University of Miami Law Review

Volume 70
Number 1 *Volume 70 Number 1 (Fall 2015)*

Article 9

10-1-2015

Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech

Alix Iris Cohen

NOTES

Nonconsensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech

ALIX IRIS COHEN*

Nonconsensual pornography, or the distribution of sexually graphic images of individuals without their consent, is not illegal at the federal level, nor is it illegal in the majority of states. Failure to pass laws prohibiting nonconsensual pornography, commonly referred to as "revenge porn," leaves many victims without recourse. Opponents of legislation regulating revenge porn claim that it cannot be banned because it constitutes speech that is protected by the First Amendment. This Comment argues that nonconsensual pornography should be considered an unprotected category of speech, which would enable it to be prohibited without triggering First Amendment concerns. The method of regulating revenge porn (i.e., through particular torts or criminal prohibitions) is beyond the scope of this Comment; instead, it focuses on why this speech should be unprotected, opening the door for legislatures to regulate it as they see fit.

Nonconsensual pornography should not be protected by the First Amendment because of its similarities to existing unprotected categories of speech: namely, public disclosure of

* BA 2013, New York University; JD Candidate 2016, University of Miami School of Law. I would like to thank Professor Caroline Mala Corbin for her invaluable support, feedback, and assistance throughout the writing of this Comment.

private fact, defamation, and child pornography. Part I presents the three theories often articulated for why the First Amendment protects speech: to create a marketplace of ideas, facilitate participatory democracy, and promote individual autonomy. Part II explains why certain types of speech are unprotected: because their minimal value towards advancing these free speech goals is outweighed by the significant harm they cause. Part III discusses three current unprotected categories: public disclosure of private fact, defamation, and child pornography. For each, it explains why they have been found to be unprotected - balancing their contribution to promoting free speech values against the harms they cause. Part IV argues for revenge porn as a new unprotected category, first defining the parameters of the category, discussing what the category should encompass in order to ensure it is not overbroad. It then highlights nonconsensual pornography's low free speech value and analogous harms to the existing three categories—showing it is indistinguishable from speech that has already been deemed unprotected.

INTRODUCTION 303
I. WHY SPEECH IS PROTECTED 306
A. *Marketplace of Ideas* 307
B. *Participatory Democracy* 308
C. *Individual Autonomy* 309
II. DETERMINING CATEGORIES OF UNPROTECTED SPEECH 310
A. *Balancing Test* 311
B. *Reluctance to Declare New Categories* 312
III. CURRENT UNPROTECTED CATEGORIES OF SPEECH 314
A. *Public Disclosure of Private Fact* 314
1. DEFINITION 314
a. *Public Disclosure* 314
b. *Private Fact* 315
2. FREE SPEECH VALUE 318
a. *Marketplace of Ideas* 318
b. *Participatory Democracy* 319

c. *Individual Autonomy* 319
3. HARM 320
B. Defamation.....322
1. DEFINITION.....322
a. *Public Figure*.....322
b. *Private Figure* 323
2. FREE SPEECH VALUE.....324
a. *Marketplace of Ideas*.....324
b. Participatory Democracy.....325
c. *Individual Autonomy* 326
3. HARM 326
C. *Child Pornography* 327
1. DEFINITION.....327
2. FREE SPEECH VALUE.....328
a. *Marketplace of Ideas*.....329
b. *Participatory Democracy*.....329
c. *Individual Autonomy* 330
3. HARM 330
IV. REVENGE PORN AS A NEW UNPROTECTED CATEGORY 331
A. *Definition* 331
1. CONSENTING TO ONE IS NOT CONSENTING TO ALL 332
2. NO PUBLIC VS. PRIVATE FIGURE DISTINCTION 334
B. *Free Speech Value* 335
1. MARKETPLACE OF IDEAS.....335
2. PARTICIPATORY DEMOCRACY 337
3. INDIVIDUAL AUTONOMY 338
C. *Harm* 339
1. DIRECT HARM 340
a. *Individual Harms: Psychological & Emotional Damage* 340
b. *Community Harms: Reputation & Economic Loss*.....343
2. INDIRECT HARM.....344
a. *Harm to Future Victims* 344
b. *Harm to Women in General*.....345
CONCLUSION.....346

INTRODUCTION

A human trafficking victim testified that her former pimp, Alex Campbell, forced her to have sex with another woman while he videotaped her and then threatened to send the video to her family if she did not "come back into his grasp."[1] A high school teacher's ex-boyfriend allegedly accessed his email account and sent naked photos of the teacher to 287 of his students and staff after the two broke up.[2] A woman's ex-boyfriend posted a topless photo of her on her employer's Facebook page, accompanied by a message calling her a "drunk" and a "slut."[3]

While each of these perpetrators may be prosecuted on other grounds (i.e., for human trafficking),[4] the underlying act—the distribution of nonconsensual pornography—is not illegal in many states.[5] Failure to pass laws prohibiting nonconsensual pornography leaves many victims without recourse.[6] Nonconsensual pornography, often referred to as revenge porn (used interchangeably

---

[1] Marion Brooks, *The World of Human Trafficking: One Woman's Story*, NBC CHICAGO (Feb. 22, 2013), http://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html.

[2] Andy Campbell, *Jilted Ex-Boyfriend Sends Nude Photos of Teacher To Students, Staff: Police*, HUFFINGTON POST (Nov. 4, 2014), http://www.huffingtonpost.com/2014/11/04/richard-rosa-david-galvan_n_6099464.html.

[3] Office of the City Attorney for the City of Los Angeles, *Press Release: City Attorney Feuer Secures Conviction Under State's "Revenge Porn" Law* (Dec. 1, 2014), http://freepdfhosting.com/b9b7570cb1.pdf.

[4] *See* Brooks, *supra* note 1.

[5] *See* Mary Anne Franks, *Drafting an Effective "Revenge Porn" Law: A Guide for Legislators*, ENDREVENGEPORN.ORG (July 18, 2014), http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf.

[6] *See, e.g.*, Erin Donaghue, *Judge Throws Out New York 'Revenge Porn' Case*, CBS NEWS (Feb. 25, 2014), http://www.cbsnews.com/news/judge-throws-out-new-york-revenge-porn-case/ (New York judge ruled that a man who posted nude photos of his ex-girlfriend on Twitter and sent them to her employer and sister, allegedly without the woman's consent, did not violate any existing criminal law); *see also* Amanda L. Cecil, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2517 (2014) (Court of Appeals of Texas held class action suit against web-hosting company for displaying nude images of women on one of their web sites without the women's consent should be dismissed because publishing images taken by a third party is not illegal); *see also* Annmarie Chiarini, *I Was a Victim*

throughout this Comment), is the "distribution of sexually graphic images of individuals without their consent."[7] The images include those originally taken without consent and those initially taken with consent—most often within a private relationship—and then distributed to others without consent.[8] Revenge porn is commonly posted online by "ex-boyfriends, ex-husbands and ex-lovers, often accompanied by disparaging descriptions and identifying details, like where the women live and work, as well as links to their Facebook pages."[9] Once online, the images spread—often "picked up by dozens or even hundreds of other Web sites."[10] These images, exposing individuals' most private aspects of themselves, are often published to perpetrate abuse, to embarrass, or to shame.[11]

While prior to 2013, only three states—New Jersey, Alaska, and Texas—had laws criminalizing nonconsensual pornography, ten states passed laws in 2013 and 2014, and legislation has been introduced or is pending in eighteen other states, as well as in Washington D.C. and Puerto Rico.[12] However, many state proposals and federal legislation have faced opposition from critics arguing that such laws infringe on the First Amendment to the U.S. Constitution's protection of free speech.[13] A bill addressing the issue in Florida, for

---

of Revenge Porn. I Don't Want Anyone Else to Face This, THE GUARDIAN (Nov. 19, 2013), http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change (When Chiarini's ex-boyfriend auctioned a CD of 88 naked images of her on eBay without her consent, the Baltimore County police told her there was nothing they could do because "[n]o crime had been committed.").

[7] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014).

[8] *Id.*

[9] Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N.Y. TIMES (Sept. 23, 2013), http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?pagewanted=all&_r=0.

[10] *Id.*

[11] *See, e.g.*, *supra* text accompanying notes 1–3.

[12] As of the time this Comment was written. Franks, *supra* note 5, at 2.

[13] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . ."); *see also* Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex To The Internet*, BUS. INSIDER (Oct. 1, 2013), http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9; Steven Nelson, *Federal 'Revenge Porn' Bill Will Seek to Shrivel Booming Internet Fad*, U.S. NEWS (Mar. 26, 2014), http://www.usnews.com/news/articles/2014/03/26/federal-revenge-porn-bill-will-seek-to-

instance, failed in the state's legislature in 2013, in part because of First Amendment concerns.[14] Under the First Amendment, speech is not limited to spoken words, but also covers other forms of expression—including images.[15] Thus, laws that ban or criminalize the distribution of images may raise free speech questions.

This Comment argues that nonconsensual pornography should be considered an unprotected category of speech, which would enable it to be prohibited without triggering First Amendment concerns.[16] The method of regulating nonconsensual pornography (i.e., through particular torts or criminal prohibitions) is beyond the scope of this Comment; instead, this Comment focuses on why nonconsensual pornography should be unprotected, opening the door for legislatures to regulate it as they see fit.

Arguably, distributing nonconsensual pornography should be considered conduct, not speech, because nonconsensual pornography is generally disseminated to cause harm, rather than to express an idea.[17] Moreover, there are many laws regulating conduct that may be considered speech, but are not thought to trigger the First Amendment—i.e., perjury, extortion, placing bets, etc.[18] However, assuming nonconsensual pornography (as defined above) is speech,

---

shrivel-booming-internet-fad (revealing that commentators claim federal legislation introduced to criminalize online dissemination of nonconsensual pornography raises First Amendment issues).

[14] Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 693–94 (2014).

[15] *See, e.g.*, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 594 (noting that adult pornography is generally considered protected speech under the First Amendment Free Speech Clause).

[16] *See* Cohen v. California, 403 U.S. 15, 19–20 (1971) (explaining that if a category of speech is established as unprotected, it can be regulated without regard to the First Amendment).

[17] *See* Spence v. Washington, 418 U.S. 405, 409–11 (1974) (Conduct is considered speech covered by the First Amendment if the speaker intends to convey a particular message, and "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."). If the distributor's intent is to harm, it is not necessarily to convey a message, nor necessarily understood by viewers as conveying a message.

