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"But, I Didn't Mean to Hurt You": Why the First Amendment Does Not Require Intent-to-Harm Provisions in Criminal "Revenge Porn" Laws

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"BUT, I DIDN'T MEAN TO HURT YOU"[1]: WHY THE FIRST AMENDMENT DOES NOT REQUIRE INTENT-TO-HARM PROVISIONS IN CRIMINAL "REVENGE PORN" LAWS

Abstract: Free speech protection under the First Amendment to the U.S. Constitution is arguably one of the most essential rights that U.S. citizens hold. Since the founding of this country, a tension has existed between the government's protection of free speech and an individual's right to privacy. The Internet exacerbated this tension by providing an accessible avenue for the dissemination of private images for all to see. Nonconsensual pornography and "revenge porn" are at the epicenter of this issue. Today, one in twelve adults in the United States will become a victim of nonconsensual pornography during their lifetime. Despite the pervasive role of nonconsensual pornography in modern society, most existing state criminal laws are narrowly drawn and, as a result, fail to protect most victims from these devastating attacks. State efforts to pass statutes that provide more comprehensive protections to victims' privacy are routinely frustrated by constitutional challenges under the First Amendment. This Note discusses the two most prominent types of criminal nonconsensual pornography laws—harassment-based statutes and privacy-based statutes— and explores the intersection between these laws and the First Amendment. This Note argues that, to sufficiently protect all victims of nonconsensual pornography, states must adopt privacy-based laws with no intent-to-harm provisions. Finally, this Note argues that these privacy-based statutes do not violate the Constitution, because they make permissible content-neutral restrictions on speech that should survive intermediate scrutiny when challenged under the First Amendment.

INTRODUCTION

"Never ever in my life have I ever trusted anyone as much as I trusted my boyfriend," said a Reddit user, a 24-year-old female, in her anonymous Reddit post from January 2020.[2] The post, *I Found Out That My Boyfriend Has Been Sharing My Nudes with His Father*, detailed how the Reddit user confronted her boyfriend after she discovered that he sent naked photos of her to his father

[1] *See* People v. Austin, 155 N.E.3d 439, 449 (Ill. 2019), *cert. denied*, 141 S. Ct. 233 (2020); Brief of Defendant-Appellee Bethany Austin at 2–3, *id.* (No. 193910).

[2] *I (24F) Found Out That My (25M) Boyfriend Has Been Sharing My Nudes with His Father*., REDDIT (Jan. 1, 2020, 9:12 PM), https://www.reddit.com/r/TwoXChromosomes/comments/eirnp9/i_24f_found_out_that_my_25m_boyfriend_has_been/ [https://perma.cc/G4Y9-7APH].

via text message.[3] When the Reddit user mentioned the text exchange to her boyfriend, he explained that he sent the photos to brag about her body and their sex life.[4] After expressing the violation and humiliation she felt, the Reddit user ended the post by sharing her *uncertainty* about pursuing legal action against her boyfriend.[5] Unfortunately, even if the Reddit user wanted to bring criminal charges, she likely would not be able to.[6]

Like the anonymous Reddit user, millions of Americans are victims of the sharing of their sexually explicit or nude images without their consent.[7]

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[3] *See id.* The Reddit user, a girl in her mid-twenties, discovered the text messages when scrolling through her boyfriend's phone. *Id.* In response to the photographs of her, her boyfriend's father made commentary on her looks and body. *Id.* The Reddit user then confronted her boyfriend, and he explained that he was "completely devastated and genuinely fe[lt] terrible." Erica Diaz, *Woman Asks for Advice After Finding Out Her Boyfriend Has Been Sharing Her Nudes with His Father*, PERCOLATELY, https://percolately.com/erica/woman-advice-boyfriend-sharing-nudes-father/ [https://perma.cc/W9ZQ-L6SE] [hereinafter Diaz, *Woman Asks for Advice After Boyfriend Shared Her Nudes*]; *see also* Jesus Diaz, *What Is Reddit and How to Use It: The Definitive Guide*, TOM'S GUIDE (July 22, 2019), https://www.tomsguide.com/reference/what-is-reddit [https://perma.cc/AW9Z-LQQE] (defining Reddit as conglomeration of online forums where users can post about any topic imaginable).

[4] *See I (24F) Found Out That My (25M) Boyfriend Has Been Sharing My Nudes with His Father.*, *supra* note 2. In an updated post, the Reddit user explained that her boyfriend's father always judged his son about the amount of sex that he had and judged his manhood off it. Diaz, *Woman Asks for Advice After Boyfriend Shared Her Nudes*, *supra* note 3.

[5] *See I (24F) Found Out That My (25M) Boyfriend Has Been Sharing My Nudes with His Father.*, *supra* note 2.

[6] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws/ [https://perma.cc/8JQK-6LGC]. Today, forty-eight states, Washington, D.C, and one U.S. territory have passed legislation that makes it illegal to disseminate a sexually explicit image of another without their consent. *See id.* (listing states with some form of nonconsensual pornography law). Out of those fifty statutes, thirty-six require that the perpetrator act with some form of an intent to harm the victim. *See id.*; *see also, e.g.*, FLA. STAT. § 784.049(1)(b) (2020) (requiring the intent to cause "substantial emotional" harm to the victim); MD. CODE ANN., CRIM. § 3-809(c)(1) (West 2020) (requiring "the intent to harm, harass, intimidate, threaten or coerce" the victim); 18 PA. CONS. STAT. § 3131(a) (2020) (requiring an "intent to harass, annoy or alarm" the victim); Amber Heard, Opinion, *Amber Heard: Are We All Celebrities Now?*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/opinion/amber-heard-revenge-porn.html [https://perma.cc/B6UL-W2ZC] (illuminating how "revenge porn" laws that have intent-to-harm provisions do not protect victims whose perpetrators acted without an intent to harm the victim). Currently, no federal law exists to protect victims from individuals who share private sexually explicit images without their consent. Nicole Goodkind, *Katie Hill Could Finally Bring Pending Revenge Porn Bill in Congress to a Vote*, FORTUNE (Oct. 29, 2019), https://fortune.com/2019/10/29/katie-hill-revenge-porn-bill-congress/ [https://perma.cc/YN2Y-CGH6].

[7] AMANDA LENHART ET AL., DATA & SOC'Y RSCH. INST., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" 4, 6 (2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf [https://perma.cc/N2Z2-36L5]. A 2016 study of 3,002 American Internet users found that one in twenty-five Internet users was a victim of someone showing, sending, or posting a nude or nearly nude image of them without their consent. *Id.* at 6. Today, one in twenty-five equates to more than thirteen million people. *See id.*; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/6XUK-P7FQ] (Jan. 9, 2021) (equating that to approximately 13.2 million people out of 330 million people, which is the current U.S. population); *see also* Yanet Ruvalcaba & Asia A. Eaton, *Nonconsensual Pornography Among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration and Health Cor-*

This phenomenon is known as nonconsensual pornography.[8] Nonconsensual pornography, more commonly referred to as "revenge porn,"[9] is the dissemination of nude or sexually explicit images of another without their consent.[10] Although society is all too familiar with the common "revenge porn" storyline—a jilted ex-partner posts naked or sexually explicit photos or videos online of their ex-paramour[11]—most "revenge porn" cases are not rooted in revenge whatsoever.[12]

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relates for Women and Men, AM. PSYCH. ASS'N, Dec. 2018, at 1, 4 (finding, in a 2018 study, that one in twelve U.S. adults have been victims of nonconsensual pornography); Grace Williams, *4 Percent of Americans Have Been Victims of Revenge Porn, Report Says*, FOX NEWS (Dec. 13, 2016), https://www.foxnews.com/tech/4-percent-of-americans-have-been-victims-of-revenge-porn-report-says [https://perma.cc/4ANQ-W2HR] (outlining the statistics resulting from the Data & Society Research Institute's study).

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

[9] *Id.* at 345–46 (noting that "revenge porn" is used to refer to nonconsensual pornography).

[10] *Id.*; Megan Fay, Note, *The Naked Truth: Insufficient Coverage for Revenge Porn Victims at State Law and Proposed Federal Legislation to Adequately Address Them*, 59 B.C. L. REV. 1839, 1841 (2018) (noting that in many cases of nonconsensual pornography the victims create the images or give their consent for the images to be created, but then the perpetrator disseminates the images without the victims' consent). For the purposes of this Note, the term nonconsensual pornography describes the broad definition of the publication or dissemination of sexually explicit images of another without their consent. *See* 720 ILL. COMP. STAT. 5/11-23.5(a)–(b) (2020) (promulgating a broad definition of nonconsensual pornography). In contrast, in this Note, the term "revenge porn" denotes when an actor publishes or disseminates sexually explicit images of another without their consent and with the intent to harm the image's subject. *See* VT. STAT. ANN. tit. 13, § 2606(a) (West 2020) (requiring a perpetrator act with an intent to harm their victim, thus asserting a narrower definition).

[11] *See* Charlotte Alter, *'It's Like Having an Incurable Disease': Inside the Fight Against Revenge Porn*, TIME (June 13, 2017), https://time.com/4811561/revenge-porn/ [https://perma.cc/LCJ9-CUS9] (explaining the violations Kara Jefts felt when her ex-boyfriend emailed nude images of her to her family and friends and posted them on Internet sites accompanied by threats or falsities about her sexual history); Gabrielle Fonrouge, *The Disturbing Story Behind NYC's Revenge-Porn Perpetrators*, N.Y. POST (Feb. 25, 2019), https://nypost.com/2019/02/25/the-disturbing-story-behind-nycs-revenge-porn-perpetrators/ [https://perma.cc/N3PG-K2BB] (detailing how a woman in Manhattan repeatedly found explicit images of herself across the Internet after her ex-boyfriend posted them online); Melissa Jun Rowley, *There Are Revenge Porn Laws on the Books in 46 States, but Victims Say Not Enough Is Being Done to Protect Them Online*, INSIDER (Nov. 11, 2019), https://www.insider.com/revenge-porn-laws-katie-hill-chrissy-chambers-2019-11 [https://perma.cc/ECL5-4JRK] (describing how former U.S. congresswoman Katie Hill's estranged husband posted sexually explicit photographs of her on the Internet).

[12] *See* ASIA A. EATON ET AL., CYBER C.R. INITIATIVE, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION: A SUMMARY REPORT 19 (2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf [https://perma.cc/XHW8-FKGH] (finding that approximately 80% of people who share private sexual images of another without their consent do not intend to harm the image's subject); April Glaser, *New York's New Revenge Porn Bill Is a Bittersweet Victory*, SLATE (July 25, 2019), https://slate.com/technology/2019/07/revenge-porn-law-new-york.html [https://perma.cc/KD4S-ZAU3]. Attorneys and scholars argue that that not all perpetrators act with the intent to harm or harass their victims. Danielle Citron & Mary Anne Franks, *Evaluating New York's "Revenge Porn" Law: A Missed Opportunity to Protect Sexual Privacy*, HARV. L. REV. BLOG (Mar. 19, 2019), https://blog.harvardlawreview.org/evaluating-new-yorks-revenge-porn-law-a-missed-opportunity-to-protect-sexual-privacy/ [https://

As of 2020, forty-eight states, Washington, D.C., and one U.S. territory have passed laws that criminalize nonconsensual pornography.[13] Of those fifty statutes, most are harassment-based legislation that merely protects victims when their perpetrator acts with the intent to harm or harass.[14] Although several states have passed privacy-based statutes, which provide more comprehensive protection to all nonconsensual pornography victims, these statutes are more vulnerable to First Amendment challenges under the U.S. Constitution than harassment-based statutes.[15]

This Note argues that privacy-based nonconsensual pornography laws do not run afoul of the First Amendment because they are content-neutral restrictions on speech subject to intermediate scrutiny.[16] Part I of this Note provides an overview of the United States' courts current framework for examining First Amendment challenges to speech restrictions.[17] Part I additionally highlights the two definitions of nonconsensual pornography and explains how

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perma.cc/D6ZZ-VEKR] (highlighting empirical evidence showing that 80% of actors do not disseminate sexually explicit images with the intent to harm); Glaser, *supra*. One incidence where perpetrators did not carry an intent to harm their victims is evidenced in the 2017 U.S. Marines "revenge porn" scandal. Glaser, *supra.* In 2017, the War Horse, a nonprofit news organization, exposed a Facebook group called Marines United, which hosted thousands of sexually explicit photos of female Marines and service members without their consent. *Id.* Despite the devastating harm to the female Marines resulting from the page and its exposure to the public, it is unlikely that the page's thirty thousand members explicitly intended to harm the female Marines. Thomas James Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Collogues*, REVEAL (Mar. 4, 2017), https://revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/ [https://perma.cc/2KWJ-ND2Q] (noting that the Marines United page's code of conduct required that members do not engage in "threats, harm or harassment"); Glaser, *supra*. It was more likely that the member-Marines "shar[ed] the photos for their own entertainment." Glaser, *supra*.

[13] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6 (noting the one U.S. territory is Guam).

[14] *See id.* Thirty-six states have harassment-based statutes, which require that the perpetrator acted with some intent to harm the person depicted in the image. *Id.*; *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-1425(A) (2020) (stating that "[i]t is unlawful for a person to intentionally disclose an image of another" when the person depicted is in a state of nudity or engaged in sexual activities, "with the intent to harm, harass, intimidate, threaten or coerce the depicted person"); COLO. REV. STAT. § 18-7-107(1)(a) (2020) (noting it is a crime to distribute, by "social media or any website," a sexually explicit image "[w]ith the intent to harass, intimidate, or coerce the depicted person"); VT. STAT. ANN. tit. 13, § 2606(b)(1) (criminalizing "knowingly disclos[ing]" a sexually explicit image of another without their consent, "with the intent to harm, harass, intimidate, threaten, or coerce the person depicted").

[15] *See, e.g.*, CONN. GEN. STAT. § 53a-189c(a) (2020) (stating that it is a misdemeanor to disseminate an intimate image without consent from the images subject, but not requiring that the perpetrator act with the intent to harm); 720 ILL. COMP. STAT. 5/11-23.5(b) (requiring no intent to harm or harass on behalf of the criminal actor); *see also* Citron & Franks, *supra* note 12 (illustrating the forces that played into the creation of New York's harassment-based nonconsensual pornography law that requires an intent to harm the victim). *See generally 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6 (consolidating a list of state nonconsensual pornography laws enacted across the country).

[16] *See infra* notes 244–293 and accompanying text.

[17] *See infra* notes 22–82 and accompanying text.

state legislatures shape laws to reflect these differing definitions.[18] Part II examines how U.S. courts' First Amendment jurisprudence affects existing nonconsensual pornography laws challenged under the U.S. Constitution.[19] Part III first argues that to adequately protect victims, states must pass broad privacy-based nonconsensual pornography laws.[20] Part III then argues that these privacy-based nonconsensual pornography laws do not run afoul of the First Amendment because they are content-neutral restrictions on speech that should survive intermediate scrutiny under the First Amendment.[21]

I. Free Speech: What Are Its Limits Under Nonconsensual Pornography Laws?

The Internet often operates as a double-edged sword.[22] Since its inception, the Internet has created seemingly limitless opportunities for the dissemination of information, propelling society into the digital age.[23] The interconnectedness of the digital age, however, arms individuals with the ability to harm each other at magnitudes previously unimaginable.[24] At the epicenter of this new-age harm is the use of the Internet for the dissemination of nonconsensual pornography.[25]

Nonconsensual pornography is not a new phenomenon.[26] Today, however, new technologies, including the Internet, assist actors in disseminating non-

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[18] *See infra* notes 83–148 and accompanying text.

[19] *See infra* notes 149–243 and accompanying text.

[20] *See infra* notes 244–267 and accompanying text.

[21] *See infra* notes 268–293 and accompanying text.

[22] Scott R. Stroud, *The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn*, 29 J. Mass Media Ethics 168, 168 (2014). The Internet is a "dual-natured gift," which allows users a unique outlet to facilitate and disseminate speech between more people than ever imagined. *Id.* The Internet's "gift[s]," however, do not come without costs, especially because of users' ability to transmit images of a personal and intimate nature with ease. *Id.*

[23] *Id.*

[24] Mudasir Kamal & William J. Newman, *Revenge Pornography: Mental Health Implications and Related Legislation*, 44 J. Am. Acad. Psychiatry L. 359, 359 (2016). The Internet allows users to conceive new mechanisms for harming others by enabling users to "widely disseminate false or private information" with ease. *Id.* Internet-related crime, including cyber-harassment, cyber-stalking, and cyber-hacking, occurs when perpetrators use the Internet to annoy, embarrass, or emotionally distress another individual. *Id.* at 359–60.

[25] *Id.* at 359; Adrienne N. Kitchen, Note, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul the First Amendment*, 90 Chi.-Kent L. Rev. 247, 249 (2015) (emphasizing how new technologies exacerbate the harm from permanent privacy exposures, which leave victims feeling forever "branded" online (quoting Janice Richardson, *If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law*, *in* Feminist Perspectives on Tort Law 145, 159 (Janice Richards & Erika Rackley eds., 2012))).

[26] *See* Alexa Tsoulis-Reay, *A Brief History of Revenge Porn*, N.Y. Mag. (July 19, 2013), https://nymag.com/news/features/sex/revenge-porn-2013-7/ [https://web.archive.org/web/20190725234714/http://nymag.com/news/features/sex/revenge-porn-2013-7/] (outlining the history of the publishing of nude or sexually explicit photos of others without their consent from 1980 to 2013). One of the first

consensual pornography globally with ease.[27] Consequently, this expansion of platforms for dissemination exacerbates the harm that victims of nonconsensual pornography face.[28] Today, one in twelve adult Americans are victims of nonconsensual pornography.[29] Despite the pervasive harms victims of nonconsensual pornography face, free speech advocates believe that a greater harm results when laws prohibiting the dissemination of nonconsensual pornography diminish the First Amendment rights of American citizens.[30] As a result, an

documented, highly publicized incidences of nonconsensual pornography was in 1980 when Hustler Magazine published nude photos of women accompanied by falsities about their sexual history. *Id.*; *see* Ashby v. Hustler Mag., Inc, 802 F.2d 856, 857–58 (6th Cir. 1986) (holding the defendant, Hustler Magazine, liable for publishing a nude photo of the plaintiff, Urusula Ashby, without her consent); Wood v. Hustler Mag., Inc., 736 F.2d 1084, 1085–86 (5th Cir. 1984) (holding the defendant, Hustler Magazine, liable for publishing a stolen nude photograph of and false information about the plaintiff, Lajuan Wood, without her consent).

