentioned above, that the victim had an objectively reasonable expectation of privacy in the disseminated image. *See id.*

133 *See id.*

134 Franks, *supra* note 10, at 1286.

135 *Id.* at 1287.

136 VT. STAT. ANN. Tit. 13, § 2606 (2021).

137 *See* discussion *supra* Section II.A. Vermont courts construe the "knowing" mens rea to apply both to the act of disclosure and the fact of nonconsent. State v. VanBuren, 214 A.3d 791, 812 (Vt. 2019).

138 Tit. 13, § 2606(b)(1).

139 *Id.* § 2606(d)(1). See FRANKS, *supra* note 132, at 10 & n.61, for Franks's ambivalence in incorporating a reasonable expectation of privacy exception.

VanBuren.[140] The court's application of this narrowing provision results in an arguably weaker statute that will have little effect where a revenge porn victim initially shared the image with another person voluntarily. Under the court's application of its narrowing provision, if the parties involved are not in a traditionally defined romantic relationship, the victim is deemed to have no reasonable expectation of privacy in the image.[141] Thus, the victim would have no redress under the statute.

The State prosecuted Rebekah VanBuren under section 2606 after she posted nude photos of the complainant to the Facebook profile of Anthony Coon, a mutual "friend."[142] The complainant had sent the photos via private message to Coon's Facebook account, not realizing VanBuren had access to the account.[143] VanBuren refused to remove the photos, and told the complainant "that she was going to ruin [her] and get revenge."[144] As the first person in Vermont to be prosecuted under section 2606, VanBuren took the opportunity to mount a facial constitutional challenge to the law, arguing that it "violated the First Amendment . . . because it restricted protected speech and it could not survive strict scrutiny."[145]

The trial court found for the defendant after concluding the statute "imposed a content-based restriction on protected speech," and that "the State failed to show that there were no less restrictive alternatives available."[146] The Vermont Supreme Court reversed on the issue of the statute's constitutionality, upholding the law after applying strict scrutiny.[147] However, in an unexpected move, the court proceeded to decide the case on the merits and ultimately found for the defendant.[148]

Without considering the other categories of scrutiny, the Vermont Supreme Court assumed section 2606 was a content-based restriction on protected speech, and thus applied strict scrutiny.[149] To survive strict scrutiny, the state must show the restriction is "narrowly tailored to serve a compelling government interest."[150] Given the harm caused by nonconsensual pornography, the low constitutional significance the Supreme Court typically affords speech involving purely private

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140 *VanBuren*, 214 A.3d at 813.

141 *Id.* at 820.

142 *Id.* at 796–97.

143 *Id.*

144 *Id.* at 796.

145 *Id.* at 797.

146 *Id.* at 798.

147 *Id.* at 800.

148 *Id.* at 817–18.

149 *Id.* at 807.

150 *Id.* at 799–800.

matters, and the existence of similar privacy restrictions in other contexts that attract little to no First Amendment scrutiny, the Vermont Supreme Court found section 2606 served a compelling state interest.[151]

After analyzing the text of the statute, the court found it was sufficiently narrow based on the following aspects: the restricted content is narrowly defined; the disclosure and lack of consent must be knowing; there must be a specific intent to harm; the harm caused is based on an objective standard; and images disclosed in the public interest, as well as those created in "public or commercial settings or in a place where a person does not have a reasonable expectation of privacy," are excluded.[152] Based on this final element, the court went a step further to offer an additional narrowing construction, and asserted that "images *recorded* in a private setting but *distributed* by the person depicted to public or commercial settings or in a manner that undermines any reasonable expectation of privacy" should also be excluded.[153] Because the statute both served a compelling state interest and was narrowly tailored to serve that interest, the court found the law survived strict scrutiny and upheld it as constitutional.[154]

This decision was initially seen as a win for proponents of nonconsensual pornography laws.[155] However, it is overshadowed by the final verdict in favor of the defendant. In her defense on the merits, VanBuren argued that the complainant had no reasonable expectation of privacy in the photos she sent to Mr. Coon, and thus no liability could attach as a result of VanBuren having posted the photos publicly on Facebook.[156] The court agreed, finding the state failed to make out a prima facie case because it provided no evidence that the relationship between the complainant and Mr. Coon was "sufficiently intimate or confidential" to engender a reasonable expectation of privacy in their communications.[157]

This conclusion is a clear result of the court's application of its narrowing provision. The narrowing provision, which excludes images distributed in a manner that would undermine the depicted person's reasonable expectation of privacy, is in line with the existing language

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151 *Id.* at 808–11.

