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# The Constitution and Revenge Porn

John A. Humbach\*

*“Many are those who must endure speech they do not like, but that is a necessary cost of freedom.”<sup>1</sup>*

Revenge porn refers to sexually explicit photos and videos that are posted online or otherwise disseminated without the consent of the persons shown, generally in retaliation for a romantic rebuff.<sup>2</sup> The problem of revenge porn seems to have emerged fairly recently,<sup>3</sup> no doubt facilitated by the widespread practice of sexting.<sup>4</sup> In sexting, people make and send explicit pictures of themselves using digital devices.<sup>5</sup> These devices, in their very nature, permit the pictures to be easily shared with the entire online world. Although the move from sexting to revenge porn might seem as inevitable as the shifting winds

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1. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2669 (2011).

2. See *State ‘Revenge Porn’ Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES (Aug. 15, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx>.

3. There were relatively few searches on the term “revenge porn” until about 2013, when searches on the term skyrocketed. See *Revenge Porn*, GOOGLE TRENDS, <http://www.google.com/trends/explore#q=revenge%20porn> (last visited Aug. 27, 2014).

4. See, e.g., David Rosen, *We Are All Sexters Now: America’s Favorite Amateur Porn*, SALON (Aug. 16, 2014), available at [http://www.salon.com/2014/08/16/we\\_are\\_all\\_sexters\\_now\\_americas\\_favorite\\_amateur\\_porn](http://www.salon.com/2014/08/16/we_are_all_sexters_now_americas_favorite_amateur_porn). According to a 2010 survey, 43% of teens and 28% of parents engaged in sexting behavior. Stephanie Steinberg, *‘Sexting’ Surges Nationwide, and It’s Not Just Teens Doing It*, USA TODAY (July 20, 2010), [http://usatoday30.usatoday.com/life/lifestyle/2010-07-21-texting21\\_ST\\_N.htm](http://usatoday30.usatoday.com/life/lifestyle/2010-07-21-texting21_ST_N.htm). The numbers are likely larger today. See Matthew Mientka, *‘Sexting’ Now Mainstream as Half of U.S. Adults Send and Receive*, MED. DAILY (Feb. 5, 2014), <http://www.medicaldaily.com/sexting-now-mainstream-half-us-adults-send-and-receive-268703>.

5. For my earlier discussion of sexting, see John A. Humbach, *“Sexting” and the First Amendment*, 37 HASTINGS CONST. L.Q. 433 (2010).

and tides of amorous affection, people have been caught off-guard,<sup>6</sup> and revenge porn has become a significant item of moral and legal concern.<sup>7</sup>

The inherent repulsiveness of revenge porn has led to calls for laws making it a crime and, as of this writing, at least ten states have enacted statutes to prohibit revenge-porn dissemination.<sup>8</sup> Moreover, an important article offering “recommendations to lawmakers working to criminalize revenge porn” was recently published by Professors Danielle Keats Citron (University of Maryland) and Mary Anne Franks (University of Miami).<sup>9</sup> While there are variations in the

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6. Both men and women are reportedly victimized by revenge porn. Cynthia J. Najdowski, PhD, and Meagen M. Hildebrand, *The Criminalization of 'Revenge Porn'*, 45 AM. PSYCHOLOGICAL ASS'N MONITOR ON PSYCHOLOGY 26 (2014), available at <http://www.apa.org/monitor/2014/01/jn.aspx>. However, while “[m]en are more likely than women to report being victims of this online privacy invasion[,]” *id.* (citation omitted), it has been argued that the impact on women may be greater because “[w]hen it comes to sexual expression, females are denied the freedoms enjoyed by men.” Emily Poole, *Hey Girls, Do you Know? Slut-Shaming on the Internet Needs to Stop*, 48 U.S.F. L. Rev. 221, 222 (2013). The unfortunate social reality is that, for women whose conduct “do[es] not conform with traditional gender expectations,” “slut shaming remains a tremendous problem.” *Id.* at 231-32. It “not only demeans women, but it also highlights the sexual double standard rampant in our society.” *Id.* at 232. “The emotional harms caused by slut-shaming [including revenge porn] can follow a woman around for years, damage her self-perception, and possibly cause her either to dismiss her own sexuality or be labeled as *easy* . . . .” *Id.* at 232-33 (emphasis in original).

7. See, e.g., Editorial, *Fighting Back Against Revenge Porn*, N.Y. TIMES, Oct. 13, 2013, at SR10; Erica Goode, *Once Scorned, But on Revenge Sites, Twice Hurt*, N.Y. TIMES, Sep. 23, 2013, at A11; Lorelei Laird, *Victims Are Taking on 'Revenge Porn' Websites for Posting Photos They Did Not Consent To*, A.B.A. (Nov. 1, 2013), [http://www.abajournal.com/magazine/article/victims\\_are\\_taking\\_on\\_revenge\\_porn\\_websites\\_for\\_posting\\_photos\\_they\\_didnt\\_c](http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c); David Schwartz, *Arizona Governor Signs Legislation to Discourage 'Revenge Porn,'* REUTERS (Apr. 30, 2014), <http://www.reuters.com/article/2014/05/01/us-usa-arizona-revengeporn-idUSBREA4000T20140501>.

8. See *State 'Revenge Porn' Legislation*, *supra* note 2; see, e.g., CAL. PENAL CODE § 647(j)(4)(A) (West 2013); N.J. STAT. ANN. § 2C:14-9 (West 2004). Commentator Rachel Budde describes that recent flurry of revenge porn as exemplifying emotion-driven “crime du jour legislation.” Rachel E. Budde, *Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age*, \_\_ GEO. J. OF GENDER & THE LAW \_\_, 39 (forthcoming), available at <http://ssrn.com/abstract=2424518>.

9. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge*

specific provisions of the various revenge porn laws, both as enacted and proposed, they typically share two key prohibitions, namely, they forbid:

- images that show *sexual* exposure or contact, and
- dissemination *without consent* of persons depicted.

