No. A19-0576

State of Minnesota
In the Supreme Court

State of Minnesota,
Petitioner,
vs.

Michael Anthony Casillas,
Respondent

Brief of Cyber Civil Rights Initiative, Standpoint, Minnesota Coalition Against Sexual, and the Battered Women's Justice Project as Amici Curiae in Support of Petitioner

Tracy Shoberg (#0398545)
BATTERED WOMEN'S JUSTICE PROJECT
1801 Nicollet Ave. S., Suite 102
Minneapolis, MN 55403
Phone: 612-383-1314
tshoberg@bwjp.org
Attorney for Amicus Battered Women's Justice Project

Katherine S. Barrett Wiik (#0351155)
BEST & FLANAGAN LLP
60 South Sixth Street, Suite 2700
Minneapolis, MN 55402
Phone: 612-341-9710
kbarrettwiik@bestlaw.com
Attorney for Amici Curiae Cyber Civil Rights Initiative, Standpoint, Minnesota Coalition Against Sexual, and the Battered Women's Justice Project

Lindsay J. Brice (#388227)
MINNESOTA COALITION AGAINST SEXUAL ASSAULT
161 St. Anthony Ave., Suite 1001
St. Paul, MN 55103
Phone: 651-802-1175
lbrice@mncasa.org
Attorney for Amicus Minnesota Coalition Against Sexual Assault

Rana S Alexander (#0333906)
STANDPOINT
2233 University Ave. W., Suite 150
St. Paul, MN 55114
Phone: 612-343-9842
rana@standpointmn.org
Attorney for Amicus Standpoint

(Counsel for the parties listed on following page)

John Arechigo (#0386535)
ARECHIGO & STOKKA, P.A.
332 Minnesota St., Ste W1080
St. Paul, MN 55101
Phone: 651-222-6603
Attorney for Respondent

Keith Ellison, Attorney General
(#039628)
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
Phone: 651-297-2040

Anna Light (#039628)
DAKOTA COUNTY ATTORNEY'S OFFICE
1560 Highway 55
Hastings, MN 55033
Phone: 651-438-4438
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATION

RULES

OTHER

CCRI, *46 States + DC Have Revenge Porn Laws*, https://www.cybercivilrights.org/revenge-porn-laws/ 4

CCRI, Frequently Asked Questions, https://www.cybercivilrights.org/faqs/ 8

CCRI, *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography, Cyber Civil Rights Initiative*, Oct. 6, 2017, https://www.cybercivilrights.org/2017-cybercrime-symposium/ 27

Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345 (2014) .....passim

Tracy Clark-Flory, *Criminalizing 'revenge porn,'* Salon, Apr. 6, 2013, https://www.salon.com/2013/04/07/criminalizing_revenge_porn/ 6

Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report* (2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf 7, 9

Michelle Ferrier, *Attacks and Harassment: The Impact on Female Journalists and Their Reporting* 7 (2018), https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf 12

Mary Anne Franks, *Nude Photos of Katie Hill Had Nothing to Do with Her Conduct*, Wash. Post, Oct. 30, 2019, https://www.washingtonpost.com/outlook/2019/10/30/photos-katie-hill-had-nothing-do-with-her-conduct/ 11

Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251 (2017).....8

Emma Gray, *The Emma Watson Threats Were A Hoax, But Women Face Similar Intimidation Online Every Day*, Huffington Post, Sept. 26, 2014, https://www.huffpost.com/entry/emma-watson-hoax-women-online-threats_n_5887712 11

Sarah Horner, *Judge cracks down on first ex-boyfriend sentenced for 'revenge porn' in Ramsey County*, Pioneer Press, Oct. 3,

Amy Radil, *The Surveillance Society: Document 1: The Right to be Left Alone*, Minn. Public Radio, http://news.minnesota.publicradio.org/features/199911/15_newsroom_privacy/leftalone.html.....19

Revenge Porn: Misery Merchants, The Economist, July 5, 2014, https://www.economist.com/international/2014/07/05/misery-merchants.....7

'Revenge Porn' Website has Colorado Women Outraged, CBS Denver, Feb. 3, 2014, http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/ 9

Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149 (2005).....17

Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1 (2009) 6

Ian Sherr, *Forget being a victim. What to do when revenge porn strikes*, CNET, May 13, 2015, https://www.cnet.com/news/forget-being-a-victim-what-to-do-when-revenge-porn-strikes/ 6

Shawn Snow, *Seven Marines court-martialed in wake of Marines United scandal*, Marine Corp Times, Mar. 1, 2018, https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/.....15

Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967 (2003) 17

Office of Congresswoman Jackie Speier, *Press Release: Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn*, July 14, 2016, https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual.....21

Testimony of "E.W.," S.F. 2713, Sen. Jud. 9 Comm., 89th Minn. Leg., Apr. 7, 2016 (digital audio), http://mnsenate.granicus.com/ViewPublisher.php?view_id=2... 12, 14-15

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Cyber Civil Rights Initiative ("CCRI"), Standpoint, Minnesota Coalition Against Sexual Assault ("MNCASA"), and the Battered Women's Justice Project ("BWJP") submit this brief as *amici curiae* in support of the State of Minnesota and its defense of Minn. Stat. § 617.261.[1]

These organizations, most of which were involved with the drafting of § 617.261, are in a special position to provide guidance regarding the impact of this Court's decisions on victims of sexual exploitation and the continuing validity of privacy law. The answers to the questions raised in this case will have a direct and significant impact on the wellbeing of the victims for whom amici advocates in Minnesota. The answers also likely will impact how other states interpret their respective nonconsensual pornography statutes.

Cyber Civil Rights Initiative ("CCRI") is a non-profit organization that advocates for technological, social, and legal innovation to fight online abuse. CCRI's board includes the two foremost legal experts on nonconsensual pornography in the United States, Professor Mary Anne Franks (President) and Professor Danielle Citron (Vice-President). Professor Franks, who is also CCRI's Legislative & Tech Policy Director, authored the first model criminal

[1] Amici certify per Minn. R. Civ. App. P. 129.03 that: (1) no counsel for a party wrote the brief in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of the brief other than Amicus, its members, and its counsel.

statute on nonconsensual pornography in 2013, served as Reporter for the 2018 Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act, helped draft H.R. 2896, the federal Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act of 2019, and worked closely with the sponsor of 2016 Minnesota Session Law, Chapter 126, the legislation that created Minn. Stat. §617.261.

Standpoint (formerly known as The Battered Women's Legal Advocacy Project, Inc.) is a private, non-profit organization that serves as a statewide agency in Minnesota, providing legal consultation, training, and resources to domestic and sexual violence victims and their advocates, attorneys, and law enforcement. Standpoint consults yearly with thousands of domestic and sexual violence victims, some of whom experience the non-consensual sharing of their private sexual images. Standpoint was involved in the drafting of 2016 Minnesota Session Law, Chapter 126.

Minnesota Coalition Against Sexual Assault ("MNCASA") is a private, nonprofit organization supported by public and private funds. MNCASA is a coalition of Minnesota's rape crisis centers and dual domestic/sexual violence victim advocacy programs statewide. Its member programs and allies also include health care agencies, community groups, victims/survivors, attorneys and law enforcement agencies whose employees and volunteers support victims of sexual assault. MNCASA represents the interests of these

stakeholders in matters of public policy, media outreach, prevention awareness, systems change, and community organizing around issues of sexual violence. MNCASA was involved in the drafting of 2016 Minnesota Session Law, Chapter 126.

Battered Women's Justice Project ("BWJP") is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence (IPV). The BWJP promotes systemic change within the civil and criminal justice systems to ensure an effective and just response to victims and perpetrators of IPV, and the children exposed to this violence.

Amici file this brief with two purposes in mind: to provide the Court with empirical and scholarly research on "nonconsensual pornography" and to offer perspective on the First Amendment and privacy issues raised by this case.

ARGUMENT

I. Nonconsensual Pornography is an Invasion of Privacy That Causes Devastating and Often Irreparable Harm, Especially to Vulnerable Groups

Nonconsensual pornography is "the distribution of sexually graphic images of individuals without their consent."[2] As of April 2020, forty-six state legislatures have recognized the devastating impact of this form of privacy violation through criminal statutes,[3] and bipartisan federal criminal legislation on the issue is pending in Congress.[4]

Nonconsensual pornography includes not only images voluntarily exchanged with another person within the context of a private relationship, but also images originally created or obtained without consent (*e.g.*, through hacking, surreptitious filming, or recordings of sexual assaults). No matter the motive or how the images are originally obtained, the unauthorized disclosure of such highly sensitive, private information causes immediate, devastating, and in many cases irreparable harm. With a push of a button,

---

[2] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014).

[3] *See* CCRI, *46 States + DC Have Revenge Porn Laws*, https://www.cybercivilrights.org/revenge-porn-laws/ (collecting state statutes).

[4] *See* Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act of 2019 H.R. 2896, 116th Cong. (2019).

these images can be made accessible to millions of strangers or transmitted directly to the victim's family members, employers, and peers. The exposure of such sensitive intimate images wreaks havoc on victims' personal, professional, educational, and family life.[5] Victims frequently experience serious emotional and psychological distress, including depression, anxiety, agoraphobia, difficulty maintaining intimate relationships, and post-traumatic stress disorder.[6] Victims have been stalked, harassed, threatened with sexual assault, defamed as sexual predators, terminated from employment, expelled from their schools, or forced to change their names. Some victims have committed suicide.[7]

---

[5] *See* Citron & Franks, *supra* note 2 at 350–54.

[6] Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 Feminist Criminology 22, 38–39 (2017).

[7] Citron & Franks, *supra* note 2 at 372. *See also* Nina Burleigh, *Sexting, Shame and Suicide*, Rolling Stone, Sept. 17, 2013, http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917; BBC News Serv., *Tiziana Cantone: Suicide following years of humiliation online stuns Italy*, Sept. 16, 2016 (31-year-old Italian woman hangs herself after video of her performing a sex act goes viral), http://www.bbc.com/news/world-europe-37380704; Emily Bazelon, *Another Sexting Tragedy*, Slate, Apr. 12, 2013 (17-year-old Canadian girl hangs herself after photos of her being sexually assaulted at a party are circulated), https://slate.com/human-interest/2013/04/audrie-pott-and-rehtaeh-parsons-how-should-the-legal-system-treat-nonconsensual-sexts.html; Kate Briquelet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, The Daily Beast, June 20, 2016 (15-year-old girl shoots herself in the head after

The economic impact of nonconsensual pornography can be devastating. Victims often find themselves unemployable due to the disclosure, or may withdraw from online life entirely, to the detriment of their job prospects and careers.[8] Victims can spend thousands of dollars in an often-futile attempt to get the damaging material removed from the internet,[9] or in legal fees pursuing judgments that, even if awarded, they may never collect.[10]

The prevalence and impact of nonconsensual pornography is likely to be exacerbated by rising domestic violence rates,[11] stay-at-home orders,

---

ex-boyfriend posts nude photo on social media), https://www.thedailybeast.com/nude-snapchat-leak-drove-teen-girl-to-suicide.

[8] *See* Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1, 8–10 (2009); *see also Warren City Bd. of Educ.*, 124 Lab. Arb. Rep (BNA) 532, 536–37 (2007) (arbitration decision upholding the termination of a teacher fired because an ex-spouse distributed nude images to co-workers and school officials); Citron & Franks, *supra* note 2 at 352.

[9] *See* Ian Sherr, *Forget being a victim. What to do when revenge porn strikes*, CNET, May 13, 2015 (noting that a typical case "can cost as much as $10,000."), https://www.cnet.com/news/forget-being-a-victim-what-to-do-when-revenge-porn-strikes/.

[10] *See* Tracy Clark-Flory, *Criminalizing 'revenge porn,'* Salon, Apr. 6, 2013 (https://www.salon.com/2013/04/07/criminalizing_revenge_porn/.

[11] M.B. Pell & Benjamin Lesser, *Researchers warn the COVID-19 lockdown will take its own toll on health*, Reuters, Apr. 3, 2020, https://www.reuters.com/investigates/special-report/health-coronavirus-usa-cost/.

increased time online, and the shift to online education and work-from-home using unfamiliar and insecure communication technology due to the COVID-19 pandemic. Social distancing and other exposure avoidance measures restrict responses such as contacting law enforcement or leaving one's home.

A. The scale of the problem

In 2017, CCRI researchers studied a sample of 3,044 American adults who use social media.[12] This study found that 1 in 8 participants had been the victims of or threatened with nonconsensual pornography.[13] Nearly half of all victims' intimate images were distributed by text message and the rest were distributed through social media, in person, or the internet.[14]

As many as 10,000 websites feature "revenge porn,"[15] some dedicated solely to this content.[16] These easily accessible, largely anonymous platforms connect profit-driven purveyors with voyeuristic consumers. These sites frequently display personal information about the victims (*e.g.*, name, age,

---

[12] Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report* 11 (2017), https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf.

[13] *Id.* at 11.

[14] *Id.* at 21.

[15] This figure is based on takedown requests made available to CCRI.

[16] *See Revenge Porn: Misery Merchants*, The Economist, July 5, 2014, https://www.economist.com/international/2014/07/05/misery-merchants.

address, employer, email address, and links to social media profiles) alongside the images, making it easy for strangers to threaten and harass victims.[17]

B. Perpetrator motives and potential deterrents

Contrary to what the colloquialism "revenge porn" suggests, many perpetrators of nonconsensual pornography are not motivated by personal vindictiveness, but by motives such as greed, voyeurism, and self-aggrandizement. Indeed, the CCRI study found that the vast majority of perpetrators—nearly 80%—report being motivated by something other than the desire to hurt the victim.[18] Domestic abusers threaten to disclose intimate photos to keep a partner from leaving or from reporting abuse to law enforcement;[19] sex traffickers use compromising images to keep unwilling individuals in the sex trade; rapists record attacks to discourage victims from reporting assaults;[20] medical professionals[21] and nursing home workers post

---

[17] *See* Citron & Franks, *supra* note 2 at 350–51.

[18] CCRI, Frequently Asked Questions, https://www.cybercivilrights.org/faqs/.

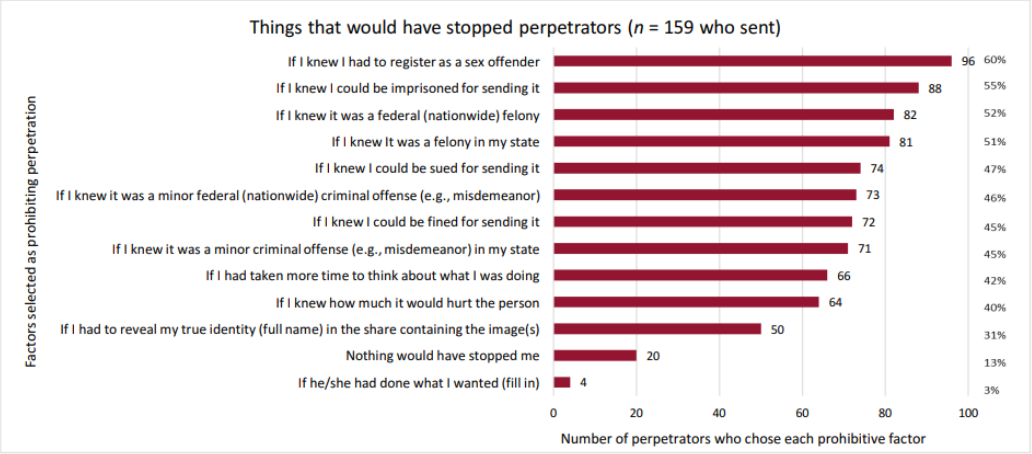
[19] Citron & Franks, *supra* note 2 at 351.