[18] Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981).

it should be unprotected by the First Amendment because of its similarities to existing unprotected categories of speech: namely, public disclosure of private fact,[19] defamation,[20] and child pornography.[21]

Part I presents the three theories often articulated for why the First Amendment protects speech: to create a marketplace of ideas, facilitate participatory democracy, and promote individual autonomy. Part II explains why certain types of speech are unprotected: because their minimal value towards advancing these free speech goals is outweighed by the significant harm they cause. Part III discusses three current unprotected categories: public disclosure of private fact, defamation, and child pornography. For each, it explains why they have been found to be unprotected—balancing their contribution to promoting free speech values against the harms they cause. Part IV argues for revenge porn as a new unprotected category, first defining the parameters of the category and discussing what the category should encompass in order to ensure it is not overly broad.[22] It then highlights nonconsensual pornography's low free speech value and analogous harms to the existing three categories—showing it is indistinguishable from speech that has already been deemed unprotected.

I. WHY SPEECH IS PROTECTED

There are three predominant theories for why freedom of speech is protected under the First Amendment: (1) to create a marketplace

---

[19] *Publication of Private Facts*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/publication-private-facts (last visited July 29, 2015).

[20] *Frequently Asked Questions—Speech*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/faq/frequently-asked-questions-speech (last visited July 29, 2015).

[21] *Id.*

[22] Some revenge porn laws go too far in infringing upon speech. *See, e.g.*, *First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images*, ACLU (Sept. 23, 2014), https://www.aclu.org/free-speech/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images (A coalition of bookstores, news media, librarians, and photographers challenged an Arizona "nude photo law" for being overbroad in criminalizing speech protected by the First Amendment.). However, a narrow range of nonconsensual pornography should be considered unprotected speech in order to allow for criminal or civil legal remedies for nonconsensual pornography victims.

of ideas; (2) to enhance participatory democracy; and (3) to promote individual autonomy and self-expression.[23] While some may be emphasized in certain cases over others, all three have been used by the Supreme Court to justify the protection of speech.[24]

A. *Marketplace of Ideas*

Justice Holmes wrote, "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution."[25] This articulates the theory that by protecting freedom of speech, the Constitution fosters a marketplace of ideas by allowing different viewpoints to be expressed.[26] Doing so promotes the search for truth because there is a greater change that the truth will be revealed if different ideas are expressed.[27]

Under this theory, false ideas are useful because by challenging true ideas, they encourage re-examination of the truth, strengthening and vitalizing the truth.[28] Discussion of both true and false ideas is necessary to discover which the falsities are; thus, "the remedy to be applied [to overcome falsehood] is more speech, not enforced silence."[29]

The marketplace of ideas theory has been criticized because in reality, truth does not always prevail over falsehood.[30] For instance, inequality among communicators in the marketplace of ideas—i.e., the fact that social and economic power largely determine who has control of channels of communication—affects what messages are heard.[31] In addition, people's tendency to interpret information in a

---

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

[24] *See Cohen*, 403 U.S. at 24–26 (alluding to all three theories as reasons for finding that wearing a jacket stating "Fuck the draft" is protected speech).

[25] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[26] *See id.*

[27] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964).

[28] *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989).

[29] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[30] *See* Greenawalt, *supra* note 28, at 132–34.

[31] *See id.* at 134.

way that conforms with social convention or serves individuals' interests or unconscious desires may color their understanding of truth.[32]

However, the alternative to protecting a free marketplace of ideas is regulation by the government. Giving the state power to control which ideas are heard sparks the fear underlying the Free Speech Clause: that government regulation will be driven by a desire of those in power to only allow dissemination of ideas in support of themselves and the policies they favor (contrary to promoting participatory democracy, discussed below).[33] Indeed, "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[34]

B. *Participatory Democracy*

Freedom of speech facilitates democratic government in at least two ways: (1) it makes having an informed electorate possible by ensuring access to information; and (2) it encourages participation in the democratic process by enabling people to express their political views.[35]

First, because in a democracy the electorate votes government officials into power, citizens need as much information as possible to elect the best-suited political officials.[36] Free speech enables the media to report a wide variety of viewpoints on political candidates and public affairs, including "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[37] This facilitates democracy by providing the electorate with information and different opinions on the government, in order for it to effectively assess candidates' performances.[38]

---

[32] *Id.* at 134–35.

[33] Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 632 (2004).

[34] Cohen v. California, 403 U.S. 15, 25 (1971).

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

[36] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596 (1982).

[37] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (limiting the scope of defamation against public officials to protect the media's ability to contribute to "uninhibited, robust, and wide-open" public debate).

[38] *See* Redish, *supra* note 36, at 596.

Second, protecting speech encourages participation in the democratic process by enabling people to voice their own opinions about their government and political officials, even if those opinions are critical.[39] Democracy is based not only on the election of political officials, but also on a culture of participation in government—often through speech regarding political affairs.[40] The value of this democratic culture is that "it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them."[41] Voicing ideas may also be influential in other people's voting decisions and in the legislature's policy choices.[42]

C. *Individual Autonomy*

Because free speech affords people an opportunity to hear and consider different ideas as well as to voice their own opinions, it promotes autonomy.[43] Autonomy "consists of a person's authority (or right) to make decisions about herself . . . as long as her actions do not block others' similar authority or rights."[44] The autonomy advanced by freedom of expression includes self-realization, or independent thought, and self-determination, or independent decision-making.[45]

First, self-realization refers "to development of the individual's powers and abilities"—an individual's power to realize his or her own potential.[46] This is tied to free speech because people define themselves by expressing their thoughts through speech.[47] For instance, speech encompasses self-expressive rights, such as the right to persuade or associate with others, or on the contrary, to criticize

---

[39] *See generally* Texas v. Johnson, 491 U.S. 397, 417–18 (1989) (upholding a right to burn the American flag as a form of free speech because it is expression of a particular political idea).

[40] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004).

[41] *Id.*

[42] *See id.* at 35–36.

[43] Greenawalt, *supra* note 28, at 143.

[44] C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011).

[45] *See* Greenawalt, *supra* 28, at 143–44.

[46] Redish, *supra* note 36, at 593.

[47] *See* Baker, *supra* note 44, at 253–54.

or disassociate with others.[48] These forms of expression help individuals define who they are based on who and what they like, as well as who and what they dislike.[49]

Second, self-determination refers to "the individual's control of his or her own destiny through making life-affecting decisions"—an individual's ability to achieve the life goals that he or she has set.[50] The ability to think and speak freely enables individuals to make decisions autonomously, both because of the link between freedom of speech and freedom of thought,[51] and because free speech ensures access to information needed for one to make informed decisions.[52] Government interference with freedom of speech denies individuals the right to hear an idea and deprives them of the ability to obtain information necessary for making independent decisions.[53] Thus, limiting free speech "interferes with free choice, and therefore with the exercise of autonomy."[54]

II. DETERMINING CATEGORIES OF UNPROTECTED SPEECH

While these three theories underlying free speech are compelling, the First Amendment right to freedom of speech, like most constitutional rights, is not absolute.[55] If speech is protected under the First Amendment, and a state regulates it, the state regulation must be subjected to some type of heightened scrutiny.[56] However, certain narrowly defined classes of speech are unprotected by the First

---

48 *Id.* at 254.

49 *See id.*

50 Redish, *supra* note 36, at 593.

51 Greenawalt, *supra* note 28, at 144–45.

52 *See* Balkin, *supra* note 40, at 36.

53 *See* Baker, *supra* note 44, at 254.

54 Greenawalt, *supra* note 28, at 150.

55 Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

56 *See* United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (applying strict scrutiny to a federal law prohibiting a particular type of lie because false statements are protected speech under the First Amendment); *contra Chaplinsky*, 315 U.S. at 573–74 (upholding a state law prohibiting "fighting words" without applying any kind of heightened scrutiny because such speech is unprotected).

Amendment because the "prevention and punishment of [such classes] has never been thought to raise any Constitutional problem."[57] Regulations restricting these types of speech are not subject to heightened scrutiny.[58] These include obscenity, libel, and "fighting" words, for instance.[59]

A. *Balancing Test*

Determining whether speech is protected "involves weighing the free speech interests involved in a particular case against other countervailing interests, such as the public or state interests in order and security and the interests in deferring to legislative judgment."[60] Essentially, courts weigh how much the type of speech contributes to free speech values against the harm the speech causes.[61] If the harm caused is great, and the speech contributes only minimally to the underlying purposes of the First Amendment (creating a marketplace of ideas, facilitating participatory democracy, or advancing autonomy), it may be deemed an unprotected category.[62]

For example, in *Chaplinsky v. New Hampshire*, the Supreme Court found "fighting words"—or words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace"—to be an unprotected category of speech.[63] Fighting words have minimal free speech value because they are personal epithets, not an "exposition of ideas" that contribute to the marketplace or to participatory democracy.[64] While they may have slight value in

---

[57] *Chaplinsky*, 315 U.S. at 571–72. There is, however, one exception to the general rule that unprotected categories of speech do not raise constitutional concerns: even if speech is unprotected, regulations of such speech cannot discriminate based on a specific viewpoint. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–91 (1992).

[58] *See Chaplinsky*, 315 U.S. at 571–74.

[59] *Id.* at 572.

[60] Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 904 (1979).

[61] *See id.* at 904–05.

[62] *See id.* at 910–11.

[63] 315 U.S. at 572.

[64] *See id*. The fighting words spoken by the appellant in this case, for example, were "You are a God damned racketeer . . . a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists . . . " *Id*. at 569.

terms of autonomy of the speaker, who is expressing his or her hatred or desire to attack the listener, they have no value for the autonomy of the listener, who is subjected to a personal insult.[65] In addition, fighting words cause severe harm because by definition, they insult the listener and pose a safety risk to society, as they are likely to provoke retaliation, causing breach of the peace.[66]

B. *Reluctance to Declare New Categories*

Generally, pornography is protected speech to the extent that the sexually explicit images neither constitute obscenity nor child pornography.[67] The question of whether nonconsensual pornography is protected speech, however, has not yet been before the Supreme Court. In *Revenge Porn and Freedom of Expression*, Clay Calvert argues that the Supreme Court is unlikely to designate nonconsensual pornography as a new category of unprotected speech, due to its reluctance to find new classes of speech unprotected in recent cases.[68] In *United States v. Stevens*, *Brown v. Entm't Merchants Ass'n*, and *United States v. Alvarez*, for instance, the Court declined to identify new categories of unprotected speech for depictions of animal cruelty, violent images directed at children, and lies, respectively.[69]

In *Alvarez*, the plurality took a slightly different approach to determining unprotected categories. Rather than applying the traditional test—balancing the free speech benefits against the harms of the speech—the Court insisted on a historical analysis.[70] Justice Kennedy wrote, "[b]efore exempting a category of speech from the normal prohibition on content-based restrictions . . . the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of

---

[65] *See id.* at 572.