Unfortunately, these two key prohibitions of revenge porn laws seem to fly directly in the face of the free speech and press guarantees of the First Amendment.<sup>10</sup> In short, the two prohibitions constitute unconstitutional content discrimination, viewpoint discrimination and speaker discrimination, not to mention prior restraint. A restriction on speech that is limited to particular content, e.g., sexual exposure, is *content* discrimination.<sup>11</sup> A restriction designed to suppress a particular point of view, e.g., negative or unflattering personal information, is *viewpoint* discrimination.<sup>12</sup> And a restriction that is applicable only to persons who have not received consent is *speaker* discrimination,<sup>13</sup> as well as a *prior*

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*Porn*, 49 WAKE FOREST L. REV. 345, 386 (2013). In a subsequent publication on the Social Science Research network, Professor Franks has proposed a model for revenge porn laws, which reads in principal part:

An actor may not knowingly disclose an image of another, identifiable person, whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the depicted person has not consented to such disclosure.

Mary Anne Franks, *Drafting an Effective “Revenge Porn” Law: A Guide for Legislators* 5 (2015), available at <http://ssrn.com/abstract=2468823>.

10. U.S. CONST. amend. I.

11. See, e.g., *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 811-12 (2000); *Sable Commc'ns v. FCC*, 492 U.S. 115, 118 (1989); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”).

12. See, e.g., *Rosenberger*, 515 U.S. at 828; see also *Wood v. Moss*, 134 S. Ct. 2056, 2069 (2014) (recognizing the rule).

13. See *Rosenberger*, 515 U.S. at 828 (“[G]overnment regulation may not favor one speaker over another.”). Actually, the consent requirement results in both viewpoint discrimination and speaker discrimination by limiting communication to selected viewpoints and speakers while criminalizing the rest. The overall effect of consent requirements is to permit *positive* personal

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*restraint*—among the most disfavored of restrictions on speech.<sup>14</sup>

While the Supreme Court has recognized a number of circumstances that justify government impingements on free expression, the Court has been extremely reluctant to permit speech restrictions that discriminate based on a message's content, its viewpoint, or the speaker.<sup>15</sup> It has nearly always refused to tolerate such discrimination unless the case falls within one of the several historically established exceptions to First Amendment protection.<sup>16</sup> Because of the special place that the modern First Amendment cases accord to content discrimination (and the allied discriminations based on viewpoint and speaker), any statutes designed specifically to outlaw revenge porn *as such*<sup>17</sup> would seem to face some very tough sledding—if indeed they can be written in ways that are constitutionally permissible at all.

At the end of this paper, I propose a possible approach to crafting a law that addresses the primary harms of revenge porn, but which seeks avoid the direct affront to the First Amendment of the revenge porn laws currently proposed and enacted. Whether this approach would actually work is a question that cannot be answered with certainty but, unless the Supreme Court changes the application of the First Amendment to accommodate revenge porn, I think its chances are at least better than the statutes, drafts and proposals to date.

## I. Basic Meaning of the First Amendment

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information to be communicated by approved speakers while suppressing disapproved *negative* private information. *See also* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663 (2011) (disapproving a law that enacted “content- and speaker-based restrictions” on the disclosure of private physician-prescribing information).

14. *See infra* notes 150-55 and accompanying text.

15. *See infra* Part II.

16. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012); United States v. Stevens, 559 U.S. 460, 468 (2010); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994); *infra* Part II.B.

17. I.e., statutes whose prohibition is limited to *sexually explicit* images disseminated *without consent*.

The First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>18</sup> The basic meaning of this clause is, of course, to restrict the government’s power.<sup>19</sup> Specifically, the Free Speech Clause restricts the government’s power to address a particular class of potentially harmful conduct—namely, conduct that consists of speech. This limitation on the government’s power to deal with harms caused by speech is in distinct contrast with the broad power that the government has to deal with social harm generally.

With respect to most kinds of harm, governmental bodies are traditionally deemed to have the power to restrict private liberty “wherever the public interests demand it,”<sup>20</sup> and legislatures possess “a large discretion . . . to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.”<sup>21</sup> Under what is known as the “rational basis” test, the rule is that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”<sup>22</sup> The “rational basis” test is, in other words, an expression of the judiciary’s broad deference to the legislative branch to decide what the

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18. U.S. CONST. amend. I.

19. *See* *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). *See also* *United States v. Stevens*, 559 U.S. 460, 468 (2010); *Landmark Commc’ns v. Virginia*, 435 U.S. 829, 844 (1978) (a “check” on legislative power).

20. *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

21. *Id.*

22. *Berman v. Parker*, 348 U.S. 26, 31-35 (1954); *see also* *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (under the rational basis test, it “suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost”). The Court has, in other words, expressly abandoned the former idea that the legislature’s “determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.” *Lawton*, 152 U.S. at 137. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”).

public interest requires and what laws are appropriate to serve the public's needs. Courts do not normally second-guess legislative decisions.

For harms caused by speech, however, the rule is entirely different. Measures to address speech harms (real or alleged) are subject to *heightened* standards of judicial review. The "presumption of constitutionality" that the courts normally apply to non-speech conduct is reversed.<sup>23</sup> Instead, courts assessing restrictions on speech use a level of scrutiny that is called (depending on the context) "intermediate" scrutiny or "strict" scrutiny.<sup>24</sup> Use of "intermediate" or "strict" scrutiny entails active judicial review of the challenged legislation, its effects on free expression and its putative compensating benefits.<sup>25</sup> The operating assumption is that any harm that might result from speech is less serious than the harm that results from government restrictions on it.<sup>26</sup>

Of course, as often stressed by advocates of laws to impinge on free expression, "the right of free speech is not absolute at all times and under all circumstances."<sup>27</sup> There are exceptions to the protection of speech, and we will consider them in the discussion that follows. For the moment, however, it suffices to say that, just because there are *some* exceptions to the protection of speech, it does not follow that legislatures can restrict speech whenever they decide it is "too harmful to be tolerated"<sup>28</sup> or not "worth it."<sup>29</sup> On the contrary, the very "point of all speech protection . . . is to shield [speech] that in someone's eyes [is] misguided, or even hurtful."<sup>30</sup> "The First

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23. See *Ashcroft v. ACLU*, 542 U.S. 656, 659 (2004); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 817 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

24. See generally *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994).

25. See *infra* Part II.A. Strict Scrutiny.

26. See *United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

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

28. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011).