[20] *See* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 Fla. L. Rev. 1251, 1258 (2017) (excerpt attached as an addendum to this brief).

[21] *See* Katelyn G. Bennett & Christian Vercler, *When Is Posting about Patients on Social Media Unethical 'Medutainment'?,* AMA Journal of Ethics,

nude photos of vulnerable patients to social media as a form of entertainment;[22] and "revenge porn" site owners traffic in unauthorized sexually explicit photos and videos to make money or to attain notoriety.[23]

CCRI researchers asked what, if anything, would have stopped individuals who admitted perpetrating nonconsensual pornography from doing so.[24] As indicated below, the most common answers relate to criminal enforcement: registration as a sex offender, imprisonment, and knowing that the nonconsensual distribution of sexually explicit materials was a felony.



April 2019, https://journalofethics.ama-assn.org/article/when-posting-about-patients-social-media-unethical-medutainment/2018-04

[22] *See* Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat,* Pro Publica, Dec. 21, 2015, https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat.

[23] '*Revenge Porn' Website has Colorado Women Outraged*, CBS Denver, Feb. 3, 2014, http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/.

[24] Eaton et al., *supra* note 12 at 22.

C. Nonconsensual pornography disproportionately harms vulnerable groups, especially women and girls

Nonconsensual pornography exacerbates gender inequality. CCRI's research shows that women are more likely to be victims of this abuse, while men are more likely to be perpetrators.[25] Available evidence also indicates that women and girls face more serious consequences as a result of victimization.[26] "Revenge porn" websites feature far more women than men, and the majority of court cases and news stories to date involve female victims and male perpetrators.[27] Nonconsensual pornography often plays a role in crimes that disproportionately affect women, including intimate partner violence, sexual abuse of minors, sexual assault, and sex trafficking. It also helps to "sustain a culture . . . in which sexual consent is regularly ignored."[28]

The disclosure or threatened disclosure of intimate images has the capacity to chill women's speech, expression, and professional ambition. As a

---

[25] *Id.* at 12, 15.

[26] Citron & Franks, *supra* note 2 at 353–54.

[27] *See* Anastasia Powell et al., *The Picture of Who Is Affected by 'Revenge Porn' Is More Complex Than We First Thought*, Conversation, May 7, 2017, https://theconversation.com/the-picture-of-who-is-affected-by-revenge-porn-is-more-complex-than-we-first-thought-77155.

[28] Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 Oxford J. of L. Studies 534 (2017).

result, it is often used to punish and intimidate outspoken or successful women.[29] Those who are targeted frequently withdraw from various spheres of meaningful activity: work, school, social media, and personal relationships.

> Online privacy violations such as 'revenge porn' do not only have a traumatic impact on the individual woman victimized, but by their very public nature have a dramatic impact on other women in or considering public life. . . . '[R]evenge porn' and other digital attacks are linked to a secondary violence that often follows an initial attack where women are blamed for their own victimization . . . . The perception of impunity emboldens perpetrators, and raises women's sense of insecurity and violation, driving many away from political participation.[30]

In one high-profile case, California Congresswoman Katie Hill resigned from office after nude photos of her were released to the media without her consent in 2019.[31] A survey of women journalists found that nearly 70% of respondents had been threatened or harassed online at least once, and that approximately 40% said they avoided reporting certain stories as a result of

---

[29] Emma Gray, *The Emma Watson Threats Were A Hoax, But Women Face Similar Intimidation Online Every Day*, Huffington Post, Sept. 26, 2014, https://www.huffpost.com/entry/emma-watson-hoax-women-online-threats_n_5887712.

[30] National Democratic Institute,, *#NotTheCost: Stopping Violence Against Women in Politics* 19 (2017), https://www.ndi.org/sites/default/files/not-the-cost-program-guidance-final.pdf.

[31] *See* Mary Anne Franks, *Nude Photos of Katie Hill Had Nothing to Do with Her Conduct*, Wash. Post, Oct. 30, 2019, https://www.washingtonpost.com/outlook/2019/10/30/photos-katie-hill-had-nothing-do-with-her-conduct/.

this harassment.[32]

D. The harm: examples

When Minnesota resident E.W. was 19 years old, her then-boyfriend recorded their first sexual encounter without her knowledge.[33] She learned of the recording and asked him to delete it, and he claimed to comply. But a few weeks after E.W. ended the emotionally and physically abusive relationship, her ex contacted her to tell her he never deleted the video, threatening to "share [the video] with everyone" and "destroy" her by doing so. E.W testified before the Minnesota state legislature in 2016 that without a law in place prohibiting nonconsensual pornography, she lived in constant fear and apprehension of her ex carrying out his threats. "At this point," she stated, "my only hope that my testimony keeps any other future victim from this appalling crime from having to do what I'm doing right now: standing in front of strangers, trying to convince those strangers that what happened to me is a crime."[34]

The legislature was convinced, passing the bill in a near-unanimous

---

[32] Michelle Ferrier, *Attacks and Harassment: The Impact on Female Journalists and Their Reporting* 7 (2018), https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf.

[33] Testimony of "E.W.," S.F. 2713, Sen. Jud. 9 Comm., 89th Minn. Leg., Apr. 7, 2016 (digital audio) (beginning at 3:06:45), http://mnsenate.granicus.com/ViewPublisher.php?view_id=2.

[34] *See id.*

vote. These efforts have now been undone by the Court of Appeals. E.W.'s courageous attempt to ensure that no other woman would have to beg strangers to take her suffering seriously has been defeated. This is painfully illustrated by an interview of a woman who reached out to amici this year in the hopes that her story would help convince this Court to uphold § 617.261. She describes how her abusive ex pressured her into making sexually explicit videos, then posted the videos to Snapchat after she ended the relationship. She speaks of her terror and disbelief upon learning from police that "there is no law preventing this from happening. My ex didn't do anything illegal."[35]

The man who inflicted this suffering is now emboldened to act with impunity, as are men like Mankato resident Cameron Lee Brown, who threatened to kill his victim if she reported him to law enforcement for posting nude photographs of her to a social media platform without her permission in 2019. As *The Free Press* noted, Brown was not charged with the nonconsensual dissemination of private sexual images because of the ruling below that invalidated § 617.261.[36]

---

[35] Interview with Victim (attached as an addendum to this brief).

[36] *Man allegedly threatened woman after posting revenge porn*, The Free Press, Jan. 24, 2020, https://www.mankatofreepress.com/news/local_news/man-allegedly-threatened-woman-after-posting-revenge-porn/article_76924c2e-3ef2-11ea-b10c-0b86ead84839.html.

As CCRI's study revealed, many perpetrators of nonconsensual pornography claim they do not mean to harm their victims. That includes the first person to be sentenced under § 617.261, Michael Weigel of Anoka, who posted naked photos of his ex-girlfriend on a fake Facebook account he created in her new partner's name. Weigel emailed the photos to his victim and told her, "You will never live in peace. You will live in shame and embarrassment for the rest of your life." At trial, the woman detailed the humiliating ordeal of having to show the images to police to report the crime, of worrying that the disclosure would lead to her losing her job, of how her "new boyfriend's family and friends, some of whom she hadn't yet met, now had images of her naked body in their minds." She stated, "I will worry about these images for the rest of my life and live with the shame and embarrassment the rest of my life." Nonetheless, Weigel told the court "he never meant to hurt" his victim.[37]

In her 2016 testimony in support of Minnesota's bill, E.W. spoke directly to this issue. She implored legislators not to include an "intent to harass" requirement in the bill, saying, "It will give the people who commit

[37] Sarah Horner, *Judge cracks down on first ex-boyfriend sentenced for 'revenge porn' in Ramsey County*, Pioneer Press, Oct. 3, 2017, https://www.twincities.com/2017/10/03/minnesota-revenge-porn-judge-cracks-down-on-first-ex-boyfriend-sentenced-jail/.

this crime an absolutely ludicrous loophole that will stand as a valid defense . . . Don't give [my ex] a loophole to maintain his hold on me."[38]

Proprietors and patrons of "revenge porn" sites routinely disclaim any intent to harm the people whose naked images they offer for sexual entertainment. These include private Facebook pages such as "Marines United," where male Marines exchanged sexually explicit photos of their female colleagues without their consent,[39] and sites like Anon-IB, notorious for featuring hacked photos of nude celebrities.[40] Like many revenge porn sites, Anon-IB offers access on an exchange basis, allowing users to post photos in lieu of registration or payment. One fan wrote, in a "review" of the site,

> You can upload any pic that may be in your possession pretty easily. Use a simple drag and drop method and just like that, other users can feast their eyes on your pic. It could be your ex-girlfriend, that neighbor's teen you f*cked last year or any nude photo you have. And the best thing is, you don't have to register or whatever.[41]

---

[38] *See* Testimony of "E.W.," *supra* note 33.

[39] *See* Shawn Snow, *Seven Marines court-martialed in wake of Marines United scandal*, Marine Corp Times, Mar. 1, 2018, https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal/.

[40] *See* Andrew Liptak, *Dutch police have shut down Anon-IB in the course of a revenge porn investigation*, The Verge, April 29, 2018, https://www.theverge.com/2018/4/29/17299020/anon-ib-the-netherlands-dutch-police-revenge-porn-shut-down.

[41] PornDude.com, https://theporndude.com/1304/anon-ib.

The same user describes how Anon-IB, like many revenge porn sites, is searchable by geographic location:

> Note that the site has a section for people to share posts from most of the American states and other countries all over the world. Looking for a local slut….? … I entered Minnesota and was greeted by a thread titled 'more Minnesota sluts.' You can check out sluts from your local area pretty easily. Some of the sluts are so local you will be like 'oh great, that's my friend's little sister.[42]

The user reassures others that while "[t]he legality of the site is a bit murky… there is zero chance of getting caught if you feel like posting nude pictures which should only add to the thrill."[43] Although Anon-IB was shut down by Dutch police in April 2018,[44] it continues to pop up in new iterations that offer state-specific searches, including for Minnesota.[45] A similar site also offering Minnesota-specific searches asks, "ever wanted to see your crush naked or wondered if your new girlfriend was a slut well if she was chances are she is inside our members area archives. You want real sluts exposing themselves right? Not that fake 'amateur' stuff either. Anon World has Nudes, videos, and gifs of real women baring it all . . . . It feels wrong in all

---

[42] *Id.*

[43] *Id.*

[44] *See* Liptak, *supra* note 40.

[45] Anon-IB, http://boards.anonib.ru/mn/.

the right ways."[46]

II. This Court Should Uphold § 617.261 as a Privacy Regulation that Responds to the Serious Harm of Nonconsensual Pornography Without Violating the First Amendment

Minnesota, like all states, recognizes the right to privacy. Like many other federal and state privacy laws, § 617.261 protects against the unauthorized disclosure of sensitive information. Various state and federal laws protect the right of individuals to keep a wide array of information private: medical records, social security numbers, student educational records, drivers' license information, genetic information, biometric data, geolocation data, even video rental information.[47] Some of these laws are very broad in scope; some impose serious criminal as well as civil penalties; and some permit the imposition of liability based on negligence as well as recklessness, knowledge, and purpose. Yet the U. S. Supreme Court has never struck down a privacy regulation that restricted purely private speech on First Amendment grounds. Indeed, most privacy laws have never faced serious First Amendment challenge at all.[48]

Section 617.261 is a content-neutral privacy regulation that restricts

---

[46] Anon World, http://anonworld.org/.

[47] Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 971–72 (2003).

[48] *See* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149, 1199–200 (2005).

how and when purely private information may be disclosed, without any attempt to disfavor a particular perspective or to drive unpopular ideas from the marketplace of ideas. It relies on reasonable, objective assessments about privacy and consent rather than vague and arbitrary assessments of subjective motives or responses.

As a result, § 617.261 easily satisfies constitutional scrutiny. Its restriction on the unauthorized disclosure of private, sexually explicit images treads in territory far removed from the core concerns of the First Amendment. The defendant's conduct—posting nude photos of the victim without consent—should not receive the full measure of the First Amendment's protection. Rather, this Court should have "no difficulty in concluding" the distribution of homemade sexually explicit material "does not qualify as a matter of public concern under any view."[49] Prohibiting the nonconsensual disclosure of intimate images therefore poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas."[50]

---

[49] *San Diego v. Roe*, 543 U.S. 77, 84 (2004).

[50] *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quotation omitted).

A. Section 617.261 is a narrow, content-neutral protection of the right to privacy that regulates speech only on matters of purely private concern

As this Court recognized, the "right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close."[51] It is no coincidence that the case that led this Court to recognize the right of privacy, like the one before it now, dealt with the unauthorized disclosure of naked photos. In the words of this Court, "One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection."[52]

One of the plaintiffs in *Lake* stated, "You just never know where [the photo] going to be; it could still be on the Internet for all I know."[53] That persistent sense of anxiety is familiar to any victim of nonconsensual pornography, underscoring the chilling effect of surveillance, whether the source is a store employee, an ex-boyfriend, or a government agent.

---

[51] *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

[52] *Id.*

[53] Amy Radil, *The Surveillance Society: Document 1: The Right to be Left Alone*, Minn. Public Radio, http://news.minnesota.publicradio.org/features/199911/15_newsroom_privacy/leftalone.html.

The U.S. Supreme Court recognized the interrelationship between privacy and free speech in *Bartnicki v. Vopper*: "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas."[54]

Privacy and free speech values do not always point in the same direction, of course. Sometimes there is a "conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."[55]

This Court recently confronted this conflict in *Cilek v. Office of the Minnesota Secretary of State*.[56] In *Cilek*, the Minnesota Voters' Alliance demanded access to sensitive voter registration data that including voting status, arguing that all government data is presumed public. The ACLU, in an amicus brief opposing this access, urged that "[w]idespread dissemination

---

[54] 532 U.S. 514, 533 (2001) (citation and quotation marks omitted).

[55] *Id.* at 517–18.

