University of Chicago Legal Forum

Volume 2019 Article 15

2019

Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection?

Evan Ribot

Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection?

Evan Ribot[†]

I. INTRODUCTION

Like many issues related to relationships and sexuality, "revenge porn" has become more complicated—and its consequences more sinister—thanks to twenty-first century technology. Revenge porn, often referred to as nonconsensual pornography, involves the publication or distribution of sexually explicit images without the subject's consent.[1] This may include images obtained without consent, as well as images initially obtained with consent—often within the context of an intimate relationship—but later shared broadly or used as blackmail.[2] The issue received increased public attention after a 2014 incident in which a hacker accessed and leaked sexually explicit photos of several celebrities.[3] But celebrities are far from the only victims: a 2016 study found that roughly one in twenty-five Americans have been threatened with or been the victim of nonconsensual image sharing.[4]

The impact of revenge porn is deep for its victims because, even if they can bring their attackers to justice, the stain of the images or videos shared—especially if they circulate online—is hard to erase. Victims of revenge porn often face workplace discrimination or cyberstalking,

[†] B.A. 2014, Harvard College; J.D. Candidate 2020, The University of Chicago Law School. I would like to thank Professor David Strauss for his advice and feedback. I would also like to thank the current and former staff and board of *The University of Chicago Legal Forum*.

[1] Danielle Keats Citron, *Revenge Porn Should be a Crime in the U.S.*, CNN (Jan. 16, 2014), https://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html [https://perma.cc/65P5-5RDQ].

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

[3] Nicole Darrah, *Jennifer Lawrence, Kate Upton's Nude Photo Hacker Sentenced to Prison*, FOX NEWS (Aug. 30, 2018), https://www.foxnews.com/entertainment/jennifer-lawrence-kate-uptons-nude-photo-hacker-sentenced-to-prison [https://perma.cc/4PL9-SLMY].

[4] Lori Janjigian, *Nearly 10 Million Americans are Victims of Revenge Porn, Study Finds*, BUS. INSIDER (Dec. 13, 2016), https://www.businessinsider.com/revenge-porn-study-nearly-10-million-americans-are-victims-2016-12 [https://perma.cc/5RVL-FLPE].

and many victims lose their jobs or struggle to gain employment because their sexually explicit images are readily available online.[5] As understanding of the negative impacts of revenge porn has deepened, states have rushed to pass laws criminalizing the practice. To date, forty-six states as well as Washington, D.C., have enacted statutes banning the disclosure or distribution of sexually explicit images without the subject's consent.[6] Activists and scholars alike see the growth of state laws criminalizing revenge porn as healthy progress in addressing a phenomenon that existing laws lack the teeth to curb.[7]

As revenge porn statutes spread, however, they face increasing resistance from critics who claim the new laws run afoul of the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[8] Accordingly, the government's ability to restrict speech is limited, and if the government wants to impose a "content-based" restriction on speech, such a restriction must be narrowly tailored to serve a compelling state interest.[9] Yet, First Amendment doctrine does not provide blanket protections for all speech, and some types of speech "can be regulated due to their propensity to bring about serious harms and only slight contributions to First Amendment values."[10] Thus, proponents of strong criminal statutes against revenge porn seek to argue that nonconsensual pornography falls into one of the categorical exemptions of speech that does not garner the full protection of the First Amendment. Alternatively, drafters of statutes addressing nonconsensual pornography aim to demonstrate that these statutes can be carefully constructed to survive strict scrutiny.

But two recent court decisions evaluating different state revenge porn statutes reveal the potential flaws in those approaches. In April 2018, the Texas Court of Appeals struck down the state's law prohibiting "Unlawful Disclosure or Promotion of Intimate Visual Material" as overbroad under the First Amendment.[11] The court reasoned that the law, which did not consider the intent of the person posting or sharing

---

[5] Citron, *supra* note 1.

[6] *See 46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIV. RTS. INITIATIVE (Aug. 5, 2019), https://www.cybercivilrights.org/revenge-porn-laws/ [https://perma.cc/R63K-ZBK3].

[7] *See* Citron & Franks, *supra* note 2, at 349.

[8] U.S. CONST. amend. I.

[9] Citron & Franks, *supra* note 2, at 374.

[10] *Id.* at 375.

[11] Andrea Zelinski, *Texas "Revenge Porn" Law Struck Down by State Appeals Court*, HOUS. CHRON. (Apr. 23, 2018), https://www.chron.com/news/politics/texas/article/Texas-revenge-porn-la-struck-down-by-12848920.php [perma.cc/2TS6-7E44].

the sexually explicit images, was not the least restrictive means of preventing the dissemination of nonconsensual pornography.[12] But in August 2018, the Vermont Supreme Court held that the state's statute banning "Disclosure of Sexually Explicit Images Without Consent" was constitutional.[13] Although the Vermont Supreme Court declined to place revenge porn into a category of speech exempted from full First Amendment protection, it ruled that the state's law did survive review under strict scrutiny because it was narrowly tailored to advance a compelling state interest.[14]

This Comment will argue that revenge porn should be categorically exempt from the full protection of the First Amendment so that statutes restricting it need not withstand strict judicial scrutiny. As states continue to draft and litigate these statutes, it would be prudent for proponents of criminalizing revenge porn to argue for an exemption from First Amendment protection for the distribution of nonconsensual pornography. Such arguments are in line with the historical expansion of Supreme Court jurisprudence in understanding "low-value speech." In fact, the call to exempt revenge porn from garnering constitutional protection mirrors the Supreme Court's embrace of a First Amendment categorical exemption for child pornography in *New York v. Ferber*.[15] Moreover, a categorical exemption for revenge porn from First Amendment protection will prevent proponents from having to define revenge porn under the "obscenity" exemption, which would limit the potency of revenge porn statutes. Finally, a categorical exemption for nonconsensual pornography will prevent these statutes from having to withstand strict scrutiny, a requirement which threatens to derail state efforts at curbing revenge porn.

II. THE LEGAL LANDSCAPE OF REVENGE PORN

A. Defining Revenge Porn and its Harms

Revenge porn refers to the sharing and distribution of sexually explicit images or videos without the subject's consent.[16] This definition may include images obtained without consent, as well as images initially obtained with consent but with the expectation that they would remain private.[17] It is often referred to as nonconsensual pornography

---

[12] Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *7 (Tex. App. May 16, 2018).

[13] State v. VanBuren, No. 16-253, 2018 WL 4177776, at *12 (Vt. Aug. 31, 2018).

[14] *Id.*

[15] 458 U.S. 747 (1982).

[16] Citron & Franks, *supra* note 2, at 346.

[17] *Id.*

and is sometimes described as "involuntary porn" or "cyber rape."[18] That distinction in terminology, of course, "is one of motive, not effect: revenge porn is often intended to harass the victim, while any image that is circulated without the agreement of the subject is nonconsensual porn."[19] That is, an image or video need not be shared or posted by a former partner to constitute nonconsensual pornography, and the circulation of images posted by hackers or individuals seeking to profit from them lack the "revenge" element that comes to mind in discussions of this issue.

Regardless of whether the images are posted by a scorned ex, a hacker, or someone looking to blackmail the subject, the impact of revenge porn on the victim is deep. Due to the permanence and vastness of the internet, victims often struggle to escape the impact of their sexually explicit images being circulated. Once an image is posted, it can reach hundreds of websites with ease, and even if a victim has "an image scrubbed from one site, there's no way to guarantee it hasn't been copied, screenshotted, or stored on a cache somewhere."[20] This means that, at any given moment, a victim's photos may be "only one email, Facebook post, or Google search away."[21] Further, rather than being a rare phenomenon, modern technology has allowed revenge porn to become startlingly common: a 2016 study found that 4 percent of U.S. internet users—roughly 10.4 million people—have either had someone post an intimate image of them without their consent or threaten to do so.[22] For women under thirty, that number rose to nearly 10 percent.[23] These images may be posted to websites devoted to revenge porn, but they often hit victims closer to home by being posted on social media and shared with friends and family. In January of 2017 alone, Facebook received more than 51,000 reports of revenge porn and disabled 14,000 accounts in response.[24]

Unsurprisingly, because revenge porn is fueled by technology, its impact is most deeply felt by younger people. A 2016 study showed that 16 percent of American adults had sent a sexually explicit photo, and more than 20 percent had received one.[25] More than 23 percent of those who had received nude photos reported sharing the images, and men

---

[18] I will use "revenge porn" and "nonconsensual pornography" interchangeably throughout this Comment.