152 *Id.* at 811–13.

153 *Id.* at 813.

154 *Id.* at 814.

155 *See, e.g.*, Nicole McLemore, *"Revenge Porn" Law Survives Constitutional Challenge in Vermont*, MIAMI LAW: RACE & SOCIAL J.L. REV., https://race-and-social-justice-review.law.miami.edu/revenge-porn-law-survives-constitutional-challenge-vermont [https://perma.cc/5LHT-LJ72] (noting, after the initial decision upholding the law under strict scrutiny, that it was a "significant victory for victims of non-consensual pornography").

156 *VanBuren*, 214 A.3d at 797.

157 *Id.* at 823.

of the statute.[158] However, the court's gloss on its narrowing provision arguably goes beyond the text of the statute to create an entirely new exception for images shared by the person depicted, with one other recipient, where there is no readily definable romantic relationship between the two parties.[159] While the statutory exception clearly refers to images created voluntarily in a *place* where the person depicted has no reasonable expectation of privacy[160]—such as in a public park, during a commercial photo or video shoot, or an analogous situation—the court's interpretation obscures this meaning by including images that are taken in private and then shared voluntarily with one other person, when that person is not necessarily an exclusive romantic partner.[161]

By applying the law in this way, the court appears to contravene its own interpretation of its narrowing provision, which stated "there is no practical difference between a nude photo someone voluntarily poses for in the public park and one taken in private that the person then voluntarily posts in that same public park."[162] While it may be the case that one does not have a reasonable expectation of privacy in an image one shares with the public, the complainant here did not share her image with the public, or even with all of her Facebook friends; she sent it via private message to a single recipient.[163] Because the court construed the statute to include a reasonable expectation of privacy as an element of the crime—rather than an affirmative defense—the state failed to meet its burden in showing the victim had a reasonable expectation of privacy in the image she initially shared voluntarily.[164] The court thus affirmed the trial court's dismissal of the claim.[165]

Why did the court feel the need to add its own narrowing provision to a statute that was already, by the court's own account,[166] sufficiently narrow to withstand constitutional scrutiny? One possible answer is, despite the court's admittedly deep analysis and careful weighing of both the privacy and free speech interests at stake, the presumption against constitutionality[167] that comes with strict scrutiny carries so

158 The actual text of the statute reads: "This section shall not apply to . . . [i]mages involving voluntary nudity or sexual conduct in public or commercial settings or in a place where a person does not have a reasonable expectation of privacy." VT. STAT. ANN. tit. 13, § 2606(d)(1) (2021).

159 *VanBuren*, 214 A.3d at 820.

160 § 2606(d)(1).

161 *VanBuren*, 214 A.3d at 820.

162 *Id.* at 813.

163 *Id.* at 818.

164 *Id.* at 821–22.

165 *Id.* at 823.

166 *Id.* at 812.

167 *See supra* notes 104–06 and accompanying text.

much weight that the court could not help but be pulled by its gravitational force—even after finding the statute constitutional. This is arguably the point of strict scrutiny analysis: to prompt courts to be exceedingly skeptical of laws that either directly or indirectly have the effect of stifling free expression.[168] But the *VanBuren* decision shows how this analysis may also distort the court's view of the salient issues at stake. Without the presumption against constitutionality that comes with strict scrutiny,[169] the court might have been satisfied that section 2606 was sufficiently drafted to protect the privacy interests of revenge porn victims, and that it did not disproportionately burden the free speech interests at stake. Instead, the skepticism attendant to strict scrutiny led the court to adopt a narrowing provision, the application of which will make it difficult—if not impossible—for a wide swath of revenge porn victims in Vermont from achieving redress under section 2606.

2. Illinois & *People v. Austin*

In contrast, the Illinois Supreme Court applied intermediate scrutiny to its nonconsensual pornography statute in *People v. Austin*,[170] and ultimately upheld the law.[171] The Illinois statute, section 11-23.5,[172] contains the basic dissemination and consent provisions found in Franks's model statute.[173] The dissemination element requires an intentional (purposeful) mens rea, just like the model.[174] The consent element requires a knowing or negligent mens rea,[175] in line with the model statute, which calls for no higher than a recklessness standard.[176] The statute also includes a reasonable expectation of privacy provision, which requires that the disseminator "obtain[ed] the image under circumstances in which a reasonable person would know or understand that the image was to remain private."[177] The reasonable expectation of privacy provision calls for a negligence mens rea.[178]

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168 *See, e.g.*, United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 817–18 (2000).