[56] No. A18-1140, 2020 WL 1696939 (Minn. Apr. 8, 2020).

of the information at issue to the public, pursuant to its interpretation, implicates individual privacy concerns—particularly for victims of stalking and harassment as well as for people incorrectly identified as having a felony conviction."[57] In holding that the Minnesota Voters Alliance's request for access to sensitive voter information was properly denied, this Court stated, "[a]ccess to 'Big Data' about Minnesota voters requires the balancing of policy values such as transparency, privacy, and discretion."[58]

Section 617.261 is, by comparison, simple. The right to privacy and dignity clearly includes the right to keep one's naked body from public view. There is no countervailing general public interest in viewing someone's naked body without their consent. As renowned constitutional law scholar Erwin Chemerinsky has succinctly stated, the "First Amendment does not protect a right to invade a person's privacy by publicizing, without consent, nude photographs or videos of sexual activity."[59]

---

[57] Br. of Amicus Curiae ACLU Minn., *Cilek v. Office of Minn. Sec'y of State*, No. A18-1140, 2019 WL 7878514, at *13 (Minn. Ct. App. July 25, 2019).

[58] 2020 WL 1696939, at *6.

[59] Office of Congresswoman Jackie Speier, *Press Release: Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn*, July 14, 2016, https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual.

By protecting Minnesota residents against unauthorized disclosures of personally sensitive information of no legitimate concern to the public, § 617.261 advances the government's interest in safeguarding important values of both privacy and expression. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[60] Although all privacy laws, in some sense, restrict speech, they also "directly enhance private speech" because their "assurance of privacy helps to overcome our natural reluctance" to communicate freely on private matters out of fear that those communications "may become public."[61] This is particularly true when the potential threat of dissemination is "widespread," as it is with images that can be shared over the internet.[62]

B. The claim that the absence of an intent-to-harm element renders § 617.261 unconstitutional misunderstands both the offense and First Amendment doctrine

The Court of Appeals ruled that "§ 617.261's lack of an intent-to-harm element . . . runs afoul of the First Amendment."[63] This conclusion both fundamentally misunderstands the harm of nonconsensual pornography and

---

[60] *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

[61] *Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring).

[62] *Id.*

[63] *State v. Casillas*, 938 N.W.2d 74, 85 (Minn. Ct. App. 2019), *rev. granted* (Mar. 17, 2020).

mischaracterizes First Amendment doctrine. While motive may be a meaningful factor in offenses such as harassment or disorderly conduct, it is irrelevant in privacy violations because the harm inflicted does not depend on the motive of the discloser. Nor does the constitutionality of privacy violations turn on the question of motive. Indeed, intent requirements are more likely to create First Amendment vulnerabilities than to solve them.

1. Privacy harms are not dependent on subjective motives or responses

While the majority of people who disclose private, sexually explicit images without consent do so with motivations other than intent to harm the victim, the lack of a personally vengeful motive does not make the invasion of sexual privacy any less harmful. Acknowledging this fact, nearly a dozen state laws criminalizing nonconsensual pornography do not require a particular motive.[64] The same is true of the 2018 Uniform Law Commission's Civil Remedies for the Unauthorized Disclosure of Intimate Images Act,[65] the provision of the Uniform Code of Military Justice addressing nonconsensual pornography,[66] and the proposed bipartisan federal criminal legislation

---

[64] *See, e.g.*, 720 ILCS 5/11-23.5; Wash. Rev. Code § 9A.86.010.

[65] https://www.uniformlaws.org/committees/community-home?CommunityKey=668f6afa-f7b5-444b-9f0a-6873fb617ebb.

[66] 10 U.S.C. § 917a.

against nonconsensual pornography.[67]

To date, the nonconsensual pornography laws of five states have been challenged on First Amendment grounds. In all four of the cases to have reached termination in the state courts, the law has been upheld.[68] In upholding Illinois's law, which is nearly identical to Minnesota's, the Illinois Supreme Court observed that motive is fundamentally irrelevant to the crime:

> [T]he motive underlying an intentional and unauthorized dissemination of a private sexual image has no bearing on the resulting harm suffered by the victim. A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator's objective. Therefore, the question of the disseminator's motive or purpose is divorced from the legislative goal of protecting the privacy of Illinois citizens. The explicit inclusion of an illicit motive or malicious purpose would not advance the substantial governmental interest of protecting individual privacy rights, nor would it significantly restrict its reach.[69]

---

[67] SHIELD Act, *supra* note 4.

[68] *See People v. Austin*, 2019 IL 123910, ¶¶ 49–50, *petition for cert. filed* (U.S. Feb. 19, 2020) (No. 19-1029); *State v. VanBuren*, 214 A.3d 791 (Vt. 2019); *State v. Culver*, 918 N.W.2d 103 (Wis. App.), *review denied*, 923 N.W.2d 165 (Wis. 2018); *People v. Iniguez*, 202 Cal. Rptr. 3d 237 (Cal. App. Dep't Super. Ct. 2016). *But see Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888 (Tex. App. May 16, 2018), *petition for discretionary review granted* (July 25, 2018).

[69] *Austin*, 2019 IL 123910, ¶ 102.

2. The First Amendment does not require that privacy statutes include intent-to-harm requirements

The Court of Appeals concluded that the absence of an intent-to-harm requirement rendered § 617.261 overbroad. But the law does not burden protected speech at all, much less a substantial amount of it. The law is a privacy measure with a plainly legitimate sweep, and unauthorized "sexually explicit publications concerning a private individual" are not "afforded First Amendment protection."[70] Whatever small degree of overbreadth that might be imagined to exist should be cured, not through the "strong medicine" of facial invalidation, but through as-applied challenges by defendants who claim their conduct was constitutionally protected.[71]

In arriving at the contrary conclusion, the Court of Appeals erroneously analogized § 617.261 to harassment, disorderly conduct, and other statutes that potentially implicate a wide swath of speech "at the heart of the First Amendment's protection"—namely, speech on "matters of public concern."[72] While specific intent requirements can be useful to avoid overbreadth in such

---

[70] *United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014); *see also United States v. Petrovic*, 701 F.3d 849, 855–56 (8th Cir. 2012) (distributing a victim's private nude photos without consent "may be proscribed consistent with the First Amendment").

[71] *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 n.6 (2008).

[72] *Snyder*, 562 U.S. at 451.

statutes, § 617.261 poses no similar risk of "sweep[ing] in a whole spectrum of constitutionally protected activity"[73] because it applies only to speech on purely private matters and regulates only the manner in which such speech can be communicated.

In finding that Illinois's nonconsensual pornography statute is a content-neutral, time, place, and manner restriction, the Illinois Supreme Court noted that the law "distinguishes the dissemination of a sexual image not based on the content of the image itself but, rather, based on whether the disseminator obtained the image under circumstances in which a reasonable person would know that the image was to remain private and knows or should have known that the person in the image has not consented to the dissemination," and so "does not prohibit but, rather, regulates the dissemination of a certain type of private information."[74] The court concluded that the Illinois law was "similar to laws prohibiting the unauthorized disclosure of other forms of private information" and that to strike it down "would cast doubt on the constitutionality of these and other statutes that protect the privacy rights of" the state's residents.[75] As § 617.261 is almost identical to Illinois's law, the analysis applies with equal force here.

---

[73] *Matter of Welfare of A. J. B.*, 929 N.W.2d 840, 861 (Minn. 2019).

[74] *Austin*, 2019 IL 123910, ¶¶ 49–50.

[75] *Id.* at ¶ 50.

First Amendment scholars agree that there is no doctrinal basis for the assertion that a law aimed at protecting privacy must include an intent-to-harm element to withstand First Amendment scrutiny. Professor Chemerinsky observes that there is nothing "in the First Amendment that says there has to be an intent to cause harm to the victim," as it suffices that the private information "is intentionally or recklessly made publicly available. . . . Imagine that the person is putting the material online for profit or personal gain. That should be just as objectionable as to cause harm to the victim."[76]

Echoing this view, First Amendment scholar Eugene Volokh has written that "[r]evenge porn is bad because it's nonconsensual—at least one of the participants didn't agree to the distribution of the material—and not because its purpose is revenge. . . . . For purposes of legal analysis, there's no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person."[77]

The Court of Appeals attempted to support the contrary conclusion by

---

[76] CCRI, *Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography, Cyber Civil Rights Initiative*, Oct. 6, 2017, https://www.cybercivilrights.org/2017-cybercrime-symposium/.

[77] Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. Rev. 1366, 1405–06 (2016) (excerpt attached as an addendum to this brief).

contrasting § 617.261 with Vermont's nonconsensual pornography statute upheld in *VanBuren*, which differs from Minnesota's law in that it includes "a specific intent to harm, harass, intimidate, threaten, or coerce the person depicted or to profit financially."[78] The *VanBuren* court, however, went out of its way to emphasize that it "express[ed] no opinion as to whether [this intent-to-harm] element is essential to the constitutionality of the statute."[79] The court based its finding that the statute survived strict scrutiny by looking to the privacy interests protected by the statute, not on the statute's intent-to-harm requirement.

3. Intent-to-harm requirements tend to create, rather than resolve, First Amendment vulnerabilities

Far from being required by the First Amendment, intent-to-harm elements can instead create constitutional infirmities: "[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection."[80]

Demonstrating this point, the Texas Court of Criminal Appeals struck

---

[78] *Casillas*, 938 N.W.2d at 87 (quoting *Van Buren*, 214 A.3d at 812).

[79] *VanBuren*, 214 A.3d at 812 n.10 (citing Citron & Franks, *supra* note 2 at 387); *see also Culver*, 918 N.W.2d at 110–11 (rejecting defendant's claim that the absence of an intent-to-harm element rendered Wisconsin's nonconsensual pornography law unconstitutional).

[80] *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007).

down an improper photography law in part because the law's intent elements "exacerbate[] the First Amendment concerns.[81] In invalidating the law, which required defendants to act with "the intent to arouse or gratify the sexual desire of any person,"[82] it pointed to *Texas v. Johnson*, where the Supreme Court found that Texas's flag-burning statute "was content based because it punished mistreatment of the flag that was intentionally designed to seriously offend other individuals."[83]

The Court of Appeals decision here pointed to this Court's earlier analysis of Minnesota's mail-harassment statute to support its view that specific intent requirements serve important limiting functions. But that decision actually underscored the *insufficiency* of such a requirement to save an otherwise unconstitutional statute:

> The specific-intent element in the mail-harassment statute does not carve out protected speech or expressive conduct . . . . Mailing letters to an elected official advocating for a change of law may very well be sent with an intent to "abuse" or "disturb" the elected official or "cause distress." . . . . But the letters are protected by the First Amendment.[84]

---

[81] *Ex parte Thompson*, 442 S.W.3d 325, 337–38 (Tex. Crim. App. 2014).

[82] Tex. Penal Code § 21.15(b)(1) (2015).

[83] *Thompson*, 442 S.W.3d at 347 (quoting *Texas v. Johnson*, 491 U.S. 397, 411 n.7 (1989)).

[84] *Matter of Welfare of A. J. B.*, 929 N.W.2d at 861.

Similarly, specific intent requirements did not save cyberbullying laws in North Carolina and New York from being struck down on the grounds that phrases such as harass, torment, and embarrass are unconstitutionally vague.[85]

In short, if speech is protected by the First Amendment, the speaker's motive for voicing it is largely irrelevant. Indeed, singling out certain bad purposes may constitute viewpoint discrimination, and even where it does not, it creates chilling effects for speakers who are unsure of how they will be able to demonstrate a legitimate versus an illegitimate purpose.[86]

Moreover, when a statute "punishes some speech on the grounds that the speech undermines a compelling interest, and fails to punish other speech that undermines the interest to the same extent, the law is generally seen as unconstitutionally underinclusive."[87] Requiring an intent-to-harm requirement for § 617.261 would run the same risk, as it would punish the unauthorized dissemination of private, sexually explicit images only when it was done for the purpose of harming the person depicted, while allowing the same act to be committed for any other purpose.

---

[85] *See State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016); *People v. Marquan M.*, 19 N.E.3d 480, 486 (N.Y. 2014).

[86] Volokh, *supra* note 78 at 1386.

[87] *Id.* at 1418.

C. Section 617.261 is not overbroad because it uses a "know or has reason to know" as a mens rea standard for elements of the offense relating to privacy

The Court of Appeals concluded that § 617.261's use of a "negligence mens rea" renders the law overbroad by causing it to reach "protected First Amendment expression that neither causes nor is intended to cause a specified harm." This is incorrect.

Section 617.261 prohibits the intentional dissemination of highly personal and sensitive information only when a person knows or should know that the depicted person has not consented and has a reasonable expectation of privacy. If the right to privacy means anything at all, it must include protection against intentional disclosures of highly sensitive information that a reasonable person would know is done without consent and violates a reasonable expectation of privacy. Such disclosures are objectively harmful, and the "knew or had reason to know" elements of the statute properly recognize this.

Minnesota courts have indicated that a significant factor in overbreadth analysis is the extent to which a statute relies on objective determinations. In upholding the harassment-restraining-order statute against First Amendment challenge, the Court of Appeals emphasized that the statute:

> requires a court to find that there are reasonable, rather than

> merely subjective, grounds to believe that the accused engaged in harassment. … [It] requires both objectively unreasonable conduct *or* intent on the part of the harasser *and* an objectively reasonable belief on the part of the person subject to harassing conduct.[88]

One of the strengths of § 617.261 is its emphasis on objective rather than subjective determinations, an emphasis shared by privacy laws generally. The Court of Appeals fundamentally misunderstood the nature of this standard when it found that the "reasonable knowledge" standard regarding the expectation of privacy is "highly subjective" because, "[d]epending on one's sensibilities and tolerance of sexual images on publicly available mediums, reasonable people could reach different conclusions regarding the privacy expectations associated with such images."[89]

The Court of Appeals' concern about subjective standards is, first, hard to square with its simultaneous insistence on the necessity of an intent-to-harm element that is by its very definition subjective. More importantly, "reasonableness" as an objective standard is foundational in the law, including in the test for determining reasonable expectations of privacy for

---

[88] *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. Ct. App. 2006) (emphasis added).

[89] *Casillas*, 938 N.W.2d at 89.

the purposes of protecting the constitutionally guaranteed Fourth Amendment rights.[90]

There is no obvious reason why reasonableness should be a uniquely troublesome standard in the context of non-state invasions of privacy. Reasonableness is a common standard in many Minnesota laws addressing privacy and expression. For instance, one statute addressing unauthorized computer access provides that a "person is guilty of a gross misdemeanor if the person *knows or has reason to know* that by facilitating access to a computer security system the person is aiding another who intends to commit a crime and in fact commits a crime."[91] Another criminal statute forbids the intentional disclosure or intentional use of various communications if one "*know[s] or ha[s] reason to know*" the information was obtained through illegal interception.[92] Minnesota law also imposes criminal sanctions when one "intentionally manufactures, produces, distributes, offers for sale, sells, or possesses with intent to sell or distribute any counterfeited item or service, *knowing or having reason to know* that the item or service is counterfeit."[93] If

---

[90] *See State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994) (explaining that inquiries into "malice" and other states of mind are subjective, while inquiries into "reasonableness" are objective).