[19] Charlotte Alter, *'It's Like Having an Incurable Disease': Inside the Fight Against Revenge Porn*, TIME (Jun. 13, 2017), http://time.com/4811561/revenge-porn/ [https://perma.cc/CE5H-4C9P].

[20] *Id.*

[21] *Id.*

[22] Janjigian, *supra* note 4.

[23] Alter, *supra* note 19.

[24] *Id.*

[25] *Id.*

were twice as likely as women to do so.[26] Young people—the generation most adept at using smartphones and modern technology—are increasingly likely to send and receive sexually explicit texts, photos, or videos by cell phone, practices known as "sexting."[27] A 2015 survey found that nearly 40 percent of teenagers had posted or sent sexually suggestive messages, and that 24 percent of people between the ages of fourteen and seventeen and 33 percent of people between the ages of eighteen and twenty-four engaged in nude sexting.[28] Accordingly, revenge porn is a uniquely twenty-first century phenomenon that poses twenty-first century challenges to lawmakers looking to curb it. Stories in recent years of school officials and law enforcement discovering and trying to stomp out "sexting rings"—in publicized incidents in Virginia,[29] New York,[30] Colorado,[31] and Connecticut[32]—are emblematic of the challenge nonconsensual pornography poses to a generation empowered to upload and share anything from their phone instantaneously.

Older Americans may find the practice of sharing sexual photos within a relationship alarming, and critics sometimes dismiss victims of revenge porn for having created the content in the first place. But MIT professor Sherry Turkle explains that sexting is "embedded in modern relationships" in a way that does not trouble a generation of people who "grew up with a phone in [their] hand."[33] Although parents are often startled by the idea that their teenagers may be exchanging explicit images and videos, such practices are understood to be common within relationships in the digital age.[34] Moreover, Carrie Goldberg, a New York lawyer profiled in *The New Yorker* as "the attorney fighting

---

[26] *Id.*

[27] Karen Thalacker, *New "Revenge Porn" Law Could Snag Sexting Teens*, DES MOINES REG. (July 10, 2017), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2017/07/10/new-revenge-porn-law-could-snag-sexting-teens/465718001/ [https://perma.cc/5B2H-C3HJ].

[28] *Id.*

[29] *Sexting Exposes Louisa Teens*, THE CENT. VIRGINIAN (April 2, 2014), http://www.thecentralvirginian.com/sexting-exposes-louisa-teens/ [https://perma.cc/PX3J-HKTV].

[30] Kristine Thorne, *Massive Sexting Scandal at Kings Park High School Leads to Dozens of Suspensions, Some Arrests*, ABC7 (Nov. 9, 2015), https://abc7ny.com/news/massive-sexting-scandal-at-long-island-high-school-leads-to-dozens-of-suspensions/1075927/ [https://perma.cc/DX53-AM4Z].

[31] The Associated Press, *Colorado: No Charges for Students in Sexting Case*, N.Y. TIMES (Dec. 9, 2015), https://www.nytimes.com/2015/12/10/us/colorado-no-charges-for-students-in-sexting-case.html [https://perma.cc/CAU2-8W4P].

[32] Lorenzo Ferrigno, *Newtown High School Students Charged in 'Sexting' Ring*, CNN (Jan. 27, 2016), https://www.cnn.com/2016/01/27/us/connecticut-high-school-sexting-ring/index.html [https://perma.cc/XT5Q-RVT6].

[33] Alter, *supra* note 19.

[34] *See* Thalacker, supra note 27.

revenge porn," suggests that sharing intimate material is "time-honored behavior" that is "often part of intimate communication."[35] The digital exchange of intimate images and videos, Goldberg suggests, resembles the practice of soldiers deploying to war decades ago carrying pinup photographs of their wives and girlfriends.[36] Goldberg also cites other invasive practices—such as voyeuristic upskirt videos, peephole videos, and other nonconsensual means of obtaining explicit images—as a reminder that many victims of revenge porn did not consent to the creation of such images in the first place.[37] Even when the creation of the image is consensual—as it often is within modern intimate relationships—the nonconsensual distribution of the material harms its victims.

It is also unsurprising that the victims of revenge porn are overwhelmingly female. While women sometimes circulate images of men, studies show that the vast majority of nonconsensual pornography involves images of women posted and shared by men.[38] Some men admit to sharing these images out of anger or jealousy toward a former partner, but for others, "[t]he dissemination of images can be as much about impressing other men as it is about humiliating the victim."[39] Additionally, studies suggest that minorities and members of the LGBTQ community are more likely to be threatened with or victimized by revenge porn than the general population.[40] Because of its disparate impact on women and members of other marginalized communities, activists and legal scholars alike have called for a more serious recognition of the issue within the #MeToo Movement.[41] Undoubtedly, the growth of the #MeToo Movement and heightened scrutiny surrounding sexual misconduct has intensified the spotlight on revenge porn and accelerated legal and political discussions about how to approach the challenge. Now, activists seek to change how people discuss the phenomenon, saying that revenge porn "should be called out for what it is: image-based

---

[35] Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Dec. 5, 2016), https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn [https://perma.cc/QR4M-PM65].

[36] *Id.*

[37] *Id.*

[38] *See* Alter, *supra* note 19.

[39] *Id.*

[40] *See* Janjigian, *supra* note 4.

[41] *See* Leah Juliett, *Why Revenge Porn Needs its Own #MeToo Movement*, GLAMOUR (June 4, 2018), https://www.glamour.com/story/why-revenge-porn-needs-its-own-metoo-movement [https://perma.cc/EU67-547L].

sexual abuse."[42] Within abusive relationships, the explicit images themselves can be "a form of domestic violence."[43] Abusers often use the threat of disclosing the material to pressure their victims into staying in a relationship and follow through on the threats when the victims leave.[44]

Revenge porn's connection to the #MeToo Movement is bolstered by the fact that its impact haunts victims in a way that is similar to sexual assault and other forms of sexual misconduct. Victims of revenge porn suffer professional consequences: once an explicit picture is posted online, a search of the victim's name will display the image, meaning that many victims either lose their jobs or struggle to find employment.[45] Especially in an age when employers screen job candidates' online profiles throughout the hiring process, victims of nonconsensual pornography are deeply disadvantaged—and often permanently.[46] As victims struggle to remove all traces of their explicit images from the internet, they have limited success in seeking employment because "employers do not want to hire individuals whose search results might reflect poorly on the employer."[47] Furthermore, revenge porn raises the risk that its victims will face offline stalking and physical attack, meaning that victims often do not feel safe leaving their homes.[48] Many victims report withdrawing from social settings, particularly from online engagement, where they shutter their social media profiles and back away from online networking, an essential tool of the internet age.[49] Revenge porn also leaves its victims with lasting trauma, as many victims suffer from panic attacks, depression, and other symptoms associated with post-traumatic stress disorder.[50] Research from the End Revenge Porn campaign showed that 51 percent of revenge porn victims have had suicidal thoughts.[51] These studies of victims and their stories paint a picture of revenge porn's lasting—and often unavoidable—impact.