[27] *See* Madeline Verge, *Technology as an Enabler: 'Revenge Porn' and the Law*, LAW SOC'Y, 2017, at 1, 1–2. The sharing of explicit images with others was once limited to physical forms of imagery, but the use of technology now allows abusers to hurt their victims in a manner that fully encompasses their lives. *Id.*

[28] *See id.*; *see also*, *e.g.*, Annmarie Chiarini, *Revenge Porn Almost Ruined My Life—Here's How I Fought Back*, REFINERY29 (Apr. 18, 2017), https://www.refinery29.com/en-us/2017/04/150325/revenge-porn-nude-photos-cyber-rights [https://perma.cc/Q8XL-AEW7]. In 2010, Annmarie Chiarini's then-boyfriend threatened to sell naked images of her, which she previously took consensually, on eBay. Chiarini, *supra*. Her boyfriend sent auction links to Chiarini, her friends, her ex-husband, and her child's babysitter, and then posted a link to the auction on Facebook. *Id.* Chiarini contacted Facebook, eBay, and Yahoo! and reported her then-boyfriend's pages for two days straight. *Id.* He created new pages each time one was taken down. *Id.* For fourteen months Chiarini spent every night googling herself to ensure that her ex-boyfriend did not create additional posts. *Id.* In 2011, a porn website featured the nude photos of Chiarini and included her personal information, including her name, where she lived, and where she worked. *Id.* The website also posted solicitations for sex, supposedly sent by Chiarini. *Id.* The porn website generated more than four thousand views in the first fourteen days. *Id.* After spending forty-eight hours reporting the account and doing "damage control," Chiarini took a leave of absence from her job. *Id.* After several weeks of feeling like her torture would never end, she attempted suicide. *Id.* Chiarini stated that the experience was a horrifying violation of privacy, but she noted the worst harm was from the "permanence of the Internet" and the rape and death threats that she received and still receives today. *Id.*; *see also* Cara Bayles, *With Online Revenge Porn, the Law Is Still Catching Up*, LAW360 (Mar. 1, 2020), https://www.law360.com/access-to-justice/articles/1247863/with-online-revenge-porn-the-law-is-still-catching-up?carousel=1 [https://perma.cc/E7MQ-XZP2]. Similarly, in 2018, an individual posted graphic sexual videos and photographs of Spring Cooper, along with her name, address, and links to her social media pages. Bayles, *supra*. She has spent most of her time since the incident reporting new posts of her images on various social media sites. *Id.* Due to the widespread reach of the images, Cooper has received countless invasive online messages, threats, and harassment. *Id.*

[29] Ruvalcaba & Eaton, *supra* note 7, at 1. The study focused on nonconsensual pornography initially created with the victim's consent (i.e., the individuals took the photo or video themselves or consented to the image being taken or recorded) and subsequently distributed to others without the victim's consent. *See id.*

[30] John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 217 (2014) (arguing that "revenge porn" laws "fly directly in the face of free speech" by discriminating based on a speaker's viewpoint); Lee Rowland, *VICTORY! Federal Judge Deep-Sixes Arizona's Ridiculously Overbroad 'Nude Photo' Law*, ACLU (July 10, 2015), https://www.aclu.org/blog/free-speech/internet-speech/victory-federal-judge-deep-sixes-arizonas-ridiculously-overbroad [https://perma.cc/F5AC-

inherent tension exists between free speech and laws providing protection against nonconsensual pornography.[31]

Part I of this Note addresses the intersection of free speech and nonconsensual pornography laws.[32] Section A of this Part explores individuals' First Amendment right to free speech and highlights both permissible and impermissible restrictions on speech under the U.S. Constitution.[33] Section B of this Part describes the roots of nonconsensual pornography and its role in today's society.[34] Section C outlines the different legal definitions of nonconsensual pornography today, explaining both harassment-focused and privacy-focused definitions.[35] Section C also discusses existing state laws that reflect these differing definitions of nonconsensual pornography.[36]

A. First Amendment Doctrine: Content-Based & Content-Neutral Restrictions on Speech

The First Amendment to the U.S. Constitution, applicable to state governments via the Fourteenth Amendment to the U.S. Constitution, prohibits the enactment of laws that abridge an individual's freedom of speech.[37] Under the U.S. Constitution, no state government may validly restrict speech because of

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K7QN] (arguing that protecting the U.S. Constitution and its amendments means "making tough calls" to oppose nonconsensual pornography laws that criminalize constitutionally protected speech). Some legal scholars assert that although there are certain enumerated exceptions to protected speech, legislatures should not be allowed to restrict speech whenever they deem that speech "too harmful to be tolerated." Humbach, *supra*, at 220 (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011)).

[31] *See* Adam Candeub, *Nakedness and Publicity*, 104 IOWA L. REV. 1747, 1773 (2018) (arguing that if we were to diminish First Amendment protection in the "revenge porn" context, it would create a slippery slope allowing legislatures to restrict speech in other instances, such as "gossip"); Evan Ribot, Comment, *Revenge Porn and the First Amendment: Should Nonconsensual Distribution of Sexually Explicit Images Receive Constitutional Protection*, 2019 U. CHI. LEGAL F. 521, 522, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1646&context=uclf [https://perma.cc/SH5B-P6FG] (highlighting that newly passed "revenge porn" laws are facing growing resistance from free speech advocates who argue that these "new laws run afoul the First Amendment" to the U.S. Constitution); *supra* note 30 and accompanying text.

[32] *See infra* notes 37–148 and accompanying text.

[33] *See infra* notes 37–82 and accompanying text.

[34] *See infra* notes 83–97 and accompanying text.

[35] *See infra* notes 110–119 and accompanying text (discussing the harassment-focused definition of nonconsensual pornography); *infra* notes 132–140 and accompanying text (discussing the privacy-focused definition of nonconsensual pornography).

[36] *See infra* notes 120–131 and accompanying text (highlighting examples of harassment-based state nonconsensual pornography laws); *infra* notes 141–148 and accompanying text (highlighting examples of privacy-based state nonconsensual pornography laws).

[37] *See* U.S. CONST. amend. I (prohibiting state or federal governments from passing laws that abridge individuals' "freedoms concerning religion, expression, assembly, and the right to petition" the government for redress); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (noting that state governments are also bound by the constraints of the First Amendment).

the message or subject matter conveyed.[38] These content-based restrictions, and the laws that impose such restrictions, are presumptively invalid under the First Amendment.[39] Not all restrictions on speech, however, are content-based restrictions.[40] The U.S. Supreme Court recognizes that free speech restrictions may be content-neutral.[41] This content distinction plays an integral role in First Amendment jurisprudence.[42] In modern First Amendment cases, invalidity or validity of the law depends largely on whether the adjudicating court characterizes a regulation as content-based or content-neutral.[43] The following Subsections highlight the distinctions between content-based and content-neutral restrictions on speech, and the varying degrees of scrutiny courts apply to such restrictions.[44]

1. Content-Based Restrictions on Speech & Strict Scrutiny

When adjudicating First Amendment challenges to state law, courts must first determine whether the state's regulation of speech is a content-based or content-neutral restriction.[45] A law is a content-based restriction on speech if the law applies to speech merely because of the topic, idea, or message expressed.[46] For example, a law makes a content-based restriction on speech if

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[38] *See Reed*, 576 U.S. at 163 (emphasizing that the Constitution prohibits state governments from enacting impermissible restraints on speech based on its content unless the restriction is narrowly tailored to serve a compelling governmental interest); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (same).

[39] *See Reed*, 576 U.S. at 163–64; R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[40] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (illustrating the difference between laws that make content-based and content-neutral restrictions on speech).

[41] *See id.* at 642–43 (asserting that content-neutral restrictions on speech may be constitutionally permissible).

[42] Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 804 (2004).

[43] *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49–50 (2000) (delineating cases where the Court's distinction of content-neutral and content-based regulations was outcome determinative).

[44] *See infra* notes 45–62 and accompanying text (discussing content-based restrictions on speech subject to strict scrutiny); *infra* notes 63–82 and accompanying text (discussing content-neutral restrictions on speech subject to intermediate scrutiny).

[45] *See Turner Broad. Sys., Inc.*, 512 U.S. at 642 (requiring that courts look at the content distinction first before determining which level of scrutiny they will apply upon review of the law); Chemerinsky, *supra* note 43, at 50, 54 (arguing that many free speech cases in the United States depend on the application of the content distinction).

[46] Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015). In 2015, in *Reed v. Town of Gilbert*, the U.S. Supreme Court articulated a test to determine whether a regulation is content-based, requiring that a court consider whether a regulation of speech on its face draws distinctions based on the speech's content, topic, idea or message. *Id.* Specifically, in *Reed*, the Town of Gilbert's sign ordinance prohibited individuals from displaying outdoor signs, depending on the message depicted on the sign itself. *Id.* at 155. The effect of the town's ordinance prohibited a local church's use of directional signs to advertise the location of its Sunday services. *Id.* As a result, the plaintiffs, the local church

the law specifically prohibits the destruction of the American flag but permits the destruction of another nation's flag.[47] There are two subgroups of content-based restrictions on speech: (1) subject-matter restrictions and (2) viewpoint restrictions.[48] A subject-matter restriction regulates speech based on the topic of the speech.[49] A viewpoint restriction regulates speech based on the ideology of the message.[50]

To determine if a law is generally content-based, a court must consider whether the regulation of speech draws distinctions, on its face, based on the subject-matter or viewpoint the speaker conveys.[51] If a law regulates speech in either of these regards, the law is presumptively invalid under the Constitution.[52] To rebut a presumption of invalidity, the government must prove that the regulation can survive strict scrutiny review by a court—the highest standard of review in U.S. jurisprudence.[53] One could call strict scrutiny a "killing scrutiny" due to the Supreme Court's rich history of overturning virtually every content-based restriction to which this exacting standard of review applied.[54]

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and pastor, filed suit claiming that the defendant's sign ordinance restricting the size, duration, and location of temporary directional signs violated the First Amendment. *Id.* The Court held that the town's sign ordinance, which singled out signs bearing a particular message, was a content-based restriction on speech and invalid under the First Amendment. *Id.* at 171, 173.

[47] *See* Texas v. Johnson, 491 U.S. 397, 420 (1989) (overturning a state statute that restricted an individual's ability to burn the American flag in protest). Other examples of content-based restrictions include prohibiting the display of signs that critique a foreign nation within a certain distance of a foreign embassy and prohibiting all picketing except for picketing on one particular topic. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 334 (1988) (restricting the display of signs disparaging foreign governments within five hundred feet of the foreign embassy); Carey v. Brown, 447 U.S. 455, 465 (1980) (prohibiting individuals from residential picketing except for "peaceful labor picketing").

[48] *See* Chemerinsky, *supra* note 43, at 51.

[49] *See id.* (articulating a subject-matter restriction as a content-based burden on speech).

[50] *See id.* (specifying that a viewpoint restriction is a content-based regulation of speech).

[51] *See Reed*, 576 U.S. at 163–64 (defining content-based restrictions on speech as laws that regulate speech by particular subject-matter or by its function or purpose).

[52] *See id.* at 163 (establishing that content-based laws are presumptively unconstitutional but may survive a constitutional challenge if narrowly tailored to serve a compelling state interest); R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (same).

[53] *Reed*, 576 U.S. at 163; Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (noting that the burden shifts to the government to prove that the statute will survive strict scrutiny review).

[54] Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age*, 2007 BYU L. REV. 1595, 1598 (arguing that the current First Amendment doctrine does not allow content-based restrictions to be validly enacted); Adam Wrinkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 807 (2006) (emphasizing that application of this heightened scrutiny is "almost always fatal," and referring to strict scrutiny as a "death knell" (first quoting Jeff Rubenfeld, *The Anti-discrimination Agenda*, 111 YALE L.J. 1141, 1160 (2002); and then quoting CAROL M. SWAIN, THE NEW WHITE NATIONALISM IN AMERICA 269 (2002))); *see, e.g.*, United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 827 (2003) (overturning restrictions on cable providers that regulated sexually explicit programming); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (overturning a

Under existing First Amendment doctrine, laws that regulate speech based upon its content may be permitted if the government can prove that the construction of the statute is narrowly tailored to serve compelling state interests.[55]

To ensure that content-based state statutes are narrowly tailored to the government interests they seek to serve, the Supreme Court developed a standard of strict scrutiny for reviewing statutory challenges under the First Amendment.[56] To satisfy strict scrutiny, the government must satisfy a three-part test.[57] First, the government must show that there is a compelling state interest underlying the regulation.[58] Second, the government bears the burden of showing that the regulation is "directly and substantially related to advancing" that interest.[59] Finally, the government bears the additional burden of proving that the regulation employs the least restrictive means of achieving the state's interest.[60]

The strict scrutiny test aims to protect individuals' right to free speech by ensuring that legislatures cannot impose restrictions on speech that are unnecessary to achieve a significant legislative interest.[61] If a statute does not meet the requirements set forth in the strict scrutiny test, courts will hold it invalid under the Constitution and strike it down.[62]

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law that regulated the earning of convicts who wrote books about their crimes); Texas v. Johnson, 491 U.S. 397, 420 (1989) (overturning a law that restricted an individual's ability to burn flags).

[55] *Reed*, 567 U.S. at 163–64; *Ashcroft*, 542 U.S. at 660 (noting that the burden shifts to the government to prove a statute's constitutionality when the statute is initially presumptively invalid).

[56] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (introducing the test for the strict scrutiny standard).

[57] R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 ELON L. REV. 291, 293–94 (2016).

[58] *Id.* at 294. First, the government must prove that the statute advances a "compelling or overriding government" objective. *Id.*

[59] *Id.* For the government to prove that the statute is "directly and substantially related to advancing" the compelling objective, the regulation must assume the means that "directly advance" the government's interest rather than substantially advance those interests. *Id.* at 294 n.16. For the law to prevail under the strict scrutiny analysis, the "direct relationship" between the regulation and the government's interest is crucial. *Id.* (highlighting that in the First Amendment context, the government's restriction on speech must be "actually necessary" to achieve the interest (quoting United States v. Alvarez, 567 U.S. 709, 725 (2012) (plurality opinion))).

[60] *Id.* at 294. Finally, the government must show that the statute is the "least restrictive" yet still "effective means to advance" its objective. *Id.*

[61] *See* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) (highlighting that the primary question a court needs to ask is whether the statute is the least restrictive means available to meet the government's goal). In 2004, in *Ashcroft v. American Civil Liberties Union* (ACLU), the U.S. Supreme Court constructed this inquiry to ensure that states are not imposing restrictions that instill an unnecessary chilling effect on free expression. *Id.*

[62] *Id.* at 660 (articulating that content-based restrictions are presumptively invalid and, if the government does not meet its burden of proof under the strict scrutiny inquiry, are unconstitutional).

2. Content-Neutral Restrictions on Speech & Intermediate Scrutiny

In contrast, content-neutral regulations on speech impose burdens, or confer benefits, without reference to the idea, message, or viewpoint expressed.[63] For example, a regulation that prohibits individuals from posting any sign on public property makes a content-neutral restriction on speech because it does not distinguish based on the content of signs.[64] To deem a law content-neutral, the court must find that the regulation serves a purpose unrelated to the content of the speech.[65] If this inquiry reveals, however, that the government enacted a law to censor the view or message expressed, the law is considered content-based rather than content-neutral.[66] Despite this, a content-neutral law will not be considered content-based simply because it disparately affects some speakers or topics but not others.[67] As the U.S. Supreme Court stated in 1989 in *Ward v. Rock Against Racism*, a court may deem a regulation content-neutral notwithstanding the law's "incidental effect" on some expression.[68]

The Supreme Court refers to these type of regulations as "time, place and manner" restrictions because they do not regulate the content that the messages express, but they merely regulate the manner of expression.[69] For example, a content-neutral restriction of speech may require that protestors request a permit before holding a demonstration or place zoning restrictions on the location

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[63] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (articulating the requirements that a court must consider to deem a statute to be content-neutral); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that a regulation may serve a content-neutral purpose even if it has a peripheral effect on some speakers' messages); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987) (defining content-neutral laws).

[64] Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (upholding a city ordinance prohibiting the posting of signs on city property). Some other examples of content-neutral laws include a law requiring an individual to obtain a permit before conducting an event with greater than fifty people in a public park and a law requiring all events in public parks to use city-approved speakers to reduce noise from concerts. *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316, 325 (2002) (prohibiting gatherings of fifty people or more in public parks without a prior authorized permit); *Ward*, 491 U.S. at 803 (requiring the use of city-approved speakers to reduce noise levels within Central Park).

[65] *Ward*, 491 U.S. at 791 (outlining that this inquiry is particularly salient in cases where the regulation makes a "time, place, or manner" restriction on speech). To determine if the law is a content-neutral restriction, courts must find that the government's motive when enacting the law was not to regulate the message expressed. *Id.*

[66] *See id.* (noting that the government's underlying purpose for the regulation is the crucial factor for determining content-neutrality of a law).

[67] McCullen v. Coakley, 573 U.S. 464, 480 (2014); *Ward*, 491 U.S. at 791.

[68] 491 U.S. at 791; *McCullen*, 573 U.S. at 480 (reaffirming the proposition that facially neutral laws may not be considered content-based because of some "disproportionate[] affects" on certain topics).

[69] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring in part and dissenting in part); *Ward*, 491 U.S. at 789, 789 (detailing that content-neutral laws may make valid regulations of speech on "time, place and manner"); *see* Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (articulating the Supreme Court's first recognition of valid "time, place and manner" restrictions on speech).

of adult theaters and shops.[70] Because the regulation does not differentiate between types of speech—pro-life protests versus pro-choice protests, for example—but instead regulates the location or timing of protests, the regulation is not considered a content-based restriction.[71] Unlike content-based restrictions, content-neutral restrictions on speech are not presumptively invalid.[72] Because content-neutral laws do not regulate what speakers are saying, they do not pose the same threat to individuals' First Amendment rights and, as a result, are subject to a less-exacting level of scrutiny.[73] Consequently, courts conduct judicial review of such restrictions under the less-stringent standard of intermediate scrutiny.[74]

Despite this presumption of validity, a content-neutral law must survive the Supreme Court's four-part intermediate scrutiny inquiry to be held constitutionally valid.[75] First, the restriction on speech must further a substantial

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[70] *See* KATHLEEN ANN RUANE, CONG. RSCH. SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 9 (2014), https://fas.org/sgp/crs/misc/95-815.pdf [https://perma.cc/98VK-UVR4] (highlighting that courts held that zoning laws, regulating the location of sexually explicit businesses, are content-neutral); Huhn, *supra* note 42, at 806–07 (same); Kevin Francis O'Neill, *Time, Place and Manner Restrictions*, FIRST AMENDMENT ENCYC., https://www.mtsu.edu/first-amendment/article/1023/time-place-and-manner-restrictions [https://perma.cc/73WE-D25H] (observing that permit requirements for protest, parades, and demonstrations are routinely held to be content-neutral).

[71] *See, e.g.*, *McCullen*, 573 U.S. at 480–81 (declaring a law content-neutral because it prohibited anyone from intentionally standing within a certain distance of an abortion clinic, thus obstructing the entrance, but noting it made no distinctions based on a person's purposes for being there).

[72] *Turner Broad. Sys., Inc*., 512 U.S. at 645 (majority opinion). In 1994, in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, the U.S. Supreme Court noted that for this presumption of validity to exist, the law cannot be a "subtle means of exercising a content preference." *Id.*

[73] *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 789; Geoffrey R. Stone & Eugene Volokh, *A Common Interpretation: Freedom of Speech and the Press*, CONST. DAILY (Dec. 1, 2016), https://constitutioncenter.org/blog/a-common-interpretation-freedom-of-speech-and-the-press [https://perma.cc/F72P-TVLM] (highlighting that content-neutral laws are "less threatening" to the First Amendment than content-based restrictions on speech). The intermediate scrutiny inquiry was first developed by the Supreme Court as a means for "weighing" the First Amendment rights of individuals against community interests. Bhagwat, *supra*, at 788–89 (quoting Martin v. City of Struthers, 319 U.S. 141, 143 (1943)). The inquiry resulted from a string of cases where the Supreme Court struck down laws that imposed burdens on individuals' First Amendment rights but "did not involve flat censorship (in today's jargon, content-based regulations)." *Id.* at 788. The Court's promulgation of the inquiry came as a compromise to allow states to impose some substantial burdens on speech. *Id.* at 788–89.

[74] *See* Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 (1984) (setting up the prerequisites for applying the intermediate scrutiny analysis).