[91] Minn. Stat. § 609.8913 (emphasis added).

[92] Minn. Stat. § 626A.02 (emphasis added).

[93] Minn. Stat. § 609.895, subd. 2 (defining the crime of counterfeited intellectual property) (emphasis added).

the standard of reasonableness is truly so unsound as to be unconstitutional, this will have serious repercussions extending far beyond § 617.261 and this case.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

April 23, 2020

_/s/ Katherine S. Barrett Wiik
Katherine S. Barrett Wiik (#0351155)
BEST & FLANAGAN LLP
60 South Sixth Street, Suite 2700
Minneapolis, MN 55402
Phone: 612-341-9710
kbarrettwiik@bestlaw.com
Attorney for Amici Curiae Cyber Civil Rights Initiative, Standpoint, Minnesota Coalition Against Sexual, and the Battered Women's Justice Project

Rana S Alexander (#0333906)
STANDPOINT
2233 University Ave. W., Ste., Suite 150
St. Paul, MN 55114
Phone: 612-343-9842
rana@standpointmn.org
Attorney for Amicus Standpoint

Lindsay J. Brice (#388227)
MINNESOTA COALITION AGAINST SEXUAL ASSAULT
161 St. Anthony Ave., Suite 1001
St. Paul, MN 55103
Phone: 651-802-1175
lbrice@mncasa.org
Attorney for Amicus Minnesota Coalition Against Sexual Assault

Tracy Shoberg (#0398545)
BATTERED WOMEN'S JUSTICE PROJECT
1801 Nicollet Ave. S., Suite 102
Minneapolis, MN 55403
Phone: 612-383-1314

tshoberg@bwjp.org
Attorney for Amicus Battered Women's Justice Project

CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Amici Curiae certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13–point, proportionately spaced typeface utilizing Microsoft Word 2019 and contains 6,996 words, including headings, footnotes, and quotations.

April 23, 2020

_/s/ Katherine S. Barrett Wiik
Katherine S. Barrett Wiik (#0351155)
BEST & FLANAGAN LLP
60 South Sixth Street, Suite 2700
Minneapolis, MN 55402
Phone: 612-341-9710
kbarrettwiik@bestlaw.com
Attorney for Amici Curiae Cyber Civil Rights Initiative, Standpoint, Minnesota Coalition Against Sexual, and the Battered Women's Justice Project

ADDENDUM TO THE BRIEF

ADDENDUM CONTENTS

In November of 2019, I broke up with my partner. I thought we were in love - we were inseparable. However, I began to realize that while I was very driven and goal-oriented, he just wanted everything handed to him. He hated that I was more successful than him, and that he didn't have a dollar to his name even though he was older than me. In hindsight, he was like a leech and just using me for what I had. He was also an alcoholic, and we fought whenever he drank. He would call me names like "stupid whore" and "stupid bitch" all the time. One night he kicked the wall so hard that he broke his foot. He was a very violent person and was famous for throwing our phones and breaking them. One night he was so drunk I ran to a neighbor's house and asked them to call the police. I did fear for my safety a lot of the time, especially knowing I have a daughter.

He wasn't happy that I broke up with him and kicked him out of my house. He still wanted to date me, probably because I supported him in many ways. Fast forward to January 2020 - he was constantly harassing me, always calling me, and stalking me by following me on my Snapchat map. On the 2nd or 3rd of January, he called me over 20 times and texted me multiple times in a three hour window. I decided to take the high road and ignored him, because I didn't want him in my life anymore. That night I woke up at 4am and saw over a dozen videos and images of myself with him that are very intimate and of our personal relationship.

Back when we were dating, he cheated on me. Instead of breaking up with him, I listened to him and learned what he needed and wanted in our relationship. I focused on meeting those needs, which included creating these images and videos, and prioritized his needs over my own. I didn't want him to cheat on me anymore, and I wanted to satisfy him. I'm not a quitter, I want to learn who the other person is and try to understand them. So, we made those videos. If this is what he desired, I wanted to be his person.

He took those videos and images of me and posted them online simply because this time I didn't give him what he wanted - an answer to his phone calls. He posted all of them.

The first person I called after I saw this was the mother of his children. I knew that his children have him on their Snapchat and hoped to prevent them from seeing these images. I was too late. I didn't know how long these videos had been on Snapchat, or

how many people had seen it. I was sick to my stomach - I was shaking, I was petrified. I was so afraid, but I still had to go one with my day as though it was normal, even though it was shattering and everything was falling apart.

I reported these videos to Snapchat and tried to get them taken down. I even asked him to take the images down. He said he didn't care, and that there were more to come.

I went in to work, and it was impossible to concentrate. All I could think about were these videos and who had seen them. I knew I had to do something, and that I would need to talk to my boss. I had only been at this job for four months before all of this happened. As a new employee, I was scared and nervous to talk with my boss about something so vulnerable and personal, and was nervous about asking for time off. What would that look like? Would they fire me? I just bought my house and have a daughter to support, what happens if I get fired? Would they want to deal with me and all of this mess? Luckily, my team was supportive and I was able to take the time off to make a police report, but not everybody is this lucky.

I made a police report at the station near my home. The officer took down all of my information, but he said there is no law preventing this from happening. My ex didn't do anything illegal. I was told I could file a restraining order, but that I better hurry because it was 3pm on a Friday and the courts close for the weekend at 4. This is where I broke down. I just couldn't believe what was happening. Here is my private life all over Snapchat. I had tried to do something for him to meet his needs, and he used this act of vulnerability against me. He was so upset I didn't answer his phone call, so he wanted to do anything in his power to hurt me. It destroyed me.

I was able to hurry to the courts and filed for a Harassment Restraining Order. The order was granted, but it means nothing when he can still post things about me online and it's not a crime. That's what hurts the most - I have no idea how many people have seen these videos. I know my brother and sister in law saw the videos and some of my neighbors, and it's really embarrassing. Even though I am a really strong woman, it still hurts me internally because I don't understand how somebody could go that low, even if they were angry.

After this happened, I don't think I slept more than two hours a night for about two months. I was constantly looking out my windows to see if he was going to show up at

my house, and I needed to make sure he wasn't there. I couldn't eat because I was so stressed out all the time and living in fear.

Even with the order in place, he still calls me. I could block his number, but then I wouldn't have any heads up about what he's trying to do to hurt me. I live alone and have a daughter. I have been scared out of my mind that he is going to show up at my house. I am constantly living in fear of him showing up. He has a criminal history as well, and that only adds to my fear. I'm a good person, I am a nice person, and he could easily try to crumble me. But I'm not going to let that happen, even though it's still scary.

While I am lucky to have a supportive family, at first I didn't tell them what happened. I'm very reserved with my family, and didn't want to share this with them. I was so embarrassed. How could I explain the fact that he had cheated on me, and that I thought making those videos was the right choice to save our relationship? My brother and sister in law saw the videos, and I did tell other family members after that. They've been supportive, but not everybody has family that they can rely on.

If there was a law preventing the nonconsensual dissemination of private sexual images, I would feel less nervous and less scared. I would take comfort knowing that if this were to happen to any young boy or girl, there is protection out there for them. My daughter and her whole generation live on the internet - if my story can help prevent her from having to deal with this, then I will have done my job. It would feel great knowing my ex could never do this again, to myself or to another person. Right now he could do this again and nothing would happen. Right now I am the one suffering, but a law holding people accountable means someone else can't get hurt. Other people might not be as strong as I am or have supports like I do - a situation like this could make them run away or contemplate committing suicide and I don't want that to happen. I'm glad to be strong enough and have people I can go to and feel comfortable, but not everybody has that. Sometimes the law is the only place people can reach out to.

"REVENGE PORN" REFORM: A VIEW FROM THE FRONT LINES

Mary Anne Franks[*]

Abstract

The legal and social landscape of "revenge porn" has changed dramatically in the last few years. Before 2013, only three states criminalized the unauthorized disclosure of sexually explicit images of adults and few people had ever heard the term "revenge porn." As of July 2017, thirty-eight states and Washington, D.C. had criminalized the conduct; federal criminal legislation on the issue had been introduced in Congress; Google, Facebook, and Twitter had banned nonconsensual pornography from their platforms; and the term "revenge porn" had been added to the *Merriam-Webster Dictionary*. I have had the privilege of playing a role in many of these developments. In 2013, I argued that nonconsensual pornography required a federal criminal response and drafted a model statute to this effect. That statute served as the template for what eventually became the federal Intimate Privacy Protection Act of 2016, as well as for numerous state laws criminalizing nonconsensual pornography. As the Legislative and Tech Policy Director of the Cyber Civil Rights Initiative, I have worked with tech industry leaders, legislators, attorneys, victims, and advocates to develop policies and solutions to combat this abuse. This Article is an account from the front lines of the legislative, technological, and social reform regarding this evolving problem.

* Professor of Law, University of Miami School of Law. I am grateful to Christopher Bracey, Mary Anne Case, Danielle Citron, Carrie Goldberg, Holly Jacobs, Orin Kerr, Andrew Koppelman, Ira C. Lupu, Richard McAdams, Eric Posner, Naomi Schoenbaum, Congresswoman Jackie Speier, Lior Strahilivetz, JoAnne Sweeny, Jason Walta, participants in the University of Chicago Family, Sex, and Gender Workshop, and participants in the George Washington University Law School Work in Progress Series. Thank you to Emily Cabrera for research assistance.

INTRODUCTION: LADY GODIVA'S RIDE

According to an eleventh-century legend, Leofric, the Earl of Mercia and Lord of Coventry, was a harsh ruler who imposed oppressive taxes on his townspeople.[1] The Earl's beautiful and kindhearted wife, Lady Godiva, had repeatedly beseeched Leofric to take mercy on the suffering people.[2] Leofric, weary of Lady Godiva's pleas, finally promised that he would lower the taxes on the condition that she ride throughout the town on horseback completely naked.[3] Leofric, certain that Lady Godiva would never agree to such a humiliating act, believed that this would put

1. *See* Evan Andrews, *Who Was Lady Godiva?*, ASK HIST. (Oct. 22, 2014), http://www.history.com/news/ask-history/who-was-lady-godiva.

2. *Id.*

3. *Id.*

not your choice . . . I've looked several times" at Lawrence's photos.[14] Williams asked her audience to "[c]lap if you've looked at Jennifer Lawrence's hacking pictures."[15]

Williams's reaction reflects the widespread contemporary view that looking at a woman's naked body without her consent is both normal and justified.[16] As her comments demonstrate, we are a long way from Lady Godiva's ride. It is almost impossible to imagine, in our time, members of the public voluntarily turning away from the sight of a woman exposed against her will. It is equally impossible to imagine a society that would have praised any woman so exposed for her virtue and nobility, rather than using the exposure as an excuse to unleash a torrent of misogynist criticism, victim-blaming, and rape threats against her. We are instead a society of Peeping Toms, no longer fearing judgment for our voyeurism, but administering judgment on the objects of our gaze.

It is no longer considered merely acceptable to look at women naked without their consent; lack of consent has increasingly become the entire point of the spectacle, the factor that provides the erotic charge. Anyone interested in viewing naked bodies can easily access millions of hard-core sexually explicit images and videos of consenting individuals with a click of a mouse. The "revenge porn" consumer is not aroused by graphic sexual depictions as such, but by the fact that the people in them—usually women—did not consent to being looked at.

This was true long before the term "revenge porn" entered popular discourse. In the 1980s, hard-core porn magazine *Hustler* began running a feature called "Beaver Hunt," which published reader-submitted sexually explicit photographs.[17] The women depicted in these photographs had often not consented to their submission or publication: some photographs had been stolen, some were submitted by exes with malicious purposes, and some were simply published without consent.[18] The feature was controversial, resulting in numerous lawsuits against

14. Sierra Marquina, *Wendy Williams Admits to Looking at Jennifer Lawrence's Nude Leaked Photos, Mocks the Star's Defense*, US MAG. (Oct. 10, 2014, 7:00 PM), http://www.usmagazine.com/celebrity-news/news/wendy-williams-admits-she-looked-at-jennifer-lawrences-nude-photos-20141010.

15. *Id.* It is perhaps encouraging that the audience responded with only a smattering of applause. *See* Wendy Williams, *Jennifer Lawrence Speaks Out*, YOUTUBE (Oct. 8, 2014), https://www.youtube.com/watch?v=A-rZkEnAUJY.

16. *See infra* Section I.A.

17. Emily Poole, *Fighting Back Against Non-Consensual Pornography*, 49 U. S.F. L. REV. 181, 186 (2015).

18. *Id.*

Hustler,[19] but it continues today. As video recorders and cameras became smaller and cheaper, many online communities and websites began featuring "amateur porn" of uncertain provenance.[20] In many cases, there is no evidence that the individuals depicted were aware that they were being filmed or that they have consented to the material being distributed.[21] Yet the "amateur porn" industry flourishes largely without investigation or regulation, betraying a lack of social or political interest in ensuring that those featured in such intimate scenarios had consented to being seen in this way.[22]

Until quite recently, there was little formal resistance to the steady normalization of viewing women naked without their consent. Before 2003, no law in the United States explicitly criminalized the unauthorized disclosure of sexually explicit images of another adult person.[23] The issue received little attention from the media or from lawmakers. That began to change in 2010, when Hunter Moore created a website featuring stolen or user-submitted sexually explicit imagery of people, mostly women, without their consent.[24] Moore's site also provided detailed personal, contact, and other identifying information about the people depicted on the site.[25] In 2011, Christopher Chaney was arrested for hacking the email accounts of dozens of female celebrities to obtain suggestive or explicit images of the women.[26] Despite high-profile cases like these and a rise in "revenge porn" sites, before 2013 only three states had criminal laws applicable to the conduct.[27] Victims mostly suffered in silence for fear of greater exposure. Those that did attempt to seek help in law enforcement

---

19. Many of the lawsuits were resolved in favor of the plaintiffs. *See* Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1085 (5th Cir. 1984); Gallon v. Hustler Magazine, Inc., 732 F. Supp. 322, 326 (N.D.N.Y. 1990).

20. Taylor Linkous, *It's Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn*, 20 RICH. J.L. & TECH. 1, 10 (2014).

21. In other cases, what is labeled "amateur" or "homemade" porn is in fact professionally produced material made with consenting and compensated individuals.

22. *See* Mary Anne Franks, *Who's Afraid of Hot Girls?*, HUFFINGTON POST: BLOG (June 26, 2015, 8:46 AM), http://www.huffingtonpost.com/mary-anne-franks/whos-afraid-of-hot-girls_b_7670514.html.

23. New Jersey was the first state to enact such a law in 2003. *See* N.J. STAT. ANN. § 2C:14-9 (West 2016).

24. *See* Connor Simpson, *Revenge Porn King Hunter Moore Arrested for Hacking Email Accounts*, ATLANTIC (Jan. 23, 2014), https://www.theatlantic.com/national/archive/2014/01/revenge-porn-king-hunter-moore-arrested-conspiracy-hack-email-accounts/357321/.