169 *See supra* notes 104–06 and accompanying text.

170 People v. Austin, 155 N.E.3d 439, *cert. denied*, 141 S. Ct. 233 (Oct. 5, 2020).

171 *Id.* at 474.

172 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2021).

173 *Compare* 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2021), *with* Franks, *supra* note 10, at 1284–86 (discussing the elements of Franks's model statute). *See also supra* Section II.A.

174 *See supra* Section II.A.

175 5/11-23.5(b)(3).

176 Franks, *supra* note 10, at 1284; *see supra* Section II.A.

177 5/11-23.5(b)(2).

178 *Id.*

The State prosecuted Bethany Austin under section 11-23.5 after she sent nude photos of her ex-fiancé's lover to their mutual friends and family.[179] In response, Austin moved to dismiss the charge, arguing the statute is a content-based restriction on speech and is therefore unconstitutional on its face.[180] The court rejected the contention held by both parties that section 11-23.5 was a content-based restriction requiring strict scrutiny.[181] Instead, the court found the statute was a "content-neutral time, place, and manner restriction . . . regulat[ing] a purely private matter."[182]

The court based its decision to apply intermediate scrutiny on these two distinct conclusions: first, that the statute was "a content-neutral time, place, and manner restriction"; and second, that it "regulates a purely private matter."[183] Regarding the first conclusion, the court acknowledged the statute targets a particular category of speech while explaining that "[g]overnment regulation of speech 'is content neutral so long as it is *justified* without reference to the content of the regulated speech.'"[184] Relying on *City of Renton v. Playtime Theatres*,[185] and *Turner Broadcasting System v. FCC*,[186] the court concluded that "the proper focus is on whether the government has addressed a category of speech to suppress discussion of that topic."[187]

The purpose of section 11-23.5 is not to suppress speech, but is rather focused on protecting privacy.[188] Because the statute does not prohibit the communication of specific content, but rather regulates the manner in which the content described in section 11-23.5 may be communicated, the court reasoned that it is "[t]he *manner* of the image's acquisition and publication, and not its *content*, [which] is thus crucial to the illegality of its dissemination."[189] Such a law is therefore subject to intermediate scrutiny because it "generally present[s] a less

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179 People v. Austin, 155 N.E.3d 439, 449 (Ill. 2019).

180 *Id.* at 449.

181 *Id.* at 456.

182 *Id.* at 456 (explaining that "[i]n contrast to content-based speech restrictions, 'regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny [citation] because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.'" (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994) (alteration in original)).

183 *Id.* at 456–59.

184 *Id.* at 457 (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

185 City of Renton v. Playtime Theatres, 475 U.S. 41 (1986).

186 Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

187 *Austin*, 155 N.E.3d at 457.

188 *Id.*

189 *Id.*

substantial risk of excising certain ideas or viewpoints from the public dialogue."[190]

Addressing the second conclusion, the court looked to the overarching purpose of the First Amendment, finding that while "speech on public issues occupies the highest position of the hierarchy of [F]irst [A]mendment values and is entitled to special protection," those "protections are less rigorous where matters of purely private significance are at issue."[191] The court had no trouble recognizing "that the nonconsensual dissemination of the victim's private sexual images was not an issue of public concern."[192] As such, the statute simply "does not pose such inherent dangers to free expression or present such potential for censorship or manipulation as to justify application of strict scrutiny."[193]

This point is significant because the court looked beyond the categories of "content-based" and "content-neutral" to contend with the fundamental purpose of the First Amendment.[194] By basing its decision to employ intermediate scrutiny on the underlying goals of free speech protections, namely to foster and safeguard public debate on matters of social and political import, the court engaged directly with the competing interests of free speech and privacy and reasoned that the statute was not a threat to those goals.[195] Under this intermediate scrutiny analysis, the court held section 11-23.5 was sufficiently narrowly tailored to serve a compelling state interest, and that it did not restrict more speech than necessary.[196]

The court reinforced its holding that section 11-23.5 is a privacy regulation aimed at protecting purely private information, rebuking Austin's attempt to argue that once an image is shared, it ceases to be a private matter absent express assurances that it will remain confidential.[197] Instead, given the nature of such intimate images as purely private material, the court found there is an implicit duty on the part of the recipient to keep such images private.[198] By characterizing the statute as a content-neutral time, place, and manner restriction, the

190 *Id.* at 458.