[66] *See id.*

[67] *See* Sunstein, *supra* note 15, at 594.

[68] Calvert, *supra* note 14, at 683.

[69] *Id.* at 683–84 (discussing United States v. Stevens, 559 U.S. 460 (2010); Brown v. Ent. Merchs. Ass'n, 131 S. Ct. 2729 (2011); United States v. Alvarez, 132 S. Ct. 2537 (2012)).

[70] United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012).

proscription.'"[71] Although, as Calvert writes, revenge porn is a "new form of expression for which there is no historical lack of protection,"[72] its minimal benefits and severe harms closely parallel those of child pornography, defamation, and public disclosure of private fact—all of which are historically unprotected speech.[73]

Moreover, nonconsensual pornography should be distinguished from false statements at issue in *Alvarez* because false statements were historically protected speech;[74] revenge porn, however, did not exist prior to the invention of the Internet, the predominant tool used to distribute nonconsensual pornography. Thus, because revenge porn inherently is not part of a "tradition of proscription," lack of historical roots should not prevent it from being identified as an unprotected category.[75] In addition, an originalist analysis should not be used for determining classes of unprotected speech because the Founders had a more limited view of the Free Speech Clause than the general view today.[76] Nevertheless, even under a historical approach, revenge porn should not be precluded from being deemed unprotected because its similarities to historically unprotected speech make it more like a reconfiguration of existing categories, rather than an entirely new one.[77]

---

[71] *Id.* (Kennedy, J., plurality) (finding false statements should not constitute a new category of unprotected speech on this historical basis) (internal citation omitted).

[72] Calvert, *supra* note 14, at 684.

[73] *See* Sheppard Liu, *Ashcroft, Virtual Child Pornography, and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2007); *Frequently Asked Questions—Speech*, *supra* note 20; *Publication of Private Facts*, *supra* note 19.

[74] *See Alvarez*, 132 S. Ct. at 2547.

[75] *See id.* at 2547.

[76] Michael Kahn, *The Origination and Early Development of Free Speech in the United States*, 76 FLA. B.J. 71, 71 (2002). The original understanding of the clause excepted broad categories of speech as not being protected, including speech that was "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels." *Id.* (internal citation omitted).

[77] Nonconsensual pornography would likely be considered to fall within the scope of historically unprotected "immoral" or "scandalous" speech. *See id.*

III. CURRENT UNPROTECTED CATEGORIES OF SPEECH

Nonconsensual pornography is closely analogous to three current unprotected categories of speech: public disclosure of private fact, defamation, and child pornography.[78] Like each of these classes of speech, discussed below, nonconsensual pornography should not be protected because it does not advance the marketplace of ideas, participatory democracy, or individual autonomy, and it causes significant harm in many of the same ways these unprotected categories do.

A. *Public Disclosure of Private Fact*

1. DEFINITION

Although the cause of action for public disclosure of private fact differs state by state, the elements of the tort generally include: (1) the public disclosure, (2) of a private fact, (3) that would be offensive and objectionable to a reasonable person, and (4) that is not of legitimate public concern.[79] Unlike defamation, public disclosure of private fact "does not rest upon the inaccuracy of the statement but upon the unwanted publicity" resulting from the statement.[80]

a. *Public Disclosure*

The disclosure of a private fact is public if the communication is made to a large or "potentially large" group of people.[81] Public disclosure is considered to occur both when the communicator distributes the private information to the large group of people himself or herself, as well as when the communicator "merely initiates the process whereby the information is eventually disclosed to a large number of persons."[82] The private fact may be disclosed through a variety of means, including oral or written communications, video, or still photographs.[83]

---

[78] *See* Liu, *supra* note 73 at 2; *Frequently Asked Questions—Speech*, *supra* note 20; *Publication of Private Facts*, *supra* note 19.

[79] Richard E. Kaye, *Invasion of Privacy By Public Disclosure of Private Facts*, 103 AM. JUR. PROOF OF FACTS 3D 159, § 2 (2014).

[80] Kapellas v. Kofman, 459 P.2d 912, 921 (Cal. 1969).

[81] Kaye, *supra* note 79, at § 3.

[82] *Id.*

[83] *Id.*

For instance, in *Kinsey v. Macur*, the defendant, Macur, previously had a sexual relationship with the plaintiff, Kinsey, before Kinsey was married.[84] After their relationship ended, Macur mailed several harassing letters to Kinsey, his new wife, and their acquaintances disclosing private facts concerning Kinsey's character, including that Kinsey had been accused of murdering his first wife, spent six months in jail for that crime, and had marijuana in his apartment.[85] Although these letters were mailed to roughly twenty people, the court still held it was sufficient publicity to justify finding the plaintiff's privacy had been invaded.[86]

In addition, although the plaintiff had shared most of the facts disclosed with Macur at some time, Macur's publicizing these facts to about twenty others was still an invasion of privacy.[87] The court noted, "much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is the right to define one's circle of intimacy."[88] In other words, it is not the number of people to whom the fact is disclosed that constitutes the primary harm, but the fact that the person whose privacy was invaded was unable to choose with whom the information was shared.[89]

b. *Private Fact*

To be considered private, the facts disclosed must not already be a matter of public record; there must be some reasonable expectation of privacy in the facts.[90] Facts that have previously been considered

---

[84] 165 Cal. Rptr. 608, 609–610 (Cal. Ct. App. 1980).

[85] *Id.* at 610. Kinsey had in fact been charged with the murder of his first wife and spent six months awaiting trial, so these statements were not defamatory. *See id.* at 609. While Kinsey had disclosed the former two facts to Macur, he had not disclosed other facts in the letters (including those regarding his prior drug use) to Macur. *Id.* at 610. He concluded she found out about his marijuana possession by breaking into his apartment. *Id.*

[86] *Id.* at 611–612.

[87] *See id.* at 612.

[88] *Id.*

[89] *See id.*

[90] Kaye, *supra* note 79, at § 4.

private include information about intimate parts of a person's anatomy and images of sexual acts.[91]

In *Banks v. King Features Syndicate*, for example, a woman's doctors turned over a copy of an X-ray of her pelvic region—without her consent—to a newspaper reporter.[92] The reporter passed the X-ray picture to King Features Syndicate, Inc., which published an article about a medical issue afflicting the plaintiff.[93] The article and X-ray were published in a newspaper and circulated throughout the U.S.[94] No claim was made that the article or X-ray picture were false; however, by publishing the X-ray, which depicted details of the woman's anatomy, her right to privacy was violated.[95]

The court in *Banks* defined privacy as "the right of an individual to be let alone or to live a life of seclusion, or to be free from unwarranted publicity, or to live without unwarranted interference by the public about matters with which the public is not necessarily concerned."[96] Although the article was describing medical malpractice inflicted on the plaintiff—arguably an issue of public concern—the image of the most intimate details of her body was private.[97]

Moreover, in *Michaels v. Internet Entertainment Group*, the court granted a preliminary injunction to prevent the dissemination of a videotape depicting famous rock star Bret Michaels and actress Pamela Anderson Lee engaging in sexual intercourse.[98] The court stated that "distribution of the Tape on the Internet would constitute public disclosure," and "the content of the Tape—Michaels and Lee engaged in sexual relations—constitutes a set of private facts," the

---

[91] *See* Banks v. King Features Syndicate, 30 F. Supp. 352 (S.D.N.Y. 1939); *see also* Michaels v. Internet Ent. Grp., 5 F. Supp. 2d 823 (C.D. Cal. 1998).

[92] *Banks*, 30 F. Supp. at 353.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See id.* at 353–54. The court in *Banks*, however, deferred determination of the motion before it until trial because whether the act constituted a violation of the plaintiff's right to privacy depended on state law. *Id.* at 354. Because the pleadings were ambiguous as to which state King Features "broke the seal of privacy and made public the plaintiff's name and X-ray picture" in, it was unclear under which state's law the defendant would be held liable. *Id.*

[98] 5 F. Supp. 2d 823, 828 (C.D. Cal. 1998).

disclosure of which "would be objectionable to a reasonable person."[99] The court rejected the defendant's argument that because Lee had appeared nude in magazines, movies, and publicly distributed videotapes, the content of the tape was no longer private.[100] "The fact that she has performed a role involving sex, does not, however, make her real sex life open to the public."[101] Furthermore, even though a different videotape disclosing sexual relations between Lee and her husband Tommy Lee had previously been made public, that disclosure did not justify disclosing a sex tape between Lee and Michaels: "Sexual relations are among the most personal and intimate of acts. . . . public exposure of one sexual encounter [does not] forever remove[] a person's privacy interest in all subsequent and previous sexual encounters."[102]

Although the plaintiffs in *Michaels* are public figures who threw themselves into the public spotlight by seeking fame, and therefore must tolerate some public exposure of their romantic involvement, the "visual and aural details of their sexual relations" are "facts which are ordinarily considered private even for celebrities."[103] This set of facts surrounding their intimate sexual relations remains private—despite their chosen fame, and despite prior dissemination of a different sexual videotape featuring Lee.[104] Thus, in determining whether public disclosure of private fact is unprotected speech, whether it is considered "private" turns not on the status of the figure, but on the nature of the fact.[105]

---

99 *Id.* at 840.

100 *Id.*

101 *Id.* Similar reasoning should apply to the nude photos of celebrities hacked in 2014. *See* Amanda Remling, *iCloud Nude Leaks: 26 Celebrities Affected in the Nude Photo Scandal*, INT'L BUS. TIMES (Sept. 21, 2014), http://www.ibtimes.com/icloud-nude-leaks-26-celebrities-affected-nude-photo-scandal-1692540.

102 *Michaels*, 5 F. Supp. 2d at 840.

103 *Id.*

104 *Id.*

105 *See id.*

2. FREE SPEECH VALUE

The private facts tort has been challenged on constitutional grounds for restricting speech protected under the First Amendment.[106] The Supreme Court has not definitively ruled on the conflict between the tort and the First Amendment, leaving the parameters of what speech is unprotected unclear.[107] However, generally, if the private fact is not on a matter of public concern, it is not protected by the First Amendment.[108] This rule, expressed in the fourth element of the tort—that the private facts must not be on a matter of "legitimate public concern"—indicates the minimal free speech value of this form of expression.[109]

a. *Marketplace of Ideas*

Courts have defined whether a private fact is of legitimate public interest based on whether it is "newsworthy," or has some public importance.[110] How newsworthiness is defined varies by jurisdiction. In California, for example, there is a three-prong test that considers "1) the social use of the published facts; 2) the extent of the article's encroachment into seemingly private affairs; and 3) the extent to which the victim consented to a position of public fame."[111] The Restatement (Second) of Torts approach, adopted by the Ninth Circuit Court of Appeals, provides that if "the publicity exceeds the community's sense of decency," it cannot be of legitimate public concern.[112] In other words, "if a reasonable person would find the disclosed facts so indecent as to exceed the promulgation of information to which the community is entitled, then that disclosure is not of legitimate public concern."[113]

---

106 John A. Jurata, Jr., *The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 498 (1999).

107 *Id.* at 498, 502.