---

[42] Claire McGlynn, *Call "Revenge Porn" What it is: Sexual Abuse*, VOX (July 10, 2017), https://www.vox.com/first-person/2017/7/8/15934434/rob-kardashian-blac-chyna-revenge-porn-abuse [https://perma.cc/5NXV-W8E5].

[43] Citron & Franks, *supra* note 2, at 351.

[44] *Id.*

[45] *See* Citron, *supra* note 1.

[46] *Id.*

[47] Citron & Franks, *supra* note 2, at 352.

[48] *See* Citron, *supra* note 1.

[49] *Id.*

[50] *See* Melanie Ehrenkranz, *We Need to Study the Effects of Revenge Porn on Mental Health*, GIZMODO (June 22, 2018), https://gizmodo.com/we-need-to-study-the-effects-of-revenge-porn-on-mental-1823086576 [https://perma.cc/K5TS-HUNA].

[51] *Id.*

B. The Growth of State Law

As recent studies and news reports began to illuminate the scope of nonconsensual pornography and its harms, activists and legal scholars began to call for states to criminalize the practice. Although countries around the globe—including Australia, Canada, Germany, and Israel—had all passed laws criminalizing revenge porn by 2014, American jurisdictions were slower to approach the issue.[52] One of the earliest and most significant calls to address the problem came from Danielle Keats Citron and Mary Anne Franks in the Wake Forest Law Review in 2014.[53] Their article details the revenge porn phenomenon, explains the shortcomings of civil law and the need to invoke criminal law to address it, and offers some guidance for states looking to square their approach in combating revenge porn with the limits of the First Amendment.[54] This article is highly informative, and it reflects how pervasive the issue of nonconsensual pornography has become. When Citron and Franks first published their article, only six states had laws on the books criminalizing revenge porn.[55] Today—just five years later—forty-six states as well as Washington, D.C. have passed laws criminalizing the nonconsensual distribution of sexually explicit images.[56]

Citron, Franks, and others who have written on the subject have offered guidelines for states to follow in drafting revenge porn laws that will effectively counter the practice without clashing with the First Amendment. Citron and Franks argue that a "narrowly crafted revenge porn criminal statute that protects the privacy of sexually explicit images can be reconciled with the First Amendment."[57] Accordingly, they recommend several careful drafting techniques for state legislators. First, they say revenge porn laws should explicitly clarify the perpetrator's mental state, possibly to require the defendant's knowledge that the victim did not consent to the disclosure.[58] However, Citron and Franks fear that revenge porn statutes that require intent to do harm or inflict emotional distress go too far and are not required by the First Amendment.[59] Second, they suggest that statutes will better withstand

---

[52] *See* Yifa Yaakov, *Israeli Law Makes Revenge Porn a Sex Crime*, THE TIMES OF ISRAEL (Jan. 6, 2014), https://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/ [https://perma.cc/Q2GS-B5EF].

[53] Citron & Franks, *supra* note 2, at 345.

[54] *Id.*

[55] *Id.* at 371.

[56] *46 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6.

[57] Citron & Franks, *supra* note 2, at 376.

[58] *Id.* at 387.

[59] *See id.* ("Whether the person making the disclosure is motivated by a desire to harm a particular person, as opposed to a desire to entertain or generate profit, should be irrelevant").

First Amendment challenges if they require proof that the victims suffered harm and contain clear exemptions to protect disclosures regarding matters of public interest.[60] These suggestions address concerns that the First Amendment limits restrictions on speech that contribute to a matter of public importance without inflicting private harm. Finally, Citron, Franks, and others also note the importance of clearly defining the terms of the crime in state statutes to establish a clear understanding of what exactly a "sexually explicit" image is and what "disclosure" entails.[61] Other authors addressing the subject recommend taking definitions of "intimate material" from existing federal law.[62]

A survey of state revenge porn laws enacted within the last few years reveals the practical implications of recommendations from scholars like Citron, Franks, and others.[63] The enacted state laws reflect a messy legal landscape of nonconsensual pornography laws across the country and demonstrate the extraordinary challenge of defining and addressing the issue. While Citron and Franks argue against an intent requirement, the majority of state revenge porn laws include some "intent to harass"[64] or "intent to harm"[65] requirement. Of the forty-seven enacted statutes, only twelve lack any sort of intent requirement. Twenty-seven of the statutes require that the victim have a "reasonable expectation of privacy"[66] or that the parties "agree or understand"[67] that the image was to remain private. This requirement is not necessarily the same as having knowledge that the victim has not consented, the mental state that Citron and Franks recommend; twenty-three of the statutes include a requirement that the defendant "knows or should have known"[68] that the victim did not consent to the distribution of the image. Eight states adopted the recommendation to require that the victim actually suffer harm, while four others require that the action would "cause a reasonable person to suffer harm."[69] This haphazard national landscape reflects the difficulty legislators face in assessing the

---

[60] *Id.* at 388.

[61] *Id.*

[62] *See* Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How A Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT L. REV. 247, 284 (2015).

[63] While this Comment is in no way intended to review or evaluate each state law on the books to date, it will discuss some significant laws to show relevant trends and point to potential strengths and shortcomings evident in different statutes.

[64] *See, e.g.*, OR. REV. STAT. ANN. § 163.472(1)(a) (2017).

[65] *See, e.g.*, VT. STAT. ANN. TIT. 13, § 2606(b)(1) (2015).

[66] *See, e.g.*, KAN. STAT. ANN. § 21-6101(a)(8) (2016).

[67] *See, e.g.*, CAL. PENAL CODE § 647(j)(4) (2019).

[68] *See, e.g.*, 720 ILCS 5/11-23.5(b)(3) (2015).

[69] *See, e.g.*, VT. STAT. ANN. TIT. 13, § 2606(b)(1) (2015).

pernicious—but still relatively new—challenges associated with revenge porn. The gaps in state laws create a few notable challenges.

First, two state laws err in requiring some type of romantic relationship for the law to apply. Arkansas law mandates that the victim be "a family or household member of the actor or another person with whom the actor is in a current or former dating relationship."[70] Pennsylvania law requires an "intent to harass, annoy or alarm a current or former sexual or intimate partner."[71] The shortcomings of these two statutes should be evident: a victim need not have been in a sexual relationship with the perpetrator in order to suffer from the lasting impact of nonconsensual pornography. The Pennsylvania law seems to suggest that a victim's angry ex could provide intimate images to a friend with instructions to share them with intent to cause harm, and the friend—who had never been an "intimate partner" of the victim—could do so without punishment. These laws too narrowly portray the scope of nonconsensual pornography.

Second, perhaps the most significant gray area between different state laws lies between requirements that the victim had an expectation that the image would remain private and that the defendant disseminated the image knowing that the victim did not consent. Citron and Franks focus only on the latter in their recommendations, suggesting that the perpetrator's knowledge that the victim did not consent is the most effective way for state laws to establish the defendant's mental state.[72] There is ostensibly some overlap between knowledge that the victim did not consent to the distribution of sexually explicit images and the reasonable expectation that those images would remain private. Yet several state statutes include both requirements. Observing how those clauses work together as more cases of nonconsensual pornography come to the fore should illuminate the differences between these two requirements.

Statutes that have neither an intent requirement nor a requirement that the defendant know that the victim has not consented might present First Amendment challenges. Georgia's bizarre statute requires that the dissemination of the image "is harassment or causes financial loss to the depicted person and serves no legitimate purpose to the depicted person"[73] but also says that a violation only occurs if the defendant, "knowing the content of a transmission or post, knowingly

---

[70] ARK. CODE ANN. § 5-26-314(a)(2) (2015).

[71] 18 PA. STAT. AND CONS. STAT. ANN. § 3131(a) (2014).

[72] Citron & Franks, *supra* note 2, at 387.