191 *Id.*

192 *Id.* at 459.

193 *Id.*

194 *See id.* at 458–59.

195 *See id.* at 458–59.

196 *Id.* at 466.

197 *Id.* at 474.

198 *Id.*

Illinois Supreme Court afforded the privacy interests at stake equal weight to the free speech concerns advanced by the defendant.[199]

3. Minnesota & *State v. Casillas*

a. Court of Appeals Decision

In December of 2019, an appellate court in Minnesota struck down the state's nonconsensual pornography statute as overly broad in *State v. Casillas*.[200] The statute, section 617.261, went into effect in August 2016, and prohibits the intentional dissemination of a sexual image of an identifiable person without consent where the person depicted has a reasonable expectation of privacy in the image.[201]

The dissemination provision requires an intentional (purposeful) mens rea, in keeping with the model statute.[202] The consent provision requires only a negligence mens rea, meaning the actor may be held liable if he should have known the person depicted did not consent to its dissemination.[203] Similarly, the reasonable expectation of privacy provision requires only a negligence mens rea as to the actor's understanding of the depicted person's privacy expectations.[204] A violation of section 617.261 is a gross misdemeanor, unless certain aggravating factors are present.[205] Two notable aggravating factors are (1) "the person depicted in the image suffers financial loss due to the dissemination of the image," and (2) "the actor disseminates the image with intent to harass the person depicted in the image," which relate to the issues of specific intent and actual harm caused by the proscribed conduct.[206]

Michael Anthony Casillas was charged with violating section 617.261 after he accessed his ex-girlfriend's wireless account and stole her private, intimate photos and videos before sharing them directly with at least forty-four recipients and posting them online.[207] The trial court found the statute regulates obscenity, and thus rejected Casillas's

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199 *See id.* at 459–62.

200 938 N.W.2d 74 (Minn. Ct. App. 2019).

201 MINN. STAT. ANN. § 617.261 (West 2021).

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 State v. Casillas, 938 N.W.2d 74, 77–78 (Minn. Ct. App. 2019), *rev'd*, 952 N.W.2d 629 (Minn. 2020).

facial challenge to the statute as overbroad, and found him guilty.[208] However, the appellate court reversed, finding section 617.261 does not regulate obscenity, and that the statute is unconstitutionally overbroad on its face.[209] On December 30, 2020, the Minnesota Supreme Court reversed that decision, upholding the law as constitutional.[210]

The intermediate appellate court proceeded from the assumption that section 617.261 is a content-based restriction on expressive conduct, and thus framed the inquiry in terms of whether the statute prohibits a substantial amount of protected speech in relation to its legitimate sweep.[211] The court rejected the state's contention that as a privacy regulation, the statute does not implicate the First Amendment, because privacy invasions are not a category of unprotected conduct.[212] Ultimately the court concluded the statute is unconstitutionally overbroad because it lacks a specific intent-to-harm element, and because the consent and reasonable expectation of privacy provisions require only a negligence mens rea.[213]

Because of the negligence mens rea, the court purported to imagine a plethora of otherwise innocent conduct that would engender criminal liability under the statute.[214] The court never considered how the context in which an intimate image is obtained will inform whether a reasonable person in the actor's position would, or should, know the person depicted never consented to its disclosure.[215] Instead, the court assumed an actor who finds and then shares an image on the internet depicting the kind of nudity described by the statute, without knowing the circumstances of its provenance, would be held liable under section 617.261 if it turns out the person depicted never consented to its dissemination.[216]

However, it is not at all clear that a court or jury would find a person in the actor's position reasonably should have known the person depicted neither consented to its dissemination nor had a reasonable

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208 *Id.*

209 *Id.*

210 *See infra* Section II.B.3.b.

211 *Casillas*, 938 N.W.2d at 78–82.

212 *Id.* at 83–84.

213 *Id.* at 85–90.

214 *Id.* at 89 ("It is not difficult to envision a substantial number of situations in which a person observes an image that may have been disseminated in violation of Minn. Stat. § 617.261 and further disseminates that image without knowing that the subject of the image did not consent to the original dissemination, without knowing that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy, and without intending to cause a specified harm.").