29. *Stevens*, 559 U.S. at 470.

30. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995)).

Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”<sup>31</sup>

## II. Content Discrimination

As stated in the introduction, revenge porn laws face a major First Amendment hurdle because their explicit and unabashed aim is to punish and suppress disfavored speech. As such, they constitute content discrimination and its aggravated variants, viewpoint discrimination and speaker discrimination (hereafter sometimes collectively referred to as, simply, “content discrimination”). Since *R.A.V. v. City of St. Paul*,<sup>32</sup> at least, the Supreme Court’s free speech cases have come to treat content discrimination as the least tolerated variety of governmental regulation on free expression. So even while the freedom of speech may not be “absolute,”<sup>33</sup> what *has* become nearly absolute is the constitutional prohibition on governmental efforts to repress disfavored ideas, facts, viewpoints or speakers: “[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>34</sup>

The Supreme Court’s particular attention to content discrimination has led to a division of speech restrictions into two major groups: restrictions that are content-*neutral* and those that are content-*based*.<sup>35</sup> An example of content-neutral restrictions is one that regulates merely the *time, place and manner* of expression, without regard to the ideas, facts or

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31. *Stevens*, 559 U.S. at 470.

32. 505 U.S. 377 (1992). The history of content-discrimination jurisprudence goes back even further, at least as far back as *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), which specifically identified content discrimination, viewpoint (“points of view”) discrimination and speaker discrimination (“some groups [and not] others”) as needing to be “carefully scrutinized.” However, it is beginning with *R.A.V.* that the Supreme Court has recognized content discrimination as a recurrent principal basis for its First Amendment decisions.

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

34. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

35. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994); e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 800-01 (1989).

message expressed—a ban, for example, on loud, amplified music in a public park.<sup>36</sup> Another example is a law that is merely meant to address the so-called “secondary effects” of speech.<sup>37</sup> By contrast, restrictions are content-based when they burden or restrict speech based on its subject matter or on the viewpoint that is expressed.<sup>38</sup>

When assessing content-neutral restrictions on speech, the Supreme Court has been relatively amenable to *balancing* harms (for example, holding that speech freedom may have to yield to other significant governmental interests),<sup>39</sup> but it has been almost unbending in its protection of speech from content *discrimination*. Not only does the Court hold that “content-

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36. See *Ward*, 491 U.S. at 789 (loud, amplified music in a public park). See e.g., *Kovacs v. Cooper*, 336 U.S. 77, 86-88 (1949) (sound trucks).

37. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a zoning law that created a zone for adult theatres). The “secondary effects” that were the target of the laws in *Renton* were the blight and other negative neighborhood impacts of theaters showing sexually-themed movies. These secondary effects are to be distinguished from the *primary* effects of speech, which refers to the effects that the speech has on its audience, *Boos v. Barry*, 485 U.S. 312, 321 (1988), and the effects it has on the broader society *through* of the effects that the speech has on listeners. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 n.7. The distinctive concept of “secondary effects” has been somewhat difficult to nail down, but the difference between it and “primary” effects seems to be roughly this: Whereas the *primary effects* of speech are the effects of its content on listeners, the *secondary effects* are the effects that dissemination has on the locations where it occurs (ambiance, tone, property values, etc.). In any case, so far the Supreme Court has not extended the application of the secondary-effects doctrine beyond its original context—as a justification for upholding zoning laws that are aimed, not at particular messages, but at preserving intangible qualities of neighborhoods.

At any rate, “[t]he emotive impact of speech on its audience is not a ‘secondary effect’ and a law that ‘regulates speech due to its potential primary impact ... must be considered content-based.’” *Barry*, 485 U.S. at 321. Likewise, “[l]isteners’ reactions to speech are not the type of ‘secondary effects’ we referred to in *Renton*.” *Id.* For these reasons, arguments that revenge porn laws might be able to pass constitutional scrutiny on a “secondary effects” theory (that they target only emotional secondary effects, not content) would appear to be a non-starter.

38. See *Turner Broad. Sys.*, 512 U.S. at 642-43; *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

39. See *Ward*, 491 U.S. at 801; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 308 (1984).

based regulations are presumptively invalid<sup>40</sup> but, with narrow exceptions,<sup>41</sup> such regulations must pass the highest level of scrutiny, so-called “strict” scrutiny, in order to overcome that presumption.<sup>42</sup> The exacting test of strict scrutiny applies to any “regulations reflecting ‘aversion’ to what ‘disfavored speakers’ have to say,”<sup>43</sup> and that is exactly what the currently enacted and proposed revenge porn laws are—regulations reflecting a legislative “aversion” to what “disfavored speakers” have to say.

To be sure, even when restrictions on speech are based on content, they are not *necessarily* subject to strict scrutiny. The Supreme Court has recognized a number of special kinds of cases in which content-based restrictions are constitutionally weighed under less strict standards.<sup>44</sup> Most of these special kinds of cases (such as the rules for school speech, government-employee speech or broadcast speech) have little or no broad applicability to the social problems posed by revenge porn. Two, however, offer some promise and, together with the possibility of passing strict scrutiny, they give us the following three possible theories in support of laws designed to reduce the harms, particularly the emotional and privacy harms, which revenge porn can produce:

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40. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 817 (2000). *See also R.A.V.*, 505 U.S. at 382.

41. *See infra* Part II.B. Categorical Exceptions.