[73] GA. CODE ANN. § 16-11-90(b) (2015).

and without the consent of the depicted person"[74] disseminates the image. The defendant need not know that the victim has not consented but rather merely must knowingly post the image and know its content.[75] First passed in 2015, Texas's law required only that the defendant disclose material "without the effective consent"[76] of the victim. Accordingly, anyone who distributed nonconsensual pornography—even without any understanding of the circumstances in which it was created or any intent to do harm to the subject—became liable under the Texas statute. Laws like this are likely too broad to survive First Amendment challenges because they can be more narrowly tailored and because they treat defendants with intent to do harm and knowledge of a victim's lack of consent no differently than they do defendants who thoughtlessly share an image. It should be no surprise, then, that the Texas revenge porn statute was successfully challenged in court.

C. *Jones*, *VanBuren*, and Lingering First Amendment Questions

Texas's law criminalizing revenge porn was passed in 2015, but the state's Twelfth Court of Appeals struck it down in April 2018 in *Ex Parte Jones*.[77] The Texas law made a defendant liable for disclosing intimate visual material "without the effective consent of the depicted person" when that material was obtained or created "under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private" and the disclosure both caused harm to and revealed the identity of the victim.[78] Notably, the statute included no requirement of intent to harm or knowledge that the victim did not consent to disclosure of the material. After being charged with unlawful disclosure of intimate visual material in violation of the statute, defendant Jordan Jones offered a pretrial application for a writ of habeas corpus alleging that the statute was unconstitutional.[79] Although the trial court denied his application, the Twelfth Court of Appeals reversed, holding that the Texas revenge porn statute was an unconstitutional regulation of free speech that did not survive strict scrutiny review.[80]

---

[74] *Id.*

[75] Georgia's statute is one of three that alludes to financial hardships of victims, along with Hawaii (HAW. REV. STAT. ANN. § 711-1110.9(b) (2018)) and North Carolina (N.C. GEN. STAT. ANN. § 14-190.5A(b) (2017)).

[76] TEX. PENAL CODE ANN. § 21.16(b)(1) (2017).

[77] No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. May 16, 2018).

[78] TEX. PENAL CODE ANN. § 21.16(b) (2017).

[79] Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *1 (Tex. App. May 16, 2018).

[80] *Id.* at *8.

The court rebuffed efforts from the Texas Attorney General's office to reconsider its ruling.[81] In an interview following the Twelfth Court of Appeals' decision, Mary Anne Franks said that, even though the Texas statute was "not perfect," the court "'delivered a very poorly reasoned opinion that will hopefully be quickly reversed.'"[82] Jones's attorney, Houston First Amendment lawyer Mark Bennett, disagreed, arguing that "'[i]f a statute restricts a real and substantial amount of protected speech, then it's void.'"[83] But lawyers defending the law for Texas's Office of the State Prosecuting Attorney countered by emphasizing the limited contribution that revenge porn makes to the marketplace of ideas. As Texas attorney John Messinger explained, "[t]here is no 'core political speech' at risk here . . . the conduct prohibited by the statute—violations of privacy of the most intimate kind—is not necessary or even helpful to a vibrant democracy."[84]

The Texas Twelfth Court of Appeals' opinion squares with the notion that a statute must be narrowly tailored in order to survive strict scrutiny analysis. The court described the statute's broad reach in its strict scrutiny review with a hypothetical in which a man shares an explicit photo of an ex taken with the understanding it would remain private; after the vengeful ex shares the photo, it is shared again by others who do not recognize the victim and do not know that it was disseminated without her consent.[85] In this scenario, the court laments, all parties who share the photo can be charged under the Texas law, "despite . . . having no knowledge of the circumstances surrounding the photograph's creation or the depicted person's privacy expectation."[86] Thus, the court concluded that the statute created a prohibition of "alarming breadth" and did not survive strict scrutiny.[87] However, just as Franks suggested that the Texas statute "could have been drafted more carefully," the court here offered suggestions for improving the law.[88] "At the very least," the court reasoned, the law "could be narrowed by requiring that the disclosing person have knowledge of the

---

[81] Emma Platoff, *Is "Revenge Porn" Protected Free Speech? Texas Court of Criminal Appeals to Weigh In*, THE TEX. TRIB. (Dec. 12, 2018), https://www.texastribune.org/2018/12/12/revenge-porn-free-speech-texas-court-criminal-appeals/ [https://perma.cc/7Z4L-X4XE].

[82] Melanie Ehrenkranz, *Texas Court Strikes Down Revenge Porn Law for Being 'Overbroad'*, GIZMODO (Apr. 20, 2018), https://gizmodo.com/texas-court-strikes-down-revenge-porn-law-for-being-ove-1825429020 [https://perma.cc/8LJ4-GGG9].

[83] Platoff, *supra* note 81.

[84] *Id.*

[85] Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *6 (Tex. App. May 16, 2018).

[86] *Id* at *7.

[87] *Id.*

[88] Ehrenkranz, *supra* note 82.

circumstances giving rise to the depicted person's privacy expectation."[89]

Following this legal defeat, the Texas House and Senate each voted unanimously to heed the court's advice and revise the state's revenge porn statute. The revised law, signed by Governor Greg Abbott on June 15, 2019, includes a provision requiring the defendant to have intent to harm the victim and that that he or she "knows or has reason to believe that" the victim had a reasonable expectation the material would remain private.[90] When unveiling the bill, State Rep. Mary Gonzalez said that the revisions were made "in order to make sure that unintended consequences, that people who might've accidentally received [an explicit image] and then continued to send it aren't negatively impacted."[91]

On the other hand, Vermont's 2015 revenge porn law was upheld in August 2018 by the Vermont Supreme Court in *State v. VanBuren*.[92] The Vermont law makes it a crime to "knowingly disclose a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, *with the intent to harm, harass, intimidate, threaten, or coerce the person depicted*, and the disclosure would cause a reasonable person to suffer harm."[93] Defendant Rebekah VanBuren was alleged to have accessed the Facebook account of a man she was romantically involved with and discovered messages of nude photos from complainant, an ex-girlfriend.[94] The defendant told the complainant she was "going to ruin [her] and get revenge," and posted the pictures on Facebook.[95] The trial court granted the defendant's motion to dismiss on the grounds that the Vermont statute was an unconstitutional prohibition on free speech that did not withstand strict scrutiny, but the state's supreme court reversed and upheld the statute.[96] Following the case, Defender General Matt Valerio said in an interview that the decision was "bizarre" and that his office is contemplating an appeal to the United States Supreme Court.[97]

---

[89] *Ex Parte Jones*, 2018 WL 2228888, at *7.

[90] Civil and Criminal Liability for the Unlawful Disclosure of Intimate Visual Material, 2019 Tex. Sess. Law Serv. Ch. 1354 (H.B. 98).

[91] Stephen Young, *Texas Fixes Its Revenge Porn Law*, THE DALLAS OBSERVER (May 20, 2019), https://www.dallasobserver.com/news/texas-passes-revenge-porn-fix-11668838 [https://perma.cc/34BP-EUYK].

[92] No. 16-253, 2018 WL 4177776 (Vt. Aug. 31, 2018).

[93] VT. STAT. ANN. TIT. 13, § 2606(b)(1) (2015) (emphasis added).

[94] *VanBuren*, 2018 WL 4177776, at *2.

[95] *Id.*

[96] *Id.* at *4.

[97] Mark Davis, *Vermont Supreme Court Upholds Revenge Porn Law*, SEVEN DAYS VT. (Aug. 31, 2018), https://www.sevendaysvt.com/OffMessage/archives/2018/08/31/vermont-supreme-court-upholds-revenge-porn-law [https://perma.cc/YT7M-FGZD].