215 *See generally id.*

216 *See id.* at 89.

expectation of privacy in the image. While the court worried about the chilling effects section 617.261 will have on expressive conduct, it appeared wholly unconcerned with the chilling effects on the private, expressive conduct involved in creating the images which may become revenge porn in the absence such a law.[217] Because the court proceeded from the assumption that it must apply strict scrutiny, it readily found an incurable constitutional problem with the statute.[218]

b. Minnesota Supreme Court Decision

On December 30, 2020, the Minnesota Supreme Court reversed[219] the appellate court's finding that the statute failed to survive strict scrutiny. The court declined to determine whether the Minnesota statute was a content-based or content-neutral restriction because it was satisfied that even under the more exacting strict scrutiny standard, the statute was constitutional.[220] Given the obvious harm wrought by the dissemination of nonconsensual pornography, the court found that the state had a compelling interest in preventing such harm to its citizens.[221] The court then determined that the statute was narrowly tailored to serve that interest.[222] It enumerated five factors that compelled this result: (1) the legislature specifically defined the proscribed image;[223] (2) the disclosure must be intentional, as opposed to reckless or negligent;[224] (3) there are numerous exemptions protecting dissemination for legal, scientific, medical, commercial, educational, or journalistic purposes;[225] (4) the defendant must act without consent to be eligible for prosecution;[226] and (5) crucially, the type of speech proscribed by the statute involves only private speech.[227] This final factor is significant, and illustrates an important aspect of the U.S. Supreme Court's First Amendment jurisprudence—i.e., that certain private speech does not carry the same constitutional weight as speech

217 *Id.* at 89–90; *see also* discussion *supra* Section I.C.

218 *See Casillas*, 938 N.W.2d at 78–90.

219 State v. Casillas, 952 N.W. 2d 629, 634 (Minn. 2020).

220 *Id.* at 641 ("In this case, we need not determine whether Minnesota Statutes § 617.261 is content-based or content-neutral because we find that the State has met its burden under the more searching strict scrutiny analysis.").

221 *Id.* at 642 (noting that "[e]ven if a victim is fortunate enough to avoid the serious mental, emotional, economic, and physical effects, the person will still suffer from humiliation and embarrassment. The harm largely speaks for itself.").

222 *Id.* at 643–44.

223 *Id.* at 643.

224 *Id.*

225 *Id.*

226 *Id.* at 642–43.

227 *Id.* at 643–44.

involving matters of public concern.[228] Having rejected the appellate court's reasoning for invalidating the statute, the Minnesota Supreme Court remanded with instructions to render a decision on Casillas's remaining issues raised on appeal.[229]

While this decision is certainly a win for privacy advocates and revenge porn victims, the court's application of strict scrutiny is at odds with its recognition that private speech has diminished constitutional value. That the court side-stepped the question of whether the statute was a content-based or content-neutral restriction on speech on its way to concluding that the law survives strict scrutiny also reveals a discomfort with such a categorical approach. Rather than grapple with that question, the court obviates the need for discussing such a distinction by jumping to the strict scrutiny analysis. This may have been the "safer" choice—by holding the statute to the heightened standard, the court kills two birds (i.e., standards of review) with one stone. However, by side-stepping the threshold question of whether strict scrutiny applies, the court is chipping away at the distinction between strict and intermediate scrutiny. The court thereby sets a precedent that will no doubt increase the state's burden in future cases because the state will presumably always have to satisfy strict scrutiny in cases involving First Amendment challenges to its laws. The ultimate outcome here is a win for revenge porn victims and privacy advocates, but it remains to be seen how the court's analysis will shape cases involving similar clashes between privacy and free speech in the future.

III. PROPOSAL

Courts confronting First Amendment challenges to revenge porn laws should decline to apply strict scrutiny as the operative legal standard. Strict scrutiny is the appropriate standard of review when the statute at issue works to censor ideas or stifle political debate. In such contexts, strict scrutiny is doubtless a necessary bulwark against government overreach and oppression of disfavored or minority viewpoints. However, when properly drafted, nonconsensual pornography laws do not implicate the kind of speech the First Amendment and strict scrutiny are meant to protect. Further, because nonconsensual pornography laws work to protect the privacy of victims, these statutes ultimately serve the First Amendment by safeguarding the kind of intimate expression Citron argues is necessary for identity formation. By holding revenge porn laws to the onerous

228 *See, e.g.*, *id.* at 642–43 (collecting cases); *see also* discussion *infra* Section III.A.