42. *See infra* Part II.A. Strict Scrutiny.

43. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (describing reasoning in *Turner Broad. Sys.*, 512 U.S. at 658).

44. The situations in which regulations of speech are not necessarily subject to strict scrutiny would include: categorical exceptions, incidental burdens on speech, non-public forum speech, school speech, copyrighted content, government employee speech, speech harmful to minors, television/radio broadcasts, commercial speech, and publicly funded speech.

While the “categorical exceptions” to First Amendment protection (first item on this list) have not been said by the Court to include the other listed special situations, it is not easy to see why the others should be treated separately. For example, the special situation of “government employee speech” (with its exception for speech on matters of public concern, see *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)) can be easily seen as analogous to the categorical exception for defamation (with its similar exception for public officials and figures, see *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

- The statute can pass strict scrutiny
- A “categorical exception” applies
- The burdens on speech are deemed “incidental”

The three will be considered in turn.<sup>45</sup>

#### A. *Strict Scrutiny*

The level of scrutiny that a content-based restriction must normally pass is “strict” scrutiny,<sup>46</sup> which is, as the name implies, a highly rigorous standard of review. Under strict scrutiny, the aims of the First Amendment are treated as imperatives of the first-order, not to be subordinated to competing governmental interests except in extraordinary cases. The Court itself has stressed: “It is rare that a regulation restricting speech because of its content will ever be permissible.”<sup>47</sup> Constitutional scholar Gerald Gunther once quipped, the Supreme Court’s highest level of scrutiny is “strict in theory and fatal in fact.”<sup>48</sup>

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45. The special situation of copyrighted content, listed in the preceding footnote, provides another possible constitutional basis for statutes criminalizing revenge porn, *viz.* the Copyright Clause. U.S. CONST. art. I, § 8, cl. 8. Existing copyright laws may not be well suited to deal with revenge porn effectively, but it is conceivable that new laws under the copyright power could be designed specifically to suppress undesirable re-dissemination of copyrightable explicit images. See Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2014); Amanda Lewendowski, *Using Copyright to Combat Revenge Porn*, 3 NYU J. INTELL. PROP. & ENT. L. 422 (2014). Whether, however, the copyright power, which was meant to incentivize speech and creativity, could be properly applied for the purpose of suppressing truth is a question for another paper. See Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346 (2014).

46. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (citing *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989)).

47. *Entm't Merchs.*, 131 S. Ct. at 2738.

48. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation omitted). Barry McDonald has noted that “a majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons.” Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1365 n.63 (2006) (quoted in *United States v. Stevens*, 533 F.3d 218, 232 (3d Cir. 2008), *aff'd*, 559 U.S. 460

Formally speaking, in order to meet strict scrutiny a regulation of speech must:

- serve a *compelling governmental interest*;
- be *narrowly tailored* to meet the public need; and
- lack *less restrictive alternatives* for achieving the government's goal.<sup>49</sup>

These three elements of strict scrutiny each present *factual questions*, and the government “bears the risk of uncertainty.”<sup>50</sup> Strict scrutiny means that, instead of deferring to the legislature on these questions (as under the rational basis test), courts must make their own “independent judgment of the facts”<sup>51</sup> and assure that “[the legislature] has drawn reasonable inferences based on substantial evidence.”<sup>52</sup> Courts “may not simply assume that the [law] will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.”<sup>53</sup> On the contrary, a law that burdens free expression “requires a justification far stronger than mere speculation about serious harms,”<sup>54</sup> and “ambiguous proof will not suffice.”<sup>55</sup> Rather, the government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>56</sup> And, most importantly for the present

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(2010)).

49. See, e.g., *Playboy Entm't Grp.*, 529 U.S. at 813; *Boos v. Barry*, 485 U.S. 312, 321, 329 (1998).

50. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (“[T]he Government bear[s] the burden of showing their constitutionality.”); *Entm't Merchs.*, 131 S. Ct. at 2739 (stating that the government “bears the risk of uncertainty”).

51. *Sable Commc'ns*, 492 U.S. at 129.

52. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (Kennedy, J., plurality).

53. *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 496 (1986) (quoting *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22 (1984)).

54. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) (quoting *Turner Broad. Sys.*, 512 U.S. at 664) (internal quotation marks omitted).

55. *Entm't Merchs.*, 131 S. Ct. at 2739 (2011).

56. *Turner Broad. Sys.*, 512 U.S. at 664; *Nat'l Treasury Emps. Union*, 513 U.S. at 475 (applying same rigor as for content discrimination); see also *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 817 (2000).

context, the government must show that the law was prompted “by something more than *a mere desire to avoid the discomfort and unpleasantness* that always accompany an unpopular viewpoint.”<sup>57</sup>

In short, the application of strict scrutiny to revenge porn laws will put into sharp focus the harms caused by disseminating others’ intimate photos as well as the harms, if any, in banning such dissemination. The harms caused by revenge porn seem obvious and well-understood but, because they are, so to speak, harms caused by truth, they present themselves in an awkward posture under the First Amendment. Dissemination of truth seems, after all, to be exactly the kind of thing that the First Amendment exists to protect.

### 1. Truth Is Harmful?

Sometimes a law restricting speech is enacted for the very purpose of preventing dissemination of truthful information—bluntly, to suppress truth.<sup>58</sup> The assumption underlying such laws is, presumably, that if people know the truth—at least certain truths—it can be a bad thing.<sup>59</sup> In other words, the “harm” these laws seek to prevent is the harm that results because the truth gets out.

So, can truth be harmful? The answer is yes and no. While revelations of truth can undeniably cause individualized harm, this is not the same as saying the revelations cause *social* harm. Individualized harm and social harm are not the same

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57. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (emphasis added).

58. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (striking down a law that restricts disclosure of data concerning the prescribing habits of physicians); *see United States v. Stevens*, 559 U.S. 460 (2010) (law prohibiting depictions of scene of animal cruelty); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (names of alleged crime victims); *Smith v. Daily Mail Publ’g Co.* 443 U.S. 97 (1979) (names of alleged juvenile offenders); *Landmark Commc’ns v. Virginia*, 435 U.S. 829 (1978) (information concerning an administrative proceeding); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (names of certain crime victims).

59. *Sorrell*, 131 S. Ct. at 2670 (observing, in the context of a law restricting truthful speech: “Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects.”).

thing.<sup>60</sup> For example, revealing evidence of illegal or immoral acts may cause a good deal of individualized harm to the persons whose conduct is exposed, but it seems hard to say that reporting crime or immorality causes *social* harm. In ordinary day-to-day life, we are constantly required to repose trust in the others with whom we deal, meaning we must repeatedly decide whether and to what degree trust is safe and appropriate.<sup>61</sup> Most people would presumably prefer that these decisions be informed rather than uninformed and, in this regard, people may especially want to know what others have done of which they are not especially proud. Deliberate obstructions to the free flow of this information would be a definite harm to the interest that people have in knowing who among us strays beyond the bounds of the law or morality.<sup>62</sup>

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60. The harms suffered in a romantic rebuff provide an obvious example. Even though amorous rejection often leads to a lot of emotional anguish and torment, no one thinks the “pangs of despised love” should be considered a social harm or that refusing an unwanted relationship should be grounds for legal redress. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

More generally, individualized harms and social harm are different simply because people’s individual interests are often in conflict and the law has no alternative but to choose which interests to favor, leaving the harms to the disfavored interests as unredressable *damnum sine injuria*. As a result, there are many, many individual harms that cannot be considered as social harms.

61. An ability to trust appropriately is obviously a matter of utmost importance in managing the riskiness inherent in dealing with other people and it has, indeed, been observed that the human brain is “wired” to begin judging the trustworthiness of a new acquaintance almost instantly (33 milliseconds), even before the person’s face is consciously perceived. Jonathan B. Freeman et al., *Amygdala Responsivity to High-Level Social Information from Unseen Faces*, 34 *THE J. OF NEUROSCIENCE* 10573 (2014), available at <http://www.jneurosci.org/content/34/32/10573.short?rss=1>. But more information will nearly always provide greater security and, given the costs of unnecessary precautions, it is natural that people crave information about others in order to make well-founded judgments about whom to trust and how much.

62. Is the conduct that is revealed by revenge porn illegal or immoral? Perhaps. It is, for example, a federal felony to create sexually explicit images, even non-obscene pictures of oneself, without affixing to them certain statements informing viewers where to find the name, birth date and other personal information about each of the persons depicted. See 18 U.S.C. § 2257 (2012). While there is much to question and dislike about § 2257 in terms of the First Amendment, it has been defended in court by successive administrations (Bush and Obama), and it has been upheld as constitutional. See *Connection Distrib. Co. v. Holder*, 557 F.3d 321 (6th Cir. 2009) (en banc). To the extent that § 2257 means that revenge porn amounts to a public

The Supreme Court, at any rate, takes the position that the First Amendment represents a “judgment by the American people”<sup>63</sup> that the harm of suppressing truth exceeds the benefits, adding that the courts are not empowered to “revise that judgment” or make exceptions based on “an ad hoc balancing of relative social costs and benefits.”<sup>64</sup> To see why the Court has taken this position—that the benefits of truth are constitutionally deemed to exceed the detriments—consider one of the examples of harm reported by victims of revenge porn, *viz.* the loss of job opportunities after potential employers find an applicant’s nude pictures online.<sup>65</sup>

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revelation of federal felonies, the senders of revenge porn may be thought (by some, at least) to provide an unintended public service. At any rate, it is hard to see how the states could have a “compelling” state interest in suppressing evidence of federal felonies.

As for the idea that revenge porn exposes “immoral” conduct, I would stress that I, personally, see nothing inherently “immoral” about taking and sending sexually explicit pictures of oneself, but I also realize that others are entitled to take a different view (and probably do). *See, e.g., Texting, Sexting and the Right Thing*, THE GOOD NEWS, <http://www.ucg.org/video/christian-living/texting-sexting-and-right-thing/> (last visited Mar. 24, 2015); *Is Texting a Sin?*, YOUTH PASTOR ADAM (Feb. 10, 2012), <http://youthpastoradamk.wordpress.com/2012/02/10/is-sexting-a-sin/>. As elaborated in the text that follows, the point of the First Amendment is to assure that judgments as to what information is important, morally or otherwise, should be left to the people, not to the government.

63. *Stevens*, 559 U.S. at 470.

64. *Id.*

65. *See* Citron & Franks, note 9, at 352 (“Common reasons for not interviewing and hiring applicants include concerns about their ‘lifestyle,’ ‘inappropriate’ online comments, and ‘unsuitable’ photographs, videos, and information about them.”).

One may wonder who would want to work for an employer who surfs revenge porn sites or other porn outlets where applicants’ naked photos might appear. Because the operators of legitimate search engine sites, such as Google, apparently try to prevent explicit photos from readily showing up in search results, it is unlikely that an applicant’s images will pop up in ordinary online activity. *See* Casey Newton, *Google Tweaks Image Search to Make Porn Harder to Find*, CNET (Dec. 12, 2012), <http://www.cnet.com/news/google-tweaks-image-search-to-make-porn-harder-to-find/>. As the Supreme Court itself has noted, the only people who are likely to find sexually explicit images on the Internet are people who look for it. *Reno v. ACLU*, 521 U.S. 844, 854 (1997) (“Though such material is widely available, users seldom encounter such content accidentally. . . . Almost all sexually explicit images are preceded by warnings as to the content. For that reason, the ‘odds are slim’ that a user would enter a sexually explicit site by accident. . . . [T]he receipt of information on the Internet requires a series of