[75] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (promulgating the original iteration of the intermediate scrutiny test for content-neutral restrictions on speech); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989) (articulating the four-part intermediate scrutiny inquiry for "time, place and manner" restrictions of speech). The original intermediate scrutiny inquiry was promulgated under *United States v. O'Brien*, but the Supreme Court tailored the intermediate scrutiny test in *Ward v. Rock Against Racism* to evaluate "time, place, and manner" restrictions on speech. *See* Bhagwat, *supra* note 73, at 789, 791, 828 (highlighting that intermediate scrutiny under *Ward* encom-

governmental interest.[76] Second, the government bears the burden of showing that their interest is "unrelated to the suppression of free expression."[77] Third, the regulation "must be narrowly tailored to serve the government's . . . interest."[78] Unlike strict scrutiny, "narrow tailor[ing]" under intermediate scrutiny does not require that the state employ "the least restrictive . . . means" to serve the government's interest.[79] Rather, narrow tailoring is satisfied, so long as the restriction promotes a government's substantial interest that would be "achieved less effectively" without the restriction.[80] Finally, to fully satisfy intermediate scrutiny, the state must show that the restriction leaves open "ample alternative channels of communication," such as another legally permissible method to engage in the same expression.[81] If the state meets this burden of

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passes the *O'Brien* test by incorporating a version of "narrow tailoring" designed to meet the less-exacting demands of intermediate scrutiny).

[76] *Ward*, 491 U.S. at 791, 798; *Clark*, 468 U.S. at 293. In some instances, the Supreme Court blended the first and third prong of this test by requiring that the restriction is "narrowly tailored to serve a significant governmental interest." *See, e.g.*, *Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293. In each case, however, the inquiry requires the state to identify a substantial government interest at the onset. *See Turner Broad. Sys., Inc*., 512 U.S. at 662; *Ward*, 491 U.S. at 783; *Clark*, 468 U.S. at 296.

[77] *Turner Broad. Sys., Inc*., 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377); *Ward*, 491 U.S. at 791 (requiring that the regulation be "justified without reference to the content of the regulated speech" (quoting *Clark*, 468 U.S. at 293)).

[78] *Turner Broad. Sys., Inc*., 512 U.S. at 662; *Ward*, 491 U.S. at 798.

[79] *Ward*, 491 U.S. at 798 (rejecting the requirement that the state use the "least restrictive means" to regulate speech); Bhagwat, *supra* note 73, at 789, 828 (emphasizing that Supreme Court clarified that "narrow tailoring" does not require that the state use "least restrictive means" to achieve their interest); *see also* McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (plurality opinion). In 2014, in *McCutcheon v. Federal Election Commission*, the U.S. Supreme Court noted that in every case, even when applying a less-exacting level of scrutiny, the laws must fit the government's purpose. 572 U.S. at 218. The Court explained that under intermediate scrutiny, this does not require the "least restrictive means," but the law must be reasonably narrowly tailored to achieve the legislature's goal. *Id.* (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)); *see* Reed v. Town of Gilbert, 576 U.S. 155, 175 n.* (2015) (Alito, J., concurring) (noting that even content-neutral restrictions on speech "must be narrowly tailored to serve the government's legitimate, content-neutral interests," but do not need to meet the exacting standard that content-based restrictions must meet (quoting *Ward*, 491 U.S. at 798)).

[80] *Ward*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). In other words, narrow tailoring under intermediate security requires that the time, place, and manner regulation does not "burden substantially more speech than is necessary to further the government's legitimate interest." *Turner Broad. Sys., Inc*., 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799).

[81] *Ward*, 491 U.S. at 789, 791 (quoting *Clark*, 468 U.S. at 293) (highlighting that this channels inquiry is especially salient in cases where the restriction is a "time, place and manner" restriction on speech (quoting *Clark*, 468 U.S. at 293)); *see* Hill v. Colorado, 530 U.S. 703, 726 (2000) (finding that "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement"); *Turner Broad. Sys., Inc*., 512 U.S. at 662 (articulating that the *O'Brien* test for intermediate scrutiny requires that the state shows any incidental restriction on First Amendment freedoms is "no greater than is essential to the furtherance of that interest" (quoting *O'Brien*, 391 U.S. at 377)).

proof under intermediate scrutiny, a court will uphold the content-neutral restriction as a constitutionally permissible restriction on speech.[82]

B. Nonconsensual Pornography's Pervasive Role in Society

The exchange of sexually explicit images is not new in the Internet Age.[83] But the innovative technology that expanded avenues for speech also magnified the reach of nonconsensual pornography throughout modern society.[84] Snapchat,[85] which launched in September of 2011, is now synonymous with sexting.[86] In modern relationships, sexting serves as a method by which romantic partners routinely converse with one another.[87] A 2016 study found that 21% of adults ranging from ages twenty-one to seventy-five reported sending sexually explicit text messages, and 28% of adults reported being on the re-

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[82] *See Ward*, 491 U.S. at 803 (upholding a content-neutral restriction on speech that satisfied the intermediate scrutiny inquiry); *Clark*, 468 U.S. at 299 (same).

[83] *See* Rachel Thompson, *For Better or Worse, Snapchat Changed Sexting Forever*, MASHABLE (Feb. 7, 2017), https://mashable.com/2017/02/07/snapchat-sexting-revolution/ [https://web.archive.org/web/20201112034925/https://mashable.com/2017/02/07/snapchat-sexting-revolution/?europe=true]. Exchanging sexually explicit images is not a phenomenon that is unique to the digital era; its roots date back to Paleolithic cave paintings, but its emergence in everyday society exploded in the 2000s when smartphones became commonplace. *Id.* Today, this exchange most frequently takes form as sexting. *Id.* Sexting is defined as "the sending of sexually explicit messages or images by cell phone." *Sexting*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014). Sexting is more colloquially used, however, as a catch-all term for any communication of sexually explicit material between two individuals (either by cell phone or other means). Dena Sacco et al., *Sexting: Youth Practices and Legal Implications* 1, 3 (Berkman Ctr. for Internet & Soc'y Harv. Univ., Research Publication No. 2010-8, 2010), https://cyber.harvard.edu/publications/2010/Sexting_Youth_Practices_Legal_Implications [https://perma.cc/SC4K-L6JP].

[84] Swathi Krishna, *Sexting: The Technological Evolution of the Sexual Revolution*, PSYCHIATRIC TIMES (Dec. 30, 2019), https://www.psychiatrictimes.com/special-reports/sexting-technological-evolution-sexual-revolution [https://perma.cc/4PVX-Z8SU] (highlighting that the rise of the Internet and smartphones increased sexting among adults and youth). Sexting today has become a routine practice for couples and is a "natural marriage of [traditional] forms of sexual expression and modern day technology." *Id.*; VOA Student Union, *Snapchat Fueled the Explosion of Sexting, Study Says*, VOA NEWS (Feb. 27, 2018), https://www.voanews.com/student-union/snapchat-fueled-explosion-sexting-study-says [https://perma.cc/A3G9-74Y7] (noting that the popularity Snapchat led to an explosion in rates of sexting, especially amongst youths).

[85] VOA Student Union, *supra* note 84. Snapchat is a smartphone app that allows users to send temporary photos to one another. *See id.* The app deletes photos after a maximum of ten seconds. *Id.* Today, however, there are many ways to save these seemingly temporary photos, even without notifying the sender. *Id.*

[86] *See* Thompson, *supra* note 83 (emphasizing that Snapchat's inception in 2011 radically changed the nature of cell phone use forever).

[87] *See id.* (arguing that Snapchat transformed the consensual act of sharing intimate photos from a "stigmatized and seedy activity" to a typical way that partners communicate with one another); *see also* Jeff R. Temple et al., Comment, *Sexting in Youth: Cause for Concern?*, 3 LANCET: CHILD & ADOLESCENT HEALTH 520, 520 (2019). In one study, researchers found that adolescents' exploration of their sexual identity serves as a developmental and biological imperative. Temple et al., *supra*, at 520–21. The study encourages individuals to look at sexting as "healthy relating" to a significant other. *Id.* at 521.

ceiving end.[88] But sexting is not just limited to adults.[89] In 2018, a study on youth sexting habits showed that approximately 15% of adolescents, ages twelve to seventeen, were sending sexts, and 27% of youth were receiving them.[90]

Although sexting may be harmless when it occurs between two consenting individuals, there is an inherent risk in divesting control over a sexually revealing image.[91] There are two classes of sexting: "primary sexting" and "secondary sexting."[92] "Primary sexting" occurs when the subject of the sexually explicit photo sends the photo of themselves to others willingly.[93] "Secondary sexting" is when a person receives a photo from the subject or a third party, and then they further distribute the photo to additional third parties.[94] Approximately twenty-three percent of adults that received sexually explicit images reported sharing the images with others in a 2016 survey.[95] Amongst teens, more than one in ten reported forwarding a sext without consent, and one in twelve reported having a sext they sent shared without their consent.[96]

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[88] Justin R. Garcia et al., *Sexting Among Singles in the USA: Prevalence of Sending, Receiving and Sharing Sexual Messages and Images*, 13 SEXUAL HEALTH 428, 428 (2016).

[89] Sheri Madigan et al., *Prevalence of Multiple Forms of Sexting Behavior Among Youth: A Systemic Review and Meta-Analysis*, 172 JAMA PEDIATRICS 327, 328, 331 (2018). A meta-analysis of thirty-nine studies concerning youth sexting habits indicated that the average percentages for youths sending and receiving sexts were 14.8% and 27.4%, respectively. *Id.* at 331. The mean age of participants in the thirty-nine studies was 15.16 years. *Id.* at 327.

[90] *Id.* at 327, 331.

[91] Thompson, *supra* note 83. Sexting exposes individuals to the danger of becoming a "revenge porn" victim. *Id.* Although platforms used for sexting, like Snapchat, delete photos once the recipient opens the image, there are mechanisms for users to capture the image and save it for later use without notifying the sender. Christine Elgersma, *Parents Ultimate Guide to Snapchat*, COMMON SENSE MEDIA (Mar. 9, 2021), https://www.commonsensemedia.org/blog/parents-ultimate-guide-to-snapchat [https://perma.cc/7MN3-Q4KA] (highlighting that the use of third-party apps to capture a snapchat image will not notify the sender that their message has been captured or screen-grabbed); Thompson, *supra* note 83. According to social media expert Blaise Grimes-Viort people that engage in sexting run the risk that the "no-saving" and "no-sharing" agreement between them and their sexting partner "will not be respected." Thompson, *supra* note 83.

[92] Elizabeth M. Ryan, Note, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 360–61 (2010). Sexting "involves four different roles: (1) the subject of the photo, (2) 'the person who *took* the photo,' (3) 'the *distributor(s)* of the photo,' and (4) 'the *recipient(s)* of the photo.'" *Id.* (quoting *Policy Statement on Sexting*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD. (Sept. 21, 2009), https://web.archive.org/web/20101224041342/http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130). Under this framework, a single actor may take on several roles (i.e., if the subject of the photo takes a nude photo of themselves and sends it to another, they assume the first three roles), but it is also very common for "multiple actors [to] assume a single role" (i.e., when a photo is sent or forwarded to many recipients). *See id.*

[93] Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 30 (2009) (referring to primary sexting also as "initial" sexting); Ryan, *supra* note 92, at 361.

[94] Calvert, *supra* note 93, at 30 (referring to secondary sexting as "downstream sexting" due to the photo reaching further recipients); Ryan, *supra* note 92, at 361.

[95] Garcia et al., *supra* note 88, at 428.

[96] Madigan et al., *supra* note 89, at 331.

When a sexually explicit image escapes the privacy of the initial recipient's purview, without the depicted person's consent, secondary sexting transforms into nonconsensual pornography.[97]

C. Harassment v. Privacy: Differing Definitions of Nonconsensual Pornography

Nonconsensual pornography is the dissemination or sharing of sexually explicit images of another without their consent.[98] Although there is no consensus on a legal definition of nonconsensual pornography, all definitions center on the lack of the victim's consent to dissemination.[99] The different definitions for nonconsensual pornography, however, are directly reflected in the laws that criminalize this conduct.[100]

As of 2020, fifty statutes are in effect criminalizing the distribution of nonconsensual pornography.[101] These statutes vary in their construction and, consequently, provide varying degrees of protection for victims.[102] Out of the fifty existing statutes, thirty-six consider nonconsensual pornography a form of criminal harassment.[103] Of the few remaining criminal statutes, some catego-

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[97] *See* Mitchell Osterday, Note, *Protecting Minors from Themselves: Expanding Revenge Porn Laws to Protect the Most Vulnerable*, 49 IND. L. REV. 555, 560–61 (2016) (suggesting that once an image is published on the internet, the purview of sexting ends and the image sharing becomes "revenge porn"); Ryan, *supra* note 92, at 362 (arguing that the state should impose penalties even on minors who engage in "secondary sexting").

[98] Citron & Franks, *supra* note 8, at 346.

[99] 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, 676–77 (2015) (focusing on the lack of consent to subsequent forwarding or disseminations of the image as the common element found in definitions of nonconsensual pornography).

[100] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6.

[101] *See id.* (noting that Guam has also outlawed this conduct).

[102] *See* Heard, *supra* note 6 (arguing that many laws enacted to combat this issue cover "revenge porn," but noting there are other types of harms that fall on the continuum of image-based sexual abuse).

[103] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6; *see also e.g.*, ARIZ. REV. STAT. ANN. § 13-1425(A) (2020) (noting that "[i]t is unlawful for a person to intentionally disclose an image of another" where the person depicted is nude or engaged in sexual activities "with the intent to harm, harass, intimidate, threaten or coerce the depicted person"); COLO. REV. STAT. ANN. § 18-7-107(1)(a) (West 2020) (stating that it is a crime to distribute, by "social media or any website," a sexually explicit image "[w]ith the intent to harass, intimidate, or coerce the depicted person"); MO. REV. STAT. § 573.110(2) (2020) (prohibiting the intentional dissemination of an image of a person "who is engaged in a sexual act or whose intimate parts are exposed" with the "intent to harass, threaten, or coerce" the person); N.H. REV. STAT. ANN. § 644:9-a(II) (2020) (criminalizing the purposeful dissemination of an image of a person "who is engaged in a sexual act or whose intimate parts are exposed" with the intent to "harass, intimidate, threaten, or coerce the depicted person"); VT. STAT. ANN. tit. 13, § 2606(b)(1) (West 2020) (criminalizing knowingly disclosing a sexually explicit image of another without their consent and "with the intent to harm, harass, intimidate, threaten, or coerce the person depicted").

rize the dissemination of nonconsensual pornography as a breach or invasion of privacy.[104]

For the purposes of this Note, it is important to understand the divergent definitions of nonconsensual pornography,[105] the interests that these definitions protect,[106] and how these definitions create a split in existing laws.[107] The following Subsections highlight these definitions[108] and the laws shaped in their likeness.[109]

1. A Harassment-Focused Definition of Nonconsensual Pornography

A harassment-focused definition of nonconsensual pornography closely tracks the traditional social understanding of "revenge porn."[110] Harassment-based statutes define nonconsensual pornography as the dissemination of a sexually explicit image of another, without their consent, and with the intent to harm the person depicted.[111] The key feature of this definition is the *intent-to-*

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[104] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6; *see also e.g.*, CONN. GEN. STAT. § 53a-189c(a), (c) (2020) (declaring that it is a misdemeanor to disseminate an intimate image without consent from the image's subject, but not requiring that the perpetrator act with the intent to harm the victim); DEL. CODE ANN. tit. 11, § 1335(9) (West 2020) (prohibiting the act of "[k]nowingly reprodu[ing], distribut[ing], exhibit[ing], publish[ing], transmit[ting], or otherwise disseminat[ing] a visual depiction of a person who is nude or is engaging in sexual conduct . . . without the consent of the person depicted," but not requiring the perpetrator to have an intent to harm or harass the person depicted); 720 ILL. COMP. STAT. 5/11-23.5 (2020) (requiring no intent to harm or harass on behalf of the criminal actor). Some laws, however, only target instances of "video voyeurism," when a perpetrator records, without consent, a person in the nude, or engaging in sexually explicit activity. *See, e.g.*, IDAHO CODE ANN. § 18-6609(2) (West 2020) (stating that it is a crime in install or permit the use of an imagining device in a place where a person would have "reasonable expectation of privacy").

[105] *See infra* notes 110–148 and accompanying text (highlighting the distinctions between a harassment-focused and privacy-focused definition of nonconsensual pornography). This Note focuses on two ways of characterizing nonconsensual pornography: (1) as a form of harassment and (2) as a breach of privacy. *See infra* notes 110–131 (discussing nonconsensual pornography as a form of harassment); 132–148 (discussing nonconsensual pornography as a breach of privacy).

[106] *See infra* notes 110–148 and accompanying text.

[107] *See infra* notes 110–148 and accompanying text.

[108] *See infra* notes 110–119, 132–140 and accompanying text.

[109] *See infra* notes 120–131, 141–148 and accompanying text.

[110] Tegan S. Starr & Tiffany Lavis, *Perceptions of Revenge Pornography and Victim Blame*, 12 INT'L J. CYBER CRIMINOLOGY 427, 427 (2018) (recognizing that the common understanding of nonconsensual pornography is instances of "revenge porn" where individuals, seeking revenge after a breakup, leak intimate images of their ex-partner online).

[111] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6. There are variations of the harassment-focused definition that include more language than the intent-to-harm. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1425(A) (2020) (requiring that a person disclose the image with the "intent to harm, harass, intimidate, threaten or coerce the depicted person"); COLO. REV. STAT. ANN. § 18-7-107(1)(a)(I) (West 2020) (requiring the "intent to harass, intimidate, or coerce the depicted person"); VT. STAT. ANN. tit. 13, § 2606(b)(1) (West 2020) (requiring the "intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm"); Glaser, *supra* note 12 (urging that a harassment-focused definition of

harm clause, which narrows the definition of nonconsensual pornography.[112] Under such, the actions of perpetrators who do not intend to harm or harass, but are motivated by some other purpose, such as entertainment, bragging, financial gain, or sexual gratification, are not criminalized.[113]

In 2014, in *Antigone Books L.L.C. v. Brnovich*, the American Civil Liberties Union (ACLU) on behalf of the plaintiffs, various booksellers, authors, publishers and media organizations, challenged Arizona's law addressing nonconsensual pornography.[114] In the suit, the ACLU expressed its concern that the broadly defined Arizona statute would criminalize innocent actors, and it demanded that the state legislatures redefine the crime with an intent-to-harm element.[115] The suit alleged that without this intent-to-harm provision, the Arizona statute was not constitutionally sound because it ran afoul of the First Amendment.[116]

Free speech proponents, like the ACLU, champion a narrow harassment-focused statutory definition of nonconsensual pornography because it does not

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nonconsensual pornography is less effective in defining this conduct because it is narrowed through an intent-to-harass clause). For the purposes of this Note, the phrase "intent-to-harm" encompasses all variations of the harassment definition. *See infra* notes 112–131 (discussing harassment-based laws that feature some variation of an intent-to-harm provision).

[112] Glaser, *supra* note 12 (noting that intent-to-harm or -harass clauses create harassment-focused definitions of nonconsensual pornography).

[113] *Id.* Most cases of nonconsensual sharing of sexual images do not fall into this definition of harassment because the individual distributing the photos does not always want to cause some type of harm to the person depicted in these images. *Id.*; Carrie Goldberg, *Seven Reasons Illinois Is Leading the Fight Against Revenge Porn*, CYBER C.R. INITIATIVE (Dec. 31, 2014), https://www.cybercivilrights.org/seven-reasons-illinois-leading-fight-revenge-porn/ [https://perma.cc/7X4L-KAMP]. A plethora of other reasons, including entertainment, sexual gratification, or financial gain, motivate perpetrators of nonconsensual pornography. Goldberg, *supra*; *see, e.g.*, Diaz, *Woman Asks for Advice After Boyfriend Shared Her Nudes*, *supra* note 3 (highlighting that some individuals share nonconsensual pornography to brag about their partner's looks and body); *I (24F) Found Out That My (25M) Boyfriend Has Been Sharing My Nudes with His Father*., *supra* note 2 (same).