229 *Id.* at 646–47.

strict scrutiny standard, courts risk victims' freedom to express themselves in intimate relationships in favor of the disseminator's freedom to share another's intimate image as a perverse form of entertainment. Rather than relying on a categorical approach that often triggers a strict scrutiny analysis, courts should look to the Illinois Supreme Court, together with Justice Breyer's balancing approach, as models for assessing the validity of their own nonconsensual pornography laws.

A. *Strict Scrutiny Is Most Appropriate Where Core Political Speech Is Implicated*

The Supreme Court has interpreted the Free Speech Clause of the First Amendment to protect a broad swath of expression, including speech about "politics, nationalism, religion, or other matters of opinion."[230] Strict scrutiny review, as already discussed, carries a presumption that the challenged law is unconstitutional, and imposes an onerous burden on the state to overcome that presumption by proving the statute is narrowly tailored to serve a compelling state interest.[231] This level of scrutiny is appropriate where the core tenants[232] of the First Amendment are at stake. Because of the potential chilling effects that come with censorship of ideas regarding matters of public concern,[233] and the ensuing detrimental effects such censorship can

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230 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

231 *See* discussion *supra* Section I.D.1.

232 *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011) ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. 'If 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.'" (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

233 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.' Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First . . . Amendment[]." (citations omitted)).

have on our democratic institutions,[234] strict scrutiny is necessary in certain circumstances to safeguard the free exchange of ideas.

However, when the ideas at issue do not involve matters of public or political import, but rather only concern private interactions, such a high standard of review is not necessary because the First Amendment ideals at stake are minimal. The Court has already recognized as much in the case of *City of San Diego v. Roe*,[235] where a cop was fired after his superiors discovered he was selling self-styled porn on eBay. Because the speech at issue did not involve a matter of public concern, the Court declined to apply the balancing test it established in *Pickering v. Board of Education*,[236] in which a court must balance the employee's right to freely comment upon matters of public concern against the state's interest in maintaining a well-functioning workplace.[237] Like strict scrutiny, such a balancing test functions to protect employees' right to free speech in the face of a government employer's sanctions. Instead, the Court in *City of San Diego v. Roe* had no trouble concluding that the speech at issue—making and selling pornography while clad in his police officer uniform—did not involve a matter of public concern.[238] Accordingly, the San Diego Police Department's decision to fire him over the videos was not subject to the higher scrutiny involved in *Pickering* balancing.[239]

This conclusion—that speech not involving a matter of public import does not implicate core First Amendment values—also

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234 *See id.* at 270 ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." (quoting Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)) (first omission in original)).

235 543 U.S. 77 (2004).

236 391 U.S. 563 (1968).

237 *Roe*, 543 U.S. at 82 ("To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" (quoting *Pickering*, 391 U.S. at 568)).

238 *Id.* at 84.

239 *Id.*

animated the Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[240] In that case, the Court refined its holding from *Gertz v. Robert Welch, Inc.*,[241] to find that a private plaintiff in a defamation case need not prove actual malice where the statements at issue involve only private matters.[242] The speech at issue in *Dun & Bradstreet* involved information in the plaintiff's credit report, which erroneously stated the plaintiff had filed for bankruptcy.[243] In contrast to *New York Times Co.* and *Gertz*, the Court concluded that the false statements in the credit report were of little constitutional value, and that the state's interest in protecting the private plaintiff's reputation was substantial in relation to the potential chilling effects of allowing presumed and punitive damages.[244] In other words, because the speech at issue added little value to public discourse, its First Amendment protections were not as stringent as speech involving matters of public concern.[245] Therefore, the plaintiff did not need to meet the high "actual malice" burden established in *New York Times Co.* and was entitled to both presumed and punitive damages even absent such a showing.[246] Courts should employ this same reasoning when it comes to First Amendment challenges to revenge porn laws: where the speech targeted by a given statute involves matters of only private concern, First Amendment protections are less stringent and may be outweighed by the state's interest in protecting individuals' privacy.[247]

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240 472 U.S. 749 (1985).

241 418 U.S. 323 (1974). *Gertz* declined to extend *New York Times Co.*'s actual malice standard to defamation cases brought by private individuals—even though the speech at issue involved matters of public concern. *See id.* at 352.