108 *See* Whitney Kirsten McBride, *Lock the Closet Door: Does Private Mean Secret?*, 42 MCGEORGE L. Rev. 901, 914–15 (2011).

109 *See* Kaye, *supra* note 79, at § 2.

110 *See* McBride, *supra* note 108, at 914.

111 Jurata, *supra* note 106, at 506–07.

112 *Id*. at 502–03.

113 *Id*. at 503.

Under the California test, speech that discloses private facts contributes little to the marketplace of ideas because the marketplace of ideas concerns discovery of broader societal truths, rather than intimate details of an individual's private life.[114] Under the Restatement's "decency" test, exposure of an "indecent" fact also contributes little to the marketplace of ideas because it does not advance the discovery of any truth pertinent to the public interest, i.e. artistic, literary, academic, or political truth.[115]

b. *Participatory Democracy*

If a private fact does not relate to a legitimate public concern, which would include political candidates or public affairs, it is not "newsworthy" and is also unlikely to advance participatory democracy.[116] For instance, in *Florida Star v. B.J.F.*, the Supreme Court held that a newspaper printing the name of a rape victim through a publicly released police report was in the public interest.[117] The name was newsworthy because the information was about "a matter of public significance"—a crime report.[118]

This protected speech, which makes some contribution to participatory democracy by, for instance, showing crime levels under the current regime, stands in stark contrast to speech that has been determined not newsworthy—such as the sex tape in *Michaels*, which had essentially no impact on political affairs or any legitimate public value.[119]

c. *Individual Autonomy*

Public disclosure of a private fact also contributes little to individual autonomy, because the third element, which requires the fact to be offensive or objectionable to a reasonable person, implies that

---

[114] *See* discussion *supra* Section I.A. (discussing the marketplace of ideas).

[115] *Cf.* Abrams v. United States, 250 U.S. 616, 617, 630–31 (1919) (Holmes, J., dissenting) (advocating for freedom to express opinions, such as using language "intended to incite, provoke and encourage resistance to the United States," as opposed to publicly disclosing private facts).

[116] *See* discussion *supra* Section I.B. (discussing participatory democracy).

[117] 491 U.S. 524, 532–37 (1989).

[118] *Id.* at 536–37.

[119] *See* Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998).

publishing the fact would hinder, not advance, the autonomy of the plaintiff. Even if this speech marginally advances the autonomy of the defendant, who arguably is expressing himself or herself by publishing the fact, it diminishes the autonomy of the victim, who now is unable to exercise self-determination in controlling who has access to information about his or her private life.[120] In *Kinsey*, for example, although writing the letters about Kinsey's former drug use may have advanced Macur's self-expression, it diminished Kinsey's autonomy by not enabling him to control whether and when that information would be expressed to the recipients of the letters.[121]

3. HARM

Public disclosure of private fact is unprotected speech because its minimal free speech value is outweighed by the severe harm it causes.[122] As discussed above, although it may slightly advance the autonomy of the speaker,[123] it diminishes the autonomy of the individual whom the fact is about[124] and fails to contribute to the marketplace of ideas[125] or advance participatory democracy.[126] Yet by disclosing the fact, the publisher may inflict severe psychological harm on victims by humiliating them or damaging their reputation.[127] Disclosing the fact also infringes on victims' sense of security by invading their privacy and diminishing their ability to control the release of information about themselves.[128]

Because public disclosure of private fact is defined as requiring that the disclosure of the fact be objectionable to a reasonable per-

---

120 *See* discussion *supra* Section I.C. (discussing individual autonomy).

121 *See* Kinsey v. Macur, 165 Cal. Rptr. 608, 612 (Cal. Ct. App. 1980).

122 *See* Kaye, *supra* note 79, at § 2.

123 *See* discussion *supra* Section III.A.2.c. (discussing the speaker's autonomy when publicly disclosing private facts).

124 *See id.*

125 *See* discussion *supra* Section III.A.2.a. (discussing how public disclosure of private fact does not contribute to the marketplace of ideas).

126 *See* discussion *supra* Section III.A.2.b. (discussing how public disclosure of private fact does not advance participatory democracy).

127 M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1131 (2011).

128 *See* Kinsey v. Macur, 165 Cal. Rptr. 608, 612 (Cal. Ct. App. 1980).

son, this speech by definition inflicts harm on the person whose privacy is invaded.[129] In *Kinsey*, the Court awarded the plaintiff damages including "mental anguish, suffering, expenses incurred in trying to remove himself and his wife from Macur's reach, and to protect his wife's security and ensure her peace of mind."[130] Similarly, in *Banks*, the plaintiff asserted that she had "been caused to suffer humiliation, agony and loss of social prestige by this publicity."[131] Both cases highlight the direct psychological harm endured from such a violation of privacy, as well as the embarrassment and loss of security that results from being unable to control the disclosure of private information.

The harm is comparable to that of a Fourth Amendment privacy violation, an unreasonable search or seizure, in that it results from interference with one's reasonable expectation of privacy.[132] Invasion of privacy causes a lack of personal sense of security, which may cause anxiety, embarrassment, or fear.[133] The more privacy is infringed upon—the more "we might limit what we think and say."[134] This is because as privacy decreases, the risk that our speech will be made public increases, so we tailor our speech to be suitable for a public audience.[135] Thus, it is not prohibiting speech disclosing private facts that risks chilling free speech, but in fact, the opposite: allowing privacy to be repeatedly invaded is what ultimately would stop people from speaking freely, thus diminishing ideas in the marketplace, hindering participatory democracy, and reducing autonomy. To protect future speech in furtherance of these First Amendment values, private facts must be able to remain private.

---

129 *See* Kaye, *supra* note 79, at § 9 (The third element of the tort is that disclosing the fact would be "offensive and objectionable to a reasonable person.").

130 *Kinsey*, 165 Cal. Rptr. 608 at 614.

131 Banks v. King Features Syndicate, 30 F. Supp. 352, 353 (S.D.N.Y. 1939).

132 *See* Kaye, *supra* note 79, at § 9.

133 *See* Calo, *supra* note 127, at 1131.

134 *Id.* at 1146.

135 *See id.*

B. Defamation

1. DEFINITION

At common law, defamation consists of the "unprivileged publication of false and defamatory statements concerning a plaintiff."[136] Defamation refers to two torts: libel and slander.[137] If the false defamatory statement is written, it is libel; if oral, it is slander.[138] The standard for whether defamation is unprotected speech differs depending on whether the defamatory statements target a public or private figure.[139]

a. *Public Figure*

In *New York Times Co. v. Sullivan*, the Supreme Court changed the standard for defamation when the false defamatory statement targets public officials, rather than private figures.[140] Speech defaming a public official is unprotected only if it is made with "actual malice," meaning that it is made with actual knowledge that the statement is false or with reckless disregard for its falsity.[141] Without requiring actual malice, any time a newspaper were to make a mistake about a fact defaming a public figure, it would be held liable for damages.[142] This might cause newspapers to self-censor in order to avoid making mistakes, chilling accurate criticism of public officials.[143] Because protecting criticism of public officials is a core goal of the Free Speech Clause,[144] the balance of free speech benefits and harms is different regarding public officials: the value to the

---

[136] Arien W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 907 (1989).

[137] *Id.*

[138] *Id.*

[139] *See id.* New York Times Co. v. Sullivan, 376 U.S. 254, 279–82 (1964).

[140] *Id.* at 279–80.

[141] *Id.*

[142] *See id.* at 271–72.

[143] *See id.* ("Erroneous statement[s] [are] inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive. . . .'") (quoting NAACP. v. Button, 371 U.S. 415, 433 (1963)).

[144] *See* discussion *supra* Sections I.A–B.

marketplace of ideas and participatory democracy outweighs the harms, unlike in defamation of private figures.[145]

The Supreme Court has expanded the *Sullivan* standard to apply not just to public officials, but also to public figures, including individuals such as a university football coach and a retired general.[146] The "actual malice" standard applies to public figures because like public officials, they may command a substantial amount of public interest, and are therefore likely to be involved in issues the public has a justified and important interest in.[147] However, "public figure" has been defined narrowly, and does not include those who have become famous without thrusting themselves into public controversy to influence others.[148]

b. *Private Figure*

The standard for defamation does not require actual malice for private individuals because the harms are greater for private figures: they have less access to channels of communication to rebut false statements about them and are therefore more vulnerable to injury than public figures.[149] The free speech benefits of allowing defamation against private figures is also lower: there is less of a concern about chilling free speech regarding criticism of private figures, as this speech contributes less to participatory democracy and the marketplace of ideas, unlike criticism of public officials.[150]

If individuals become public figures because they have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," they are a limited purpose public figure.[151] These individuals become public

---

145 *See* New York Times Co., 376 U.S. at 270.

146 *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 154–55 (1967).

147 *Id.*

148 *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979) (holding that a scientist whose research on monkeys was publicly attacked was not a public figure for defamation purposes); *see also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (holding that Russian spies' nephew, active in public affairs, was not a public figure because he did not voluntarily thrust himself into controversy).

149 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342–44 (1974).

150 *See id.* at 344–45.

151 *Id.* at 345, 351–52.

figures for the "limited range of issues" related to those controversies.[152]

For example, in *Time, Inc. v. Firestone*, a wealthy industrial family brought a libel suit against Time magazine for printing false and defamatory reports about the husband and wife's "extramarital adventures" revealed during their divorce proceedings.[153] Although the couple was well known—the Florida Supreme Court referred to the Firestone divorce as a "cause celebre"—the U.S. Supreme Court held the divorcee was not a public figure for the limited purpose of her divorce.[154] "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public," the Court wrote.[155] Although the couple was publicly known for its wealth, Ms. Firestone did not freely choose to publicize issues regarding her married life.[156] Because she did not thrust her divorce into public controversy, the *Sullivan* standard did not apply to defamation about her divorce.[157]

2. FREE SPEECH VALUE

Defamation is unprotected speech if the defamatory false statements are made negligently for private figures, or with actual malice for public figures, because the free speech benefits of allowing the speech are outweighed by the harm it causes.

a. *Marketplace of Ideas*

Although false statements are not in themselves an unprotected category of speech, the Supreme Court has stated: "there is no constitutional value in false statements of fact."[158] Neither intentional

---

[152] *Id.* at 351.