Unlike the much broader law in Texas, the Vermont revenge porn statute withstood strict scrutiny analysis, as the court concluded that the law was narrowly tailored to serve a compelling state interest. The Vermont court said that the state interest underlying the statute is compelling based on "the relatively low constitutional significance of speech relating to purely private matters, evidence of potentially severe harm to individuals arising from nonconsensual publication of intimate depictions of them, and a litany of analogous restrictions on speech that are generally viewed as uncontroversial and fully consistent with the [First Amendment]."[98] While not denying that the restriction was "content-based," the court compared the statute to others that prevent disclosure of private information surrounding health or finances and reasoned that the state's interest in preventing nonconsensual disclosure of sexually explicit images is "at least as strong as its interest" in other disclosures, restrictions upon which are "uncontroversial and widely accepted as consistent with the First Amendment."[99] Said the court:

> In the constellation of privacy interests, it is difficult to imagine something more private than images depicting an individual engaging in sexual conduct, or of a person's genitals, anus, or pubic area, that the person has not consented to sharing publicly. The personal consequences of such profound personal violation and humiliation generally include, at a minimum, extreme emotional distress.[100]

Further, the court construed the statute's requirement that the disclosure be made "knowingly" to require knowledge both of the act of disclosing and the absence of consent from the subject.[101] By relying on this narrow construction, the court affirmed the statute's intent while avoiding an interpretation of the law that would force a constitutional clash.

Although the courts in Texas and Vermont performed a strict scrutiny analysis of their state's respective revenge porn laws, the question of whether strict scrutiny review is unnecessary remains. The Texas court in *Ex Parte Jones* noted that content-based restrictions on speech survive only when confined to some traditional categories of unprotected speech such as obscenity, defamation, fraud, and true threats.[102] Yet the state in *Jones* oddly conceded at oral argument that Texas's statute was subject to strict scrutiny instead of arguing that it may

---

[98] *VanBuren*, 2018 WL 4177776, at *12.

[99] *Id.* at *15.

[100] *Id.*

[101] *Id.* at *17.

[102] Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *4 (Tex. App. May 16, 2018).

cover speech consistently categorized as unprotected.[103] Then, on rehearing and in subsequent briefs, the State disregarded that concession and argued that the statute should be subject only to "intermediate scrutiny," which would afford revenge porn less protection than "speech on pressing political questions."[104] Nonetheless, the court quickly brushed aside the idea that the speech targeted by the Texas law was obscene, saying that the statute "does not include language that would permit a trier of fact to determine that the visual material disclosed is obscene" and, even if it did, the statute would be "wholly redundant in light of Texas's obscenity statutes."[105] Thus, the court spent little time on anything other than its strict scrutiny analysis, which it used to invalidate the law.

However, the Vermont court considered in much greater depth the possibility that revenge porn may not get full First Amendment protection, potentially creating an opening for new legal arguments on the issue. In *VanBuren*, the state argued its revenge porn statute could escape strict scrutiny because it "categorically regulates obscenity."[106] The court was not persuaded because "a state's interest in regulating obscenity relates to protecting the sensibilities of those exposed to obscene works, as opposed to, for example, protecting the privacy or integrity of the models or actors depicted in obscene images."[107] In other words, obscenity receives less robust First Amendment protection than other speech because of its ability to offend unwilling recipients of obscene speech, whereas revenge porn laws aim to protect the privacy and safety of unwilling subjects. In dismissing the attempt to label revenge porn as obscenity, the court offered a potentially useful hint: "Vermont's statute is more analogous to the restrictions on child pornography that the Supreme Court has likewise categorically excluded from full First Amendment protection."[108]

Similarly, the court dismissed Vermont's argument to carve out a new category of unprotected speech for revenge porn as an extreme invasion of privacy. The court detailed favorably the argument that "nonconsensual pornography seems to be a strong candidate for categorical exclusion from full First Amendment protections" based on precedent

---

[103] *Id.*

[104] Platoff, *supra* note 81.

[105] *Ex Parte Jones,* 2018 WL 2228888, at *4.

[106] *VanBuren*, 2018 WL 4177776, at *6.

[107] *Id.*

[108] *Id.*

supporting the government's ability to regulate speech about purely private matters.[109] Nonetheless, the court declined to offer such a categorical rule about nonconsensual pornography based on the Supreme Court's "emphatic rejection of attempts to name previously unrecognized categories, and the oft-repeated reluctance of the Supreme Court to adopt broad rules dealing with state regulations protecting individual privacy as they relate to free speech."[110] Ultimately, the court wrote, "we leave it to the Supreme Court in the first instance to designate nonconsensual pornography as a new category of speech that falls outside the First Amendment's full protections."[111]

III. CREATING A FIRST AMENDMENT CATEGORICAL EXEMPTION FOR REVENGE PORN

Although they reached different conclusions in assessing their respective states' revenge porn laws, the courts in Texas and Vermont each declined to categorically exempt revenge porn from the protection of the First Amendment. The court in Texas was brief in its assessment of the issue, as the state mostly conceded the point: "[n]ew categories of unprotected speech may not be added to the list based on a conclusion that certain speech is too harmful to be tolerated."[112] The Vermont Supreme Court gave more credence to the idea but nonetheless "decline[d] to predict" that the Supreme Court would create a new categorical First Amendment exemption for revenge porn.[113] The court based this decision primarily on *United States v. Stevens*,[114] where the Supreme Court decided not to recognize a new category outside the First Amendment's full protection for depictions of animal cruelty. This decision was based largely on the lack of historical regulation of such a category of speech rather than on policy arguments for the proposed category.[115]

While both courts may have been rightly reluctant to step ahead of the Supreme Court—and while the Vermont Supreme Court explicitly suggested the Supreme Court may take a different approach—revenge porn can and should properly be characterized as low-value speech demanding a categorical First Amendment exemption. If given the opportunity to consider the issue, the Supreme Court should create a categorical exemption for statutes criminalizing revenge pornography. To do so would not depart from the Court's historical approach to First

---

[109] *Id.* at *11.

[110] *Id.* at *12.

[111] *Id.*

[112] Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *4 (Tex. App. May 16, 2018).

[113] *VanBuren*, 2018 WL 4177776, at *12.

[114] 130 S. Ct. 1577 (2010).

[115] *VanBuren*, 2018 WL 4177776, at *7.

Amendment exemptions—despite its holding in *Stevens*—and would properly categorize revenge porn as low value. Indeed, a First Amendment exemption for nonconsensual pornography could operate like the exemption the Supreme Court created for child pornography in *Ferber*. Without such an exemption, revenge porn statutes will face an uphill battle either to be categorized as obscenity or to survive strict scrutiny when challenged.

A. The History of Categorical Exemptions for Low-Value Speech

While the courts in *Jones* and *VanBuren* treated First Amendment categorical exemptions as stagnant and rooted only in history, a thorough historical analysis reveals this is not the case. In a 2015 article, Genevieve Lakier challenged the prevailing assumption that the existence of the "low-value" categories of speech—such as obscenity, libel, and true threats—have been fixed throughout American history.[116] In fact, Lakier noted, from the country's founding through the nineteenth century, courts extended significant First Amendment protection to many categories of speech that would later be recognized as low value.[117] It was not until the 1930s and 1940s that the Supreme Court began to broadly categorize high-value and low-value speech, and even when the court did make such distinctions, it "relied very little on historical precedent to actually define the low-value categories."[118] Nor did the Supreme Court decide whether to identify new categories of low-value speech solely based on historical considerations; its decisions on which categories of speech demand full First Amendment protections have long been "functional, rather than historical."[119]

This history makes the Supreme Court's assertion in *Stevens*, that new categories of low-value speech cannot be created absent a "long-settled tradition of subjecting that speech to regulation," dubious at best.[120] The Vermont Supreme Court quoted *Stevens* in "rejecting the notion that the court has 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'"[121] In *Jones*, Texas's Twelfth Court of Appeals cited the Supreme Court's reasoning in *Brown v. Entertainment Merchants Association*[122] to support the idea

---

[116] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

[117] *Id.* at 2182.