242 *Dun & Bradstreet*, 472 U.S. at 763 ("We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern.").

243 *Id.* at 751.

244 *Id.* at 760–61 ("While such speech is not totally unprotected by the First Amendment, its protections are less stringent. In *Gertz,* we found that the state interest in awarding presumed and punitive damages was not 'substantial' in view of their effect on speech at the core of First Amendment concern. This interest, however, *is* 'substantial' relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. . . . In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'" (citations omitted)).

245 *Id.* at 759–60.

246 *Id.* at 761.

247 *See, e.g.*, *id.* at 759–61.

B. *Properly Drafted Revenge Porn Statutes Do Not Implicate the Kind of Speech at the Core of First Amendment Protections*

Nonconsensual pornography statutes that adhere to Franks's model statute do not implicate the kind of expression traditionally protected by First Amendment strict scrutiny analysis. If properly drafted, a nonconsensual pornography statute would prohibit an actor from disseminating only those intimate or sexually explicit images of an identifiable person without their consent.[248] A properly drafted statute would include an exception for intimate images disclosed pursuant to law enforcement work, medical need, or other public interest, and would also exclude images of people who voluntarily expose themselves in public or in a commercial setting.[249] Further, Franks is clear that the requisite mens rea for each element of the crime would preclude purely accidental disclosures from criminal sanction.[250]

Admittedly, not every state legislature has drafted their revenge porn statute according to Franks's *Guide*.[251] Courts dealing with challenges to revenge porn laws will have to assess each statute according to its own terms. If a court finds a statute prohibits only private speech, the presumption should not be against the statute's constitutionality.[252] Instead, where it is clear the statute proscribes only private speech,[253] courts should decline to apply strict scrutiny. By rejecting this heightened standard in favor of intermediate scrutiny, the practical implications will result in states having a lower burden in proving the statute is sufficiently tailored to serve its important interest.[254] With an intermediate level of scrutiny, nonconsensual pornography statutes that lack a reasonable expectation of privacy or specific intent provision are more likely to withstand a First Amendment challenge.[255] Courts will still have to engage in balancing First Amendment protections against the state's interest in protecting privacy, but it will be a true balancing—the deck will no longer be

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248 *See* FRANKS, *supra* note 132, at 5.

249 *See* FRANKS, *supra* note 132, at 6–7.

250 *See supra* Section II.A.

251 Franks herself acknowledges as much. FRANKS, *supra* note 132, at 5.

252 See *supra* notes 104–06 and accompanying text for discussion of strict scrutiny and the attendant presumption against constitutionality.

253 For example, as the Minnesota Supreme Court found in *State v. Casillas*, that the "statute covers only private sexual images and does not prohibit speech that is 'at the core of protected First Amendment speech.'" State v. Casillas, 952 N.W.2d 629, 644 (Minn. 2020) (quoting Matter of Welfare of A. J. B., 929 N.W.2d 840, 853 (Minn. 2019)).

254 See *supra* Section I.D.2 for discussion of the intermediate scrutiny standard.

255 *See* People v. Austin, 155 N.E.3d 439 (Ill. 2019) (applying intermediate scrutiny and upholding Illinois's nonconsensual pornography law); *see also supra* Section II.B.2.

stacked against states[256] in their effort to protect the privacy of its citizens.

C. *Justice Breyer's Balancing Approach*

Courts confronting free speech challenges to revenge porn laws should also look to Justice Breyer's First Amendment jurisprudence for guidance. Justice Breyer has spoken out in both concurrence and dissent to caution against reliance on pre-ordained categories like content-based and content-neutral and their attendant presumptions.[257] Where a case centers on the clash between free speech on the one hand, and privacy interests on the other, Justice Breyer has pushed back on the application of strict scrutiny as "out of place where . . . important competing constitutional interests are implicated."[258] Favoring a more nuanced approach to such a thorny issue, Justice Breyer would instead ask whether the proposed regulation has a disproportionate effect on free speech in light of the "privacy and speech-related benefits" at stake, "taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits[.]"[259] While this may not appear to be particularly revolutionary—after all, balancing competing interests is what judges are called on to do all the time[260]—it is a necessary reminder of the important interests at stake when free speech and privacy collide. Justice Breyer is simply returning the focus to the underlying issues themselves.