Loss of job opportunities is a definite individualized harm, not to be minimized, but it is not the whole story. The more fundamental reason that revenge porn leads to lost opportunity is that it conveys information that *matters*, at least to some people. When revenge porn victims encounter employment barriers, it is ultimately because, like it or not, some employers apparently regard the fact that a person makes nude self-portraits<sup>66</sup> as a legitimate hiring concern—employers such as public schools, libraries, day care centers, churches, social welfare agencies and police forces come immediately to mind. And who is to say that employers such as restaurants, retailers, and other organizations whose staff directly serves the public may not have legitimate interests in knowing facts they believe relevant to the moral caliper of their employees?<sup>67</sup>

Even apart from always-fraught questions of moral probity, however, an employer may simply consider it inadvisable or unnecessarily “risky” to hire people who engage in irregular behavior or who they see as personally weird. There are, after all, probably still a lot of employers who do not think it is exactly normal or decent to take pictures of oneself while not wearing clothes, having sex or the like. And even though I may personally deplore such censoriousness as prudish and old-fashioned, there are many others who evidently feel differently—and in a morally pluralist society, the mere fact we might dislike the choices that others make does not mean we have the right to declare ourselves the arbiter of what they should or need to know. The premise of the First Amendment is that people should decide for themselves what they need to know, and it is not the place of government to make that decision for them.<sup>68</sup>

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affirmative steps.”).

66. It has been estimated that eighty percent of the photos used in revenge porn were taken by the person depicted. See *Fighting Back Against Revenge Porn*, *supra* note 7.

67. As Susan Sontag famously opined: “Human sexuality is . . . a highly questionable phenomenon, and . . . remains one of the demonic forces in human consciousness.” SUSAN SONTAG, *STYLES OF RADICAL WILL* (1969). This view is probably not entirely passé.

68. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (“[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”); *Greater New Orleans Broad. Assoc. v. United States*, 527 U.S. 173, 182-83 (1999); *44 Liquormart, Inc. v. Rhode*

To be sure, taking naked pictures of oneself does not necessarily make a person immoral or “risky.”<sup>69</sup> But it also does not put a person into a legally protected class, either. If there are employers who do not *want* employees who take naked pictures of themselves (as there evidently are<sup>70</sup>), there is no legal or constitutional reason why they do not have the discretion to make such choices. And to the extent that some think nude self-portraits are a legitimate hiring concern, there would be definite harm if the only real evidence of people’s nude photos were to be governmentally suppressed.<sup>71</sup> In sum, even though revenge porn obviously causes individualized harm, the Constitution assumes that there would be even greater harm in criminalizing the free flow of information concerning the activities that it reveals.<sup>72</sup>

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Island, 517 U.S. 484, 508-14 (1996).

69. Indeed, my guess is that, in a few years’ time, people will look back and wonder what all the fuss was about—and the sooner it becomes known that just how common it is to take such pictures, the sooner people will stop acting as though doing so is somehow reprehensible or outré. Cf. Steven G. Kellman, *When Literature Was Dangerous*, CHRON. REV. (June 13, 2014), [http://chronicle.com/article/When-Literature-Was-Dangerous/147039/?cid=cr&utm\\_source=cr&utm\\_medium=en](http://chronicle.com/article/When-Literature-Was-Dangerous/147039/?cid=cr&utm_source=cr&utm_medium=en) (describing some of the 20<sup>th</sup> century history of banning books, including James Joyce’s now highly acclaimed *Ulysses*, which sells 100,000 copies per year today).

70. See *supra* note 65. The lost job opportunities that have reportedly already occurred show that employers have the concerns. See *id.*

71. Professors Citron and Franks note the possibility of making a “distinction between the public’s legitimate interest in knowing about the naked pictures and in actually seeing them.” Citron & Franks, *supra* note 9, at 385. It is not clear, however, what this might mean in practice. Are they suggesting that the First Amendment is satisfied as long as people are allowed to make unsupported *allegations* about one another but the government can still make it a crime to provide the evidence or proof?

72. *Sorrell*, 131 S. Ct. at 2672 (“The choice ‘between the dangers of suppressing information, and the dangers of its misuse if it is freely available’ is one that ‘the First Amendment makes for us.’”).

A legislature could, of course, declare as matter of public policy that people who take naked pictures of themselves are a legally protected class and, having done so, constitutionally restrict flows of information used to discriminate on that basis. See *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973) (allowing restriction of gender-designated ads that facilitated illegal employment discrimination); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (holding that First Amendment does not protect speech that is an integral part of a criminal activity). It apparently may not, however, create a legally protected class by the back-door route of restricting speech while leaving the right to

What is more, employers are not the only ones who might find the truth about others' doings to be relevant to their own needs, values and moral precepts. People outside the employment context also want to know about conduct evidencing the character of the people with whom they deal. Parents like to know about those who come into contact with their children, people in business like to know the penchants (and, perhaps, susceptibility to blackmail) of those they must trust, and people who go out on dates want to know who it is they are dating.<sup>73</sup> True, discrimination in employment, social relations or whatever based on posing for naked pictures may lead to bad decisions and invidious choices, but "the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."<sup>74</sup>

The bottom line is this: There is always a potential for harm in truth, especially the harm of getting found out. This potential for individualized harm from truth does not, however, translate automatically into a governmental interest (much less a *compelling* interest) in keeping others in the dark. Indeed, the very reason that disclosures of a person's arguably negative or less-than-flattering qualities may cause individual harm is precisely that the information may be valuable or relevant to the needs and values of others—the very kind of interest that the First Amendment is supposed to protect. So

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discriminate intact. See *Greater New Orleans*, 527 U.S. at 182-83; *44 Liquormart*, 517 U.S. at 508-14 (repudiating the contrary position that the Court had taken earlier in *Posadas de Puerto Rico Association v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding a ban on advertising of legal gambling establishments)). In the two more recent cases, the Court backed away from the idea, which underlay *Posadas*, that a legislative power to regulate an activity includes within it the power to restrict speech that tends to promote that activity. Compare *Posadas*, 478 U.S. at 345-46, with *Greater New Orleans*, 527 U.S. at 182-83, and *44 Liquormart*, 517 U.S. at 508-14.