[153] Time, Inc. v. Firestone, 424 U.S. 448, 452 (1976).

[154] *See id.* at 454–55.

[155] *Id.* at 454.

[156] *Id.*

[157] *See id.*

[158] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). *Contra* Greenawalt, *supra* note 28 and accompanying text ("Under this theory, false ideas are useful because by challenging true ideas, they encourage re-examination of the truth, strengthening and vitalizing the truth.").

nor unintentional lies contribute to society's interest in "'uninhibited, robust, and wide-open' debate on public issues."[159] Because they are not an "essential part of any exposition of ideas," lies do not provide new ideas in the marketplace worthy of contemplation, consideration, or debate.[160] Furthermore, untrue statements create a risk that the "'stream of information' will be 'polluted' by falsity."[161] Even if false facts add some slight value to the marketplace of ideas—i.e., through helping discern the truth by causing true ideas to be re-examined in light of contradicting false ones[162]—when false statements are also defamatory, the harm caused to the victim outweighs this minimal contribution to the marketplace.

b. Participatory Democracy

Defamation targeting private individuals does not contribute to participatory democracy because it is not about public officials, who receive less free speech protection than private officials.[163] For public officials, defamation is only unprotected speech if it is made with actual malice.[164] Defamatory statements made with actual malice do not contribute to participatory democracy because, although they may be about political candidates, they are false—and therefore would actually create a less informed electorate, rather than a more informed one. There is also less concern about chilling speech that advances participatory democracy if the speaker is only held liable when he or she knows that his or her statement is false.[165]

---

159 *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

160 *Id.*; *see also* United States v. Alvarez, 132 S. Ct. 2537, 2557 (2012) (Alito, J., dissenting) ("[L]ies have no value in and of themselves, and proscribing them does not chill any valuable speech.").

161 Langvardt, *supra* note 136, at 903; *see also Alvarez*, 132 S. Ct. at 2559 (Alito, J., dissenting) (arguing that allowing people to falsely represent themselves as receiving a medal of honor from the military "debase[s] the distinctive honor of military awards" by damaging the reputation and meaning of the award for those who rightfully earn it).

162 *See* Greenawalt, *supra* note 28, at 130; *see also* discussion *supra* Section I.A.

163 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 281–82 (1964).

164 *Id.* at 279–80.

165 *See id.* at 281–82.

If the defamation targets a limited public purpose figure, the speech is only unprotected if it is about issues the figure is not famous for.[166] This speech makes little contribution to participatory democracy because if it is not about the issues for which the figure is famous, it likely does not relate to the public affairs in which they are involved.[167]

c. *Individual Autonomy*

Because defamatory statements are false, they have little value towards advancing self-expression.[168] Moreover, even if there is some self-expressive value for the speaker, it hinders the autonomy of the subject of the defamatory statement.[169] Whereas the speaker is arguably expressing a point of view regarding another individual, the defamed person now loses the ability to control his or her reputation, the way he or she is perceived, and what information is publicized regarding his or her character.[170]

3. HARM

While defamation makes little contribution to the marketplace of ideas, participatory democracy, or autonomy, it inflicts great harm on the person who is defamed. The harms caused by defamation include both individual and community harms. Individualized harms include the "impairment of reputation and standing in the community, as well as personal humiliation, and mental anguish and suffering."[171] In essence, reputation is protected at the expense of free speech so that "good men [won't] fall prey to foul rumor"[172]—

---

166 *See* Time, Inc. v. Firestone, 424 U.S. 448, 454–55 (1976).

167 *See id.* at 453–54.

168 *See* Corbin, *supra* note 23, at 971. False statements do not strongly advance self-expression because the goal of self-expression is to better understand oneself—to "affront the individual's worth and dignity." *See id.* (quoting Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring)). Spreading lies about others does not help develop a better understanding of oneself because lies are not a true expression of one's inner worth. *See id.*

169 *See* discussion *infra* Section III.B.3. (discussing harms caused by defamation, including harm to individuals' reputations and standing in the community).

170 *See id.*

171 Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (1974).

172 Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 57 (2005-2006).

and have to endure the subsequent psychological, emotional, and economic consequences from damage to one's reputation.

Harm caused by defamation extends beyond these personal harms, also encompassing harm from the community.[173] This harm "stems from the community's changed impressions of the defamed person."[174] The defamatory statement harms the reputation of the defamed individual so severely as to "lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her."[175] In addition to further causing psychological harm, damage to reputation can have tangible, economic costs for the defamed person. The harm to the person's reputation may lead to him or her losing a job or having difficulty being hired for future jobs, causing severe economic damage. Thus, the "concrete reality of what happens" to those who are defamed is that "[t]heir lives are changed. Their standing in the community, their opportunities, their self-worth, their free enjoyment of life is limited."[176]

C. *Child Pornography*

1. DEFINITION

Child pornography, defined as pornographic materials featuring sexual conduct by children, is not protected speech under the First Amendment.[177] For example, in *New York v. Ferber*, a New York statute prohibiting a person from knowingly distributing materials depicting sexual acts by a child under 16 years of age was upheld, finding the ban consistent with the First Amendment.[178]

In defining the contours of this unprotected category of speech, the *Ferber* Court held that first, the defendant must have knowledge

---

[173] Daniel Scardino, *Liberty and Defamation*, 20-FALL COMM. LAW. 3, 3 (2002).

[174] *Id.*

[175] *Id.*

[176] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2376 (1989).

[177] Liu, *supra* note 73, at 2.

[178] New York v. Ferber, 458 U.S. 747, 774 (1982).

of the character of the materials in order to be prosecuted for distributing them.[179] Second, the Court must conduct an independent constitutional review of child pornography found by lower courts to be unprotected speech.[180] However, to be unprotected speech, child pornography is not required to "appeal to the prurient interest," "be patently offensive," or be "based on a consideration of the material as a whole."[181] Thus, "the presence of some serious literary, artistic, political, or scientific matter will not constitutionally redeem material containing depictions of sexual conduct by children."[182]

The category, however, does not extend to include sexually explicit images that appear to depict minors, but were produced without using any actual children, i.e., through computer imaging.[183] Banning virtual images of children "'goes beyond [Ferber], which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process.'"[184] Thus, such images are protected speech, if no real children are depicted.[185] Still, the requirements to fall into the unprotected category are minimal: all one needs to prove is that the material contains images of actual children engaged in sexual activity, the conduct is illegal by statute, and the defendant was aware of the character of the materials.[186]

2. FREE SPEECH VALUE

As the Supreme Court wrote in *Ferber*, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*."[187]

---

179 Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 295 (1982) [hereinafter *Codifying*].

180 *Id.*

181 *Id.*

182 *Id.*

183 Liu, *supra* note 73, at 32–33.

184 *Id.* (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002)).

185 *See id.* at 33.

186 *Codifying*, *supra* note 179, at 296.

187 New York v. Ferber, 458 U.S. 747, 762 (1982).

a. *Marketplace of Ideas*

Child pornography makes minimal contribution to the marketplace of ideas because it is not communicating a fact or opinion beyond the sexualization of children, which has little, if any, public social value.[188] It is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."[189] Moreover, in the rare case where child pornography is being used to express a literary or artistic idea, there are alternatives that can be used to express the message, such as a person over the statutory age who looks younger[190] or virtual simulations of children that are not actually children.[191]

In addition, whatever viewpoint is expressed through child pornography is not constitutionally protected because freedom of speech does not extend to illegal activities.[192] Because child pornography both features and likely perpetuates illegal abuse of children, it does not express an idea that legitimately contributes to the marketplace.[193]

b. *Participatory Democracy*

Child pornography does not advance participatory democracy because it does not relate to public officials (given that public officials are adults), public affairs, or matters of public interest. On the contrary, the Supreme Court in *Ferber* reasoned that a "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[194] Because child pornography has been deemed unprotected speech, states can pass legislation banning it to protect the "physical and emotional well-being of youth."[195] By promoting the safety and wellbeing of

---

188 *See id.* at 762–63.

189 *Id.*

190 *Id.* at 763.

191 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40, 256 (2002).

192 *See Ferber*, 458 U.S. at 761–62.

193 *See* Liu, *supra* note 73, at 7.

194 *Ferber*, 458 U.S. at 757 (citing Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

195 *Id.*

children, states can thereby foster future adult citizens who can engage actively in their communities, contributing to participatory democracy.[196]

c. *Individual Autonomy*

While child pornography may marginally promote the autonomy of creators or distributors of child porn by allowing them to express themselves through this medium, it infringes on the autonomy of the children in the films in several ways. First, because the children are subjected to sexual acts, their autonomy over their own bodies is diminished.[197] Second, being featured in child porn hinders their ability to express themselves, both as children and as adults, because the images will likely follow them through adulthood, affecting how they are perceived and interact with others permanently.[198] Third, it affects their self-determination because they are too young to legally consent to sexual activity, and thus they are not making their own life decisions regarding whether or not to be featured in the film or photographs.[199]

3. HARM

Even if child pornography has marginal free speech benefits in regards to promoting the autonomy of the creator of child porn, that benefit is outweighed by the severe harms of protecting child pornography as free speech. Child pornography causes both direct harm to the children who are the subject of the material and indirect harm to all children more generally.[200]

The direct harm caused by child pornography is the injury inflicted on the actual children in the pornographic materials: harm to their psychological, physical, mental, and emotional wellbeing.[201] While these harms are inflicted from the making of the child porn

---

196 *See id.*

197 *See id.* at 759.

198 *See id.*

199 *See id.* at 750–51 (For example, under the statute in *Ferber*, child pornography is defined to include children less than 16 years old, which means victims of child pornography under the statute are all minors.).

200 *See* Liu, *supra* note 73, at 8–9.

201 *Id.* at 8.

itself, which involves sexual abuse of the children, they are compounded by the fact that the materials produced are a "permanent record of the children's participation," and the harms are "exacerbated by their circulation."[202] The permanence of the films suggests that they will continue to play a role in the children's lives as they become adults, potentially preventing them from obtaining certain jobs or from being able to control their public image or reputation in adulthood.