Even so, where the restriction appears to implicate the kind of speech the First Amendment is traditionally thought to protect, Justice Breyer believes a strong presumption against constitutionality is appropriate.[261] But where the government is regulating an area arguably

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256 *See supra* notes 104–06 and accompanying text.

257 *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring); Reed v. Town of Gilbert, 576 U.S. 155, 178–79 (2015) (Breyer, J., concurring); Sorrell v. IMS Health, Inc., 564 U.S. 552, 580–92 (2011) (Breyer, J., dissenting).

258 *Bartnicki*, 532 U.S. at 536.

259 *Id.*

260 *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 80 (2004) (balancing the First Amendment rights of government employees against government employers' right to restrict certain employee speech); Roe v. Wade, 410 U.S. 113 (1973) (balancing a woman's right to terminate a pregnancy against the state's interest in protecting the potentiality of human life and the health of the woman).

261 *Reed*, 576 U.S. at 178–79 ("The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public

within its purview, like sensitive personal information, courts should take seriously the reasons put forth for such a restriction and determine whether any incidental restrictions on free expression outweigh the harm sought to be quelled.[262] This approach not only honors the gravity of competing constitutional rights, but also respects the separation of powers between the coordinate branches by recognizing the legislature's obligation to regulate activity the electorate deems necessary.[263] If courts confronting First Amendment challenges to nonconsensual pornography statutes took Justice Breyer's approach seriously, they would have to consider not only the free speech interests of defendants, but the equally weighty privacy interests of victims.[264]

The obvious counterargument to employing Justice Breyer's approach is that he is merely one Justice, and his approach has never garnered enough votes to win a majority. However, Justice Breyer's approach is arguably in line with, and perhaps more faithful to, the Court's First Amendment jurisprudence. When confronted with clashes between free speech and privacy—"a conflict between interests of the highest order"[265]—the Court has been careful to circumscribe its opinions, limiting its rulings to the facts at hand.[266]

Florida Star v. B.J.F.[267] is illustrative. Rather than relying on predetermined categories that carry presumptions of unconstitutionality, the Court carefully weighed the privacy interests of a rape victim whose name was published in the local paper (in contravention of the paper's own policy and state law), against the First Amendment rights of the paper to publish truthful information regarding a matter of public concern.[268] The Court ultimately found for the *Florida Star*, however it explicitly rejected the proposition that "there is no zone of personal privacy within which the State may protect the individual from intrusion."[269] In acknowledging the important privacy interests of the victim, and stressing its holding was limited, the

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forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification.").

262 *See, e.g.*, *id.* at 177–79.

263 *Id.* at 179.

264 *Bartnicki*, 532 U.S. at 536.

265 *Id.* at 518.

266 Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989) ("We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.").

267 *Id.*

268 *Id.* at 530–41.

269 *Id.* at 541.

Court signaled its willingness to accept there may be future cases in which privacy interests outweigh free speech concerns.[270]

By giving equal weight to the free speech and privacy concerns at stake, nonconsensual pornography statutes will be less burdened by the presumption against constitutionality. Still, this approach allows for the possibility a given statute may be struck down for impermissibly restricting more speech than necessary to achieve its privacy-related goals. Given the nature of nonconsensual pornography—which has no political value and creates an extremely damaging invasion of privacy[271]—courts should shun any approach to construing such laws that would replace careful analysis of the relevant interests with a cut and dried application of pre-ordained categories.[272]

CONCLUSION

Recent history has shown nonconsensual pornography laws are necessary to curb the practice of sharing intimate images without consent. Legislatures across the country have recognized the need for such regulation. Courts should not dispose of these efforts by relegating nonconsensual pornography statutes to a predefined, presumably unconstitutional category in lieu of careful consideration of the important competing interests at stake. If courts reckon honestly with the competing constitutional interests, all stakeholders will benefit. Such reckoning will provide a more solid foundation upon which legislators, law enforcement, courts, and affected individuals may build an equitable nonconsensual pornography law regime.

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270 Indeed, the Court went so far as to state that, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition . . . ." *Id.* at 534.

271 *See, e.g.*, State v. VanBuren, 214 A.3d 791, 808–11 (Vt. 2019); People v. Austin, 155 N.E.3d 439, 452, 458–59 (Ill. 2019); State v. Casillas, 952 N.W.2d 629, 641–42, 644 (Minn. 2020).

272 *See supra* Section I.D.