[114] *See* Final Decree at 1–2, Antigone Books L.L.C. v. Brnovich, No. 14-cv-02100 (D. Ariz. July 10, 2015) (settling the case amongst the parties and subsequently halting enforcement of Arizona's statute); Complaint for Declaratory and Injunctive Relief at 2, Antigone Books L.L.C. v. Brnovich, No. 14-cv-02100 (D. Ariz. filed Sept. 23, 2014) (suing to change the law from a privacy-focused definition of nonconsensual pornography to a harassment-focused one).

[115] Complaint for Declaratory and Injunctive Relief, *supra* note 114, at 4; *see* ARIZ. REV. STAT. ANN. § 13-1425(A) (2014) (amended 2016) (making it unlawful to "intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure"). Arizona's criminal law defines "[s]pecific sexual activities" as "[h]uman genitals in a state of sexual stimulation or arousal" and "[s]ex acts, normal or perverted, actual or simulated, including acts of human masturbation, sexual intercourse, oral copulation or sodomy" for purposes of the nonconsensual pornography statute. ARIZ. REV. STAT. ANN. § 11-811(E)(18)(a)–(b) (2020).

[116] Complaint for Declaratory and Injunctive Relief, *supra* note 114, at 5 (arguing that the Arizona statute unduly burdened the free speech rights of Arizona citizens because of the law's overbreadth).

threaten First Amendment rights.[117] The ACLU, along with other advocates of free speech, argue that offenders must engage in some sort of "revenge" for their actions to constitute nonconsensual pornography.[118] They fear that a broader definition, not requiring *revenge*, will chill free speech and punish innocent actors.[119]

The majority of states that have enacted legislation pertaining to nonconsensual pornography adopt a harassment-focused definition.[120] The common feature amongst harassment-based nonconsensual pornography laws is that they incorporate some form of an intent-to-harm provision to define criminal culpability.[121]

Most recently, in July of 2019, New York adopted a harassment-based nonconsensual pornography statute.[122] The New York statute defines nonconsensual pornography as a crime when the actor disseminates or publishes an "intimate image" of another without their consent and "with [the] intent to cause harm to the emotional, financial or physical welfare of another person."[123] The statute employs a harassment-focused definition of nonconsensual

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[117] *See* Press Release, ACLU, Judge Halts Enforcement of Unconstitutional Nude Photo Law in Arizona (July 10, 2015), https://www.aclu.org/press-releases/judge-halts-enforcement-unconstitutional-nude-photo-law-arizona [https://perma.cc/2M53-7HRU]. The ACLU argues that a limitation on a broad definition of nonconsensual pornography is an important vindication for the First Amendment. *Id.*; *see also* Mary Anne Franks, *The ACLU's Frat House Take on 'Revenge Porn*,*'* HUFFPOST (June 1, 2015), https://www.huffpost.com/entry/the-aclus-frat-house-take_b_6980146 [https://perma.cc/N7PF-8HUV] (explaining that the ACLU insists upon a definition that requires a "perpetrator[] act with the intent to harass [or harm] their victims").

[118] *See* Rowland, *supra* note 30 (urging that laws without an intent-to-harm requirement can violate the First Amendment). Lee Rowland, the ACLU's Senior Staff Attorney, argues that all "revenge porn" laws should have an intent element to pass "constitutional muster." *Id.*; *see* Franks, *supra* note 117; *see also* Christopher Vondracek, *Free Speech Advocates Losing Legal Challenges Against Revenge Porn*, WASH. TIMES (Dec. 31, 2020), https://www.washingtontimes.com/news/2020/dec/31/free-speech-advocates-losing-legal-challenges-agai/ [https://web.archive.org/web/20210220053747/https://www.washingtontimes.com/news/2020/dec/31/free-speech-advocates-losing-legal-challenges-agai/] (noting, Raleigh Levine, a law professor, argued that the expansive privacy-based nonconsensual pornography laws violate the First Amendment due to their "sweep" and application to persons who do not have malicious intent).

[119] *See* Daysia Tolentino, *Revenge Porn Laws Face an Unexpected Civil Rights Obstacle: The First Amendment*, MUCKROCK NEWSL. (Dec. 6, 2018), https://www.muckrock.com/news/archives/2018/dec/06/first-amendment-vs-revenge-porn-laws/ [https://perma.cc/TTG3-MQKJ]. The ACLU argues that legislatures cannot pass nonconsensual pornography laws that ignore the constraints of the First Amendment. *Id.*; *see* Rowland, *supra* note 30 (expressing concern that broadly written "revenge porn" laws may criminalize the actions of innocent actors like "booksellers, photographers, publishers, and librarians" who can face felonious charges for publishing sexually explicit images).

[120] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6.

[121] *See id.*

[122] *See* N.Y. PENAL LAW § 245.15(1)(a) (McKinney 2020) (requiring that a perpetrator of nonconsensual pornography act with an "intent to cause harm to the emotional, financial or physical welfare" of the person depicted in the image).

[123] *Id.* The intent-to-harm provisions in the New York statute are unique because they go beyond the mere intent-to-harm language found in most nonconsensual pornography laws. *See id.* Unlike

pornography because it limits criminal liability only to actors that carry an *intent* to harm their victims emotionally, physically, or financially when disseminating these types of images.[124]

Similarly, Arizona's nonconsensual pornography statute, adopted in 2016, serves as a guideline for states seeking to enact nonconsensual pornography statutes.[125] After the ACLU's suit halted enforcement of Arizona's original nonconsensual pornography law,[126] Arizona's legislature redrafted the statute to account for its constitutional deficiencies.[127] Today, Arizona's "revenge

other nonconsensual pornography statutes, the New York law defines harm in terms of "emotional, financial or physical" harms. *Id. Compare id.* (focusing on an intent to harm to the victim's "emotional, financial or physical welfare" to define criminal culpability), *with* VT. STAT. ANN. tit. 13, § 2606(b)(1) (West 2020) (requiring an "intent to harm, harass, intimidate, threaten, or coerce" the victim to define criminal culpability). In addition, the New York statutory scheme also allows victims to seek both criminal and civil action against the perpetrator. N.Y. CIV. RIGHTS LAW § 52-b (McKinney 2020) (permitting victims to bring a private right of action against their perpetrators); N.Y. PENAL LAW § 245.15(1) (serving as a mechanism for victims to bring criminal charges against their perpetrator).

[124] *See* N.Y. PENAL LAW § 245.15(1)(A) (containing an intent-to-harm provision); *see also* Glaser, *supra* note 12 (defining the harassment-based statute as one that includes some form of an intent-to-harm clause).

[125] *See* Monica Lindstrom, *Legally Speaking: What Arizona's Modified Revenge Porn Laws Mean for Jilted Lovers*, KTAR NEWS (Mar. 14, 2016), https://ktar.com/story/963033/legally-speaking-what-arizonas-modified-revenge-porn-law-means-for-jilted-lovers/ [https://perma.cc/B99Y-B9YS] (explaining the modifications made to Arizona's nonconsensual pornography law and encouraging other states to enact similar types of laws).

[126] *See* Final Decree, *supra* note 114, at 1–2 (stopping Arizona state prosecutors from enforcing the 2014 version of the law); Press Release, ACLU, *supra* note 117 (noting that in July of 2015, a federal court permanently halted the enforcement of Arizona's 2014 nonconsensual pornography law); Brian Strong, *Arizona's Revenge Porn Law Remains on Indefinite Hold*, AZ LEGAL (Sept. 16, 2015), https://www.azlegal.com/arizonas-revenge-porn-law/ [https://perma.cc/9HB8-VGLQ]. The procedural history of *Antigone Books L.L.C. v. Brnovich* began in November of 2014, when the U.S. District Court for the District of Arizona permanently ordered Arizona to abandon enforcement of the 2014 version of Arizona's nonconsensual pornography law. Strong, *supra*. In 2015, the legislature sought to draft a new constitutionally appropriate version of the law, but it still contained language that was constitutionally impermissible. *Id.* In July of 2015, the Arizona District Court entered a final decree preventing Arizona prosecutors from enforcing the 2015 revised statute. *See* Final Decree, *supra* note 114, at 1–2; Press Release, ACLU, *supra* note 117.

[127] Ryan Van Velzer, *Senate Passes Bill Revising 2014 'Revenge Porn' Law*, ARIZ. CAPITOL TIMES (Mar. 7, 2016), https://azcapitoltimes.com/news/2016/03/07/senate-passes-bill-revising-2014-revenge-porn-law/ [https://perma.cc/68XE-UWS4]. In 2016, the Arizona legislature passed the final iteration of its nonconsensual pornography law that made it a crime to share nude images of another person with the intent to hurt someone. *Id.* The ACLU supported the revised bill, expressing that the statute now is tailored in its application and limited to the behavior it originally intended to criminalize. *Id.*; *see* ARIZ. REV. STAT. ANN. § 13-1425 (2014) (amended 2016). The original Arizona statute made it illegal to "intentionally disclose, display, distribute, publish, advertise or offer a photograph, videotape, film, or digital recording of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure." ARIZ. REV. STAT. ANN. § 13-1425(A). This original version did not contain the "intent to harm, harass, intimidate, threaten or coerce the depicted person" clause that is featured in the most current version of the statute. *Compare id.* (lacking an intent-to-harm provision), *with* ARIZ. REV. STAT. ANN. § 13-1425(A)(3) (2020) (featuring an intent-to-harm clause).

porn" statute requires the disseminator act without the consent of and with "the *intent* to harm, harass, intimidate, threaten or coerce" the person depicted to establish criminal culpability.[128]

Although both Arizona's and New York's narrow construction of nonconsensual pornography does not threaten First Amendment rights under the Constitution,[129] it narrows the pool of victims that can find recourse under state criminal law.[130] As a result, many activists and researchers have called for a broader definition of nonconsensual pornography, one that focuses on the victim's privacy rather than the *intent* of the disseminator.[131]

2. A Privacy-Focused Definition of Nonconsensual Pornography

A privacy-focused definition of nonconsensual pornography encompasses all types of nonconsensual disclosure of sexually explicit images of another when the photos are taken with the expectation of privacy.[132] Unlike a harass-

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[128] ARIZ. REV. STAT. ANN. § 13-1425(A)(3) (2020) (emphasis added).

[129] *See* Tolentino, *supra* note 119 (discussing the effects of intent-to-harm provisions on court's constitutional rulings). The differences between two nonconsensual pornography statutes, Vermont's and Texas's, that were challenged in 2015 under the First Amendment highlight why the respective courts reached different outcomes. *Id.* The Vermont Supreme Court held that the Vermont statute "respect[ed] the right to free" speech because it contained an intent-to-harm clause. *Id.*; *see also* VT. STAT. ANN. tit. 13, § 2606 (West 2018). In contrast, the Twelfth Court of Appeals of Texas, concluded the Texas statute, containing no intent-to-harm provision, was too broad to withstand constitutional scrutiny. Tolentino, *supra* note 119; *see also* TEX. PENAL CODE ANN. § 21.16 (West Supp. 2017) (amended 2019), *invalidated by Ex parte* Jones, No. 12-17-00346, 2018 WL 2228888 (Tex. Ct. App. May 16, 2018).

[130] Glaser, *supra* note 12. Under the New York law, victims of this type of attack would have no recourse if their perpetrator disseminated the sexually explicit photos for another purpose other than the one enumerated in the statute. *Id.*

[131] Heard, *supra* note 6. Amber Heard, an actress and activist whose intimate photos were released by a hacker in 2014 during the infamous "celebrity hack," advocates for a broader understanding of the phenomenon of "revenge porn" and suggests that this terminology should not be used altogether. *Id.* After her attack in 2014, Heard took a stand against perpetrators of nonconsensual pornography and advocated for changes in legislation. *Id.*; Emily Heil, *Cause Celeb: Amber Heard Backs 'Revenge Porn' Bill on Capitol Hill*, WASH. POST (May 22, 2019), https://www.washingtonpost.com/arts-entertainment/2019/05/22/cause-celeb-amber-heard-backs-revenge-porn-bill-capitol-hill/ [https://perma.cc/95TD-J8XS] (highlighting Heard's support for the SHEILD Act, a federal legislation designed to protect nonconsensual pornography victims across the United States). Today, Heard is a prominent advocate for victims and urges states to reform their laws to aid all victims of nonconsensual pornography. *See* Heard, *supra* note 6.

[132] *See* Citron & Franks, *supra* note 8, at 346 (defining nonconsensual pornography as "the distribution of sexually graphic images of individuals without their consent"). Professors Danielle Keats Citron and Mary Anne Franks, the two most prominent legal scholars within the nonconsensual pornography field and members of the Cyber Civil Rights Initiative (CCRI) board of directors, highlight that this definition encompasses images that are originally obtained with consent (e.g., images consensually taken by or given to an intimate partner) but are later distributed to third parties without consent. *Id.*; *see, e.g.*, CONN. GEN. STAT. § 53a-189c (2020) (requiring no intent to harm on behalf of the perpetrator); 720 ILL. COMP. STAT. 5/11-23.5 (2020) (same). The CCRI is a nonprofit that serves vic-

ment-focused definition, the privacy-focused definition omits the intent-to-harm caveat.[133] Thus, a privacy-focused definition of nonconsensual pornography includes any dissemination of sexually explicit imagery without the consent of the person depicted.[134]

The push for a broad definition of nonconsensual pornography stems from new research reporting that approximately eighty percent of nonconsensual pornography perpetrators do not act with the intent to harm their victim.[135] Victim's advocacy groups, like the Cyber Civil Rights Initiative (CCRI) and the Battling Against Demeaning and Abusive Selfie Sharing Army, advocate for a broad privacy-focused definition because, in most cases, efforts to prove a perpetrator's intent are futile and victims feel this type of violation is ultimately more harmful than other privacy violations that the law does recognize.[136]

Supporters of a privacy-focused definition of nonconsensual pornography also call for total abolishment of the use of "revenge porn" terminology.[137]

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tims of cybercrimes, especially victims of nonconsensual pornography. *See About Us*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/welcome/ [https://perma.cc/U5SL-TLDN].

[133] *Compare* 720 ILL. COMP. STAT. 5/11-23.5(b) (noting that it is illegal to disseminate a sexually explicit photo of another with knowledge or reason to know that the person depicted did not consent and intended the image remain private), *with* VT. STAT. ANN. tit. 13, § 2606(b)(1) (West 2020) (stating that it is illegal to disseminate a sexually explicit photo of another without the depicted person's consent "with the intent to harm, harass, intimidate, threaten, or coerce the person depicted").

[134] *See* Tolentino, *supra* note 119. There is no singular motivator for perpetrators to post nonconsensual pornography online. *Id.* Although some post images with the intent to hurt or harass, others post without a motive of revenge and, thus, are challenging to prosecute under a harassment-focused understanding of revenge porn. *Id.*

[135] EATON ET AL., *supra* note 12, at 19 (using a sample of 3,044 adult American Internet users); *see* Citron & Franks, *supra* note 12. Scholars note that empirical evidence indicates that "almost 80% of people who disclose private, intimate imagery without consent" do not do so with an explicit intent to harm others. Citron & Franks, *supra* note 12. Although they may not carry the intent to cause harm, harm still results because of their disclosure. *Id.* Alternative motives for disseminating sexually explicit photos of others include "to gain social status, to brag, to make money, for sexual gratification, or to provide 'entertainment.'" *Id.*

[136] *See* Citron & Franks, *supra* note 8, at 350, 351–56; Karshmira Gander, *'BADASS': The Revenge Porn Victims Fighting for Justice*, NEWSWEEK (Feb. 26, 2018), https://www.newsweek.com/badass-revenge-porn-victim-who-turned-anger-activism-818047 [https://perma.cc/37PC-RSXU] (noting that Katelyn Bowden, a "revenge porn" victim advocate, stated that "it's extremely difficult to prove the intent of" disseminators and requiring such proof allows many perpetrators to avoid criminal culpability). Victims face prolonged psychological, physical, and economic harm from this type of cyber-attack. Citron & Franks, *supra* note 8, at 351. Some victims suffer from heightened anxiety and panic attacks. *Id.* Many face anonymous threats of rape or other physical attacks, verbal harassment, and "slut-shaming" online. *Id.* at 353. In addition, nonconsensual pornography attacks may cost victims their jobs and inhibit them from finding subsequent work. *Id.* at 352–53. State governments and the federal government have already recognized other private information, such as Social Security numbers and HIV status, that warrant protection from disclosure under the law. *Id.* at 356. The need for privacy-based nonconsensual pornography laws is rooted in the same logic surrounding other privacy laws—that consent is required before lawful disclosure can be made. *Id.*; Gander, *supra*.

[137] *See* Heard, *supra* note 6. Heard argues that the term "revenge porn" is the wrong name for this type of abuse. *Id.* She urges that laws against nonconsensual pornography should focus on the victim's lack of consent to the disclosure rather than the perpetrator's motives for doing so. *Id.*; *see* Sophie

They urge that nonconsensual pornography should concentrate more on the *consent*, or *lack thereof*, of the victim rather than the motivations of the disseminator.[138] Consequently, proponents of a privacy-focused definition of nonconsensual pornography urge legislators to shape these laws mirroring other existing privacy laws.[139] Their fear is that without a movement towards privacy laws that criminalize this type of conduct, state criminal laws will leave most nonconsensual pornography victims unprotected.[140]

Although advocates champion a broader definition of nonconsensual pornography that protects victim's privacy interests, few laws currently exist that reflect this broad privacy-focused definition.[141] One of the most notable priva-

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Maddocks, *From Non-consensual Pornography to Image-Based Sexual Abuse: Charting the Court of a Problem with Many Names*, 33 AUSTRL. FEMINIST STUD. 345, 345 (2018) (examining the many different names researchers and activists have used to replace the term "revenge porn," and describing the phenomenon as when an actor disseminates a sexually explicit video or image of another without their consent); Clare McGlynn et al., *Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse*, FEMINIST LEGAL STUD. 25, 30 (2017) (arguing that the term "revenge porn" serves as a misnomer for the broad range of activities that it describes).

[138] *See* Citron & Franks, *supra* note 12; Heard, *supra* note 6 (echoing that the focus should be on victim's consent rather than the disseminator's intent). Centralizing criminal conduct around harassment creates "categorical error" in existing law. Citron & Franks, *supra* note 12. Arguably, intent-to-harm provisions create harassment laws, rather than privacy laws, making nonconsensual pornography law ineffective in criminalizing the actions of the majority of perpetrators. *Id.*

[139] *See* Citron & Franks, *supra* note 12. Some legal scholars argue that sexual privacy is a standalone privacy interest, which is a cornerstone of sexual autonomy. *Id.* Without privacy-based laws, sexual privacy violations, like nonconsensual pornography, may chill a victim's First Amendment right to expression. *Id.* As a result, victims of nonconsensual pornography attacks will "censor" the material that they share with others. *Id.* These scholars urge that sexual privacy should be afforded the same protection that the law affords "other foundational privacy interests," like health and financial privacy. *Id.*; *see also* Privacy Act of 1974, 5 U.S.C. § 552a(b) (prohibiting disclosure of Social Security numbers without prior consent); Ferguson v. City of Charleston, 531 U.S. 67, 68 (2001) (concluding that health officials releasing positive drug test results to police was an impermissible substantial "invasion of privacy"); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing a fundamental right to privacy within the marital relationship); Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. § 164.502 (2020) (prohibiting health care providers from disclosing patients healthcare information and records without their consent).

[140] *See* Citron & Franks, *supra* note 12 (arguing that the new harassment-based New York law, and other laws with a similar intent-to-harm provisions, will fail to provide victims with adequate recourse under the criminal justice system).