25. *Id.*

26. *See* Crimesider Staff, *Christopher Chaney, So-Called Hollywood Hacker, Gets 10 Years for Posting Celebrities' Personal Photos Online*, CBS NEWS (Dec. 18, 2012, 10:02 AM), http://www.cbsnews.com/news/christopher-chaney-so-called-hollywood-hacker-gets-10-years-for-posting-celebrities-personal-photos-online/.

27. *See* discussion *infra* Section I.E.

conflicting messages about masculinity, and prone to jealousy-fueled rages. These normative pleas center the perpetrator's experience while erasing the victim. More so than victims of any other type of crime, women who are abused by men—whether through domestic violence, sexual assault, or nonconsensual pornography—are treated with skepticism and in many cases outright hostility.[310] Women are regarded as liars and manipulators, and prone to overreaction, unwise choices, and general confusion about their own desires. The impact of these negative stereotypes is particularly acute for women of color and those from lower socioeconomic backgrounds.[311]

Considering the uniquely harmful nature of privacy violations, the special power of criminal law to deter abusive behavior, and the fact that men's abuse of women is generally *under-*, not over-, criminalized, the benefits of criminalizing nonconsensual pornography outweigh the costs.

C. *First Amendment Concerns*

As previously mentioned, the various state laws criminalizing nonconsensual pornography vary considerably in scope, definitions, and clarity. Some of these laws suffer from constitutional infirmities, in particular First Amendment problems. Nonetheless, there is no reason that a criminal nonconsensual pornography law must conflict with the First Amendment. The IPPA was met with praise from many quarters, including First Amendment scholars. These included Professor Erwin Chemerinsky, Dean of Berkeley School of Law and one of the most influential legal scholars in the country. According to Professor Chemerinsky, "There is no First Amendment problem with this bill. The First Amendment does not protect a right to invade a person's privacy by publicizing, without consent, nude photographs or videos of sexual activity."[312] Professor Eugene Volokh, a First Amendment expert well known for his skepticism of "most privacy-based speech restrictions," stated that the Intimate Privacy Protection Act is "quite narrow, and pretty clearly defined."[313] Professor Neil Richards, a First Amendment and

310. *See, e.g.*, Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 95 (2008); *see also* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 79 (2000).

311. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252–82 (1991); Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1 (1998).

312. *See* Press Release, Office of Congresswoman Jackie Speier, *supra* note 205.

313. Tracy Clark-Flory, *Bill That Would Make Revenge Porn Federal Crime to Be Introduced*, VOCATIV (July 14, 2016, 10:25 AM), http://www.vocativ.com/339362/federal-revenge-porn-bill/.

privacy scholar, called IPPA "a very well-drafted law."[314]

However, there are those who claim that not only IPPA, but all attempts to legislate against nonconsensual pornography, are unconstitutional. Stated in the broadest terms, the objection to legislative reform regarding nonconsensual pornography is that such reform violates the First Amendment.[315] It is evident, however, that such a claim cannot be meant literally. It is difficult to find any critic who argues that there are *no* constitutionally permissible legal remedies for victims; indeed, as outlined above, much of the criticism of the legislative reform movement is based on the claim that adequate legal remedies already exist. The usual suspects include copyright law, privacy torts, intentional infliction of emotional distress claims, and/or criminal laws addressing conduct that often accompanies nonconsensual pornography, including law prohibiting hacking, identity theft, extortion, stalking, or harassment.

Putting aside for the moment the "other criminal laws" category, there is a clear conflict between the claim that regulating nonconsensual pornography violates the First Amendment and the assertion that the conduct is sufficiently addressed by existing law. In order to support the use of tort, copyright, or privacy law to address nonconsensual pornography, one must concede that *some* legal regulation of nonconsensual pornography must be compatible with the First Amendment. In other words, to praise the capacity of existing civil laws to address the harms of nonconsensual pornography is to approve the regulation of nonconsensual pornography, which is to acknowledge that these existing regulations do not violate the First Amendment.

In other words, no reasonable person seems to believe that "revenge porn" is categorically protected by the First Amendment. More nuanced critics instead assert that criminal laws against nonconsensual pornography are a very different matter from civil laws.[316] While civil laws indeed have different consequences than criminal laws, an issue that will be discussed below, the distinction between criminal and civil law is largely irrelevant for First Amendment purposes. We do not have two

---

314. *Id.*

315. *See, e.g.*, Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013), http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9.

316. *See, e.g.*, Steven Brill, *The Growing Trend of 'Revenge Porn' and the Criminal Laws That May Follow*, HUFFINGTON POST (Apr. 27, 2014, 5:33 PM), http://www.huffingtonpost.com/steven-brill/the-growing-trend-of-revenge-porn_b_4849990.html ("[T]he First Amendment presents support for the argument that one should not be arrested, let alone imprisoned, for publicizing its speech—in the form of these photographs or images. In fact, some suggest that the criminal law is the inappropriate venue in which to deal with this conduct. After all, the conduct is non-violent and a mere example of a somewhat harsh freedom of expression. Instead, perhaps the better course of action is to file a civil suit for the damages this conduct may cause.").

First Amendments, one for civil law and one for criminal law; and it is certainly not the case that the Supreme Court has decided that civil laws categorically raise fewer or less serious First Amendment issues than the latter. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel," noted the Court in *New York Times v. Sullivan.*[317] If anything, the Court has pointed in the opposite direction, observing that criminal statutes afford more safeguards to defendants than tort actions, suggesting that criminal regulation of conduct raises fewer First Amendment issues than tort actions.[318]

Consequently, the revised claim that "using *criminal* law to regulate revenge porn violates the First Amendment," turns out to be no more intelligible than the broad claim that "regulating revenge porn violates the First Amendment." More specificity is required, along the lines of concerns about overinclusiveness, underinclusiveness, vagueness, and overbreadth. But these concerns are not, of course, limited to criminal laws. Whatever analysis one applies to criminal statutes regulating nonconsensual pornography, one must also apply to civil or other statutes regulating nonconsensual pornography, which critics often fail to do.

If vagueness and overbreadth is a concern and narrowness is a virtue, then it should be relevant that criminal statutes regulating nonconsensual pornography based on this model statute are considerably narrower than many tort actions or other noncriminal approaches. Intentional infliction of emotional distress cases often come into the crosshairs of First Amendment challenges; copyright law is notoriously ambiguous and believed by many to exact heavy costs to freedom of expression;[319] and the standards of "unfair business practices" as promulgated by the Federal Trade Commission (FTC) are considerably vague.

The FTC decree against revenge porn site operator Craig Brittain is particularly interesting on this point. The decree prohibits Brittain from disseminating intimate images or video of individuals without their "affirmative express consent in writing" and permanently restrains and enjoins him from directly or indirectly making use of any personal information—including image and videos—obtained in connection with his revenge porn site. The order further requires Brittain to destroy all such information "in all forms" in his possession within thirty days. This is a broad order that effectively restricts a considerable amount of

317. 376 U.S. 254, 277 (1964).

318. *Id.* ("Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action.").

319. Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 320–22 (2013).

expressive conduct, yet no critic has claimed that the FTC's actions violate Brittain's First Amendment rights.

There is a fundamental oddity to be noted here about the debate over the constitutionality of "revenge porn" laws. Nonconsensual pornography laws based on this model statute are, in essence, privacy laws, and privacy laws are commonly presumed to be constitutional and commonsensical, both by the general public and by scholars.[320] That is, while such laws can be controversial in some cases, there appears to be general agreement that protecting sensitive information like medical records or Social Security numbers is something the law can and should do. When it comes to sensitive information in the form of naked pictures, however, the presumption flips: many people presume that laws that protect this information are inherently problematic. This is another way of saying that there appears to be a kind of sex exceptionalism in both lay and expert opinion about privacy and the First Amendment. Few people argue that there is a First Amendment right either to view or distribute drivers' license records, but many seem convinced that there is a First Amendment right to view or distribute naked pictures.

Another point is worth underscoring here. Like other privacy violations, nonconsensual pornography is not amenable to the strategy of "counter-speech" so cherished by First Amendment absolutists. Whatever the merits of the belief that the best answer to bad speech is more speech in other contexts, the approach is unintelligible in the face of privacy-destroying expression. One cannot "speak back" to the exposure of one's private information, whether it be medical records, private home addresses, or naked photos.

The constitutional analysis of nonconsensual pornography laws depends, of course, on the specific law. As detailed above, the model statute focuses on the knowing disclosure of private, sexually explicit photos or videos without the consent of those depicted and for no lawful public purpose. This is the soundest definition for both public policy and constitutional purposes. Other laws, especially those that add elements such as intent to harass, are more vulnerable to both policy and constitutional challenges. The defense of nonconsensual pornography laws against First Amendment objections offered here refers only to laws that are substantially similar to the model statute.

It is important to bear in mind that extreme assertions regarding the constitutionality of new laws rely on the fiction that First Amendment

320. *See* Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1505 (2015) (noting that "[d]espite calls from industry groups and a few isolated academics that these laws somehow menace free public debate, the vast majority of information privacy law is constitutional under ordinary settled understandings of the First Amendment").

doctrine is either coherent or predictable. As Professor Robert Post writes, "contemporary First Amendment doctrine is . . . striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech."[321] It is difficult to say with confidence what any court will do if and when it is faced with a question about the constitutionality of a given nonconsensual pornography statute. Courts might consider revenge porn to receive no First Amendment protection at all, in which case nonconsensual pornography laws would raise no First Amendment issues. Alternatively, courts might determine that nonconsensual pornography laws trigger minimal First Amendment scrutiny. Another possibility is that courts might decide that such laws trigger but survive strict scrutiny. Finally, it is possible, though unlikely, that courts will decide that such laws trigger and do not survive strict scrutiny. The following Subsections will consider each of the first three possibilities as applied to the model law.

1. Nonconsensual Pornography as Unprotected by the First Amendment

The First Amendment is one of the most frequently invoked and most misunderstood constitutional rights. One of the most common misperceptions, aside from the belief that the First Amendment applies to non-state actors, is that the First Amendment protects all forms of expression. A slightly more sophisticated, but still inaccurate, belief is that the First Amendment protects all forms of expression except for a few discrete categories, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[322] As Professor Frederick Schauer writes, the few categories that the Court has explicitly determined not to receive First Amendment protection do not "represent the universe of speech lying outside the First Amendment."[323] For an accurate determination of what forms of speech the First Amendment does not protect, "we must consider not only the speech that the First Amendment noticeably ignores, but also the speech that it ignores more quietly."[324]

It is not implausible that a court could treat nonconsensual pornography as belonging to an existing and explicit category of exception to full First Amendment protection. Even if it does not,

321. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249–50 (1995).

322. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–69, 1774–77 (2004).

323. *Id.* at 1777–78.

324. *Id.* at 1778.

however, nonconsensual pornography could still be considered a category of speech that is an implicit exception to the First Amendment, or as a new category of exception.

a. As Explicit Category of Exception

In *United States v. Stevens*,[325] the Supreme Court reiterated that some forms of speech have historically been unprotected by the First Amendment.[326] The categories the *Stevens* court listed were obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[327] A court could consider nonconsensual pornography to belong to one of these categories. The most likely candidates from this list would be obscenity and fighting words, though both have fallen out of fashion and are far from perfect fits. This Subsection will explore these possibilities.

1. Obscenity

In *Miller v. California*,[328] the Court set out the following guidelines for determining whether material is obscene:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . , (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[329]

The Supreme Court provided two "plain examples" of "sexual conduct" that could be regulated: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[330]

The primary challenge of classifying nonconsensual pornography as obscenity is the fact that much of the content in question—e.g., topless photos, videos of consensual adult sexual activity—is not "patently offensive" as such. Volokh has suggested that, nonetheless, "[h]istorically and traditionally, such depictions would likely have been seen as unprotected obscenity (likely alongside many consensual

325. 559 U.S. 460 (2010), *superseded by statute*, 48 U.S.C. § 48 (2012).
326. *Id.* at 470.
327. *Id.* at 468.
328. 413 U.S. 15 (1973).
329. *Id.* at 24.
330. *Id.* at 25.

depictions of nudity)."[331] A stronger argument might be that disclosing pictures and videos that expose an individual's genitals or reveal an individual engaging in a sexual act without that individual's consent could be considered a "patently offensive representation" of sexual conduct that offers no "serious literary, artistic, political, or scientific value."[332] Cynthia Barmore has argued that there is a common intuition that nonconsensual pornography is offensive, "rooted in the context in which revenge porn arises and the resulting violation of the core principle in intimate relationships that all aspects of sexual activity should be founded on consent. That violation occurs whenever a sexually explicit image is disseminated against the will of one party."[333]

Treating nonconsensual pornography as obscenity may be a poor fit for several reasons, however. First, it may produce unintended consequences if the classification is based on the content of the material rather than the manner in which it is disclosed. As Professor John Humbach has argued, "[t]he obscenity exception may permit bans on *legally obscene* revenge porn, but only perhaps at the risk of also subjecting the obscenity's producer to a risk of criminal prosecution."[334] That is, if the type of sexually explicit content in private images is considered obscene, the person creating it—who is often the person depicted—may well bear criminal responsibility along with (or instead of) the person who distributes it.[335] More fundamentally, the obscenity approach may be in tension with the goals of anti-subordination and gender equality—the association of naked bodies, especially women's bodies, with obscenity could potentially do more to reinforce sexual shame than to respect sexual autonomy.[336] Finally, there is the practical reality that while obscenity remains a formal category of expression not protected by the First Amendment, criminal prosecutions of obscenity are exceedingly rare.

---

331. Eugene Volokh, *Florida 'Revenge Porn' Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013), http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/.

332. Professor Volokh may also be making this argument when he writes that courts could uphold a "clear and narrow statute banning nonconsensual posting of nude pictures of another, in a context where there's good reason to think that the subject did not consent to publication of such pictures" on the correct basis that, "as a categorical matter[,] such nude pictures indeed lack First Amendment value." *Id.*

333. Cynthia Barmore, Note, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 STAN. L. REV. 447, 463 (2015).

334. *See* John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 215, 235–36 (2014).

335. Something similar has in fact materialized in the prosecution of minors who engage in consensual "sexting" activity for child pornography.

336. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 146–62 (1987).