[118] *Id.* at 2207.

[119] *Id.* at 2210.

[120] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

[121] State v. VanBuren, No. 16-253, 2018 WL 4177776, at *12 (Vt. Aug. 31, 2018) (citation omitted).

[122] 564 U.S. 786 (2011).

that new categories of unprotected speech cannot simply be created because the legislature concludes they are harmful, an idea that *Brown* attributed to *Stevens*.[123] Thus, it is clear that the reasoning behind *Stevens* has contributed to courts' reluctance to offer a First Amendment exemption to revenge porn. Nonetheless, the Supreme Court in *Stevens* leaves open the possibility of creating new categories of low-value speech "that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[124]

Within that framework, *Stevens* is better understood not as foreclosing the possibility of new First Amendment categorical exemptions but instead as suggesting that depictions of animal cruelty do not warrant the creation of one. In *Stevens*, the government sought to defend a statute prohibiting visual and auditory depictions of "conduct in which a living animal is intentionally harmed."[125] It argued that, because "depictions of illegal acts of animal cruelty . . . necessarily lack expressive value," such speech should be added to the list of categorical exemptions to First Amendment protection.[126] The Court rejected the government's proposition that categorical exclusions be considered "under a simple balancing test" of whether the value of the speech outweighs its societal costs:

> As a free-floating test for First Amendment coverage, that [balancing test] is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[127]

This passage suggests that balancing tests alone are insufficient grounds for creating First Amendment categorical exemptions because they "allow[ ] judges to impose their own values onto the Constitution."[128] While the Court acknowledged that the notion of a balance of harms has "descriptive" value in identifying types of exempt expression,

---

[123] Ex Parte Jones, No. 12-17-00346-CR, 2018 WL 2228888, at *4 (Tex. App. May 16, 2018).

[124] *Stevens*, 130 S. Ct. at 1586.

[125] *Id.* at 1584.

[126] *Id.* at 1585 (internal quotations omitted).

[127] *Id.*

[128] Lakier, *supra* note 116, at 2176.

such a balancing test is insufficient on its own to determine such categorical exemptions.[129] Instead, the Court noted that its exemptions have arisen from "special case[s]" in which the speech was "intrinsically related" to an underlying harm.[130] Although the Court stressed the lack of historical regulation of speech depicting animal cruelty to reject the government's proposed balancing test, assessments of categorical exemptions must focus on whether the speech in question is integral to a harm the state seeks to eliminate. In *Stevens*, the Court did not find the link between depictions of animal cruelty and the harms of animal cruelty itself sufficient to warrant a First Amendment categorical exemption.[131] However, it noted that it "need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them."[132]

Thus, although courts in Vermont and Texas relied on *Stevens* to support the contention that the Supreme Court will not create new First Amendment exemptions without historical precedent, the Court's reasoning in *Stevens* should be limited to the issue it confronted there. The depiction of animal cruelty is simply not a strong analogue for nonconsensual pornography. The government's proposition in *Stevens* that depictions of animal cruelty "necessarily lack expressive value" is similar to the claim made by Texas lawyers insisting that revenge porn is not "entitled to the highest level of protection afforded by the First Amendment" because it "is not essential for the marketplace of ideas to function properly."[133] A clear understanding of *Stevens* suggests that this argument is misplaced. Instead of focusing on "expressive value," the strongest argument to establish a categorical exemption for revenge porn is the intrinsic link between its distribution and the infliction of permanent and repeated harm upon its victims. Because a categorical exemption for revenge porn would look quite different from the one the Supreme Court considered in *Stevens*, the invocation of *Stevens* in *Jones* and *VanBuren* may be misguided. Nonetheless, it is understandable that lower courts would hesitate to create a new First Amendment categorical exemption without Supreme Court guidance, so it is not unreasonable that the Vermont Supreme Court elected to "leave it to the Supreme Court."[134]

---

[129] *Stevens*, 130 S. Ct. at 1586.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Platoff, *supra* note 81.

[134] State v. VanBuren, No. 16-253, 2018 WL 4177776, at *12 (Vt. Aug. 31, 2018) (citation omitted).

B. First Amendment Parallels Between Revenge Porn and Child Pornography

The need to create a First Amendment categorical exemption for revenge porn is similar to the recognized exemption for child pornography. Despite the potential roadblock presented in *Stevens*, the Supreme Court has latitude to identify categories of speech that are newly exempt from First Amendment protection based on the connection between the speech and its underlying harms. Thus, the Supreme Court could carve out an exemption for nonconsensual pornography much like it did for child pornography in *New York v. Ferber*.[135] In *Ferber*, the proprietor of a bookstore specializing in sexual materials claimed that a statute banning the dissemination of child pornography violated the First Amendment.[136] The Court wrote that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."[137] Just as Lakier's article suggests, the Court's approach in upholding a law criminalizing child pornography was rooted in practical considerations, not entrenched history.[138] The Court supported this categorical exemption—and could do so again—by noting that "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[139] Child pornography does not earn full First Amendment protection because it "bears so heavily and pervasively on the welfare of children engaged in its production," so "the balance of competing interests is clearly struck."[140]

But *Ferber*'s creation of a categorical exemption for child pornography is rooted not merely in the danger of the speech itself but rather in the relationship between the dissemination of child pornography and its ongoing harms. As the Court explained:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the

---

[135] 458 U.S. 747 (1982).

[136] *Id.* at 751.

[137] *Id.* at 763.

[138] Lakier, *supra* note 116, at 2218.

[139] *Ferber*, 458 U.S. at 763–64.

[140] *Id.* at 764.

> production of material which requires the sexual exploitation of children is to be effectively controlled.[141]

Thus, laws prohibiting the distribution of child pornography address two distinct harms of that speech: the harm from creating the video, during which a child is forced to engage in sexual activity, and the harm from the dissemination and the "permanent record" of the material. In that sense, the distribution of images or videos is a part of the abuse itself, which means banning that distribution is essential to curbing child sexual abuse. Notably, the depictions of animal abuse considered in *Stevens* do not present this brand of harm, as the dissemination of images and videos of animal abuse does not "intrinsically" compound that abuse.[142] In other words, while animal abuse is illegal, the spread of materials documenting that abuse does not impose harm on the animals themselves, whereas the spread of child pornography exacerbates the harm felt by its victims.

However, when the distribution of speech or material is not integral to an underlying harm, that speech is unlikely to garner a categorical exemption from First Amendment protection. This notion is made clear in contrasting *Ferber* and *Ashcroft v. Free Speech Coalition*.[143] In *Ashcroft*, the government sought to defend provisions of the Child Pornography Prevention Act of 1996 from a First Amendment challenge.[144] Although *Ferber* created a categorical exemption for the dissemination of child pornography, the provisions at issue in *Ashcroft* banned "child pornography that does not depict an actual child," whether as "virtual child pornography" or as depictions that "appear to be" of minors engaging in sexual conduct.[145] The Court noted that such depictions "do not involve, let alone harm, any children in the production process" and scoffed that the statute's literal terms could criminalize "a Renaissance painting depicting a scene from classical mythology."[146] Ultimately, criminalizing speech that merely appears to be child pornography is distinct from *Ferber* because it "records no crime and creates no victims by its production," thus eliminating the "intrinsic[]" relationship between the distribution of child pornography and its harms.[147] Because

---

[141] *Id.* at 759.

[142] *Stevens*, 130 S. Ct. at 1586.

[143] 122 S. Ct. 1389 (2002).

[144] *Ashcroft*, 122 S. Ct. at 1396.

[145] *Id.* at 1397.

[146] *Id.*

[147] *Id.* at 1402.

the production of child pornography that is not actually child pornography does not in itself harm children, the law challenged in *Ashcroft* was not within the purview of *Ferber*.