[141] *See* Glaser, *supra* note 12; *see also, e.g.*, 720 ILL. COMP. STAT. 5/11-23.5 (2020); MINN. STAT. § 617.261 (2020). Courts have struck down many broad privacy-based laws under the First Amendment. *See, e.g.*, *supra* notes 114–119 and accompanying text (illustrating how the lack of an intent-to-harm provision in Arizona's 2014 and 2015 versions of its nonconsensual pornography statute rendered it unconstitutional); *infra* notes 186–196 and accompanying text (highlighting how a Texas court determined that the state's nonconsensual pornography law was too vague and overly broad to withstand constitutional scrutiny). The Illinois statute, enacted in 2015, has a broad, privacy-focused definition of nonconsensual pornography. 720 ILL. COMP. STAT. 5/11-23.5. In 2019, in *People v. Austin*, the Illinois Supreme Court held that the statute withstood a constitutional challenge on First Amendment grounds. 155 N.E.3d 439, 448, 460, 474 (Ill. 2019), *cert. denied*, 141 S. Ct. 233 (2020). Similarly, the Minnesota nonconsensual pornography statute, enacted in 2016, adopts a broad, priva-

cy-based nonconsensual pornography statutes to date is the Illinois criminal statute.[142] The Illinois legislature enacted the state's nonconsensual pornography statute in 2015 and modeled it after the CCRI's "Model State Law."[143]

The Illinois statute adopted a privacy-focused definition of nonconsensual pornography, making it a crime to "intentionally disseminates an image of another . . . who is engaged in a sexual act or whose intimate parts are exposed," when the disseminator "knows or should have known that the person" depicted did not consent to such distribution.[144] As such, the Illinois statute contains no intent-to-harm provision and, thus, allows virtually *all* victims of nonconsensual pornography to pursue recourse under the state law.[145]

Unfortunately, the risk associated with enacting a broad privacy-focused nonconsensual pornography statute is the implication it may have on free speech.[146] Many opponents of broad, privacy-based nonconsensual pornography laws urge that they run afoul of the First Amendment and will have an adverse effect on freedom of speech by deterring individuals from engaging in

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cy-focused definition. MINN. STAT. § 617.261. In 2020, in *State v. Casillas*, the Minnesota Supreme Court held that the statute was constitutionally valid. 952 N.W.2d 629, 634–35 (Minn. 2020).

[142] 720 ILL. COMP. STAT. 5/11-23.5.

[143] *See id.*; Kim Bellware, *Illinois Passes New 'Revenge Porn' Law That Includes Harsh Penalties*, HUFFPOST (Dec. 31, 2014), https://www.huffpost.com/entry/illinois-revenge-porn_n_6396436 [https://perma.cc/4J8V-TCPT] (noting that the CCRI aided in drafting the Illinois law); *CCRI Model State Law Against NCP*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/model-state-law/ [https://perma.cc/72UY-U7KN] (advocating for a privacy-based statute without requiring that the perpetrator act with an intent to harm the victim). Mary Anne Franks, a law professor at the University of Miami School of Law and one of the first and most prominent legal scholars in the area of nonconsensual pornography and sexual privacy violations, first drafted a Model Criminal Statute in 2013. Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1256, 1269 (2017). Since then, Franks has drafted both a Model Federal Law and Model State Law. *Id.* at 1269. The Model Federal Law heavily influenced the language of the Intimate Privacy Protection Act, which was "introduced in Congress in July 2016." *Id.* at 1256, 1297. The Model State Law serves as a reference for states enacting nonconsensual pornography laws, and it aided Franks to successfully advise lawmakers in more than thirty states. *Id.* at 1256. Today, three states, Illinois, Minnesota, and Washington, have nonconsensual pornography laws that substantially mirror the Model State Law. *Id.* at 1293; *see* 720 ILL. COMP. STAT. 5/11-23.5 (containing substantially similar language to the Model State Law); MINN. STAT. § 617.261 (same); WASH. REV. CODE § 9A.86.010 (2020) (same).

[144] 720 ILL. COMP. STAT. 5/11-23.5(b).

[145] *See id.* (omitting an intent-to-harm mens rea from the elements defining culpability); Citron & Franks, *supra* note 12 (highlighting the limiting effect of including intent-to-harm provisions in state nonconsensual pornography laws). Including a narrow intent-to-harm provision in a statute might seem harmless, but it prohibits some victims' ability to obtain legal recourse when their perpetrators disclose images for other reasons, like social status, bragging rights, financial gain, pleasure, or entertainment. Citron & Franks, *supra* note 12.

[146] *See* Tolentino, *supra* note 119 (highlighting that criminalizing "revenge porn" may run afoul the First Amendment protections to free speech); *see also* Press Release, ACLU, *supra* note 117 (arguing that broad nonconsensual pornography laws, without intent-to-harm provisions, are unconstitutional).

this type of speech all together.[147] Ultimately, free speech proponents fear that these statutes will have a chilling effect that unduly restricts otherwise protected free speech, which the Founders enacted the First Amendment to prevent.[148]

II. NONCONSENSUAL PORNOGRAPHY LAWS: CONTENT-BASED OR CONTENT-NEUTRAL?

As of 2021, there have been five notable constitutional contests to varying states' nonconsensual pornography statutes.[149] In each of these cases, the de-

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[147] *See* Tolentino, *supra* note 119. The ACLU points out that that laws "not limited to cases of *revenge* pornography will be 'over[] broad'" in a constitutional context and will likely deter speech as a result. *Id.*

[148] *See* Press Release, ACLU, Free Speech and Media Groups Applaud Governor's Veto of Overbroad "Revenge Porn" Bill (June 21, 2016), https://www.aclu.org/press-releases/free-speech-and-media-groups-applaud-governors-veto-overbroad-revenge-porn-bill [https://perma.cc/4NPE-YU3N] (outlining the First Amendment fears associated with passing broad nonconsensual pornography laws). In 2016, several groups asked Rhode Island's then-Governor, Gina Raimondo, to reject a privacy-based nonconsensual pornography bill. *Id.* These groups argued that the bill was too broad and caused a "chilling effect on free speech rights." *Id.* They urged that this bill, and others like it, could limit the distribution of constitutionally protected images. *Id.*; *see* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 685 (1978). The Supreme Court has recognized the chilling effect since 1962. Schauer, *supra*, at 685; *see* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (referring to the chilling effect in a constitutional context for the first time); *see also* Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting) (summarizing the Court's use of the chilling effect doctrine). The basis for the chilling effect doctrine arose out of the Court's fear that overly broad legislation would inhibit an individual's free exercise of speech under the First Amendment to the U.S. Constitution. *See* Schauer, *supra*, at 685. The "chilling effect" refers to the "spillover" of a law's application to conduct outside of the laws intended purpose or scope. Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1649 (2013). This "chilling effect" deters an individual from engaging in activity that would otherwise be protected by the First Amendment. Monica Youn, *The Chilling Effect, and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1482 (2019). Under the overbreadth and vagueness doctrines, plaintiffs may bring facial constitutional challenges to laws that create a chilling effect on otherwise protected speech. *Id.* at 1483. The Supreme Court allowed litigants to use the chilling effect as a mechanism to gain standing in the courts to challenge overly broad statutes. Schauer, *supra*, at 685. In these cases, standing may be established even if the plaintiff fails to show that the statute chilled their own speech. Youn, *supra*, at 1483. Today, the chilling effect serves as a determinative factor that courts employ to invalidate statutes under the First Amendment. Schauer, *supra*, at 687.

[149] *See* People v. Austin, 155 N.E.3d 439, 448, 456 (Ill. 2019) (reviewing the validity of § 11-23.5 of the Illinois Criminal Code after the defendant, Bethany Austin, brought a constitutional challenge under the First Amendment), *cert. denied*, 141 S. Ct. 233 (2020); State v. Casillas, 952 N.W.2d 629, 634–35 (Minn. 2020) (reviewing the constitutional validity of § 617.261 of the Minnesota Statutes after defendant, Michael Anthony Casillas, challenged the statute under the First Amendment); *Ex parte* Jones, No. 12-17-00346, 2018 WL 2228888, at *1 (Tex. Ct. App. May 16, 2018) (reviewing the validity of section 21.16(b) of the Texas Penal Code after defendant, John Bartlett Jones, challenged the law under the First Amendment); State v. VanBuren, 214 A.3d 791, 794 (Vt. 2019) (reviewing the constitutional validity of section 2606 of the Vermont Statutes Annotated after defendant, Rebekah VanBuren, challenged the law under the First Amendment); Complaint for Declaratory and Injunctive Relief, *supra* note 114, at 2 (halting enforcement of section 13-1425 of the Arizona Revised Statutes

fendant, charged with violating their respective state's nonconsensual pornography law, challenged the statute on the basis that the law was a content-based regulation of speech violating the First Amendment to the U.S. Constitution.[150] Some of the contested state statutes, like Vermont's, survived the constitutional attack because their application on speech was narrowed by an intent-to-harm provision.[151] Courts invalidated other state statutes, however, due to their broad construction and risk of chilling speech.[152]

The inconsistency between state court decisions has led to disagreement about whether nonconsensual pornography laws make content-based or content-neutral restrictions.[153] Almost all nonconsensual pornography laws make it illegal to distribute sexually explicit photos of another without their consent, but some require that a perpetrator act with the intent to harm their victim.[154] Most state courts that examined the constitutionality of these laws deem these laws to be content-based speech restrictions.[155] Some courts consider noncon-

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after the Media Coalition and the ACLU challenged the constitutional validity of the law under the First Amendment).

[150] *See Austin*, 155 N.E.3d at 456 (explaining that the defendant challenged the state statute as a content-based regulation of speech subject to strict scrutiny); *Casillas*, 952 N.W.2d at 635 (same); *Ex parte Jones*, 2018 WL 2228888, at *3 (same); *VanBuren*, 214 A.3d at 799 (same); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 155–56 (2015) (defining a content-based regulation as a law that applies to only certain types of speech, merely because of the idea, topic, or message).

[151] *VanBuren*, 214 A.3d at 812–13 (concluding that the Vermont nonconsensual pornography statute was narrowly tailored with respect to its intent-to-harm provision).

[152] *See, e.g.*, *Ex parte Jones*, 2018 WL 2228888, at *7 (concluding that the Texas nonconsensual pornography law was not narrowly tailored because it lacked an intent-to-harm provision).

[153] *Compare* Franks, *supra* note 143, at 1318 (urging that broad nonconsensual pornography laws do not prohibit dissemination of material based on the material's content), *with* Humbach, *supra* note 30, at 217 (arguing that "revenge porn" laws "fly in the face of free speech" by discriminating based on a speaker's viewpoint). Some scholars argue that nonconsensual pornography expresses a viewpoint that the person depicted is "deservedly discredited by [their] sexuality," and subsequently laws that prohibit nonconsensual pornography seek to criminalize such a viewpoint. Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 662–63 (2016) (asserting that "revenge porn[]" laws are viewpoint content-based restrictions on speech).

[154] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 5. Although most nonconsensual pornography laws require that the person depicted in the image did not consent, some nonconsensual pornography laws require the disseminator to act with an intent to harm. *See id. Compare, e.g.*, LA. STAT. ANN. § 14:283.2(A)(4) (2020) (requiring that a perpetrator act with the "intent to harass or cause emotional distress to the person in the image"), *and* ME. STAT. tit. 17-A, § 511-A(1) (2019) (requiring that a perpetrator act with the "intent to harass, torment, or threaten the depicted person"), *and* VA. CODE ANN. § 18.2-386.2(A) (West 2020) (requiring that the perpetrator act with the "intent to coerce, harass, or intimidate" the person depicted in the image), *with* N.D. CENT. CODE ANN. § 12.1-17-07.2 (West 2020) (omitting any variation of an intent-to-harm provision), *and* UTAH CODE ANN. § 76-5b-203 (West 2020) (same), *amended by* H.B. 59, 64th Leg., Gen. Sess. (Utah 2021), *and* H.B. 147, 64th Leg., Gen. Sess. (Utah), *and* H.B. 193, 64th Leg., Gen. Sess. (Utah).

[155] *See, e.g.*, *Casillas*, 952 N.W.2d at 635 (applying strict scrutiny after the defendant alleged that the Minnesota statute made a content-based restriction on speech); *Ex parte Jones*, 2018 WL 2228888, at *3 (same); *VanBuren*, 214 A.3d at 801 (same).

sensual pornography laws to be content-based restrictions because they "criminalize[] disclosure of a photograph of a person having sex" but do not criminalize disclosure of non-sexual imagery.[156] Consequently, courts routinely held that these statutes were unconstitutional.[157]

Despite this content-based characterization by several state courts, the Illinois Supreme Court and several legal scholars disagree that these laws create content-based restrictions on speech.[158] Instead, they urge sister courts to adopt the view that nonconsensual pornography laws make content-neutral restrictions on speech.[159] Their rationale is that nonconsensual pornography laws do not favor non-sexually explicit content over sexually explicit content, but they merely regulate the *manner* in which distribution of sexually explicit content is permitted under the law.[160]

Part II of this Note examines how courts have reviewed First Amendment challenges to nonconsensual pornography laws.[161] First, Section A of this Part discusses how some state courts treat nonconsensual pornography laws as content-based restrictions on speech.[162] Section A also explores the various court decisions that as a result of the statutes' designation as content-based restrictions on speech, apply strict scrutiny to nonconsensual pornography laws.[163] Section B demonstrates how some state courts treat nonconsensual pornography laws as content-neutral restrictions on speech, and, as a result of

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[156] Mark Bennett, *Are Statutes Criminalizing Revenge Porn Constitutional?*, BENNETT & BENNETT BLOG (Oct. 14, 2013), http://blog.bennettandbennett.com/2013/10/are-statutes-criminalizing-revenge-porn-constitutional/#obscenity [https://perma.cc/R8QX-5CWK]; *see* Christian Nisttáhuz, Comment, *Fifty States of Gray: A Comparative Analysis of "Revenge Porn" Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 TEX. TECH. L. REV. 333, 351–52 (2018) (suggesting that courts should find that "revenge porn" laws impose content-based restrictions on speech).

[157] *See, e.g.*, *Ex parte Jones*, 2018 WL 2228888, at *8 (concluding Texas's nonconsensual pornography statute was invalid under the U.S. Constitution).

[158] *See Austin*, 155 N.E.3d at 457–58 (holding that the privacy-based statute made a content-neutral restriction on speech because it did not prohibit, but merely regulated, the disclosure of sexually explicit images); Franks, *supra* note 143, at 1318 (arguing that privacy-based laws make content-neutral restrictions on speech because they regulate the manner of dissemination rather than the speaker's message).

[159] *See Austin*, 155 N.E.3d at 457–58 (concluding that the Illinois privacy-based statute was a content-neutral restriction that merely regulated the manner of speech rather than its content); Franks, *supra* note 143, at 1318; Press Release, Off. of Congresswoman Jackie Speier, Rep Speier and Sens Harris, Burr, and Klobuchar Introduce Bipartisan Bill to Address Online Exploitation of Private Images (Nov. 28, 2017), https://speier.house.gov/2017/11/rep-speir-and-sens-harris-burr-and-klobuchar-introduce-bipartisan-bill [https://perma.cc/LB4U-XH8N] (detailing how the proposed federal ENOUGH Act would promulgate a content-neutral law regulating only the actors who disseminate sexually explicit images without the victim's *consent*). The ENOUGH Act is a bi-partisan co-sponsored bill in the House of Representatives. Press Release, Off. of Congresswoman Jackie Speier, *supra*.

[160] *See* Franks, *supra* note 143, at 1318.

[161] *See infra* notes 165–243 and accompanying text.

[162] *See infra* notes 165–174 and accompanying text.

[163] *See infra* notes 175–219 and accompanying text.

their designation as content-neutral restrictions, it explores these courts' application of intermediate scrutiny to such laws.[164]

A. Nonconsensual Pornography Laws Treated as Content-Based Restrictions on Speech

A law is a content-based restriction on speech if the law applies to speech merely because of the topic, idea, or message expressed.[165] Courts have traditionally considered nonconsensual pornography laws as content-based restrictions because these statutes arguably draw distinctions upon expression—images—based on their sexually explicit content.[166] Under the U.S. Supreme Court's First Amendment jurisprudence, content-based restrictions are *presumed* unconstitutional due to the threat they pose to individuals' First Amendment rights.[167] Content-based restrictions, and the laws that regulate speech based on its content, are constitutionally valid only if the court finds that they satisfy strict scrutiny.[168]

Although the Supreme Court has not yet heard a case regarding the constitutional validity of nonconsensual pornography laws, state level challenges to nonconsensual pornography laws demonstrate the effect of strict scrutiny review on these laws.[169] In 2018, 2019, and 2020, respectively, three criminal defendants challenged the constitutional validity of Texas's, Vermont's, and Minnesota's nonconsensual pornography laws.[170] The Texas, Vermont, and Minnesota courts applied strict scrutiny to determine the respective statute's validity.[171] The cases had differing outcomes, highlighting the uncertainty of ap-

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[164] *See infra* notes 220–243 and accompanying text.

[165] *See supra* notes 45–53 and accompanying text (defining content-based restrictions on speech).

[166] *See, e.g.*, State v. Casillas, 952 N.W.2d 629, 634 (Minn. 2020) (applying strict scrutiny without concluding whether the Minnesota statute was content-based or content-neutral); *Ex parte* Jones, No. 12-17-00346, 2018 WL 2228888, at *4 (Tex. Ct. App. May 16, 2018) (concluding that the Texas Penal Code provision prohibiting the dissemination of nonconsensual pornography was a content-based restriction on speech).

[167] *See supra* notes 52–53 and accompanying text.

[168] *See supra* notes 53–62 and accompanying text (outlining the strict scrutiny inquiry).

[169] *See* Austin v. Illinois, 141 S. Ct. 233, 233 (2020) (denying the petition for writ of certiorari). *See generally Ex parte Jones*, 2018 WL 2228888, at *5 (utilizing the U.S. Supreme Court's strict scrutiny inquiry to determine that a statute was not narrowly tailored to serve a compelling state interest); State v. VanBuren, 214 A.3d 791, 807–14 (Vt. 2019) (employing the Supreme Court's distinction between content-neutral and content-based restrictions on speech to determine which level of scrutiny to apply to Vermont's nonconsensual pornography law).

[170] *See Ex parte Jones*, 2018 WL 2228888, at *1, *5 (reviewing the validity of the Texas nonconsensual pornography statute after the defendant challenged the statute's regulation of speech); *VanBuren*, 214 A.3d at 796, 813 (reviewing the validity of the Vermont nonconsensual pornography statute after the defendant challenged the statute under the First Amendment).

[171] *See Ex parte Jones*, 2018 WL 2228888, at *5 (invalidating the Texas nonconsensual pornography law); *VanBuren*, 214 A.3d at 807, 813 (upholding the Vermont nonconsensual pornography law).

plying strict scrutiny analysis when addressing nonconsensual pornography laws.[172] Subsection 1 describes the impact of strict scrutiny upon harassment-based nonconsensual pornography statutes.[173] Subsection 2 explains the application of strict scrutiny upon privacy-based nonconsensual pornography statutes.[174]

1. The Effect of Applying Strict Scrutiny to Harassment-Based Nonconsensual Pornography Statutes

In 2019, in *State v. VanBuren*, the Vermont Supreme Court considered whether Vermont's harassment-based nonconsensual pornography law was valid under the First Amendment.[175] The defendant, Rebekah VanBuren, brought a constitutional challenge to the Vermont nonconsensual pornography statute, section 2606 of the Vermont Statutes Annotated, as a defense to criminal charges brought against her for posting naked photos of her ex-boyfriend's then-new girlfriend on Facebook.[176] In an effort to dismiss the charges, the defendant brought a facial challenge arguing that the statute was invalid because it was a content-based restriction on speech and was not properly narrowly tailored to Vermont's compelling state interest under a strict scrutiny analysis.[177]

On appeal, however, the Vermont Supreme Court concluded that section 2606 of the Vermont Statutes Annotated survived strict scrutiny because it is a narrowly defined statute that did not prohibit speech beyond the purview of the state's compelling interest.[178] The court noted that the government's interest, preventing any intrusions on an individual's privacy, was substantial, particularly in cases when the invasion of privacy involved nonconsensual pornogra-

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[172] *See* State v. Casillas, 952 N.W.2d 629, 634 (Minn. 2020) (concluding that Minnesota's privacy-based nonconsensual pornography statute, lacking an intent-to-harm provision, survived strict scrutiny); *Ex parte Jones*, 2018 WL 2228888, at *7 (explaining that a statute that lacks an intent-to-harm provision will be invalidated under strict scrutiny analysis); *VanBuren*, 214 A.3d at 813–14 (stating that a statute containing an intent-to-harm provision will survive strict scrutiny analysis).