2. Fighting Words

In *Chaplinsky v. New Hampshire*,[337] the Court found that among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" was a category of "'fighting' words," words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[338] The Court explained that fighting words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[339]

The "tendency to incite an immediate breach of the peace" branch of this analysis is not likely to prove useful in the nonconsensual pornography context, given that it is, as Professor Cynthia Bowman has observed, "male-biased in its central concept—the assumption that the harm of personally abusive language either consists in, or can be gauged by, its tendency to provoke a violent response."[340] However, the first branch, which focuses on words that "by which their very utterance inflict injury," has some potential.[341] Bowman suggests that fighting words may be a potential avenue for regulating street harassment, and the argument might work for nonconsensual pornography as well. Bowman posits that "[i]f women plaintiffs can establish that street harassment falls within this branch by explaining the injuries that the words inflict, as well as the reasons why they—unlike men—are unlikely to fight back, the fighting words doctrine may hold more promise than any other legal standard."[342] Similarly, if victims of nonconsensual pornography can demonstrate the immediate harm caused by nonconsensual pornography, which include humiliation, anxiety, fear, and trauma, the conduct might be considered a form of—to use Justice Antonin Scalia's words in reference to workplace sexual harassment—"sexually derogatory 'fighting words.'"[343] Like obscenity, however, the "fighting words" exception does not offer much hope of frequent and effective usage.

b. As Implicit Category of Exception

Even if nonconsensual pornography does not belong to an explicit category of exception to the First Amendment, nonconsensual

337. 315 U.S. 568 (1942).

338. *Id.* at 571–72 (1942) (footnote omitted).

339. *Id.*

340. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 563 (1993).

341. *Id.* at 547.

342. *Id.*

343. R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992).

pornography might nonetheless not receive First Amendment protection. While the majority in *Stevens* implied that its list of categories was virtually exhaustive, many scholars have criticized this assertion. These five categories come nowhere close to capturing all the categories of exceptions that the Court has recognized in the context of First Amendment protections—forty-eight by the count of one constitutional scholar.[344] Even that longer list of exceptions does not capture the vast amount of expression that the Court has quietly never subjected to First Amendment scrutiny. As Professor Schauer writes,

> no First Amendment-generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional, whether corporate executives may be imprisoned under the Sherman Act for exchanging accurate information about proposed prices with their competitors, whether an organized crime leader may be prosecuted for urging that his subordinates murder a mob rival, or whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool.[345]

In all of these examples, Schauer observes, some punishment is imposed for speech on the basis of both the content and the impact of the speech. [346] Regardless, "no First Amendment degree of scrutiny appears. In these and countless other instances, the permissibility of regulation—unlike the control of incitement, libel, and commercial advertising—is not measured against First Amendment-generated standards."[347] In other words, the view that all speech is presumptively protected by the First Amendment, as well as the view that all speech is protected subject only to a few narrow, historically recognized exceptions, is simply wrong. So even if nonconsensual pornography laws are considered to be content-based, it does not necessarily follow that such laws raise *any* First Amendment concerns, much less compelling ones. Nonconsensual pornography may well belong to the implicit category of expression that receives no First Amendment attention at all.

344. Ronald K.L. Collins, *Exceptional Freedom – The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–18 (2013).

345. Schauer, *supra* note 322, at 1770.

346. *Id.* at 1770–71.

347. *Id.* at 1771.

c. As New Category of Exception

The Court could also, in theory, decide to treat nonconsensual pornography as a new category of particularly harmful speech. While the Court asserted in *Stevens* that there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment,"[348] it did not reject the possibility that new categories may nonetheless be added in the future: "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[349] The holding in *Stevens* makes it clear that "depictions of animal cruelty" is not one of those categories,[350] but that does not mean that First Amendment jurisprudence is completely frozen in time. Child pornography, for example, was not a category historically recognized as unprotected by the First Amendment, and yet the Court determined in 1982 that child pornography did not receive First Amendment protection.[351] The *Stevens* court was at pains to explain that the determination in *New York v. Ferber* was grounded in a historically unprotected exception; that is, child pornography was "intrinsically related" to the criminal activity of child abuse.[352] Given that nonconsensual adult pornography is also strongly related to criminal activity, including extortion, stalking, harassment, and rape, as well as strongly related to unlawful sex discrimination,[353] a court might well decide that it too deserves to be added to the list of explicit categories unprotected by the First Amendment.

2. Nonconsensual Pornography Laws Under Intermediate Scrutiny

Assuming for the sake of argument that nonconsensual pornography does receive some form of First Amendment protection, and therefore that restrictions on it trigger some sort of First Amendment scrutiny, there is a strong case to be made that this scrutiny should not be particularly searching. First, it can be argued that nonconsensual pornography laws based on the model statute are not content-based restrictions, but rather time, place, and manner restrictions that should receive minimal or intermediate scrutiny. If, arguendo, the laws are considered to be content-based restrictions, they should still receive less rigorous scrutiny, as the expression they seek to regulate is not the kind of core political speech that receives the highest level of First Amendment protection.

---

348. United States v. Stevens, 559 U.S. 460, 472 (2010).

349. *Id.*

350. *Id.*

351. *Id.* at 471 (noting that the Court's decision in *New York v. Ferber* identified child pornography as a category of "speech as fully outside the protection of the First Amendment").

352. *Id.*

353. *See* discussion *infra* Subsection II.C.2.

a. As Content-Neutral Restriction

Laws based on my model nonconsensual pornography statute do not prohibit the publication of material based on its content or its message. Under the model law, private, sexually explicit photos and videos can be freely distributed, so long as the disclosure is made with the consent of those depicted or for a lawful public purpose. The images may be flattering or degrading, refined or crude. Consensually distributed images do not differ in content or message from images distributed without consent. The model law does not favor some types of sexually explicit content over others or require that sexually explicit material promote a certain message. Nonconsensual pornography laws based on my model statute restrict no message, only the manner of distribution. The governmental purpose is to protect privacy, not to express disapproval or suppress unfavorable viewpoints. Therefore, such laws can be characterized as a content-neutral "time, place, and manner" restriction. A law that regulates expressive activity "is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'"[354]

Because time, place, and manner restrictions are content-neutral, not content-based, they receive a lower form of scrutiny than content-based restrictions.[355] While such restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests," they are not required to be "the least restrictive or least intrusive means of doing so."[356] Rather, narrow tailoring requires only that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[357] The model statute protects the government's interest in preserving the intimate privacy of its citizens, an interest that would be very difficult to achieve without regulation.

b. As Content-Based Restriction

If nonconsensual pornography laws are nonetheless considered to be content-based restrictions, this does not mean that they should be reviewed under strict scrutiny. While the Court has held that "content-based regulations of speech are presumptively invalid,"[358] it has also recognized that the rationale of the general prohibition against content-

354. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

355. *Id.* at 791.

356. *Id.* at 798.

357. *Id.* at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

358. Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

based regulations "is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[359] The Court has noted that there are "numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted."[360]

The Supreme Court has "long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection,'" whereas "speech on matters of purely private concern is of less First Amendment concern."[361] Sexually graphic images intended either for no one's viewing or only for viewing by an intimate partner is a matter of purely private concern. While the disclosure of some matters of private concern may qualify for First Amendment protection, there must be some legitimate interest in these matters for this to be the case.[362] There is no such legitimate interest in disclosing or consuming sexually explicit images without the subjects' consent, with the exception of disclosures that serve the public interest.[363] Prohibiting the nonconsensual disclosure of sexually graphic images of individuals poses "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas."[364] The Court has recognized that distribution of homemade sexually explicit material "does not qualify as a matter of public concern under any view."[365]

The Supreme Court has moreover used a reduced level of scrutiny for the regulation of sexually explicit material, even when that material does not rise to the level of obscenity.[366] Such speech is afforded First Amendment protection "of a wholly different, and lesser, magnitude."[367] Courts have routinely applied intermediate scrutiny to and upheld laws that address the secondary effects of sexually explicit material, as long as the restrictions are intended to serve a substantial government interest,

359. *Davenport*, 551 U.S. at 188 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 387 (1992)).

360. *Id.*

361. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)).

362. Connick v. Myers, 461 U.S. 138, 147 (1983).

363. An exception accounted for in the model statutes.

364. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (quoting Dun & Bradstreet, 472 U.S. at 760). In *Snyder*, the Court suggested that a matter is "purely private" if it does not contribute to "the free and robust debate of public issues" or the "meaningful dialogue of ideas." *Id.*

365. City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (per curiam).

366. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976).

367. *Id.*

are narrowly tailored to serve that interest, and do not unreasonably limit alternative avenues of communication.[368]

In addition, nonconsensual pornography undermines historically protected rights, including the rights not to speak and to maintain one's privacy against unwarranted intrusions.[369] Numerous state and federal laws prohibiting the unauthorized distribution of private information—from trade secrets to medical records to drivers' licenses to Social Security numbers to video rentals—have never been deemed unconstitutional or even challenged on constitutional grounds.[370] The "publication of private facts" tort is widely accepted by the majority of courts to comply with the First Amendment, although the Supreme Court has yet to rule explicitly on the constitutionality of this tort with regard to matters not of public record. According to the *Restatement (Second) of Torts*:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[371]

Laws restricting disclosure of private information serve important speech-enhancing functions. In his concurrence in *Bartnicki v. Vopper*,[372] Justice Stephen Breyer noted that while nondisclosure laws place "direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives,"[373] that is, the interest in "fostering private speech."[374] He continued, "the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy . . . . [W]e should avoid adopting overly broad or

368. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–50, 54 (1986) (upholding a zoning ordinance restricting the location of adult theaters); Vivid Entm't, LLC v. Fielding, 774 F.3d 566, 580 (9th Cir. 2014) (upholding a measure requiring male performers in adult films to wear condoms); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 831 (7th Cir. 1999) (upholding ordinance limiting the hours of operation for adult bookstores).

369. *Cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (describing sexual conduct as "the most private human conduct"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

370. *See generally* Daniel J. Solove, *A Brief History of Information Privacy Law*, *in* PROSKAUER ON PRIVACY LAW (2006) (discussing various acts and case laws regarding the restricted distribution of medical records, drivers' licenses, Social Security numbers, etc.).

371. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

372. 532 U.S. 514 (2001).

373. *Id.* at 537–38 (Breyer, J., concurring).

374. *Id.* at 536.

rigid constitutional rules, which would unnecessarily restrict legislative flexibility."[375]

Justice Breyer's concurrence highlights how "chilling effects" can be produced not only when laws over-deter people from engaging in protected expression, but also when laws fail to protect privacy. Consider the typical advice meted out to those who fear falling prey to nonconsensual pornography: "Just don't take pictures!" In addition to blaming the victim, such a response literally instructs those most likely to be victimized by this practice—that is, women—to refrain from certain forms of expressive conduct, namely, the use of image-capturing technology in their sexual expression. Such an approach is openly hostile to freedom of expression.[376] The fear that private, intimate information might be exposed to the public not only discourages women from engaging in erotic expression, but also from other kinds of expressive conduct. Many women report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed. When nonconsensual pornography targets women in politics, as it often does,[377] it imposes additional harms: it discourages women from becoming active in politics, creates a significant hurdle for women's political engagement, and undermines the quality and integrity of democratic participation. Thus, the failure to prohibit nonconsensual pornography has a uniquely chilling effect on political speech—the very form of speech that is supposed to receive the greatest protection by the First Amendment.

The "don't take pictures" response also ignores the fact that many victims did not voluntarily produce the material in question. As cameras have gotten smaller and more portable, women have increasingly been subjected to surreptitious photography and recording in both public and private spaces. Many nonconsensual pornography victims were not aware that their sexual encounter was being filmed. "Upskirt" and "downblouse" photography usually takes place without the woman's knowledge and certainly without her consent. The horrifying modern trend of recording sexual assaults is yet another category of involuntary

375. *Id.* at 541.

376. *See* Scott Gant, *Sex, Privacy, and Videotape: Lessons of Gawker's Downfall*, WIRED (Aug. 16, 2016, 5:30 AM), http://www.wired.com/2016/08/gawker-hulk-hogan-auction/ ("[T]he notion that Hogan should be penalized for previously discussing his sex life in public was itself problematic for a defendant cloaking itself in the First Amendment. If Gawker's view were adopted by courts, then speakers would have to censor themselves or risk having their personal information displayed before the world on the grounds that their own prior statements turned the subjects of their speech into 'matters of public concern.'").

377. *See, e.g.*, John Bresnahan & Alex Isenstadt, '*Private' Video of Virgin Islands Democratic Delegate Posted Online*, POLITICO (July 21, 2016, 1:27 PM), http://www.politico.com/story/2016/07/stacey-plaskett-sex-tape-225951.

exposure. If it is women's responsibility to avoid the devastating and irremediable effects of nonconsensual pornography, they must not only refrain from using photography and video for their own voluntary erotic expression, but also constantly guard against involuntary recording by others. Women would need to adjust their daily clothing choices—no skirts, certainly, or any tops with gaps or buttons—as well as avoid situations in which they could possibly be sexually assaulted, which is to say, any situation, especially in which they might come into contact with men. These are chilling effects in the extreme.

Because nonconsensual pornography is a practice disproportionately targeted at women and girls, it could be considered a form of discrimination that produces harmful secondary effects. Protections against discriminatory conduct are valid under the First Amendment,[378] and content-based regulations that are predominantly concerned with harmful secondary effects rather than the expressive content of particular conduct do not violate the First Amendment.[379] Prohibitions against discrimination on the basis of race, sex, national origin, and other categories, even when such discrimination takes the form of "expression," have been upheld by the Supreme Court.[380] Title II and Title VII of the Civil Rights Act of 1964,[381] along with Title IX of the Education Amendments of 1972, all allow for the regulation of certain forms of speech and expression when they violate fundamental principles of equality and nondiscrimination.[382] Apart from the harm that nonconsensual pornography inflicts on individual victims, it inflicts discriminatory harms on society as a whole. Like other abuses directed primarily at women and girls, such as rape, intimate partner violence, and sexual harassment, nonconsensual pornography reinforces the message

---

378. Wisconsin v. Mitchell, 508 U.S. 476, 482 (1993) (noting that "antidiscrimination laws . . . have long been held constitutional").

379. R.A.V. v. City of St. Paul, 505 U.S. 377, 389–90 (1992) ("Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech,' . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." (emphasis omitted)).

380. *Id.* at 389 ("[S]ince words can in some circumstances violate laws directed not against speech, but against conduct . . . a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct, rather than speech . . . Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.").

381. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2012)).

382. *Id.*

that women's bodies belong to men, and that the terms of women's participation in any sphere of life are to be determined by their willingness to endure sexual subordination and humiliation. Nonconsensual pornography causes women to lose jobs, leave school, change their names, and fear for their physical safety, driving women out of public spaces and out of public discourse.[383] Combating this form of sex discrimination is not only consistent with longstanding First Amendment principles, but comports with equally important Fourteenth Amendment equal protection principles.

Assuming, then, that some degree of constitutional scrutiny of nonconsensual pornography laws is appropriate, the proper standard is intermediate review. Prohibiting the distribution of sexually explicit images of individuals without their consent does not raise the specter of the government attempting to inhibit debate on issues of public concern or to drive certain viewpoints from the marketplace. Such laws are aimed at the protection of highly personal private information and the prevention of harmful secondary effects (including financial, reputational, psychological, and discriminatory injuries) that invariably flow from the disclosure of sexually explicit depictions of individuals without their consent.[384] The intermediate scrutiny standard provides sufficient protection for any First Amendment interests at stake.