The indirect harm resulting from child pornography is the potential harm it causes to all children because child pornography is often a "catalyst for pedophiles to exploit and abuse children" in the future.[203] The advertisement, distribution, and circulation of child pornography fuel the market for child porn, promoting the subsequent infliction of harm on more children.[204] As the Court in *Ferber* wrote, "the most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."[205]

IV. REVENGE PORN AS A NEW UNPROTECTED CATEGORY

A. *Definition*

The category of unprotected speech for nonconsensual pornography must be specifically defined in order to best balance society's competing interests in protecting free speech and in protecting victims of nonconsensual porn.[206] Although adult pornography generally is protected speech,[207] the nonconsensual nature of revenge porn

---

202 *Id.*; *Ferber*, 458 U.S. at 759.

203 Liu, *supra* note 73, at 9.

204 *Id.*

205 *Ferber*, 458 U.S. at 760.

206 Although some revenge porn laws go too far in infringing upon speech, *see First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images*, *supra* note 22, child pornography and defamation laws may also be overbroad in impeding on free speech. Nevertheless, a narrowly defined category of speech should be unprotected so that narrowly tailored regulations can be enacted in order to prevent victims from the severe harms caused by nonconsensual pornography.

207 *See* Sunstein, *supra* note 15, at 594.

makes it rise to the same level of offensiveness as child porn: because it is nonconsensual, distributing revenge porn inflicts greater harm on victims than consensual pornography, outweighing its marginal free speech value. Thus, if pornography is distributed or publicized without consent, it should be considered unprotected speech.

The unprotected category of speech for revenge porn should encompass both types of non-consent: images that are initially obtained without consent (e.g., by hacking a victim's cell phone), and those that are originally obtained with consent, usually within the context of an intimate relationship, and then distributed to others without consent (e.g., images given to a sexual partner, who then distributes them to seek revenge after a break up or divorce).[208] There should also be no distinction in this category of speech between public and private figures because, unlike defamation, there is no risk of chilling legitimate criticism of public officials by outlawing nonconsensual pornography.[209]

1. CONSENTING TO ONE IS NOT CONSENTING TO ALL

Critics of legislation on nonconsensual pornography often argue that if the initial sharing of the images was consensual—i.e., if the images were consensually given to an intimate partner in a trusted relationship—the victim thereby consented to the distributor later sharing such images with the world.[210] Consent, however, is context-specific.[211] In public disclosure of private fact, the plaintiff's

---

[208] *See e.g.*, Cecil, *supra* note 6, at 2514–15 (explaining that a hacker stole half-naked images of Hollie Toups from her cell phone and posted them online on revenge porn web site); Danielle Keats Citron, *'Revenge Porn' Should be a Crime in U.S.*, CNN (Jan. 16, 2014), http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/ ("Jane" allowed her ex-boyfriend to take nude photos of her because he promised they would be "for his eyes only"; however, after their break up, he uploaded the pictures, along with her contact information on the revenge porn site UGotPosted.); Citron & Franks, *supra* note 7, at 346 (describing both kinds of nonconsensual pornography).

[209] Even if the victim was a politician, and his or her presence in porn was relevant to the legitimate public interest—i.e., if the politician was a staunch family values advocate—the photographs could be discussed without showing the actual images. Thus, unlike defamation, there is no risk of chilling speech about the political figure because his or her participation in such images could still be discussed.

[210] *See* Citron & Franks, *supra* note 7, at 354.

[211] *Id.* at 348, 355.

privacy is violated both when the defendant uncovers the private fact without the plaintiff's consent, as well as when the plaintiff previously told the defendant the private fact, but did not consent to it being publicized to others.[212] For instance, in *Kinsey v. Macur*, Kinsey initially told Macur some of the private facts that Macur later disclosed to others, and some facts Macur discovered on her own.[213] Nevertheless, the disclosure of both types of facts was still considered a violation of Kinsey's privacy; as the court stated, the claim "is not so much one of total secrecy as it is the right to define one's circle of intimacy."[214] The harm does not result from exposure of a completely secret fact, but rather from not being able to control when and to whom the fact is disclosed.[215]

Moreover, in *Banks v. King Features Syndicate, Inc.*, although the plaintiff consented to her doctors viewing the X-ray of her pelvis because it fell within the context of their medical relationship, she did not consent to the doctors' subsequent distribution of it to newspapers.[216] Additionally, even if an individual consents to some of her sexual acts being made public—i.e., sexual acts with a former partner, as in *Michaels v. Internet Entertainment Group, Inc.*—that does not mean she consents to other sexual acts being publicized.[217] As the court in *Michaels* wrote, "public exposure of one sexual encounter [does not] forever remove[] a person's privacy interest in all subsequent and previous sexual encounters."[218]

Much like public disclosure of private fact, nonconsensual pornography is essentially the distribution of a private fact: one's intimate sexual relations and acts, which were held to constitute a set of private facts in *Michaels*.[219] Thus, if public disclosure of private fact allows a privacy violation to be found where the victim consented to telling the fact to a few people, but did not consent to disclosing the fact to the public in general, so too should a privacy violation be found when revenge porn victims consent to sharing the images with

---

212 *See, e.g.*, Kinsey v. Macur, 165 Cal. Rptr. 608, 610 (Cal. Ct. App. 1980).

213 *See id.* at 610.

214 *Id.* at 612.

215 *See id.*

216 30 F. Supp. 352, 353 (S.D.N.Y. 1939).

217 Michaels v. Internet Entm't Grp., 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998).

218 *Id.*

219 *Id.* (Individuals' engagement in sexual relations "constitutes a set of private facts whose disclosure would be objectionable to a reasonable person.").

one person, but do not consent to sharing them with the public at large.

2. NO PUBLIC VS. PRIVATE FIGURE DISTINCTION

The reason for distinguishing between public and private figures in defamation is to avoid chilling accurate criticism of public figures.[220] However, this concern does not apply in the revenge porn context. Banning nonconsensual pornography would not chill any criticism of policies or public affairs, as it only limits the nonconsensual distribution of images of sexual acts, not any false defamatory statement like defamation. In addition, part of the reason for distinguishing between public and private figures in defamation is that public figures face less harm because they have more access to effective channels of communication to rebut false facts.[221] However, this reason does not apply to revenge porn because the images are not false facts that can be rebutted: once they are out in the open, they are permanently on the Internet, essentially creating a permanent record of the individuals' role in nonconsensual pornography, much like child pornography.[222] Like public disclosure of private fact, there is no falsity to disprove,[223] but rather, a disclosure of intimacy that cannot be undone.

Furthermore, for defamation, individuals may be considered public figures if they have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[224] This makes them limited purpose public figures, meaning they are only considered public figures for a limited range of issues connected to those controversies.[225] By the very nature of the fact that revenge porn is nonconsensual, it was not intentionally thrust into the public eye by the victim.[226]

---

220 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964).

221 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

222 *See* New York v. Ferber, 458 U.S. 747, 759 (1982) (Child pornography creates "a permanent record of the children's participation," which is circulated widely on the internet, exacerbating the harm to children because the images are wide-spread.).

223 *See* Kapellas v. Kofman, 459 P.2d 912, 921 (Cal. 1969).

224 *Gertz*, 418 U.S. at 345.

225 *Id.* at 351.

226 Hypothetically, there could be an instance in which a victim of nonconsensual pornography thrust herself into the spotlight on this issue in order to advocate

Even if pornography is within the range of controversies for which individuals are public, i.e., if they were famous for other sexual acts or had previously been seen nude in other contexts, being famous for their sexuality does not mean they made themselves public figures for this particular sex act.[227] Just as in *Michaels*, where the court held that Pamela Anderson Lee's sex tape was private despite the fact that she was famous in part for her role in previous sex tapes, being famous for one's sexuality does not mean consenting to a particular sex act being publicized.[228] Thus, the public-private figure distinction in defamation should not apply to nonconsensual pornography because, unlike banning defamation, banning revenge porn does not risk chilling political speech.

B. *Free Speech Value*

Parallel to public disclosure of private fact, defamation, and child pornography, nonconsensual pornography has very few free speech benefits: it only marginally, if at all, contributes to the marketplace of ideas, it does not advance participatory democracy, and although it may have some slight self-expressive benefit to the distributor, it infringes on the autonomy of the victim. Like each of the other three categories, the significant harms of revenge porn outweigh any slight free speech value it has, and its harms mirror the harms long recognized by well-established unprotected classes of speech.

1. MARKETPLACE OF IDEAS

Whether speech is an exposition of ideas does not depend on whether the materials contain an "implicit ideology," but instead, on what the speaker's purpose is and how the message is communicated.[229] Just as fighting words, for instance, are said to harm, rather than to express an idea,[230] nonconsensual pornography is distributed

---

against nonconsensual pornography, but in such cases, they still are not consenting to the distribution of the actual images. They merely are in the public to discuss the issue, not to have their images disseminated.

227 *See* Michaels v. Internet Entm't Grp., 5 F. Supp. 2d 823, 840–41 (C.D. Cal. 1998).

228 *Id.*

229 Sunstein, *supra* note 15, at 607.

230 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

to shame, to embarrass, or to seek revenge—not to contribute an idea to the marketplace.[231] As the sponsor of the Florida nonconsensual pornography bill, Representative Tom Goodson said, "there is no purpose . . . for anyone to do this, other than for harassment, hatred or to hurt people, and it has driven some people to suicide."[232]

Moreover, like public disclosure of private fact, nonconsensual pornography does not contribute to the marketplace of ideas because it is not of "legitimate public concern," meaning it is not "newsworthy."[233] Under the California test for newsworthiness, for example, nonconsensual pornography is not newsworthy because it has minimal social value, encroaches greatly on private affairs, and the victim did not consent to the relevant position of public fame. [234] Furthermore, under the Restatement (Second) of Torts test, it is not of legitimate public concern because a reasonable person would find publicizing one's sexual acts without their consent "so indecent as to exceed the promulgation of information to which the community is entitled,"[235] as nothing could be more intimate or private.

In addition, like public disclosure of private fact, nonconsensual pornography generally does not contribute to the discovery of any truth pertinent to the public interest—artistic, literary, academic, or political.[236] Yet, even in the rare situation in which nonconsensual pornography might have some artistic, literary, or political value, similar to child pornography, there are alternative means to achieve that value. For instance, just as there are alternatives to child pornography, such as using adults who look young or virtual children,[237] alternatives here include adult consensual pornography, actors, or virtual simulations depicting nonconsensual pornography.

---

231 *See* Goode, *supra* note 9; *see also supra* text accompanying notes 1–3.

232 Calvert, *supra* note 14, at 694.

233 McBride, *supra* note 108, at 914.

234 *See* Jurata, *supra* note 106, at 506–07.

235 *Id*. at 503.

236 *See* discussion *supra* Section III.A.2.a. (discussing how public disclosure of private fact contributes little to the marketplace of ideas).

237 *See* New York v. Ferber, 458 U.S. 747, 763 (1982); Ashcroft v. Free Speech Coal., 535 U.S. 234, 239–40 (2002).