73. Notably, perhaps, there may be no general "public" interest in these kinds of "daily life matters" (as Professor Volokh dubbed them in his excellent analysis), but for the majority of people, most of the time, conversational topics like these are the ones that really count—the ones that supply the information that people need most. See Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1, 32-39, 42-46 & nn.175-200 (2000).

74. *Sorrell*, 131 S. Ct. at 2658, 2672 ("The choice 'between the dangers of suppressing information, and the dangers of its misuse if it is freely available' is one that 'the First Amendment makes for us.'").

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even if there *were* a “free-floating” balancing test for free speech (which there is not<sup>75</sup>), it is not obvious that the individualized harms caused by private information disclosures would necessarily outweigh the harm of keeping others in ignorance. This other side of the harm-benefit equation is something that proponents of bans on revenge porn often appear to overlook.

## 2. Truth Leads to Crime?

Another kind of harm that has been mentioned as caused by revenge porn is that it “raises the risk of offline stalking and physical attack.”<sup>76</sup> This is a very serious concern, of course, and that is why laws against stalking and physical attack exist and should be rigorously enforced. It is elementary First Amendment law, however, that the government cannot justify a restriction on speech just because the speech might inspire somebody somewhere to commit a criminal act.<sup>77</sup> Indeed, under the longstanding *Brandenburg* rule, the guarantees of free speech and press do not allow states to forbid even the outright *advocacy* “of force or . . . law violation except where such advocacy is *directed to inciting* or producing *imminent* lawless action and is *likely* to incite or produce such action.”<sup>78</sup>

## 3. Truth Hurts

Still another kind of harm of revenge porn, and probably the most important, is the extreme emotional distress that it

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75. *United States v. Stevens*, 559 U.S. 460, 470 (2010) (rejecting the idea of a free-floating test for First Amendment coverage as “startling and dangerous”).

76. *Citron & Franks*, *supra* note 9, at 351. *See also* Goode, *supra* note 7.

77. *See* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253-54 (2002); *Stanley v. Georgia*, 394 U.S. 557, 566-67 (1969). *See also* *Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) (noting that “[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. . . . But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”).

78. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added). *See also supra* note 72.

can cause to the persons whose pictures are non-consensually shared with others and, perhaps, the world. This, too, can be a very serious harm and is not to be minimized. But it is, once again, an individualized harm that, like most speech-harms, can only be avoided by suppressing the flow of truthful information that others may find valuable and useful to their own choices and needs.

At any rate, the Supreme Court's decisions have acknowledged that speech can sometimes be emotionally distressing, but the Court has never regarded this possibility as a justification for suppressing speech. Quite the opposite, the Court has stressed that the capacity of speech to cause emotional distress is precisely one of the reasons why it needs to have constitutional *protection*—to shelter speech from the political backpressure that disagreeable emotive impacts can generate. “Speech,” the Court recently wrote, “remains protected even when it may ‘stir people to action,’ ‘*move them to tears*,’ or ‘*inflict great pain*.”<sup>79</sup> Indeed, “the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”<sup>80</sup> Therefore, “[s]peech does not lose its protected character . . . simply because it may embarrass others,”<sup>81</sup> nor can speech be restricted or punished merely because it “may have an adverse emotional impact on the audience.”<sup>82</sup> On the contrary, the Court has explicitly recognized that the First Amendment is “a *defense* in state tort suits . . . for intentional infliction of emotional distress.”<sup>83</sup>

It is true that, in protecting emotionally distressing speech, the Supreme Court has emphasized that the particular

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79. *Sorrell*, 131 S. Ct. at 2670 (emphasis added) (citing *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011)).

80. *Snyder*, 131 S. Ct. at 1219 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995)).

81. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

82. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

83. *Snyder*, 131 S. Ct. at 1215 (emphasis added); *see also Hustler*, 485 U.S. at 56 (upholding the First Amendment as a defense). In both *Snyder* and *Hustler*, the Court made clear that its holdings involved public figures or matters of public interest and that it was taking no position with respect to cases that involved only matters of purely private concern. In neither case, however, was the Court faced with a challenge to *content-discrimination*.

cases before it involved speech about public figures or matters of public concern.<sup>84</sup> It has carefully reserved the question of how it might decide in a case that involved speech on matters of purely private significance.<sup>85</sup> Perhaps this distinction between “public concern” and “private concern” will emerge as a factor in future strict-scrutiny analyses and lead to a new rule upholding restrictions on “private concern” speech that causes emotional harm. If that ever happens, however, it suffices for now to say that it would represent a new addition to current First Amendment law. It would also be contrary to the Supreme Court’s oft-mentioned view that it is not the place of the government to judge what speech is worthwhile enough to protect and then ban the speech that is not worth it.<sup>86</sup> “Most of what we say to one another lacks . . . serious value . . . but it is still sheltered from Government regulation.”<sup>87</sup>

In sum, given the stringent standards of proof of harm applicable to speech restrictions that discriminate based on content, it does not seem likely that revenge porn statutes of the kinds recently enacted or proposed would be able to survive strict scrutiny. It bears remembering that the Supreme Court has, in the last several years, upheld First Amendment protection for such doubtfully beneficial speech forms as

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84. *Snyder*, 131 S. Ct. at 1215; *Hustler*, 485 U.S. at 51-56 (repeatedly stressing that plaintiff was a “public figure”).

85. *Snyder*, 131 S. Ct. at 1220. Citron and Franks write that the Court in *Snyder* “assumed that such claims could be upheld as constitutional . . . if the expression giving rise to the claims involved purely private matters.” Citron & Franks, *supra* note 9, at 382. This conclusion is, however, hard to reconcile with the Court’s insistence that it was leaving open questions that lay outside the facts actually at issue (i.e., involving speech on a matter of public concern), *viz.*

Our holding today is narrow. . . . [A]nd the reach of our opinion here is limited by the particular facts before us. As we have noted, the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

*Snyder*, 131 S. Ct. at 1220. (internal quotation marks omitted).