3. Nonconsensual Pornography Laws Under Strict Scrutiny

Some scholars have asserted that nonconsensual pornography laws are not only content-based, but also viewpoint-based, and thus necessarily trigger more than just First Amendment scrutiny.[385] It bears emphasizing here that the model statute focuses on the harm caused by the disclosure

383. Nina Bahadur, *Victims of 'Revenge Porn' Open Up on Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 10, 2014, 8:50 AM), http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html.

384. *See* Dahlstrom v. Sun-Times Media, L.L.C., 777 F.3d 937, 949–52 (7th Cir. 2015) (applying intermediate scrutiny to restrictions on the disclosure of personal information); Vivid Entm't, L.L.C. v. Fielding, 774 F.3d 566, 580–81 (9th Cir. 2014) (applying intermediate scrutiny to restrictions directed at the secondary effects of sexually explicit depictions).

385. *See* Humbach, *supra* note 334, at 217. Humbach claims that revenge porn laws "constitute unconstitutional content discrimination, viewpoint discrimination and speaker discrimination, not to mention prior restraint." *Id.* Humbach's alternative proposed solution is to "draft a law that defines its prohibition in such a way that its burden on speech is merely 'incidental' to a valid non-speech-related purpose, thus qualifying the law for review under *O'Brien*'s less exacting intermediate-scrutiny standard." *Id*. at 249–50. Humbach suggests the following language: "It is a criminal offense for any person, in the absence of a purpose to convey or disseminate truthful information or ideas, to do any act intended to cause or otherwise attempt to cause extreme emotional distress to another person." *Id.* at 251. This statute is both overbroad and vague, similar to the cyberbullying statutes that have been found unconstitutional in state courts. *See* discussion *infra* Section III.B.

of private information and not on other harms that may also follow, such as reinforcing negative views about women or sexuality. Laws that focus on those negative views are indeed open to the charge that the regulation is an attempt by the government to suppress a disfavored viewpoint and will likely not survive First Amendment scrutiny.[386] The model statute, by contrast, is uninterested in viewpoint. While nonconsensual pornography certainly does often stigmatize its victims—particularly women—as promiscuous or sexually immoral, that is not what permits the government to regulate the manner in which certain types of private material is distributed. Rather, it reflects the government's compelling interest in preventing physical and psychological harms and protecting privacy. Like laws that regulate the public disclosure of other forms of private information, from medical records to Social Security numbers, nonconsensual pornography laws based on my model statute are not aimed at suppressing the negative messages that such information might convey. Rather, they are aimed at protecting the right of citizens to maintain control over who has access to their private information and preventing the harms that flow from exposure of private information.

Accordingly, even if nonconsensual pornography laws based on the model statute were reviewed under strict scrutiny, they should survive, as they are narrowly tailored to address compelling government interests.

---

386. In an intriguing article, Professor Andrew Koppelman argues that nonconsensual pornography laws do constitute viewpoint discrimination but are nonetheless justifiable because First Amendment doctrine should allow for the regulation of speech that is "antithetical to liberalism": "Sexism is antithetical to liberalism, but liberalism generally addresses it by means other than the restriction of speech. Here, however, there is no other way to do it. The general principles that appropriately govern free speech law should not govern here." Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 690 (2016). Koppelman's reasoning here resembles the approach of the Minneapolis anti-pornography ordinance struck down by the U.S. Court of Appeals for the Seventh Circuit in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). As the court observed, the ordinance's definition of pornography meant that "[s]peech that 'subordinates' women . . . is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content." *Id.* at 328. The court firmly held that such a position violates the First Amendment:

> The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters "premised on equality"—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

Id. at 325 (citation omitted).

The model statute protects the government's interest in preventing the real-life harms of nonconsensual pornography. As the Court observed more than century ago, "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow," and to "compel any one . . . to lay bare the body . . . without lawful authority, is an indignity, an assault, and a trespass."[387] Laws regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of one's body. Criminal laws prohibiting surveillance and voyeurism rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person's consent not only inflicts dignitary harms upon the individual observed, but inflicts a social harm serious enough to warrant criminal prohibition and punishment.[388] As previously discussed, victims of nonconsensual pornography suffer a wide range of harms, from the trauma and humiliation of having the most intimate and private details of their lives placed on display to job loss, severe harassment and threats, and serious reputational harm. There should be little question that preventing these harms is a compelling governmental interest.

Even in the absence of concrete harm, the protection of privacy is essential for fostering the relationships and values crucial to an open society. People rely on the confidentiality of transactions in other contexts all the time: they trust doctors with sensitive health information; salespeople with credit card numbers; and lawyers with their closely guarded secrets. They are able to rely on the confidentiality of these transactions because society takes it as a given that consent to share information is limited by context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished.[389] Laws protecting victims from unauthorized disclosures of their financial, legal, or medical information have a long and mostly uncontroversial history. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information.[390] The protection of a private individual's sexual

387. Union Pac. R.R. v. Botsford, 141 U.S. 250, 251–52 (1891).

388. *See generally* NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE & NAT'L DIST. ATTORNEYS ASS'N, VOYEURISM STATUTES 2009 (2009) [hereinafter VOYEURISM STATUTES 2009], http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf (cataloguing the voyeurism legislation across U.S. jurisdictions).

389. *See, e.g.*, 18 U.S.C. § 1832(a)(2) (2012) (criminalizing the unauthorized disclosure of trade secrets); 42 U.S.C. § 1320d-6(a)(3) (2012) (criminalizing the unauthorized disclosure of individually identifiable health information).

390. *See, e.g.*, 18 U.S.C. § 1832(a)(2) (criminalizing the unauthorized disclosure of trade secrets); 42 U.S.C. § 1320d-6(a)(3) (criminalizing the unauthorized disclosure of individually identifiable health information).

information against unauthorized disclosure is entitled to at least the same respect.

Furthermore, by protecting people against the disclosure of intimately private images without their consent, the model statute advances the government's interest in safeguarding important aspects of speech and expression. Although privacy laws do, in some sense, restrict speech, they also "directly enhance private speech" because their "assurance of privacy helps to overcome our natural reluctance" to communicate freely on private matters out of fear that those communications "may become public."[391] This is particularly true when the potential dissemination is extremely wide-ranging, as it is with images distributed online. The fear that private, intimate information might be exposed to the public discourages individuals from engaging not only in erotic expression, but also from other kinds of expressive conduct. Many victims report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed.[392]

To suggest that none of these is a compelling governmental interest would cast into doubt widely accepted legal restrictions for the protection of privacy, from restrictions on the disclosure of records with personally identifying information, to criminal prohibitions on voyeurism and unlawful surveillance, to common-law protections against publicizing the private life of another.

The model statute is moreover narrowly drawn to protect the fundamental right to privacy without infringing upon freedom of speech. It prohibits only the knowing and unauthorized disclosure of images of identifiable persons who are nude or engaging in sexual conduct. The law specifically exempts disclosures that are made in the public interest. The provision also does not apply to disclosures of images of voluntary nudity or sexual conduct in public or commercial settings. Nonconsensual pornography laws based on my model statute do not amount to a complete ban on expression.[393] People remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images. Moreover, they remain free to criticize or complain about fellow citizens in ways that do not violate the privacy rights of others. The narrowly tailored prohibition in the model statute does not come close to shutting down the vast number of ways in which people may vent their anger and aggression. The Internet has provided innumerable opportunities for aggressive and offensive interactions, and the First Amendment largely

391. Bartnicki v. Vopper, 532 U.S. 514, 537 (2001) (Breyer, J., concurring).

392. *See* Natalie Gil, *Victims of Revenge Porn Turn to Students for Legal Advice*, GUARDIAN (July 25, 2016, 9:38 AM), https://www.theguardian.com/law/2016/jul/25/victims-of-revenge-porn-turn-to-students-for-legal-advice.

393. *See* Vivid Entm't, L.L.C. v. Fielding, 774 F.3d 566, 578–79 (9th Cir. 2014).

protects those opportunities. The First Amendment does not, however, protect the unauthorized distribution of personal, private, and intimate images unrelated to any public interest.

III. MAKING SENSE OF THE OPPOSITION

When the issue of nonconsensual pornography first began receiving extensive public attention, representatives of the American Civil Liberties Union (ACLU) reacted by declaring that *no* criminal law prohibiting the nonconsensual distribution of sexually explicit images was permissible within the bounds of the First Amendment.[394] The organization soon backed away from this approach[395] and took a different tack, insisting on an arbitrarily narrow definition of the crime. This definition required, in essence, that the perpetrators be current or former intimate partners and be motivated by the intent to harass their victims. Despite having no basis for claiming that either of these limitations is necessary to survive First Amendment challenge and, indeed, ignoring the fact that both limitations *create* First Amendment vulnerabilities, the ACLU has succeeded in intimidating several state legislatures into watering down their laws according to the ACLU's specifications.

The ACLU was apparently emboldened by the outcome of its lawsuit over Arizona's "revenge porn" law in 2014. The ACLU pressured Arizona to replace its original law, which characterized the crime as a privacy violation, with ACLU's preferred version, which transformed the law into a weak and duplicative anti-harassment provision. Though no determination of the constitutionality of Arizona's original law was ever made (the state of Arizona merely agreed to not enforce the original law), the ACLU and its surrogates—the Media Coalition and later the Motion Pictures Association of America—repeatedly insinuated and at times outright falsely claimed that Arizona's law had been declared unconstitutional.[396] In fact, the only nonconsensual pornography law that

---

394. *See* Eric Schulzke, *California Lawmakers Target 'Revenge Porn' but Miss, Critics Say*, DESERET NEWS (Sept. 8, 2013, 5:25 PM), http://www.deseretnews.com/article/865586019/California-lawmakers-target-revenge-porn-but-miss-critics-say.html (noting that the Northern California ACLU had written a confused letter opposing the state's new "revenge porn" bill without making any coherent First Amendment arguments or citing to any relevant cases); *see also* Liz Halloran, *Race to Stop 'Revenge Porn' Raises Free Speech Worries*, NPR (Mar. 6, 2014, 11:16 AM), http://www.npr.org/blogs/itsallpolitics/2014/03/06/286388840/race-to-stop-revenge-porn-raises-free-speech-worries.

395. "Will Matthews, a spokesman for the ACLU of Northern California, said that the ACLU had no objections to the bill, but he could not offer any explanation for why the initial objection letter was sent, nor what changes in the bill altered their viewpoint." Schulzke, *supra* note 394.

396. *See, e.g.*, Memorandum from Media Coalition, Inc., to Minn. Legislature, https://drive.google.com/file/d/0B2LoKN1jK5BNVHRZdW9valMwZms/view?usp=sharing (falsely claiming that "[t]he state of Arizona agreed to a permanent bar on enforcing the law

UCLA LAW REVIEW

The Freedom of Speech and Bad Purposes

Eugene Volokh

ABSTRACT

Can otherwise constitutionally protected speech lose its protection because of the speaker's supposedly improper purpose? The Supreme Court has sometimes said "no"—but sometimes it has endorsed tests (such as the incitement test) that do turn on a speaker's purpose. Some lower courts have likewise rejected purpose tests. But others hold that, for instance, a purpose to annoy or distress can turn otherwise protected speech into criminal "harassment," or that a selfish purpose can strip protection from otherwise protected government employee speech. This Article analyzes purpose tests in First Amendment law, and concludes that such tests are on balance unsound; the protection of speech should not turn on what a factfinder concludes about the speaker's purposes.

AUTHOR

Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Many thanks to Samuel Bray, Claire Hill, Leslie Kendrick, Steven Lubet, Herb Morris, and Seana Shiffrin for their comments.

TABLE OF CONTENTS

INTRODUCTION

You want to say something. You are sure its content is constitutionally protected: This isn't speech that is understood to lack First Amendment value, such as defamatory falsehoods, obscenity, or child pornography. But could you still be restricted from saying it because you have a certain purpose—for instance, because your goal is to affect a political campaign, to get revenge on someone, to promote your own professional or financial self-interest, or to help unknown listeners commit crimes?

At times, the U.S. Supreme Court has said that speech can't be stripped of First Amendment protection because of the speaker's purpose. "[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection," wrote Chief Justice Roberts in his *FEC v. Wisconsin Right to Life, Inc.* lead opinion, and the concurrence agreed.[1] The Court has rejected purpose-based tests before in libel and emotional distress cases.[2] Some lower courts have done the same in threat cases, sexually motivated photography cases, and government employee speech cases.[3]

Yet many lower courts have been willing to adopt tests that do turn on a speaker's motivation, for instance:

a. Government employee speech: When is government employee speech "on a matter of public concern," and thus potentially protected against employer retaliation? Some circuits answer by considering whether the employees had the purpose to just improve their own working conditions, rather than to promote the public interest.[4]

b. Crime-facilitating speech: When does speech that informs people how to commit crimes lose First Amendment protection? The Fourth

1. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007) (Roberts, C.J., joined by Alito, J.) (quoting MARTIN H. REDISH, MONEY TALK$: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001)). The three concurring Justices agreed, reasoning that "test[s] that [are] tied to the public perception, or a court's perception, of . . . intent" are "ineffective to vindicate the fundamental First Amendment rights" of speakers. *Id.* at 492 (Scalia, J., concurring in part and concurring in the judgment).

2. *See infra* Part IV.A.2.

3. *See* United States v. White, 670 F.3d 498, 511 (4th Cir. 2012), *overruled as to other matters by* Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (concluding, as a statutory matter, that the government must prove recklessness or knowledge in threats cases, as opposed to the negligence that *White* would have allowed, but not endorsing a purpose test); *Ex parte* Thompson, 442 S.W.3d 325, 338 (Tex. Crim. App. 2014); Chappel v. Montgomery Cty. Fire Prot. District No. 1, 131 F.3d 564, 575 (6th Cir. 1997); Sullivan v. River Valley Sch. Bd., No. 181913, 1998 WL 1988912, at *1 (Mich. Ct. App. Nov. 6, 1998).