2. PARTICIPATORY DEMOCRACY

Like defamation targeting private individuals, nonconsensual pornography does not advance participatory democracy because it does not relate to public affairs or political officials. Even if the victim of nonconsensual pornography is a public figure, unlike defamation, it still does not contribute to "uninhibited, robust, and wide-open debate on public issues"[238] because the subject matter of nonconsensual pornography is private. Although the sex tape in *Michaels*, for instance, featured public figures, it still did not contribute to participatory democracy because the content of the tape involved a private matter.[239] Even if the content of nonconsensual pornography "may be of interest to some portion of the . . . public," like the divorce in *Time, Inc. v. Firestone*, private sexual acts are "not the sort of 'public controversy' referred to in *Gertz*."[240]

In cases where nonconsensual pornography may be politically relevant, such as news on trafficking, art, or discussion of reproductive rights, nonconsensual pornographic images do not need to be shown in order to advance democracy. For example, although in *Banks*, the medical malpractice issue was a legitimate public concern, the image of the intimate details of the plaintiff's body did not need to be exposed to the public in order to discuss the medical malpractice problem.[241] Likewise, just as in child pornography, there are alternatives for disseminating nonconsensual pornography, such as showing only consensual images.[242]

Moreover, like in *Ferber*, where the Court reasoned that child pornography should be unprotected speech because democracy rests

---

[238] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[239] *See* Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823, 840–41 (1998).

[240] Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).

[241] *See* Banks v. King Features Syndicate, 30 F. Supp. 352, 353 (S.D.N.Y. 1939). *Cf. supra* note 209 and accompanying text (in a hypothetical situation where a public official's presence in nonconsensual porn is politically relevant, i.e., if a politician who is homophobic is featured having sex with someone of the same gender, the images can be discussed freely without showing the nonconsensual pornographic images themselves).

[242] *Cf. Ferber*, 458 U.S. at 763 (Alternatives to child pornography, if child pornography "were necessary for literary or artistic value," include using "a person over the statutory age who perhaps looked younger.").

on the "healthy, well-rounded growth of young people into full maturity as citizens,"[243] so too is democracy advanced by its citizens feeling safe and secure in their communities.[244] If invasions of privacy—such as images of individuals' private sex lives being published online without their consent, and without recourse—continuously take place, it is unlikely this sense of security will be achieved, just as if public disclosures of private fact were not prevented.[245]

3. INDIVIDUAL AUTONOMY

Like public disclosure of private fact, defamation, and child pornography, even if nonconsensual pornography contributes marginally to the autonomy of nonconsensual pornography disseminators by allowing them to express themselves by distributing the pornography, it diminishes the autonomy of victims. Just as public disclosure of private fact hinders plaintiffs' self-determination because they are unable to control who has access to information about their private lives, nonconsensual pornography infringes on self-determination because revenge porn victims cannot control who sees private images of their bodies.[246] Moreover, just as defamatory statements further hinder victims' self-determination because they lose the ability to control their reputation and what information is published about them, nonconsensual pornography prevents victims from being able to control their reputation or make their own decisions regarding whether or not to display their private sex acts.[247]

In addition to impeding on victims' self-determination, nonconsensual pornography also hinders self-expression because it impacts

---

[243] *Id.* at 757 (citing Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

[244] *See* Calo, *supra* note 127, at 1145–46 ("Episodic solitude—in essence, the periodic absence of the perception of observation—is a crucial aspect of daily life. People need solitude for comfort, curiosity, self-development, even mental health.").

[245] *See id.*; *see also* discussion *supra* Section III.A.3. (discussing how invasions of privacy caused by public disclosures of private facts can cause a lack of personal sense of security).

[246] *Cf.* discussion *supra* Section III.A.2.c. (discussing the effect of public disclosure of private fact on victims' individual autonomy).

[247] *Cf.* discussion *supra* Section III.B.2.c. (discussing the effect of defamation on victims' individual autonomy).

how victims interact with others by damaging victims' psychological and emotional wellbeing.[248] It also hinders self-expression because it changes how others perceive victims, causing their messages to be interpreted differently.[249] Because once nonconsensual pornography is posted, similar to child pornography, it is permanently on the Internet,[250] it will affect how victims interact with others for the foreseeable future.

C. *Harm*

Like child pornography, the severe harm caused by nonconsensual pornography can be categorized as direct and indirect harm.[251] Direct harm refers to the injury inflicted on the actual individuals in the nonconsensual pornographic materials.[252] Similar to the harms caused by defamation, these harms can further be classified as individualized harms and harms from the community.[253] The former, individualized harm, includes damage to victims' psychological and emotional wellbeing.[254] The latter, harm from the community, includes the damage to victims' reputation and standing in the community, and resulting economic loss.[255] In contrast, indirect harm refers to harm inflicted on others who are not featured in the specific pornographic materials.[256] This includes future victims of nonconsensual pornography—which there will be more of if this speech is protected—and women in general, as revenge porn "affects women and girls far more frequently than men and boys, and creates far

---

[248] *See* discussion *infra* Section IV.C.1.a. (discussing the harms nonconsensual pornography causes to individuals).

[249] *See* discussion *infra* Section IV.C.1.b. (discussing the harm to individuals' reputation caused by nonconsensual pornography).

[250] *See* New York v. Ferber, 458 U.S. 747, 759 (1982).

[251] *See* Liu, *supra* note 73, at 8–9.

[252] *Cf. id.* at 8 (discussing direct harm to children who are the subjects of child pornography).

[253] *See* discussion *supra* Section III.B.3. (discussing harms of defamation on victims).

[254] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (1974).

[255] *See* Scardino, *supra* note 173, at 3.

[256] *See* Liu, *supra* note 73, at 9.

more serious consequences for them,"[257] thus perpetuating gender inequality if this speech is protected.[258]

1. DIRECT HARM

a. *Individual Harms: Psychological & Emotional Damage*

Just as public disclosure of private fact may cause mental anguish and humiliation because a private detail of one's life is disclosed without his or her consent,[259] the distribution of revenge porn also can cause severe psychological and emotional harm to victims, as their intimate sexual acts are publicized without their consent. According to one study, ninety-three percent of victims said they suffered "significant emotional distress due to being a victim" of nonconsensual pornography.[260]

The psychological harm caused by nonconsensual pornography stems not just from the invasion of privacy,[261] but also from fear of the consequences of revenge porn: nonconsensual pornography raises the risk of stalking and physical attack because victims' names and contact information often appear next to their nude images.[262] "In a study of 1,244 individuals, over 50% of victims reported that their naked photos appeared next to their full name and social network profile; over 20% of victims reported that their e-mail addresses and telephone numbers appeared next to their naked

---

[257] Citron & Franks, *supra* note 7, at 348. There is a disparate impact on women who are victims of revenge porn both because women are more frequently victims of nonconsensual porn and because of a societal tendency to trivialize crimes that primarily affect women and girls, including domestic violence, sexual assault, and sexual harassment. *See id.*; *see also* Danielle Keats Citron, *Law's Expressive Value in Combatting Cyber Gender Harassment*, 108 MICH. L. REV. 373, 384–85 (2009) (discussing cyber harassment's disparate impact on women); *see also* Mary Anne Franks, *How to Feel like a Woman, or Why Punishment is a Drag*, 61 UCLA L. REV. 566, 583 (2014) (noting resistance to treat crimes that disproportionately affect women, e.g., sexual abuse and harassment, seriously).

[258] *See* Citron & Franks, *supra* note 7, at 348–49.

[259] *See* Kinsey v. Macur, 165 Cal. Rptr. 608, 614 (Cal. Ct. App. 1980); *see also* Banks v. King Features Syndicate, 30 F. Supp. 352, 353 (S.D.N.Y. 1939).

[260] *Revenge Porn by the Numbers*, ENDREVENGEPORN.COM (Jan. 3, 2014), http://www.endrevengeporn.org/revenge-porn-infographic/.

[261] *See* Calo, *supra* note 127, at 1131.

[262] Citron & Franks, *supra* note 7, at 350–51.

photos."[263] Fear that this raises risk of harm is not just paranoia, but reality: forty-nine percent of victims in a Cyber Civil Rights Initiative study said they have been harassed or stalked online by people who viewed their material.[264] As a result of this risk, many victims struggle with anxiety, suffer from panic attacks, and fear leaving their homes, all of which make it difficult to complete their work.[265]

For instance, Hollie Toups, a thirty-three-year-old teacher's aide in Texas, suffered psychological consequences ranging from humiliation to fear when she found several topless photos of herself published on Texxxan.com, posted alongside links to her Facebook and Twitter accounts, a Google map of her whereabouts, and numerous comments.[266] Although she had taken these photos for an ex-boyfriend nearly ten years ago, a hacker stole them from her phone and posted them online.[267] After a friend called to alert her about the images, she "was in tears for days."[268] She was afraid to leave her house, and when she finally did, she was approached multiple times by men who had seen her photographs online.[269] She stated that she "could not catch [her] breath," and that she "was on the verge of a panic attack."[270]

Similarly, for over a year after English professor Annmarie Chiarini's ex-boyfriend auctioned nude images of her on eBay without her consent, she suffered from panic attacks and severe anxiety.[271] She described her experience:

> I would wake up at 3[ ]am and check my email, my Facebook page, eBay, then Google my name, a ritual I performed three times before I could settle back down. In September 2011, I was thrown into panic

---

263 *See id.*

264 *Revenge Porn by the Numbers*, *supra* note 260.

265 *See* Citron & Franks, *supra* note 7, at 351 (citing a study conducted by the Cyber Civil Rights Initiative showing that over eighty percent of victims of nonconsensual pornography experience severe emotional distress and anxiety).

266 *See* Cecil, *supra* note 6, at 2514–15; *see also* James Fletcher, *The Revenge Porn Avengers*, BBC NEWS (Dec. 11, 2013), http://www.bbc.com/news/magazine-25321301.

267 Cecil, *supra* note 6, at 2514–15.

268 *See* Fletcher, *supra* note 266.

269 *Id.*

270 *Id.*

271 *See* Chiarini, *supra* note 6.