This nuanced distinction between the categorical exemption developed in *Ferber* and cases like *Stevens* and *Ashcroft* creates a framework to develop a First Amendment exemption for nonconsensual pornography. Laws prohibiting the dissemination of child pornography in *Ferber* addressed the harms arising both from the creation and distribution of the material. In *Stevens*, the distribution of depictions of animal cruelty did not cause the animals to suffer any additional harm. In *Ashcroft*, there were no real victims harmed by the creation of virtual images who could be further harmed by their distribution. Conversely, the harms of nonconsensual pornography are rooted in its *dissemination*, and statutes prohibiting that dissemination attempt to address the idea that such distribution creates victims. Undoubtedly, the *creation* of child pornography is far more sinister than the creation of sexually explicit images between adults, especially when such images are created consensually within the confines of a romantic relationship. However, when images or videos are obtained without consent—in the form of voyeuristic upskirt videos, peephole videos, or depictions of sexual assaults—the creation of such material is itself a crime, and its dissemination exacerbates the harm to the victim.[148] These cases create the closest analogue to *Ferber* and highlight a clear need for categorically exempting the dissemination of such material from First Amendment protection.

But even when the sexually explicit material is initially created with the victim's consent, the harm resulting from its nonconsensual distribution closely parallels that described in *Ferber*. The Court in *Ferber* emphasized that the "materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[149] Additionally, because of that harm, the value of the distribution of the material "is irrelevant to the child who has been abused."[150] In *Ferber*, the Court deferred to legislative judgment that "the use of children as subjects in pornographic materials is harmful to the physiological, emotional, and mental health of the child," and that each step in the reproduction and dissemination of the material compounds the trauma of the victim.[151] Modern stories and studies about the impacts of revenge porn paint a similar picture: victims cannot escape the presence of their explicit images, struggle to remove them from

---

[148] *See* Talbot, *supra* note 36.

[149] *Stevens*, 130 S. Ct. at 759.

[150] *Id.* at 761.

[151] *Id.* at 758.

web searches and social media, and find it nearly impossible to outrun their impact in professional and personal settings.[152] Victims whose images are posted on sites catering to revenge porn are often harassed, stalked, and physically threatened.[153] If anything, the intrinsic distribution harms described in *Ferber*—decided nearly four decades ago—are worsened exponentially by the use of modern technology to fuel revenge porn. Even when there is no harm in the consensual creation of a sexually explicit image, its nonconsensual dissemination online creates permanent repercussions for victims that can be at least as harmful as those associated with child pornography.

Thus, the Supreme Court could craft a categorical First Amendment exemption to revenge porn that mirrors the approach it took toward child pornography in *Ferber*. As the #MeToo Movement grows and stories of revenge porn's harms come to the fore, evidence that the nonconsensual distribution of sexually explicit material bears "heavily and pervasively" on victims' welfare is exceedingly strong. Victims of revenge porn are overwhelmingly young, female, LGBTQ, or members of another minority group, and their lives are forever changed by the dissemination of a single sexually explicit image.[154] They suffer physical, financial, and emotional hardship as a result of the distribution of their images—that is, revenge porn attacks the welfare of its victims and often permanently impacts their lives. Moreover, the fear of dissemination of an explicit image is often an intrinsic part of an abusive relationship insofar as the abuser will force the victim to stay in a relationship by threatening to share the material if the victim leaves.[155] By the Supreme Court's reasoning in *Ferber*—and an understanding, rooted in Lakier's arguments, that the Court can and should create First Amendment exemptions by weighing "the expressive value of speech against its social costs"[156]—there are strong reasons for the Supreme Court to create a new categorical exemption from First Amendment protection for revenge porn when the Court reviews the constitutionality of the revenge porn statutes.

Finally, the Vermont Supreme Court in *VanBuren* details the compelling argument that extreme invasions of privacy like revenge porn are "historically unprotected, but . . . not yet . . . specifically identified," per *Stevens*.[157] This means that, in addition to the bevy of practical and

---

[152] *See* Citron, *supra* note 1.

[153] *Id.*

[154] *See* Janjigian, *supra* note 4.

[155] Citron & Franks, *supra* note 2, at 351.

[156] Lakier, *supra* note 116, at 2212.

[157] State v. VanBuren, No. 16-253, 2018 WL 4177776, at *7 (Vt. Aug. 31, 2018) (citation omitted).

policy implications that support stamping out revenge porn and curbing its impact on victims, the longstanding legal tradition of safeguarding privacy supports a categorical exemption for revenge porn as well. The Vermont court notes that the "Supreme Court has never struck down a restriction of speech on purely private matters that protected an individual who is not a public figure from an invasion of privacy or similar harms."[158] Instead, the Supreme Court has considered the private and public interests at stake on a case-by-case basis.[159] Even in cases where the Court upheld the free speech right, it was careful to not diminish privacy interests. For example, the Vermont court in *VanBuren* noted that the Supreme Court had never held "that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion."[160] The lengthy legal history that supports a right to privacy even against First Amendment considerations thus provides an additional reason for the Supreme Court to draw a categorical exemption from First Amendment protection for nonconsensual pornography. Coupled with the weight of the intrinsic "evil to be restricted" as described in *Ferber*, these clear historical standards create a strong case for the categorical exemption of revenge porn, even under the ostensibly restrictive framework laid out in *Stevens*.

C. Revenge Porn and Modern Conceptions of Consent

Those hesitant to criminalize revenge porn present First Amendment and practical concerns, but a categorical exemption for revenge porn would comport with modern understandings of consent in the #MeToo era. John Humbach's 2014 article notes that revenge porn does not fall into the Supreme Court's delineated categorical exceptions to the First Amendment and far more closely resembles "emotionally distressing speech" that nonetheless receives full constitutional protection.[161] Further, Humbach argues that revenge porn laws prevent dissemination of true, albeit harmful, information.[162] Thus, although revenge porn may lead to "definite individualized harm" for victims such as the loss of employment opportunities, the fact that it "conveys information that *matters*, at least to some people" should afford revenge porn First Amendment protection even if that information is harmful.[163] Essen-

---

[158] *Id.* at *8.

[159] *Id.*

[160] *Id.* at *9 (citation omitted).

[161] John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 237 (2014).

[162] *Id.* at 226.

[163] *Id.* at 228.

tially, Humbach suggests that an employer evaluating a potential candidate—or anyone evaluating someone in a social setting—may want to know about conduct that reflects the character of that person, and the decision to take and send a nude photo may be useful information even if it harms the victim.

But Humbach's approach understates the harmful impact of revenge porn on its victims and conflates a personal decision to intimately share an explicit image with the experience of seeing one's explicit image disseminated without consent. Perhaps this argument would be stronger if the impacts of revenge porn were solely professional, but victims of revenge porn face stalking, harassment, and physical threats and abuse in addition to lasting economic and professional hardship. Those professional hardships should not be minimized, as women today struggle within the workplace to escape the cultural reach of sex discrimination. Moreover, Humbach's idea that criminalizing revenge porn restricts "the free flow of information concerning the activities that it reveals" narrows the importance of consent by suggesting that a victim's proclivity to share photos within an intimate relationship "reveals" something worth knowing.[164] To the extent that it does, there remains a vital difference between knowing that someone shares explicit photos with an intimate partner and seeing the photos themselves. Citron and Franks aptly state that "[c]onsent to share information in one context does not serve as consent to share this information in another context. . . . Consent is contextual; it is not an on/off switch."[165] The argument for the Supreme Court to classify revenge porn as speech categorically exempt from full First Amendment protection is supported by the Court's precedent and history. That support is not at all eroded by misguided suggestions that laws criminalizing revenge porn halt the free flow of truthful information.