[173] *See infra* notes 175–185 and accompanying text.

[174] *See infra* notes 186–219 and accompanying text.

[175] *See* 214 A.3d at 814 (considering whether the Vermont law, which included an intent-to-harm provision, was constitutionally valid); *see also* VT. STAT. ANN. tit. 13, § 2606 (West 2018).

[176] *See VanBuren*, 214 A.3d at 796–98. In 2015, the defendant, Rebekah VanBuren, was arrested for violating section 2606 when she posted nude photos on Facebook that depicted her ex-boyfriend's new girlfriend. *Id.* at 797. In 2016, in *State v. VanBuren*, the Vermont Superior Court for the Bennington Criminal Division ultimately dismissed the defendant's charges because it found that the Vermont statute was unconstitutional. *Id.* at 798. The State of Vermont challenged the trial court's dismissal of the defendant's charges, which ultimately brought the case to the Vermont Supreme Court in 2019. *Id.*

[177] *See id.* at 797. The trial court concluded that the state failed to show that there was no less restrictive alternative available for the law, and, as a result, it decided that the statute did not survive strict scrutiny analysis under the U.S. Constitution. *Id.*

[178] *Id.* at 813. In 2019, in *State v. VanBuren*, the Vermont Supreme Court concluded that the express limitations on the statute's reach meant that it was narrowly tailored to the state's interest. *Id.*

phy.[179] In upholding the protections of the statute, the court highlighted several restrictions unique to the Vermont statute that narrowly tailored it to that interest.[180] Specifically, the court explained that the law was not unduly overbroad because it made disclosure criminal only if a specific *intent-to-harm* the image's subject accompanied it.[181] The court reasoned that the intent-to-harm provisions in the statute abated fears of the statute penalizing otherwise protected speech, or chilling protected speech altogether.[182]

The Vermont Supreme Court's ruling was a significant victory because it stands as one of the few statutes addressing nonconsensual pornography to withstand strict scrutiny under the U.S. Constitution.[183] The intent-to-harm provision was critical to the statute's survival because it adequately served to narrowly tailor the scope of the law.[184] Although the inclusion of such a provision restricts the amount of free speech implicated under the statute, it also restricts the number of victims that the statute can protect.[185]

2. The Effect of Applying Strict Scrutiny to Privacy-Based Nonconsensual Pornography Statutes

In 2018, in *Ex Parte Jones*, the Twelfth Court of Appeals of Texas analyzed the constitutional validity of Texas's privacy-based nonconsensual por-

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[179] *See id.* at 810–11. The court acknowledged that the harm to victims of this crime was substantial because these images could be disseminated to friends, family, employers, and anyone else who came across them. *Id.* at 810. The court noted that it would be hard to imagine something more private than images of an individual's genitals or of an individual engaging in a sexual act. *Id.*

[180] *Id.* at 812–13. The court noted that the Vermont statute "precisely defined, with little gray area," what types of images that the law regulated. *Id.* at 812. The law also contained a specific provision requiring the intent to harm, which the court noted further restricted the statute's applicability. *Id.*

[181] *Id.* at 812.

[182] *See id.* at 814. The court also noted that because the statute was narrowly tailored, it did not run the risk of chilling more speech than necessary speech to accomplish its purpose. *Id.*

[183] *See id.* (concluding that the Vermont statute was constitutional). *Compare Ex parte* Jones, No. 12-17-00346, 2018 WL 2228888, at *7 (Tex. Ct. App. May 16, 2018) (holding that section 21.16(b)(2) of the Texas Penal Code was invalid and not properly tailored because it included no express clause, like an intent-to-harm provision, to limit the conduct implicated in the law), *with VanBuren*, 214 A.3d at 814 (determining that section 2606 of the Vermont Statutes Annotated was narrowly tailored because it limited the conduct implicated under the statute to conduct that was intended to harm the person depicted in the image).

[184] *See VanBuren*, 214 A.3d at 813 (holding that section 2606 of the Vermont Statutes Annotated was constitutionally valid because of the express limitations built into the statute's language requiring a specific intent to harm the victim).

[185] *See* Glaser, *supra* note 12. Most perpetrators do not intend to harm or hurt their "revenge porn" victims. EATON ET AL., *supra* note 12, at 19; Glaser, *supra* note 12. As such, statutes limiting unlawful conduct with an intent-to-harm provision do not adequately protect most victims of this type of invasion of privacy. *See* Glaser, *supra* note 12.

nography statute.[186] The court reviewed the conviction of the defendant, John Bartlett Jones, under section 21.16(b) of the Texas Penal Code, for the unlawful disclosure of intimate visual material.[187] The defendant challenged his conviction by contesting the validity of section 21.16(b), alleging that the statute was facially overbroad and, therefore, violated the First Amendment to the U.S. Constitution.[188] The Texas statute criminalized disseminating intimate visual material of another without consent and where (1) the depicted person is identifiable in the image and created the image with the expectation that it would remain private and (2) the dissemination of such material causes harm to the person depicted.[189] Because the court viewed the statute as regulating speech based on its sexual content, deeming it a content-based restriction, the Court of Appeals of Texas applied strict scrutiny.[190]

Under the strict scrutiny analysis, the *Jones* court recognized that Texas had a compelling government interest in protecting individuals from substantial invasions of their privacy and that the statute's purpose was to protect disclosure of images that were intended to remain private.[191] The court, however, ultimately concluded that the statute's language was not properly constrained in meeting that interest in a manner that did not overly burden free speech.[192] The court relied on a hypothetical to justify its position, which articulated a scenario wherein the Texas criminal statute, as it stood, could prohibit the conduct of many purportedly innocent actors.[193]

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[186] 2018 WL 2228888, at *1; *see* TEX. PENAL CODE ANN. § 21.16(b)(2) (West Supp. 2017) (amended 2019) (requiring no intent-to-harm on behalf of the perpetrator), *invalidated by Ex parte Jones*, 2018 WL 2228888.

[187] *Ex parte Jones*, 2018 WL 2228888, at *1; *see* TEX. PENAL CODE ANN. § 21.16(b)(2). In 2017, prosecutors charged defendant, John Bartlett Jones, with unlawful disclosure of an intimate visual material under the Texas Penal Code. 2018 WL 2228888, at *1. The defendant, who the court held as a pre-train detainee, petitioned for a writ of habeas corpus, challenging the constitutionality of the provision of the Texas Penal Code on First Amendment grounds. *Id.*

[188] *Ex parte Jones*, 2018 WL 2228888, at *1.

[189] *See* TEX. PENAL CODE ANN. § 21.16(b)(2) (further defining the statute's terminology).

[190] *See Ex parte Jones*, 2018 WL 2228888, at *3–4. In 2018, in *Ex parte Jones*, the Twelfth Court of Appeals of Texas concluded that images (photographs and visual recordings) are inherently expressive and therefore fall under First Amendment protection. *Id.* at *3. The court also held that the regulation itself was a content-based regulation because it penalized a narrow type of expression that "depict[s] another person with the person's intimate parts exposed or engaged in sexual conduct." *Id.* at *4.

[191] *See id.* at *5; *see also* Snyder v. Phelps, 562 U.S. 443, 459 (2011). In 2011, in *Snyder v. Phelps*, the U.S. Supreme Court articulated that privacy may constitute a government interest when the privacy interest is substantial and the invasion occurs in an "intolerable manner." 562 U.S. at 459 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

[192] *See Ex parte Jones*, 2018 WL 2228888, at *7. The Texas court concluded that the Texas legislature did not use the "least restrictive means" of achieving its interest in protecting citizens from this sort of invasion of privacy. *Id.* Therefore, court held the statute was invalid. *Id.* at *8.

[193] *See id.* at *5–6. The court presented a hypothetical:

In rendering its decision, the Texas court noted that the legislature could narrow the statute by adding additional requirements—such as an intent-to-harm provision—to find criminally culpability.[194] Under strict scrutiny, however, section 21.16(b) of the Texas Penal Code, as it stood, was invalid because it failed to use the least restrictive means to reach the legitimate government interest in preventing substantial invasions of privacy.[195] The Twelfth Court of Appeal of Texas's decision in *Ex parte Jones* demonstrates the hurdles that state legislatures face when enacting privacy-based nonconsensual pornography laws that lack an intent-to-harm provision.[196]

This strict scrutiny hurdle seemed insurmountable for privacy-based nonconsensual pornography laws until the 2020 Minnesota Supreme Court decision in *State v. Casillas*.[197] There, the court considered the constitutionality of Minnesota's nonconsensual pornography law, section 617.261 of the Minnesota Statutes.[198] The Minnesota nonconsensual pornography statute is one of the

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> Adam and Barbara are in a committed relationship. One evening, in their home, during a moment of passion, Adam asks Barbara if he can take a nude photograph of her. Barbara consents, but before Adam takes the picture, she tells him that he must not show the photograph to anyone else. Adam promises that he will never show the picture to another living soul, and takes a photograph of Barbara in front of a plain, white background with her breasts exposed.
>
> A few months pass, and Adam and Barbara break up after Adam discovers that Barbara has had an affair. A few weeks later, Adam rediscovers the topless photo he took of Barbara. Feeling angry and betrayed, Adam emails the photo without comment to several of his friends, including Charlie. Charlie never had met Barbara and, therefore, does not recognize her. But he likes the photograph and forwards the email without comment to some of his friends, one of whom, unbeknownst to Charlie, is Barbara's coworker, Donna. Donna recognizes Barbara and shows the picture to Barbara's supervisor, who terminates Barbara's employment.
>
> Meanwhile, Adam also emails the picture to Ed. This time, however, Adam writes in the body of the email, "She thought I never would show anyone." Ed reads the email and forwards it with the attachment to several friends.

Id. The court determined that under this hypothetical, the Texas law criminalized the actions of both Charlie and Donna, two innocent actors with First Amendment rights. *Id.* at *6. The court further reasoned that Charlie "ha[d] a First Amendment right to share a photograph" and lacked a notion of whether Barbara intended the photo to remain private. *Id.*

[194] *See id.* at *7. The court noted that the legislature could narrow the criminal liability imposed by the statute by "requiring that the disclosing person have knowledge of the circumstances giving rise to the victim's privacy expectation." *Id.* Additionally, the court explained that the addition of an intent-to-harm provision may sort out the ambiguities of this law. *See id.*

[195] *Id.* at *7–8 (concluding that section 21.16(b) of the Texas Penal Code was invalid).

[196] *See id.* (highlighting that a strict scrutiny inquiry invalidated a nonconsensual pornography law that sought to protect a privacy interest and lacked an intent-to-harm provision).

[197] *Compare id.* at *7 (illustrating that once a privacy-based law is adjudged a content-based restriction on speech, the presumption of invalidity is nearly impossible to overcome), *with* State v. Casillas, 952 N.W.2d 629, 634 (Minn. 2020) (deciding for the first time that a privacy-based nonconsensual pornography law, with no intent-to-harm clause, survived strict scrutiny).

[198] *Casillas*, 952 N.W.2d at 640–44 (reviewing the Minnesota state statute under strict scrutiny).

very few comprehensive, privacy-based nonconsensual pornography laws enacted by state legislatures to date.[199] Section 617.261 makes it a crime to "intentionally disseminate" a sexually explicit image[200] of another when (1) the person in the image is identifiable, (2) the disseminator knows or reasonably should know that the person depicted in the image does not consent to the dissemination or had a reasonable expectation of privacy, and (3) the image was created under circumstances where the disseminator knew or should have known the person depicted had a reasonable expectation of privacy.[201] Unique to the Minnesota statute, is the lack of an intent-to-harm provision.[202]

The defendant, Michael Antony Casillas, brought a constitutional challenge to Minnesota's nonconsensual pornography statute, as a defense to felony charges brought against him.[203] The defendant moved to dismiss the felony charges at the district court level, but the Dakota County District Court of

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[199] *See* MINN. STAT. § 617.261 (2018) (including no intent-to-harm provision and, therefore, creating a privacy-based nonconsensual pornography law).

[200] *See id.* § 617.261(1). Under the Minnesota statute, a sexually explicit image includes "an image of another who is depicted in a sexual act or whose intimate parts are exposed." *Id.* The statute further defines the terms "sexual act" and "intimate parts." *Id.* § 617.271(7)(a).

[201] *Id.* Section 617.271 of the Minnesota Statutes, the state's nonconsensual pornography statute, states:

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

Id. Perpetrators whose actions fit the elements of section 617.261(1) are guilty of a gross misdemeanor. *Id.* § 617.261(2)(a). Section 617.261(2)(b) of the statute, however, imposes felony charges on any perpetrator if any of the seven aggravating factors is present. *See id.* § 617.261(2)(b).

[202] *See id.* § 617.271 (containing no variation of an intent-to-harm provision, making the statute a privacy-based nonconsensual pornography law).

[203] *Casillas*, 952 N.W.2d at 635. In 2016, the defendant, Michael Anthony Casillas, and his then-girlfriend (called "A.M." for purposes of anonymity) were in a three-month relationship. *Id.* at 634. During their relationship, the defendant's girlfriend gave him access to her Dish Network Cloud account. *Id.* After their relationship ended, the defendant used her password information to access her accounts, which enabled him to view a video and images of his ex-girlfriend engaged in "sexual relations" with another man. *Id.* The defendant originally only threatened to send the video and images of his ex-girlfriend to others. *Id.* at 634–35. Ultimately, he sent the video to forty-four individuals, and he posted the video online. *Id.* at 635. Prosecutors charged the defendant with a felony under § 617.261 of the Minnesota Statutes. *Id.*; *see* MINN. STAT. § 617.261.

Minnesota denied his motion to dismiss and convicted the defendant.[204] In an effort to overturn his felony conviction, he appealed.[205] The Minnesota Court of Appeals reversed the defendant's conviction and deemed Minnesota's nonconsensual pornography statute "unconstitutionally overbroad" and, therefore, invalid.[206] Following the court's holding, the state petitioned to the Minnesota Supreme Court for further review on the constitutional validity of the Minnesota statute.[207]

Upon review of the appellate court's decision, the Minnesota Supreme Court concluded that to survive the defendant's constitutional challenge, section 617.261 of the Minnesota Statutes must pass strict scrutiny review.[208] Unique to the court's analysis was the appellate judge's decision to forego characterizing the statute's content distinction to determine the applicable level of scrutiny for review.[209] Instead, the court chose to apply the most-exacting level of scrutiny, regardless of the statute's content distinction.[210]

Despite the Minnesota Supreme Court's decision to undergo strict scrutiny analysis, the court concluded that Minnesota's privacy-based statute was constitutionally valid.[211] The decision made the Minnesota Supreme Court the first ever state court to conclude that a privacy-based nonconsensual pornogra-

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[204] *Casillas*, 952 N.W.2d at 635 (denying the motion to dismiss the defendant's felony charges under section 617.261 of the Minnesota Statutes). In *State v. Casillas*, the Dakota County District Court of Minnesota initially denied the defendant's motion to dismiss, wherein he asserted his first constitutional challenge to the state's statute. *Id.* In this motion to dismiss, the defendant asserted that the Minnesota statute made a constitutionally impermissible and overbroad restriction on speech. *Id.* (asserting that the law was "overbroad, an impermissible content-based restriction, and void for vagueness"). In denying the motion, the district court found that the statute regulated "obscene speech," which is not protected by the First Amendment. *Id.* The district court also concluded that the "degree of overbreadth was insubstantial." *Id.*

[205] *See generally* State v. Casillas, 938 N.W.2d 74 (Minn. Ct. App. 2019) (reviewing the defendant's appeal and the constitutional validity of section 617.261 of the Minnesota Statutes), *rev'd*, 952 N.W.2d 629 (Minn. 2020).

[206] *Id.* at 74, 78 (holding that the statute criminalizing nonconsensual pornography "facially violated [the] First Amendment overbreadth doctrine" and was "not reasonably subject to narrowing construction" and was thus invalid).

[207] *Casillas*, 952 N.W.2d at 635.

[208] *Id.* at 641.

[209] *Id.* (asserting that the court "need not determine whether [the statute] is a content-based or content-neutral" restriction on speech). In 2020, in *State v. Casillas*, the Minnesota Supreme Court did not further rationalize the decision to not characterize the statute's content distinction. *Id.* The court solely concluded that because the state met its burden of proof under strict scrutiny, determining the content distinction was not necessary. *Id.* At the end of the strict scrutiny analysis, however, the court acknowledged that the statute was a content-based restriction on speech. *Id.* at 644. The court concluded that even if it were to "assume" that the statute made a content-based restriction on speech, it survived strict scrutiny. *Id.*

[210] *Id.* at 641–44 (applying the strict scrutiny analysis to review the constitutional validity of the Minnesota statute).

[211] *Id.* at 644 (holding that section 617.261 of the Minnesota Statutes does not violate the First Amendment because it made a valid restriction on speech that was narrowly tailored to serve the state's compelling interest).

phy statute, without an intent-to-harm clause, withstood strict scrutiny review.[212]

To reach this unprecedented decision, the court walked step-by-step through the strict scrutiny inquiry.[213] First, the Minnesota Supreme Court evaluated the strength of the state's interest in prohibiting the dissemination of nonconsensual pornography.[214] The court concluded that the state had demonstrated its compelling interest in prohibiting the "permanent and severe harms" that result from the nonconsensual sharing of private sexually images.[215] Second, the court held that the legislature had adequately narrowly tailored section 617.261 of the Minnesota Statutes to address the state's interest because the "statute proscribe[d] only private speech that (1) was intentionally disseminated without consent,[216] (2) fell within numerous statutory definitions,[217] and (3) was outside of the seven broad exemptions" that the statute promulgates.[218] To

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[212] *Compare id.* (concluding that Minnesota's privacy-based statute satisfied strict scrutiny and was a valid restriction on speech under the U.S. Constitution), *with Ex parte* Jones, No. 12-17-00346, 2018 WL 2228888, at *7 (Tex. Ct. App. May 16, 2018) (concluding that Texas's privacy-based statute did not satisfy strict scrutiny and was, therefore, invalid under the U.S. Constitution).

[213] *See Casillas*, 952 N.W.2d at 641–44 (determining whether the statute was adequately narrowly tailored to meet a compelling and substantial state interest). The court, however, did not explicitly rationalize its determination that the statute was "the least restrictive means" to meet the state's compelling interest. *See id.* at 643 (quoting United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 827 (2003) (requiring that the legislation use the "least restrictive means" to promote the state's compelling interest and be constitutionally valid under strict scrutiny)).

[214] *Id.* at 641–42.

[215] *Id.* at 641–42, 644. In analyzing the state's interest, the Minnesota Supreme Court specifically emphasized the pervasive harms that victims of nonconsensual pornography face. *Id.* at 641–42. The court honed in on the emotional, health, and reputational harms that result from the exposure of their private sexual images to their friends, family, co-workers, and even strangers on the Internet. *Id.* The court emphasized that the significant harms that victims of nonconsensual pornography face are a "direct threat to [the] [state's] citizens' health and safety." *Id.* at 642. The court highlighted that it is a long-recognized principle that the state has a compelling interest in the well-being of its citizens. *See id.* (highlighting the holdings from various other Minnesota Supreme Court decisions that found the state had an interest in the well-being of its citizens).