> again after I read an anonymous email alerting me to an online profile that featured nude pictures of me. I Googled my name, and there I was, on a porn website. The profile included my full name, the city and state where I live, the name of the college where I teach and the campus. There was a solicitation – HOT FOR TEACHER? WELL, COME GET IT! The site had been up for 14 days and had been viewed over 3,000 times.[272]

Like child pornography, these harms are compounded by the fact that once online, there is a permanent record of victims' involvement in nonconsensual pornography, which is often widely circulated, as it was for Chiarini.[273] The permanence of Internet posts makes the risk to victims' physical wellbeing and the resulting psychological consequences long-lasting, as the risk continues for as long as the materials are online. Because Chiarini was too scared to leave her house for a prolonged period of time, her therapist insisted she go on medical leave from work.[274] However, a senior administrator at the college she worked for denied her request for medical leave, claiming that she "perpetrated the incident."[275] Chiarini feared for her job and felt that "[b]ecause of the permanence of the [I]nternet, and lack of legislation, [her] torture was never going to end."[276] As a result, that night she attempted suicide.[277]

Although Chiarini fortunately survived her attempted suicide, the permanence of nonconsensual pornography exacerbated her psychological harm because it instilled the feeling that the humiliation, pain, and anxiety would never go away.[278] The permanence of nonconsensual pornography also exacerbates the community harms

---

[272] *Id.*

[273] *Id.*; *Cf.* New York v. Ferber, 458 U.S. 747, 759 (1982) (the fact that child pornography creates a permanent record of children's participation in porn, and is often widely circulated, similarly exacerbates the harm to victims).

[274] *See* Chiarini, *supra* note 6.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *See id.*

(discussed below) because long-lasting psychological harm prevents victims from doing their jobs[279]—as it did for Chiarini.[280] In addition, the permanence of Internet posts increases the chance that one's community will discover the existence of the pornography, which raises the likelihood that victims' reputations will suffer.

b. *Community Harms: Reputation & Economic Loss*

Like defamation, the harm caused by nonconsensual pornography encompasses not only individual physical and psychological harm, but also community harm, which results from the community's changed impression of the victim.[281] Once nonconsensual pornography is posted, Internet searches of individuals' names will often display their naked image or video.[282] Thus, victims' communities will often quickly become aware of their presence in revenge porn and hold victims in lower esteem or "deter third persons from associating or dealing with [them]."[283]

In addition to worsening psychological harms, this change in reputation can cause severe economic loss. Some victims have been fired from their jobs for appearing in nude pictures online; others have been unable to find work at all.[284] For instance, an Ohio teacher was placed on paid leave after a nude photo of her was posted on a revenge porn web site.[285] A government agency fired a woman after a co-worker distributed a naked picture of her to colleagues.[286] Holly Jacobs, a 29-year-old Florida PhD student, had to legally change her

---

279 *See* Citron & Franks, *supra* note 7, at 351.

280 *See* Chiarini, *supra* note 6.

281 *Cf.* Scardino, *supra* note 173, at 3 (describing how the harm caused by defamation results from the "community's changed impressions of the defamed person.").

282 Citron & Franks, *supra* note 7, at 352.

283 *Cf.* Scardino, *supra* note 173, at 3 (explaining the effects of defamation on victims' reputations in their communities).

284 Citron & Franks, *supra* note 7, at 352.

285 Jessica Brown, *Teacher Placed on Leave in 'Revenge Porn' Case*, USA TODAY (Dec. 4, 2013), http://www.usatoday.com/story/news/nation/2013/12/04/teacher-placed-on-leave-in-revenge-porn-case/3873933/?AID=10709313&PID=6157500&SID=i5bgppgpdx00t26a00dth.

286 Citron, *supra* note 208.

name to find relief after her ex-boyfriend leaked sexually explicit videos and images of her online.[287]

Economic costs are particularly great because most employers use the Internet to screen candidates based on their online reputations, searching job applicants' names on search engines.[288] If sexually explicit images of individuals come up,

> [r]ecruiters do not contact victims to see if they posted nude photos of themselves or if someone else did in violation of their trust. The 'simple but regrettable truth is that after consulting search results, employers don't call revenge porn victims to schedule interviews or to extend offers. Employers do not want to hire individuals whose search results might reflect poorly on the employer.[289]

2. INDIRECT HARM

a. *Harm to Future Victims*

In *Ferber*, the Court reasoned that the distribution network for child pornography must be closed if the production material, which requires the sexual exploitation of children, is to be effectively controlled.[290] Similarly, the distribution of nonconsensual pornography must also be controlled to reduce demand for this type of pornography. Unlike child pornography, however, revenge porn is often not distributed for profit, but rather, to embarrass or shame the victim.[291]

---

[287] Beth Stebner, *'I'm Tired of Hiding': Revenge-Porn Victim Speaks Out Over Her Abuse After She Claims Ex Posted Explicit Photos of Her Online*, NY DAILY NEWS (May 3, 2013), http://www.nydailynews.com/news/national/revenge-porn-victim-speaks-article-1.1334147.

[288] Citron & Franks, *supra* note 7, at 352 ("According to a 2009 study commissioned by Microsoft, nearly 80% of employers consult search engines to collect intelligence on job applicants, and, about 70% of the time, they reject applicants due to their findings.").

[289] *Id.*; *see also* Citron, *supra* note 208.

[290] Liu, *supra* note 73, at 9.

[291] *See, e.g.*, *supra* text accompanying notes 1–3. Whether a revenge porn site is for profit or not, it must be regulated in order to prevent people from becoming victims of nonconsensual pornography in the future, much like the Court's rationale for finding child pornography unprotected in *Ferber*. *See* Liu, *supra* note 73, at 9.

Nevertheless, without finding this speech unprotected, future victims will continue to be harmed by revenge porn.

Moreover, although child pornography promotes illegal activity—child abuse—and nonconsensual pornography does not necessarily involve an illegal act, it may be used as a tool for crimes such as domestic violence and human trafficking.[292] The images themselves are often taken as a result of an abuser's force, and abusers often threaten to disclose the images if victims try to escape from the abusive relationship.[293] Thus, allowing nonconsensual pornography—like child pornography—may enable the perpetration of future crimes, inflicting harm on future victims.

b. *Harm to Women in General*

While men may be victims of nonconsensual pornography, the vast majority of victims are women.[294] Although significant progress has been made toward gender equality, the failure to take issues that predominantly affect women seriously—such as domestic violence, sexual assault, sexual harassment, and now nonconsensual pornography—perpetuates unequal treatment of women.[295] This is particularly true where the law recognizes an analogous issue, but the analogous crime traditionally affects men.

For instance, courts have long recognized the harms resulting from defamation: it changes victims' "standing in the community, their opportunities, their self-worth, [and] their free enjoyment of life."[296] For courts to see these harms of defamation, "and yet to fail

---

[292] *See* Citron & Franks, *supra* note 7, at 351 ("Revenge porn is often a form of domestic violence. Frequently, the intimate images are themselves the result of an abuser's coercion of a reluctant partner.").

[293] *See* Citron & Franks, *supra* note 7, at 351; *see also* Brooks, *supra* note 1 (Human trafficking victim Sarah testified that her former pimp, Alex Campbell, "made her have sex with another woman while he videotaped [her]. He then threatened to send that video to her family, to expose her, if she did not come back into his grasp."); *Revenge Porn by the Numbers*, *supra* note 260 ("One in ten expartners have threatened that they would expose risqué photos of their ex online . . . 60 percent of those who threatened to expose intimate photos followed through on their threats.").

[294] Citron & Franks, *supra* note 7, at 347; *Revenge Porn by the Numbers*, *supra* note 260 (stating that ninety percent of revenge porn victims in Cyber Civil Rights Initiative sample were women).

[295] Citron & Franks, *supra* note 7, at 347; *see also* discussion *supra* note 257.

[296] Matsuda, *supra* note 176, at 2376.

to see that the very same things happen to the victims of [revenge porn], is selective vision."[297] The law is treating like harms unalike: it is providing a remedy for people facing these harms when they are caused by an act that historically affects men (defamation), while leaving no recourse for victims enduring the same harms when the act predominantly affects women (revenge porn).[298] How many women like Chiarini need to attempt suicide before it becomes clear that the harm nonconsensual pornography inflicts on women parallels—if not exceeds—the harm defamation inflicts on men? Why is it that when a man is accused of being a communist, he can bring suit against the publisher for defaming his character—damaging his reputation and creating risk of economic loss;[299] yet, when a woman sues a man for publishing nude photos of her on Twitter and sending them to her employer—causing the same damage to her reputation and risk of economic loss—her case is automatically dismissed?[300]

CONCLUSION

Nonconsensual pornography should not be protected speech under the First Amendment because the severe harms—indirect and especially direct—strongly outweigh the marginal free speech benefits. Although preserving freedom of speech is critical to advancing the marketplace of ideas, strengthening participatory democracy, and fostering self-expression and determination, categorization—treating different forms of speech differently—does not necessarily undermine these goals.[301] As Frederick Schauer has argued, having fewer, broader categories of unprotected speech is less likely to protect free speech than having more, narrowly defined categories that

---

[297] *Cf. id.* (comparing defamation to hate speech). While Matsuda is comparing defamation to hate speech, not revenge porn, her idea of selective vision analogously applies to victims of revenge porn.

[298] For examples of how the law provides no recourse for revenge porn victims, see discussion *supra* note 6 and accompanying text.

[299] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 326 (1974).

[300] *See* Oren Yaniv, *Judge Dismisses Case Against Brooklyn Man Who Shared Nude Photos of Girlfriend on His Twitter Account*, NY DAILY NEWS (Feb. 19, 2014), http://www.nydailynews.com/new-york/brooklyn/revenge-porn-case-put-bed-article-1.1620648; *see also* Donaghue, *supra* note 6 (discussing the same New York case).

[301] *See Codifying*, *supra* note 179, at 314–15.

are less vague and malleable.[302] Thus, creating a new category for nonconsensual pornography can protect victims from the significant harms it causes, without diluting an existing category of speech or infringing upon the core free speech values.

Moreover, finding nonconsensual pornography to be unprotected speech is critical to providing a legal remedy for revenge porn victims. Without doing so, failure to provide recourse in the law causes a second injury to victims—"the pain of knowing that the government provides no remedy, and offers no recognition of the dehumanizing experience that victims . . . are subjected to."[303] Nonconsensual pornography causes real harm. "When the legal system offers no redress for that real harm, it perpetuates [it]."[304]

---

[302] *See id.* at 314 ("[T]he alternatives then are diluting those tests that are valuable precisely because of their strength, or formulating new tests and categories that leave existing standards strong within their narrower range."). Thus, rather than fitting nonconsensual pornography into child pornography, obscenity, or public disclosure of private fact, it would better protect free speech to create a narrow category of unprotected speech specifically for nonconsensual pornography.

[303] Matsuda, *supra* note 176, at 2379 (While Matsuda is referring to victims of hate propaganda, victims of revenge porn similarly endure this second injury of knowing the government provides no remedy for their suffering.).

[304] *Id.* at 2380.