Finally, Humbach's assertion wrongly minimizes the impact of material that was not obtained consensually at all. In addition to conflating consensual creation with consensual distribution, this line of criticism—much like state laws requiring a romantic relationship between the defendant and the victim—presents too narrow a conception of nonconsensual pornography. While "revenge porn" conjures up headlines about jilted exes, "[s]ometimes people surreptitiously film consensual sex acts, or even rapes, and make the footage public for reasons other than revenge."[166] Accordingly, the suggestion that revenge porn be categorically exempt from the First Amendment encompasses nonconsen-

---

[164] *Id.* at 230.

[165] Citron & Franks, *supra* note 2, at 355.

[166] Talbot, *supra* note 36.

sual pornography of all stripes, including voyeuristic recordings, depictions of nonconsensual sexual acts, and sexually explicit material shared coercively within the confines of an abusive relationship. The latter example is particularly confounding to Humbach's conception of consent, since the exchange of sexually explicit materials is "often part of a pattern of coercive domestic abuse."[167] In that context, a victim's choice to create an image may not be much of a choice at all, notwithstanding the fact that such creation does not support dissemination. All told, nonconsensual pornography can have numerous origins and mechanisms of distribution, and material need not be created consensually to fall within the purview of an appropriate First Amendment categorical exemption.

D. The Ill-Fitting Obscenity Exemption

Rather than placing nonconsensual pornography in a new categorical exemption from First Amendment protection, some scholars argue that revenge porn could fit within the obscenity exemption. Citron and Franks gesture toward the idea that "nonconsensual pornography can be seen as part of obscenity's long tradition of proscription."[168] Other authors argue that, because the "Supreme Court respects each state's 'long-recognized legitimate interest in regulating the use of obscene material,'" lawyers defending state revenge porn statutes should try to classify them as obscene to garner an existing categorical exemption.[169] This argument notes that "prurience and patent offensiveness are apparently permissible grounds on which to discriminate," so revenge porn statutes that criminalize sexually explicit material can be construed as criminalizing obscenity and thus avoid the hurdle of strict scrutiny review.[170]

The problem with this argument is that the revenge porn statutes in question do not aim to restrain sexually explicit material itself but rather the conduct associated with its dissemination. Nonconsensual pornography is harmful not necessarily because the images exist in the first place, but because those images are disseminated. While an image obtained or created without consent is harmful on its own, many modern couples value the ability to consensually exchange intimate photos.[171] Trying to place revenge porn laws under the categorical cover of the obscenity exemption misstates the aim of these statutes, which are

---

[167] McGlynn, *supra* note 42.

[168] Citron & Franks, *supra* note 2, at 384.

[169] Kitchen, *supra* note 62 at 278 (citation omitted).

[170] *Id.* (citation omitted).

[171] *See* Alter, *supra* note 19.

not geared toward criminalizing images but rather toward prohibiting the conduct associated with their nonconsensual distribution. Thus, this argument conflates the consensual and nonconsensual sharing of explicit images just as Humbach's does and, if carried forward, may threaten the potency of revenge porn laws in addressing the actual harm of dissemination. The Vermont Supreme Court recognized the Supreme Court's unwillingness to "shoehorn speech about violence into obscenity" in rejecting the suggestion in *Brown* that violent video games fit within that categorical exemption.[172] The *VanBuren* Court's observation that the "purposes underlying government regulation of obscenity and of nonconsensual pornography are distinct [and] the defining characteristics of the regulated speech are accordingly quite different" wisely demonstrates that obscenity and revenge porn do not fit together under one First Amendment exemption.[173]

E. Overcoming the Strict Scrutiny Hurdle

Creating a categorical exemption for revenge porn will provide clarity to the messy picture of emerging statutes and protect them from strict scrutiny review. For now, absent word from the Supreme Court or a state court willing to create its own categorical exemption for nonconsensual pornography, statutes criminalizing revenge porn have to withstand strict scrutiny analysis if challenged in court. Some observers may argue that this status quo is not problematic. After all, state court decisions in Vermont and Texas—although reaching different conclusions—appear to offer relatively clear guidelines for how a statute can survive a legal challenge. The Texas statute was initially too broad because it did not require knowledge of the victim's lack of consent or intent to do harm, thereby including in its sweep actors who may have shared images without clear criminal elements. The Vermont statute was upheld because it, as construed by the Vermont Supreme Court, required knowledge of the victim's lack of consent as well as intent to do harm in disseminating an image.[174] Thus, a revenge porn statute that simply looks like Vermont's law and avoids the pitfalls of Texas's original law should stand up in court.

But not all legal challenges are so simple, and the forty-seven revenge porn laws enacted to date leave us with more questions than courts in Texas and Vermont may have answered. Although activists have made their case for states to adopt stringent laws prohibiting nonconsensual pornography, a survey of the enacted statutes shows a

---

[172] State v. VanBuren, No. 16-253, 2018 WL 4177776, at *7 (Vt. Aug. 31, 2018).

[173] *Id.* at *6.

[174] *Id.* at *17.

sweepingly incoherent legal landscape. Citron and Franks offered numerous clear and cogent suggestions in their 2014 article. Five years later, dozens of states have developed statutes that jumble intent to harm, knowledge of the lack of consent, actual harm, and the victim's reasonable expectation of privacy. It remains unclear how these various legal thresholds will work together, and no one state law perfectly mirrors any other. Thus, notwithstanding persuasive policy recommendations from Citron, Franks, and other scholars who have tackled the issue, state legislatures have made progress in implementing revenge porn laws but have done little to mitigate confusion surrounding them.

Similarly, despite the ostensibly logical results in *Jones* and *VanBuren*, neither case seems to have resolved the law in its respective state. Instead, these decisions left scholars puzzled and the losing side contemplating appeals, meaning these battles may be far from over.[175] Further, the lack of uniformity of state laws likely means more lawsuits are coming, which will provide additional insight—and doubtless create additional questions—over criminal elements like intent to harm, actual harm, and the violation of a reasonable expectation of privacy. Ultimately, these questions seem destined to be resolved by the Supreme Court, but the wide array of state laws means that the high court's take on revenge porn may depend significantly on the statute it confronts. Given this litany of lingering questions, legal activists should not rest on their laurels and merely hope that the ruling in *VanBuren* offers a blueprint for drafting a constitutional revenge porn law. Instead, they should push for a categorical exemption to full First Amendment protection for these laws in order to increase their impact and limit the legal hurdles to rooting out nonconsensual pornography.

IV. CONCLUSION

Revenge porn is a uniquely twenty-first century phenomenon, exacerbated by the sinister capabilities of modern technology and amplified by the #MeToo Movement's engagement in new dialogues about relationships, consent, and sexual abuse. To curb its harms, states have laudably begun implementing new laws criminalizing the nonconsensual distribution of sexually explicit images. Yet, the most significant legal triumph over revenge porn would be classifying it as categorically exempt from the full protection of the First Amendment. Doing so would match the Supreme Court's historical approach in evaluating low-value speech based on its harmful nature. In fact, the rationale underlying the Supreme Court's decision to exempt the distribution of child por-

[175] *See* Ehrenkranz, *supra* note 82; Davis, *supra* note 97.

nography from First Amendment protection is echoed in modern discussions of revenge porn. Activists leading the charge against revenge porn should emphasize this connection. The need for a contemporary categorical exemption for revenge porn is bolstered by the pervasive threat to victims from online dissemination as well as modern understandings of consent in the #MeToo era.

Conversely, trying to place nonconsensual pornography within the existing categorical exemption for obscenity or attempting to clarify a messy landscape of state statutes in hopes that they can survive strict scrutiny are unlikely to be successful approaches. The creation of a First Amendment categorical exemption for revenge porn will empower legislators to curb this evil practice without running afoul of longstanding First Amendment jurisprudence.