[216] *Id.* at 643–44. The court reasoned that the language of the Minnesota statute served to narrow its scope. *Id.* at 643. The court specifically honed in on two provisions of the statute. *Id.* The first provision required the perpetrator to "intentionally" disseminate the image. *Id.* (quoting MINN. STAT. § 617.261(1) (2018)). The court highlighted that this "mens rea requirement" intended for only "knowing[] and voluntary[]" disclosures to be prohibited but not "negligent, accidental, or even reckless distributions." *Id.* Second, the court emphasized that a conviction under § 617.261 of the Minnesota Statutes required the perpetrator to act without the consent of the person in the image. *Id.* The court noted that this provision abated fears that the statute would prohibit "commercial advertisements, certain adult films, artistic works, and other creative expression." *Id.* at 643–44.

[217] *Id.* at 643. The court reasoned that § 617.261 of the Minnesota Statutes also narrowed its application to speech by promulgating various definitions to limit the types of images proscribed by the statute. *Id.* The court explained that the statute narrowed the definition of image by including modifiers like "sexual act" and "intimate parts," which narrowed the types of images that law expressly prohibits. *Id.* (quoting MINN. STAT. § 617.261(1)).

[218] *Id.* at 644.

finalize this unique decision, the court emphasized that this is one of the rare cases where a content-based restriction survives strict scrutiny.[219]

B. Nonconsensual Pornography Laws Treated as Content-Neutral Restrictions on Speech

In contrast to content-based restrictions, content-neutral restrictions on speech regulate speech without reference to the idea, message, or viewpoint expressed.[220] Because content-neutral laws do not pose the same threats of censoring or chilling constitutionally protected speech, they are not considered presumptively invalid under the First Amendment.[221] For the court to conclude that a content-neutral law is constitutionally valid, it must satisfy the less-exacting standard of intermediate scrutiny.[222]

To date, only one state court has determined that nonconsensual pornography laws are a content-neutral restriction on speech requiring review under intermediate scrutiny.[223] In 2019, the Illinois Supreme Court applied this less-exacting standard of review to a nonconsensual pornography statute to analyze the Illinois nonconsensual pornography law in *People v. Austin*.[224]

The constitutional challenge to section 11-23.5(b) of the Illinois Criminal Code came in response to charges brought against the defendant, Bethany Austin, who shared sexually explicit images of another woman by mail.[225] In response to her indictment, the defendant moved to dismiss the charges, arguing that the Illinois statute was facially unconstitutional and was not narrowly tai-

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[219] *Id.* (emphasizing that the statute would survive strict scrutiny even if the court were to assume it made a content-based restriction on speech). The court also rejected the argument that the Minnesota statute made a "viewpoint" restriction on speech. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)). The court rationalized that the legislature's motive in enacting the statute was more than a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* (quoting *Tinker*, 393 U.S. at 509).

[220] *See supra* notes 63–71 and accompanying text.

[221] *See supra* notes 72–74 and accompanying text.

[222] *See supra* notes 75–82 and accompanying text.

[223] People v. Austin, 155 N.E.3d 439, 456–58 (Ill. 2019) (concluding that the Illinois nonconsensual pornography statute made "a content-neutral, time, place, and manner restriction" on speech), *cert. denied*, 141 S. Ct. 233 (2020).

[224] *Id.* at 456 (concluding that the intermediate scrutiny standard applied).

[225] *Id.* at 448–49; *see* 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West 2016). In *People v. Austin*, the defendant, Bethany Austin, was engaged to her former fiancé, Matthew, when she discovered that he was seeing another woman in secret. 155 N.E.3d at 449. After ending their relationship, the defendant retained the passwords to her ex-fiancé's iCloud account and accessed the messages sent between him and the other woman, which included sexually explicit photos of the other woman. *Id.* The defendant decided to write a detailed letter to her ex-fiancé's cousin about the affair and included the sexually explicit photos. *Id.* These events ultimately led to the defendant's arrest and, subsequently, charges brought against her under the Illinois nonconsensual pornography statute. *Id.*

lored to a compelling state interest.[226] The Illinois statute is one of the most comprehensive, privacy-based nonconsensual pornography laws, outlawing the nonconsensual dissemination of sexual images when (1) an actor "intentionally disseminates" photos where the victim is identifiable, (2) where the image is obtained under circumstances wherein a "*reasonable person* would know or understand that the image was meant to remain private," and (3) the disseminator "knows or should have known" the victim did "not consent[] to the dissemination."[227] Notably, the statute does not include an intent-to-harm provision.[228]

The Illinois Supreme Court's analysis differs from other courts due to the level of scrutiny the court chose to apply.[229] Because the court held that law was not a content-based regulation, the court determined the law need only survive an intermediate level of scrutiny.[230]

The Illinois court set forth two reasons justifying its decision to lower the level of scrutiny applied.[231] First, the court explained that the nonconsensual pornography statute was "a content-neutral time, place, and manner restriction."[232] The court noted that another court might initially, but mistakenly, conclude that the statute was a content-based restriction because it targeted a

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[226] *Austin*, 155 N.E.3d at 449. The defendant argued that the statute was unconstitutional because it outlaws protected speech in violation of both the U.S. and Illinois Constitutions. *Id.*

[227] *See* 720 ILL. COMP. STAT. ANN. 5/11-23.5(b) (emphasis added); *Austin*, 155 N.E.3d at 460–61 (explaining how the Illinois statute's elements defining criminal culpability made the statute narrowly tailored to not burden more speech than necessary).

[228] *See* 720 ILL. COMP. STAT. ANN. 5/11-23.5 (including no variation of an intent-to-harm provision).

[229] *Compare Austin*, 155 N.E.3d at 456 (applying intermediate scrutiny to evaluate whether the statute was a permissible regulation of speech under the First Amendment), *with* State v. VanBuren, 214 A.3d 791, 814 (Vt. 2019) (applying strict scrutiny to determine the constitutionality of the statute under the First Amendment). In 2019, in *People v. Austin*, the Illinois Supreme Court noted that it is the court's objective to independently assess what type of scrutiny should be applied, even when both the state and defendant concede to the application of strict scrutiny. 155 N.E.3d at 456. Although even the state agreed that strict scrutiny should apply here, the Illinois court's own inquiry revealed applying strict scrutiny was not proper in this case. *Id.*

[230] *Austin*, 155 N.E.3d at 457. The court concluded the statute was a content-neutral regulation because it regulated the *manner* that sexually explicit photographs are disseminated rather than the mere fact that the images were sexually explicit. *Id.* at 457–58.

[231] *See id.* at 456, 457–58 (concluding that § 11-23.5 of the Illinois Criminal Code, which applied to purely private speech, only regulated the manner of which that speech is disseminated).

[232] *Id.* at 457–58. First, the Illinois Supreme Court reasoned that the Illinois statute did not regulate speech based on the content of the image but rather based on the circumstances surrounding the images dissemination. *Id.* at 457. More specifically, the court noted that the statute regulated circumstances because it only made the conduct illegal when there is a clear lack of consent or a reason to believe there is lack of consent. *Id.* at 457–58. The court further concluded that the Illinois statute regulated the dissemination of private information. *Id.* at 458. Therefore, the court explained this statute operated like other privacy statutes that prohibit unauthorized disclosures of, for example, medical records, Social Security numbers, and other types of personal information. *Id.* As such, the court held that purely private matters are not afforded the same First Amendment protections. *Id.*

specific category of speech.[233] The Illinois Supreme Court reasoned, however, that this law was content-neutral because it is rooted in whether the disseminator obtained the image under circumstances wherein "a reasonable person would know that the image was to remain private . . . or should have known that the [victim] in the image [did] not consent[] to the dissemination."[234] Thus, the court concluded that the manner of the acquisition and dissemination of the photo is the critical component of the illegal conduct, rather than the image's content, rendering it a proper "time, place, or manner" restriction and subject to a lesser level of scrutiny.[235]

Second, the Illinois Supreme Court justified its use of intermediate scrutiny because the statute regulated a "purely private matter."[236] The court noted that First Amendment protections are less rigorous where matters of purely private significance are at issue.[237] The court explained that although speech pertaining to private matters are not entirely exempt from First Amendment protection, the protection is less stringent.[238]

As a result, the Illinois court applied intermediate scrutiny and ultimately held that the statute was constitutionally valid.[239] In applying this less-exacting standard of review, the court determined that the state articulated a compelling interest in protecting individual citizens' privacy rights.[240] The court further concluded that the scope of the statute was reasonable and proportionate to the

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[233] *Id.* at 457 (noting that "on its face" the Illinois statute targets "the dissemination of a specific category of speech," but ultimately concluding that the statute specifically targets whether or not consent was attached to the dissemination of the image, not the image's content).

[234] *Id.*

[235] *Id.*

[236] *See id.* at 458 (concluding that the Illinois statute was subject to an intermediate level of scrutiny because it regulates a "purely private matter").

[237] *See id.* (citing Snyder v. Phelps, 562 U.S. 443, 451–52 (2011)) (articulating the holding from *Snyder v. Phelps*, concluding that restricting speech on purely private matters does not implicate the same concerns about limiting speech under the Constitution because it poses no threat to the free and "robust" debate of public issues); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) (plurality opinion) (highlighting that restrictions on speech concerning purely private matters are "of less First Amendment concern" than restrictions on speech concerning public matters); Connick v. Myers, 461 U.S. 138, 147 (1983) (noting that private speech still falls within the protection of the First Amendment, but noting it does not have the same importance as matters of public concern).

[238] *Austin*, 155 N.E.3d at 458 (citing *Snyder*, 562 U.S. at 452) (stating that in "matters of purely private significance," First Amendment protection is less rigorous).

[239] *See id.* at 466 (concluding that because the statute made a content-neutral restriction, intermediate scrutiny applied). The Illinois court concluded "that the substantial government interest of protecting Illinois residents from the nonconsensual dissemination of private sexual images would be achieved less effectively absent" the statute making it unlawful. *Id.* at 462. The court rationalized that the statute was narrowly tailored under intermediate scrutiny "so long as the law promotes a substantial government interest that would be achieved less effectively absent the law." *Id.*

[240] *See id.* at 460–61. The court noted that history suggests that the government can protect an individual's privacy rights. *Id.* at 460.

state's interest.[241] The court held that the statute was valid because the state's interest in protecting victims of this type of harm would not be effectively achieved without the statute.[242]

Although no other court has applied intermediate scrutiny to a harassment-based or privacy-based nonconsensual pornography law, the analysis of the Illinois Supreme Court enables sister courts, who engage in constitutional review of nonconsensual pornography laws, to uphold more statutes.[243]

III. Courts Should Consider Privacy-Based Nonconsensual Pornography Laws Content-Neutral Restrictions on Speech

In 2013, only three states had passed laws addressing nonconsensual pornography.[244] Today, legislation criminalizing the nonconsensual dissemination of sexually explicit photos of another is on the books in forty-eight states, Washington, D.C., and one U.S. territory.[245] Although the legal landscape has substantially transformed since 2013, the majority of existing laws today do not adequately provide protection to victims for modern nonconsensual pornography attacks.[246]

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[241] *See id.* at 465. The court underwent an analysis of the many provisions included in the law that made it narrowly tailored. *Id.* The court also enumerated the many exceptions listed in the statute that allow a perpetrator to escape charges under the statute, allowing for this speech to be lawful if it enhances a public good, like "criminal investigations" or service of a "lawful public purpose." *Id.* at 465–66 (quoting 720 Ill. Comp. Stat. Ann. 5/11-23.5(c) (West 2016)).

[242] *Id.* at 462.

[243] *Compare id.* at 459, 466 (applying intermediate scrutiny to the Illinois nonconsensual pornography laws, and holding that the law was constitutionally permissible), *with Ex parte* Jones, No. 12-17-00346, 2018 WL 2228888, at *5, *7 (Tex. Ct. App. May 16, 2018) (applying strict scrutiny to Texas's nonconsensual pornography law, and concluding the statute was invalid under the First Amendment).

[244] Franks, *supra* note 143, at 1255. Before 2003, no law, state or federal, addressed nonconsensual pornography. *Id.* The law's attention did not shift to "revenge porn" until 2010, when Hunter Moore created a "revenge porn" website that allowed users to post sexually explicit images of others without their consent, accompanied by other identifying information about the person depicted. *Id.* As of 2013, only Texas, New Jersey, and Alaska had laws that criminalized the conduct of nonconsensual pornography perpetrators. *Id.* at 1280. Between 2012 and 2017, thirty-seven states and Washington, D.C. passed new legislation criminalizing this conduct. *Id.* at 1280–81.

[245] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6 (listing the statutes enacted in 48 states, Washington, D.C., and Guam addressing "revenge porn"); *see also* Lorelei Laird, *First Amendment Defense Claims Could Threaten "Revenge Pornography" Statutes*, ABA J. (Dec. 19, 2019), https://www.abajournal.com/web/article/first-amendment-defense-claims-could-threaten-revenge-pornography-statutes [https://perma.cc/FBG3-K8F2] (highlighting that forty-eight states now have "revenge porn" laws).

[246] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6. Few laws characterize nonconsensual pornography as a privacy issue and, therefore, do not protect victims whose perpetrators act without an intent to harm. *See id.*; *supra* notes 129–131 and accompanying text (emphasizing the lack of protection that harassment-based nonconsensual pornography laws provide to victims); *supra* notes 135–143 and accompanying text (explaining how privacy-based nonconsensual pornography laws provide more comprehensive protection for all victims).

Part III of this Note argues that to adequately protect all victims of nonconsensual pornography, state legislatures must enact content-neutral, privacy-based laws.[247] Section A asserts that the majority of existing laws do not provide protection to all nonconsensual pornography victims.[248] Section B contends that to provide comprehensive protection, states must treat nonconsensual pornography as a privacy issue rather than a harassment issue.[249] In addition, Part B argues that if states were to enact privacy-based laws, these laws would make content-neutral restrictions on speech under existing First Amendment to the U.S. Constitution jurisprudence.[250] Finally, Section C concludes that these privacy-based laws should withstand constitutional challenges under the First Amendment and survive intermediate scrutiny.[251]

A. The Need for Privacy-Based Laws

One in twelve American adults will be a victim of nonconsensual pornography in their lifetime.[252] Today, nonconsensual pornography affects almost twenty-eight million adults.[253] Yet under existing laws, almost eighty percent of victims are left without recourse through the criminal justice system.[254] State legislatures have made significant strides in recent years by passing legislation regarding nonconsensual pornography, but most laws still do not comprehensively cover all victims of these attacks.[255]

The most common laws addressing nonconsensual pornography are harassment-based laws, containing some variation of an intent-to-harm provision.[256] Although intent-to-harm provisions help statutes easily meet constitu-

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[247] *See infra* notes 252–293 and accompanying text.

[248] *See infra* notes 252–267 and accompanying text.

[249] *See infra* notes 268–271 and accompanying text.

[250] *See infra* notes 272–280 and accompanying text.

[251] *See infra* notes 281–293 and accompanying text.

[252] *See* Ruvalcaba & Eaton, *supra* note 7, at 1. Nonconsensual pornography is a phenomenon where images are taken originally with the victim's consent but shared to third parties without consent. *Id.*; *supra* notes 7–10 and accompanying text (defining nonconsensual pornography).

[253] *See* Ruvalcaba & Eaton, *supra* note 7, at 1. This calculation flows from the April 2021 U.S. population of approximately 330 million people. *See U.S. and World Population Clock*, *supra* note 7.

[254] *See* EATON ET AL., *supra* note 12, at 19 (detailing that 80% of individual who have disseminated a sexually explicit image of another without their consent have done so for reasons other than to attempt to cause harm to the person depicted).

[255] *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6; *see also* Mary Ann Franks, *The Conversation We Need to Have About "Revenge Porn*,*"* REFINERY29 (Mar. 30, 2017), https://www.refinery29.com/en-us/2017/03/147465/revenge-porn-legality-controversy [https://perma.cc/NP4A-YG9C] (noting that "'intent to harass' requirements" limit the conduct criminalized under the law). Thirty-six state statutes are written with some variation of an intent-to-harm provision and, consequently, inadequately protect all victims. *48 States + DC + One Territory Now Have Revenge Porn Laws*, *supra* note 6.

[256] *See* Emma Grey Ellis, *New York's Revenge Porn Law Is a Flawed Step Forward*, WIRED (July 24, 2019), https://www.wired.com/story/new-york-revenge-porn-law/ [https://perma.cc/D6U9-HAZ2].

tional muster, they fail to protect victims from perpetrators who act without harmful motives.[257] Harassment-based laws solely punish perpetrators motivated to harm or harass their victims.[258] They also require victims to meet the criminal burden of proof—beyond a reasonable doubt— to establish that their perpetrators acted with such intent.[259] As a result, this deters victims from seeking criminal charges.[260] Even when a victim has some evidence of intent, trials for nonconsensual pornography convictions can turn into a he-said-she-said battle.[261] Consequently, harassment-based statutes improperly shift focus

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Some argue that New York's recently passed statute, featuring an intent-to-harm provision, is a "missed opportunity" for protecting victims. *Id.* The law's variation of an intent-to-harm provision allows many perpetrators' conduct to go unpunished. *Id.*; *see* N.Y. PENAL LAW § 245.15(1)(a) (McKinney 2020) (requiring that a perpetrator act with an "intent to cause harm to the emotional, financial or physical welfare" of the person depicted in the image).

[257] *See* Franks, *supra* note 255 (explaining that many state nonconsensual pornography laws are ineffective, especially when they are limited to perpetrators who intend to harm their victims); *supra* notes 110–113, 120–131 and accompanying text (highlighting that the harassment-focused definition of nonconsensual pornography and the limitations of laws that adopt such a definition); *infra* note 292 and accompanying text (emphasizing that most incidences of nonconsensual pornography are not motivated by the perpetrator's desire to harm their victim).

[258] *See* Ellis, *supra* note 256 (describing New York's statute, as a "[f]lawed [s]tep [f]orward" due to the legislature's decision to include an intent-to-harm provision within the law); Heard, *supra* note 6 (arguing that intent-to-harm provisions make laws "fall short" in extending protection to all victims).

[259] *See* Avan Schein, Note, *When Sharing Is Not Caring: Creating an Effective Criminal Framework Free from Specific Intent Provisions to Better Achieve Justice for Victims of Revenge Pornography*, 40 CARDOZO L. REV. 1953, 1957 (2019) (emphasizing that intent-to-harm provisions impose an "onerous evidentiary burden" requiring the victim to produce evidence of the perpetrator's mental state); David Migoya, *Colorado's Revenge Porn Law Brings Nearly 200 Charges, but Getting Convictions Is a Challenge*, DENVER POST (Sept. 25, 2017), https://www.denverpost.com/2017/09/25/colorados-revenge-porn-law-brings-200-charges-convictions-challenge/ [https://web.archive.org/web/20201208122803/https://www.denverpost.com/2017/09/25/colorados-revenge-porn-law-brings-200-charges-convictions-challenge/] (highlighting the difficulty to meet the burden of proof for a criminal case).

[260] *See* Christopher Teters, *Etched in Digital Stone: Nonconsensual Pornography in Kansas, and a Web That Never Forgets*, 87 J. KAN. BAR ASS'N 40, 45 (2018) (stating that crimes requiring specific intent of harassment are "notoriously difficult" to meet burdens of proof). Kansas's nonconsensual pornography statute, requiring a perpetrator to act with the "intent to harass, threaten, or intimidate" their victim, illustrates the difficulty of proving intent. *Id.* (quoting KAN. STAT. ANN. § 21-6101(a)(8) (West 2020)). To successfully convict a perpetrator under the Kansas statute, the prosecutor needs to prove that the perpetrator acted with this requisite intent. *See id.* In cases of nonconsensual pornography, however, intent is nearly impossible to prove because a perpetrator's motives can be mixed. Steven Yoder, *Why Is It So Hard to Write a Decent Revenge Porn Law?*, VICE (Aug. 2, 2016), https://www.vice.com/en/article/kwka43/why-is-it-so-hard-to-write-a-decent-revenge-porn-law [https://perma.cc/JR4G-WH2H] (noting that most prosecutors believe it is nearly impossible to a perpetrator's intent in "revenge porn" cases). Some statutes have even more constrained intent clauses, such as Colorado, which requires additional evidence of the perpetrator's "intent to cause emotional harm." Teters, *supra*, at 48; s*ee* COLO. REV. STAT. ANN. § 18-7-107(1)(a) (West 2020).