4. For more details on all these categories, see Parts II.A–II.H, respectively.

Circuit and the Justice Department have concluded that such speech is unprotected when the speaker has the purpose to promote crimes (rather than, say, to simply inform the public about how the crimes are being committed).

c. Criminal harassment: When may annoying or distressing speech said about a person be punished as criminal harassment, or restrained by an antiharassment order? Many state and federal criminal harassment statutes draw the line at speakers who have the purpose to annoy or distress the subjects of their speech. Some courts have upheld those statutes on the grounds that speech said with this bad purpose is constitutionally unprotected.
d. Sexually motivated speech and photography: When may public photography of unconsenting subjects be criminally punished? Likewise, when may communication to minors be punished? Some laws draw the line at speakers who have the purpose to sexually arouse someone, whether themselves or listeners. These laws have faced a mixed reception in court.
e. Revenge porn: When may distributing pictures of people naked or having sex, without the subjects' consent, be punishable? Some state laws punish such speech but only when the distributors seek to humiliate the subjects or damage the subjects' reputation, thus excluding distributors who have other purposes (such as making money by selling sex videos of now-famous ex-partners).
f. Right of publicity: When may someone sue because a fictional character was named after him? The Missouri Supreme Court has held that the person has a good right-of-publicity claim when the author has the primary purpose to make money, as opposed to having the primary purpose of self-expression.
g. Interference with business relations: When may a person sue a speaker who is urging others to boycott or fire the person? Some courts allow such claims under the "interference with business relations" tort when the speaker primarily seeks to damage the target, rather than having some worthier goal (such as economic competition).
h. Threats: When may a statement that a reasonable person would perceive as threatening be punished as a threat? Some courts draw the line at speech spoken with the purpose of putting the target in fear.

And there is some Supreme Court authority supporting such purpose tests, despite the above-quoted language in *Wisconsin Right to Life*. The *Brandenburg v. Ohio* incitement test, for instance, provides that speech can be restricted if it is "*directed* to inciting or producing imminent lawless action and is likely to incite or produce such action."[5] *Hess v. Indiana* held that "directed to" here means intended to persuade people to act illegally.[6]

Likewise, membership in a political group that engages in some illegal acts can lead to government-imposed penalties only when the member had a "knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."[7] This too has generally been understood as requiring a purpose to aid the illegal aims. And in one mid-1960s case, the Supreme Court concluded that demonstrating outside a courthouse with the purpose to influence judges or jurors may be made a crime. The Court did not opine on whether such demonstrations can likewise be outlawed even when they were engaged in with the mere knowledge that they would influence judges or jurors, but it seems possible that the purpose/knowledge distinction was indeed constitutionally significant here.[8]

In this Article, I will argue that the Court's statement in *Wisconsin Right to Life* is generally correct: A speaker's purpose ought not be seen as stripping First Amendment protection from otherwise protected speech.[9] Generally speaking, I will argue, a speaker's purpose doesn't affect the value of the speech to listeners or to public debate.[10] Tests that ostensibly turn on the speaker's purpose are likely to unacceptably deter even speech that is said without such a purpose.[11] And a speaker's purpose doesn't affect the harm caused (or not caused) by the speech.[12] Purpose tests might make more sense in laws that focus on the speaker's purpose

5. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).
6. Hess v. Indiana, 414 U.S. 105, 109 (1973).
7. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919–20 (1982) (civil liability); Healy v. James, 408 U.S. 169, 185–86 (1972) (university action with regard to students); United States v. Robel, 389 U.S. 258, 265 (1967) (government employment); Scales v. United States, 367 U.S. 203, 229 (1961) (criminal punishment).
8. Cox v. Louisiana, 379 U.S. 559, 566–67 (1965).
9. This is a separate question from whether a person's purpose to communicate should be relevant in deciding whether that person's non-speech conduct is treated as symbolic expression. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 21–22 (1995) (criticizing this inquiry). This purpose to communicate will usually be clearly evident, and in any event raises quite different questions from those posed in this Article.
10. *See infra* Part IV.A.
11. *See infra* Part IV.B.
12. *See infra* Part IV.C.

to himself engage in other misconduct in the future—but even there such tests are likely to unduly chill speech.[13]

If we conclude that some speech is so harmful, valueless, or traditionally unprotected that it ought to lose First Amendment protection, that should generally happen even when the speaker has a mental state below purpose, such as knowledge. (I argue that legislatures ought to do this as to revenge porn.[14]) But if we conclude that the speech should be constitutionally protected even when the speaker knows that the speech causes a certain kind of harm—for instance, when a chemistry book publisher knows that some people are misusing the book to make bombs—then that speech should be protected even when a factfinder concludes that the speaker had a bad purpose.

I. KNOWLEDGE VS. PURPOSE

A. Negligence, Recklessness, and Knowledge Requirements in Other Areas of First Amendment Law

At the outset, let me make clear which mens rea issues I will be discussing, and which I will set aside. Many First Amendment doctrines require some showing of negligence, recklessness, or knowledge as to some particular fact.[15] First Amendment libel law famously requires "actual malice" (i.e., recklessness or knowledge of falsehood) for liability in some situations and negligence in others.[16] Obscenity and child pornography doctrines also require at least negligence as to the nature of the material.[17]

These doctrines, however, deal with situations where the substance of the speech is seen as constitutionally valueless, but speakers may be unaware of certain facts that make it valueless. In order to prevent overdeterrence of speech—the famous "chilling effect"—the Court has protected speakers who have made reasonable mistakes about such facts, or perhaps even unreasonable but sincere mistakes.

13. *See infra* Part IV.E.
14. *See infra* Part IV.C.2.
15. Leslie Kendrick has recently discussed these mens rea tests. *See generally* Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013). I focus here, though, on tests that turn on the speaker's purpose, and not on the speaker's negligence, recklessness, or knowledge; for more on why I think there's a difference here, see the remainder of this Part.
16. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
17. New York v. Ferber, 458 U.S. 747, 765 (1982); Smith v. California, 361 U.S. 147, 150–51 (1959).

This is one reason the intent-plus-likelihood test developed in *Schenck v. United States* and *Debs v. United States* has been criticized:[168] "[T]o be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift."[169] And it might be one reason that the Court rejected the intent-plus-likelihood test in favor of the *Brandenburg v. Ohio* intent-plus-imminence-plus-likelihood test.

C. Purpose as Largely Irrelevant to the Harm Caused by Speech

1. Generally

So far, I've argued that purpose tests tend to restrict and deter valuable speech. Even a bad purpose doesn't strip valuable content of its value. And trying to punish speech that has a bad purpose also tends to deter a good deal of speech that lacks such a purpose.

But beyond this, the harm caused by speech generally doesn't turn on the speaker's purpose, either. Speech that damages reputation, inflicts emotional distress, or gives people information that helps them commit crime yields these harms regardless of the speaker's purposes.

This may explain why two recent Supreme Court cases specifically rejected calls to read speech-restrictive statutes as having a mens rea of purpose. The first case was *Holder v. Humanitarian Law Project* (2010).[170] Federal law bans people from providing "material support or resources" to foreign organizations that the Secretary of State has determined to engage in terrorism. The prohibition expressly extends to "training" and "expert advice or assistance," which often consist of speech.[171] And the prohibition may extend even to well-intentioned speech, such as teaching the groups "how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief."[172]

168. *See, e.g.*, ZECHARIAH CHAFEE, FREE SPEECH 78 (1941); Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 424–27; *see also* James Parker Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526, 532–35 (1921) (acknowledging this risk that the intent-plus-likelihood test would unduly deter even well-intentioned speakers, but concluding that the World War I cases were correctly decided despite this risk).

169. Ernst Freund, *The* Debs *Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13.

170. 561 U.S. 1 (2010).

171. *Id.* at 19.

172. *Id.* at 15.

The Humanitarian Law Project challenged the law, arguing in part that the law could only be applied to people who had the "specific intent to further the organization's terrorist activities."[173] But the Court held that that the statute actually required only a showing of "knowledge about the organization's connection to terrorism,"[174] and that the statute was constitutional even though it omitted a purpose requirement.[175]

Moreover, even the dissenting Justices—who would have read the statute more narrowly in order to uphold it—didn't think that a showing of purpose to promote terrorism was constitutionally necessary. Rather, they said that they "would read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions."[176] That test would be satisfied by a showing of knowledge, even without a bad purpose, though specific knowledge of the effects of the speaker's own speech and not just (as the majority concluded) of the organization's terrorist activities. And the dissenters defended their conclusion by arguing that "this reading does not require the Government to undertake the difficult task of proving which, as between peaceful and nonpeaceful purposes, a defendant specifically preferred; knowledge is enough."[177]

Elonis v. United States (2015), which dealt with threats, likewise rejected a purpose test.[178] A federal statute bans transmitting threats to injure someone, and lower courts had split on the mens rea that this requires. A few courts read the statute as requiring a showing of purpose to put the target in fear. Others had instead required only a showing of negligence as to the possibility that the target would be put in fear, and allowed liability so long as a reasonable person would perceive the statement as threatening.[179]

The Court rejected the negligence approach, because the Court had "long been reluctant to infer that a negligence standard was intended in criminal statutes."[180] Instead, the Court concluded that either recklessness or knowledge would be the right mens rea. (Because the recklessness versus knowledge question hadn't been sufficiently briefed, the Court left that issue for lower courts.)

173. *Id.* at 17.
174. *Id.* at 16–17.
175. *Id.* at 25.
176. *Id.* at 56 (Breyer, J., dissenting).
177. *Id.* at 57.
178. 135 S. Ct. 2001 (2015).
179. *Id.* at 2011.
180. *Id.* (citation omitted).

But the Court did not accept the purpose test, despite the fact that the Ninth and Tenth Circuits had adopted it.[181] And while the stated reason for not requiring purpose was that the parties before the Court had so conceded,[182] presumably the Justices would have discussed the matter in more detail if they thought there was a strong argument for a purpose mens rea (especially since an earlier precedent, *Virginia v. Black*, had language that had been read as pointing in favor of a purpose mens rea).[183]

Elonis was just a statutory decision, and the Court didn't decide what mental state the First Amendment requires in threats cases. Elonis was convicted under the negligence test, and the Court's statutory interpretation required that he be retried, so the Court didn't have to reach the constitutional question. Lower courts thus remain split on whether, as a First Amendment matter, a purpose mens rea is required, or whether even negligence might suffice (for instance, for state threat statutes). Nonetheless, *Elonis* does suggest that the Court is generally not enthusiastic about purpose tests for speech restrictions.

And many other First Amendment doctrines likewise avoid focusing on the speaker's purpose. For instance, while the Court has rejected strict liability in obscenity and child pornography, it has focused on what people knew or should have known about the properties of the speech—such as the content of the obscene material, or the age of a child depicted in child pornography—and not on what they sought to accomplish using the speech.[184]

Similarly, a speaker's mens rea is probably relevant in fighting words cases. For instance, a foreigner who is deceived by a practical joker into saying something that proves to be insulting would likely not be punishable on a fighting words theory.[185] But a purpose to start a fight is not required in fighting words cases. The defendant may be convicted so long as his speech consists of "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,"[186] whether or not they were intended to provoke such a reaction.

181. *See supra* note 71.
182. *See Elonis*, 135 S. Ct. at 2012.
183. 538 U.S. 343, 359–60 (2003).
184. New York v. Ferber, 458 U.S. 747, 765 (1982); Smith v. United States, 361 U.S. 147, 150–51 (1959).
185. *See, e.g.*, Monty Python, *The Hungarian Phrasebook Sketch*, MONTYPYTHON.NET, http://www.montypython.net/scripts/phrasebk.php [https://perma.cc/YK9J-8LY5] (last visited Apr. 4, 2016).
186. Cohen v. California, 403 U.S. 15, 20 (1971).

2. An Example: "Revenge Porn"

For a timely illustration of how purpose is irrelevant to harm, consider revenge porn. As Part II.E noted, some state statutes ban distributing photographs of people naked (or having sex) without their permission, but only when the poster seeks to distress the person being depicted. Such behavior is indeed harmful, and I think narrow restrictions on it are justifiable.[187]

But the behavior is harmful regardless of the poster's purpose. Consider four photos of women having sex, posted by ex-boyfriends who had the women's consent to take the photos for private enjoyment but not for distribution:

(1) The first is posted because the ex-boyfriend wants to humiliate the woman, as revenge for her having left him.
(2) The second is posted because the woman has become a celebrity, and the ex-boyfriend has made thousands of dollars from selling the photo. The ex-boyfriend knows that the woman will be seriously distressed, but distressing her isn't his purpose. Indeed, he mildly regrets hurting her this way, but the money matters more to him than her feelings.
(3) The third is posted because the ex-boyfriend, who is also in the photograph, is an exhibitionist who gets sexually excited by displaying such photographs of himself having sex with someone else.
(4) The fourth is posted on an online discussion group because the ex-boyfriend wants to brag about what an attractive ex-girlfriend he had.

The purposes for posting the different photos are different. Only poster 1 has the purpose to inflict emotional distress. Even if we suspect that humiliating the posters' exes is at least part of the purpose of the posters in examples 2 through 4, it's unlikely that prosecutors could prove this beyond a reasonable doubt, if the reasonable doubt standard is properly applied.

Yet all four actions are equally harmful. They are likely to equally seriously distress the women who are depicted. They equally invade their privacy. I doubt that any of the women would say, "Oh, he posted that photo, but he only wanted to make money / get sexual pleasure / brag, and not to distress me, so it's no big deal."

To be sure, only example 1 fits within the colloquial label "revenge porn." But this just shows that the label isn't quite sound. Revenge porn is bad because it's nonconsensual—at least one of the participants didn't agree to the distribution of the material—and not because its purpose is revenge. The label "revenge

187. *See* Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), http://volokh.com/2013/04/10/florida-revenge-porn-bill [https://perma.cc/NG5D-XRGG].

porn" stuck because it's vivid, and because most nonconsensual porn probably is motivated by revenge. But for purposes of legal analysis, there's no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person.

3. Another Example: Incitement

Indeed, we can see the problems of the purpose test even in the First Amendment test in which purpose is most firmly embedded: the test for incitement, which is generally rendered as requiring a showing that the speaker had the purpose of promoting imminent unlawful behavior, and the speech was likely to promote such behavior.[188]

Say that four people give speeches to mobs in front of draft offices or abortion clinics, and the speeches identically urge the mob to storm the place and burn it down. And say there are four motivations involved:

(1) The first speaker wants the mob to burn down the place, because he is ideologically committed to the cause.
(2) The second speaker is just paid money to give the speech. Indeed, he would rather that the mob not listen to him (though he knows it might)—his payment is independent of whether the mob acts, and if the mob acts, he is more likely to get into legal trouble.[189]
(3) The third speaker is trying to impress a woman whom he loves, and who is ideologically committed to the cause. But again, he would rather that the mob not listen to him: The woman would appreciate his speech even if the mob doesn't act; and, if the mob acts, both he and the woman are more likely to get prosecuted.
(4) The fourth speaker is trying to infiltrate the group—perhaps he belongs to a rival organization, and is seeking to build credibility with group members so they will eventually tell him their secrets. He would again prefer that the mob not act, though, as with the others, he is willing to risk the mob's acting.

Again, the speech in all these situations is equally harmful. Perhaps speakers 2 to 4, who don't have the purpose of egging on the mob, might be subtly less effective, because the mob will sense the speakers' insincerity. But that won't always be so: The speakers might be made eloquent by their other motivations, and in any event their charisma or rhetorical gifts might make them more effective despite their (hidden) lack of belief.

188. *See supra* Part III.A.
189. A speaker can be prosecuted for unsuccessful incitement, but successful incitement is much more likely to draw a prosecutor's attention.