[261] *See* Migoya, *supra* note 259 (explaining that most of the proof in nonconsensual pornography cases relies on the plaintiff's testimony).

to the perpetrator's intent rather than focusing on the more pressing issue of victim's consent.[262]

To protect all victims, legislatures should draft nonconsensual pornography laws like other privacy laws that restrict nonconsensual disclosures of private information, which do not typically include intent-to-harm provisions.[263] Like other privacy laws, privacy-based nonconsensual pornography laws do not contain an intent-to-harm provision.[264] As a result, privacy-based laws afford protection to all victims regardless of their perpetrator's motives.[265] To prosecute an individual under a privacy-based law, the prosecution only needs to prove the victim's lack of consent to the disclosure and, in some states, that the perpetrator knew or should have known the victim had a reasonable expectation of privacy.[266] By reducing the evidentiary hurdles that the prosecution must meet, victims, who are typically excluded under harassment-based laws, will be able to find recourse through the criminal justice system.[267]

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[262] Heard, *supra* note 6.

[263] *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a(b) (prohibiting the disclosure of Social Security numbers of others without "the prior, written consent of, the individual to whom" the Social Security number is assigned unless certain exceptions are met).

[264] *See* Citron & Franks, *supra* note 12. Intent-to-harm provisions are inadequate laws that are intended to protect a victim's privacy rights. *Id.* If other privacy laws, such as laws protecting disclosure of medical records, had intent-to-harm provisions they would be equally absurd and less effective. *Id.*; *see, e.g.*, 5 U.S.C. § 552a(b) (prohibiting disclosure of Social Security numbers without prior consent); Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. § 164.502 (2020) (prohibiting disclosure of patient's medical records without prior consent).

[265] *See* Citron & Franks, *supra* note 12 (urging states like New York to amend their laws to target violations of sexual privacy rather than harassment). *Id.* A privacy-based law would address cases where perpetrators act for motives other than the intent to harm. *Id.*; *see supra* notes 132–145 and accompanying text (illustrating the applicability of a privacy-based law to all instances of nonconsensual pornography, regardless of the perpetrator's motives).

[266] *See, e.g.*, 720 ILL. COMP. STAT. 5/11-23.5 (2020) (illustrating a privacy-based law). The Illinois law has only three elements that the prosecution must establish to convict an individual of "[n]on-consensual dissemination of a private sexual image": (1) the actor must have "*intentionally* disseminate[d]" the photo; (2) the actor obtained the photos "under circumstances in which a reasonable person would know or understand that the image was to remain private"; and (3) the actor "knows or should have known that the person in the image did not consent to the dissemination" of the image. *Id.* ch. 720, § 11-23.5(b); *see also, e.g.*, CONN. GEN. STAT. § 53a-189c (2020) (same); DEL. CODE ANN. tit. 11, § 1335(9) (West 2020) (requiring that the prosecution prove that an offending actor was "[k]nowingly reprodu[ing], distribut[ing], exhibit[ing], publish[ing], transmit[ting], or otherwise disseminat[ing] a visual depiction of a person who is nude, or who is engaging in sexual conduct . . . without the consent of the person depicted"); N.D. CENT. CODE ANN. § 12.1-17-07.2 (West 2020) (requiring the prosecutor to prove that (1) "the depicted individual in the image [did] not give[] consent," (2) the image was created "under circumstances in which the individual has a reasonable expectation of privacy," and (3) "[a]ctual emotional distress or harm is caused . . . as a result of the distribution" to meet the burden of proof); UTAH CODE ANN. § 76-5b-203 (West 2020) (same), *amended by* H.B. 59, 64th Leg., Gen. Sess. (Utah 2021), *and* H.B. 147, 64th Leg., Gen. Sess. (Utah), *and* H.B. 193, 64th Leg., Gen. Sess. (Utah).

[267] *See* Franks, *supra* note 143, at 1287 (asserting that state legislatures should not limit the laws' applicability to offenders who carry an intent to harm because that type of provision excludes cases where the perpetrators did not intend to harm their victims from recourse through the judicial system);

B. Privacy-Based Laws as Content-Neutral Restrictions on Speech

Nonconsensual pornography laws that treat dissemination as a privacy issue are content-neutral restrictions on speech.[268] The U.S. Supreme Court defines a content-neutral restriction as one that applies to all expression without regard to the substance or message of the expression.[269] Accordingly, most content-neutral regulations of speech regulate only the "time, place and manner" of speech.[270] Privacy-based nonconsensual pornography laws do just that.[271]

Nonconsensual pornography laws regulate the *manner* in which disclosure of sexually explicit images occurs.[272] A privacy-based nonconsensual pornography law does not make subject-matter distinctions on speech because the law applies to all disseminations of sexually explicit images.[273] Consensually and nonconsensually disseminated images do not differ in their content—both contain nude or sexually explicit images of another.[274] The only distinction privacy-based laws draw is whether the individual in the image gave consent before the photo's dissemination.[275] Privacy-based laws allow the dissemina-

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Schein, *supra* note 259, at 1957 (highlighting that intent-to-harm provisions impose "onerous" burdens on the victim to prove the perpetrator's mental state at the time of the offense). Professor Mary Anne Franks, the creator of the CCRI's Model State Law, asserts that an effective nonconsensual pornography law should only establish two elements: (1) knowingly disclosing a private, sexual image of an identifiable person and (2) the disclosure is made without consent. Franks, *supra* note 143, at 1283–84 (articulating that the mens rea for the second prong should be recklessness).

[268] *See* People v. Austin, 155 N.E.3d 439, 457–58 (Ill. 2019) (concluding that a privacy-based nonconsensual pornography law was content-neutral), *cert. denied*, 141 S. Ct. 233 (2020); Franks, *supra* note 143, at 1318 (same).

[269] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (defining content-neutral restrictions).

[270] *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989) (noting that content-neutral restrictions impose "time, place and manner" restrictions on speech); *supra* notes 45–53, 63–74 and accompanying text (discussing the distinction between content-neutral and content-based restrictions on speech).

[271] *See Austin*, 155 N.E.3d at 457–58 (concluding that the Illinois nonconsensual pornography law made a constitutionally permissible content-neutral distinction on speech); *supra* notes 232–235 and accompanying text (discussing the factors considered by the Illinois Supreme Court in *People v. Austin* in concluding that the statute made a content-neutral restriction on speech).

[272] *See Austin*, 155 N.E.3d at 457–58; *supra* notes 63–74 and accompanying text (explaining how content-neutral restrictions on speech can made constitutionally valid "time, place and manner" distinctions); *supra* notes 232–235 and accompanying text (emphasizing that nonconsensual pornography laws merely regulate whether or not consent was attached to the dissemination, but not the content of the speech).

[273] *See* Franks, *supra* note 143, at 1318 (explaining that nonconsensual pornography laws do "not favor some types of sexually explicit content over others").

[274] *See id.*

[275] *Austin*, 155 N.E.3d at 457–58 (highlighting that a content-neutral law's incidental effect on some speakers does not undermine the constitutional validity of the law); Franks, *supra* note 143, at 1318. In 2019, in *People v. Austin*, the Illinois Supreme Court noted that under nonconsensual pornography laws, the only speakers affected are those who disseminate sexually explicit images without consent, and then it explained that these actors' speech is incidentally restricted because they do not adhere to the *legal manner* for dissemination. 155 N.E.3d at 457–58. The court emphasized that de-

tion of sexually explicit images as long as the disseminator has consent to do so.[276] Thus, the restriction on nonconsensual image dissemination only regulates the *manner* of dissemination, not the *content*.[277]

Furthermore, privacy-based nonconsensual pornography laws do not create viewpoint restrictions on speech.[278] Under a privacy-based law, any viewpoint on sexually explicit images is permitted.[279] These laws only draw distinctions on the manner of the viewpoint's expression—with or without the subject's consent.[280]

C. Privacy-Based Laws Survive Constitutional Scrutiny

Privacy-based nonconsensual pornography laws do not run afoul of the First Amendment.[281] Because privacy-based laws make content-neutral restrictions on the manner in which individuals disseminate sexually explicit images of another, courts should evaluate their constitutional validity under intermediate scrutiny.[282] Even if courts choose to apply strict scrutiny to review

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spite the incidental effects privacy-based nonconsensual pornography laws may have on some speakers, they still make content-neutral restrictions on speech. *Id.*; *see Ward*, 491 U.S. at 791; *see also* McCullen v. Coakley, 573 U.S. 464, 480 (2014). Furthermore, the U.S. Supreme Court has established that regulations can be content-neutral even if they have an "incidental effect on some speakers or messages but not others." *McCullen*, 573 U.S. at 480 (quoting *Ward*, 491 U.S. at 791) (concluding that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics"); *see Austin*, 155 N.E.3d at 457–58; *supra* notes 67–68 and accompanying text (highlighting the Supreme Court's "incidental effects" doctrine).

[276] *See Austin*, 155 N.E.3d at 457 (highlighting that there would be no criminal liability when the same sexually explicit image is distributed with consent by the image's subject).

[277] *See id.* (noting that the manner of the image's publication is crucial to the criminalization of the perpetrator's conduct, not the content of the message).

[278] *See Austin*, 155 N.E.3d at 458 (noting that content-neutral restrictions on speech pose a "less substantial risk of excising certain . . . viewpoints from public dialogue" (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994))); Franks, *supra* note 143, at 1318 (stating that nonconsensual pornography laws do not require that sexually explicit images carry a certain type of message—favorable or unfavorable—under the law).

[279] *See* Franks, *supra* note 143, at 1318 (asserting that nonconsensual pornography laws are not meant to suppress unfavorable viewpoints, but noting that the laws should instead protect the privacy of victims).

[280] *See* O'Neill, *supra* note 70 (emphasizing that courts adjudicate and determine that permit requirements for protest, parades, and demonstrations are content-neutral). Laws that require permits for protests are like laws that require consent. *See id.* These laws do not regulate the viewpoint of the protestors but are merely requiring that the protestors ask for consent, in the form of a permit, before publicly expressing those ideas. *Id.*

[281] *See Austin*, 155 N.E.3d at 466 (concluding that the Illinois privacy-based nonconsensual pornography law was constitutionally valid); State v. Casillas, 952 N.W.2d 629, 644 (Minn. 2020) (concluding that Minnesota's privacy-based nonconsensual pornography law was constitutionally valid); *infra* notes 282–293 and accompanying text.

[282] *Austin*, 155 N.E.3d at 456–58 (noting that a privacy-based nonconsensual pornography law made "a content-neutral time, place and manner" restriction on speech); *see Turner Broad. Sys., Inc.*, 512 U.S. at 642 (requiring that content-neutral restrictions of speech endure intermediate scrutiny by

the constitutional validity of privacy-based nonconsensual pornography laws, the statutes should still survive.[283] Intermediate scrutiny, the proper standard of review in these cases, requires content-neutral laws to serve an important or substantial governmental interest and allow for reasonable substitute methods of communication.[284]

It is a traditional exercise of a state's police power to protect the health and security of their citizens.[285] By passing broad nonconsensual pornography laws, states seek to protect their citizens from harmful and substantial invasions of privacy.[286] In keeping with the general understanding of privacy rights, the Supreme Court has never declared unconstitutional a restriction of speech that protects private individuals from the dissemination of their "purely private matter[s]."[287] The interest in protecting this right in the context of nonconsensual pornography is compelling because of the nature of the harm associated with this type of disclosure.[288] State courts have concluded that nonconsensual

courts); *Austin*, 155 N.E.3d at 458 (stating that content-neutral laws are subject to an intermediate level of scrutiny because they do not pose a "substantial risk" to individuals' First Amendment rights).

[283] *See Casillas*, 952 N.W.2d at 641, 44 (concluding that Minnesota's privacy-based nonconsensual pornography law survived strict scrutiny review and was a valid restriction on speech under the First Amendment to the U.S. Constitution); *see supra* notes 197–219 and accompanying text (examining the Minnesota Supreme Court's decision in *State v. Casillas* that upheld the state's privacy-based nonconsensual pornography statute after employing strict scrutiny review). This Note argues in favor of the application of intermediate scrutiny in cases where nonconsensual pornography laws are contested under the First Amendment and, as a result, does not provide an analysis of strict scrutiny for these statutes; for a full review of the application of strict scrutiny, see Franks, *supra* note 143, at 1323–37 (discussing how nonconsensual pornography laws survive a court's application of strict scrutiny).

[284] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (establishing that the inquiry under intermediate scrutiny should focus on whether the regulation serves a government purpose but still allows for "alternative avenues of communication"); Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 293 (1984) (adding the requirement that the regulation must be "narrowly tailored"); *supra* note 72–82 and accompanying text (discussing the Supreme Court's intermediate scrutiny standard and the hurdles that content-neutral laws must overcome to withstand a constitutional attack).

[285] Hill v. Colorado, 530 U.S. 703, 715 (2000) (holding that a law restricting persons from approaching another individual without their consent outside a health facility was within the state's police power to enact).

[286] *See Casillas*, 952 N.W.2d at 642 (holding that the state had a compelling government interest in protecting its citizens from the harms that result from the "nonconsensual dissemination of private sexual images"); *Ex parte* Jones, No. 12-17-00346, 2018 WL 2228888, at *5, *7 (Tex. Ct. App. May 16, 2018) (noting that a citizen's privacy is a "compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner"); State v. VanBuren, 214 A.3d 791, 800 (Vt. 2019) (articulating the state's interest in "protecting the privacy, safety, and integrity of the victim subject to nonconsensual public dissemination of highly private images").

[287] *See Austin*, 155 N.E.3d at 460–61 (emphasizing that the Supreme Court has never before invalidated a law that makes restrictions on "purely private matter[s]").

[288] Citron & Franks, *supra* note 8, at 351. The victims of nonconsensual pornography are at risk of harassment, solicitations for sex, and threats of sexual assault. *Id.* at 353. Victims may suffer from psychological harms as well. *Id.* at 351–52. Many victims experience depression, isolation, paranoia, and thoughts of suicide. *Id.*; *see* Franks, *supra* note 143, at 1325. The interest a state has in protecting

pornography laws implement a state's interest in protecting the intimate privacy of its citizens by prohibiting disclosures of intimate images from the onset.[289]

Narrow tailoring under intermediate scrutiny requires that the regulation promote a substantial government interest, which would otherwise be "achieved less effectively absent the regulation."[290] Without privacy-based nonconsensual pornography laws, states' goals in protecting individuals from this sort of invasion of privacy will be achieved less effectively.[291] Lesser restrictive measures, like statutes with intent-to-harm provisions, are under inclusive and do not provide recourse for all victims of the crime.[292] Privacy-based laws are the *only* sufficient means for states to comprehensively protect nonconsensual pornography victims from violations of their intimate privacy.[293]

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victims from this harm is so compelling that privacy-based nonconsensual pornography laws would pass even strict scrutiny. *Casillas*, 952 N.W.2d at 644 (concluding that Minnesota's privacy-based statutes survived strict scrutiny); Franks, *supra* note 143, at 1324. These laws are tailored to preventing the real harms the victims face from such public humiliation and exposure of their naked bodies. *Casillas*, 952 N.W.2d at 642–43 (concluding that the state has a significant interest in protecting its citizens from this threat to citizen's well-being); Franks, *supra* note 143, at 1325. Even existing criminal laws prohibiting "surveillance and voyeurism" rely on the understanding that there are "dignitary [and social] harms" associated with nonconsensual exposures of oneself "in a state of undress or engaged in a sexual activity" that warrant criminal punishment. Franks, *supra* note 143, at 1325, 1337.

[289] *See* People v. Iniguez, 202 Cal. Rptr. 3d 237, 243 (App. Dep't Super. Ct. 2016) (concluding that laws protecting victims from the emotional distress caused by nonconsensual pornography disclosures are a "compelling need of society"); *Austin,* 155 N.E.3d 439, 460 (noting that other courts have found this interest in protecting privacy as compelling); *see also* Franks, *supra* note 143, at 1318.

[290] Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). In 1989, in *Ward v. Rock Against Racism*, the U.S. Supreme Court explained that narrow tailoring under intermediate scrutiny does not require that the law be "the least restrictive means" for serving a state's legitimate interest. *Id.* at 798.

[291] *See* Citron & Franks, *supra* note 8, at 387 (highlighting that the intent-to-harm provisions found within harassment-based laws undermine the state's ability to protect victim from invasions of privacy of this type); Citron & Franks, *supra* note 12 (noting that intent-to-harm provisions limit the law's application, and the conduct criminalized under them, to perpetrators that act with the intent-to-harm their victims).

[292] *See* Citron & Franks, *supra* note 12 (noting the need for privacy-based nonconsensual pornography laws because existing harassment-based laws do not adequately protect victims); *supra* notes 12, 135–138 and accompanying text (emphasizing that most nonconsensual pornography perpetrators do not act with the intent to harm their victims, and noting that the laws containing intent-to-harm provisions narrow the pools of victims offered recourse through the justice system). As of 2017, empirical evidence indicates that almost 80% of people who disclose private, sexually explicit images without consent do so without the explicit motive to harm the person in the image. Citron & Franks, *supra* note 12; *see also* EATON ET AL., *supra* note 12, at 19 (articulating these findings). Thus, the majority of perpetrators who harm victims lack an intent to harm, and, as a result, victims are left remediless under narrowly defined laws. Citron & Franks, *supra* note 12 (noting that alternative motives for disseminating sexually explicit photos of others include "to gain social status, to brag, to make money, for sexual gratification, or to provide 'entertainment'").

[293] *See* Citron & Franks, *supra* note 8, at 387 (arguing that nonconsensual pornography laws should focus on the defendant's disregard for the victim's privacy expectation); Franks, *supra* note 143, at 1283 (suggesting that the real social harm that results from cases of nonconsensual pornography is the violation of privacy that every victim faces). Privacy-based laws not only protect more victims, but they also promote the expression of private speech. Franks, *supra* note 143, at 1326.

CONCLUSION

Nonconsensual pornography is rampant in today's society, affecting more than eight percent of Americans.[294] Although existing laws attempt to respond to this emerging form of cyber-attack, most state legislation is too narrowly drawn and fails to provide protection for all victims. In addition, courts have invalidated almost all privacy-based nonconsensual pornography laws under the First Amendment to the U.S. Constitution. State courts have subjected these laws to strict scrutiny under the mistaken view that they appear to be content-based regulations. Under this strict mode of analysis, most privacy-based statutes are unable to survive constitutional challenges.

Courts continually fail to recognize that privacy-based nonconsensual pornography laws only regulate the manner of speech rather than content. Following the Illinois Supreme Court's lead, courts must reevaluate their focus on these laws and understand that privacy-based laws are content-neutral regulations that merely regulate the manner of speech's expression. With this understanding, courts will properly apply intermediate scrutiny to evaluate the validity of these laws, and more comprehensive protections for "revenge porn" victims will survive constitutional attacks.

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Without assurances that private speech will remain private, individuals might begin to censor themselves, even when it comes to purely private matters, out of fear for their public disclosure. *Id.*; *see* Citron & Franks, *supra* note 8, at 387 (emphasizing that intent-to-harm provisions undermine the security individuals feel in their private conversations and will stunt private expression).

[294] Ruvalcaba & Eaton, *supra* note 7, at 1 (finding that one in twelve adult Americans are victims of nonconsensual pornography).