86. *United States v. Stevens*, 559 U.S. 460, 470 (2010). For additional cases, see *infra* notes 132-36 and accompanying text.

87. *Stevens*, 559 U.S. at 479.

animal fighting and cruelty films,<sup>88</sup> violent video games,<sup>89</sup> private data about doctors' prescribing habits,<sup>90</sup> virtual child pornography<sup>91</sup> and false claims of having received the Medal of Honor.<sup>92</sup> The Court is not quick to strike down speech it does not like.<sup>93</sup>

### B. *Categorical Exceptions*

Another set of potential bases for upholding revenge porn laws are the so-called "categorical exceptions" to the First Amendment. The categorical exceptions are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."<sup>94</sup> The rule for categorical exceptions is simple: If a particular speech utterance falls into one of the recognized categories, it does not enjoy First Amendment protections, such as the rule of strict scrutiny.<sup>95</sup> As a result, the government can regulate the speech with more or less<sup>96</sup> the same broad level of discretion and flexibility that applies in regulating non-speech conduct.<sup>97</sup> The list of the categorical exceptions recognized to date is as follows:<sup>98</sup>

- Defamation
- Obscenity
- Incitement (to *imminent* unlawful action)

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88. *See id.* (technically, because of the statute's overbreadth, the Court did not actually get to the strict-scrutiny issue in striking down the statute down).

89. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

90. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

91. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

92. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

93. *See also supra* note 48 and accompanying text.

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

95. However, speech falling into a categorical exception may still be protected against content discrimination that is unrelated to reason the speech falls within the exception. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-95 (1992).

96. *See id.*

97. *See supra* notes 20-22 and accompanying text.

98. List is drawn from the opinion in *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

- Speech integral to criminal conduct
- True threats
- Fraud
- “Fighting words”
- Child pornography
- Grave and imminent threats to national security

Immediately noticeable about this list is that none of the categorical exceptions appears to justify a comprehensive prohibition on non-consensual posting of others’ explicit images. The exception for defamation may, for instance, provide an exemption for laws to punish *falsehoods* in revenge porn, but laws to forbid truthful revelations would not be covered.<sup>99</sup> The 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.<sup>100</sup> And, of course, the categorical exception for child pornography can be invoked to justify laws punishing the dissemination of explicit images that depict persons under 18 years.<sup>101</sup>

Unfortunately, not only do none of the existing categorical exceptions adequately fit the existing and proposed revenge porn laws, but the Supreme Court has been clear that it is not making new ones. On the contrary, the Court has repeatedly stressed, the list of exceptions is confined to a few “historic and traditional categories . . . long familiar to the bar”<sup>102</sup> and it has denied that there is any “freewheeling authority to declare new categories of speech outside the scope of the First

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

100. See *Miller v. California*, 413 U.S. 15, 43 (1973); *Roth v. United States*, 354 U.S. 476, 507 (1957). If it is true that eighty percent of revenge porn images were originally produced by the persons depicted, see *Fighting Back Against Revenge Porn*, *supra* note 7, pursuing the images as obscenity may have unintended negative consequences for the victims. See 18 U.S.C. § 2257, discussed in *supra* note 62 and accompanying text.

101. See *New York v. Ferber*, 458 U.S. 747 (1982).

102. *Alvarez*, 132 S. Ct. at 2544 (citing and quoting *United States v. Stevens*, 559 U.S. 460, 469 (2010) and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (Kennedy, J., concurring); see also *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011).

Amendment.”<sup>103</sup> In particular, the Court has flatly rejected the idea that courts can “create new categories of unprotected speech by applying a ‘simple balancing test’ that weighs the value of a particular category of speech against its social costs and then punishes . . . speech if it fails the test”—calling the notion “startling and dangerous.”<sup>104</sup>

In short, “without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription,”<sup>105</sup> having “a historical foundation in the Court’s free speech tradition,”<sup>106</sup> it is very doubtful there will be any additions to the list of categorical exceptions. The fact that the list of categorical exceptions appears to be essentially closed makes it particularly important to note what the list does *not* include. The list of items *not* included is not a short one:

*Not Among the Categorical Exceptions to First Amendment:*

- Offensive speech
- Badly motivated speech
- Outrageous speech
- Trifling and banal speech
- Emotionally distressing speech
- Pornography (non-”obscene”)
- Private information disclosures
- Non-consented to speech
- “Harmful” speech (*in se*)
- Speech re non-public figures
- Low-value speech
- Speech not of public concern
- Entertainment speech

While something might be said with respect to each one of these non-included categories, I will confine myself to the ones most likely to seem relevant to the context of revenge porn

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103. *Stevens*, 559 U.S. at 472.

104. *Entm’t Merchs.*, 131 S. Ct. at 2734 (quoting *Stevens*, 559 U.S. at 470).

105. *Id.*

106. *Alvarez*, 132 S. Ct. at 2544.

laws.

### 1. Emotionally Distressing Speech

Emotional distress is an obvious harm of revenge porn. However, as already discussed in relation to strict scrutiny,<sup>107</sup> the fact that speech causes emotional distress is not seen as a ground for restricting it but, to the contrary, as a reason for *protecting* it.<sup>108</sup> At any rate, based on the Court's repeated statements in support of protecting emotionally upsetting speech,<sup>109</sup> it seems fair to doubt that there is an as-yet unnoticed "historical foundation"<sup>110</sup> to exclude it from First Amendment protection. Emotionally distressing speech is not likely to be discovered among the categories of speech whose "prevention and punishment [has] never been thought to raise any Constitutional problem."<sup>111</sup>

### 2. Private Information Disclosures

By revealing pictures of intimate conduct and body parts to the world, revenge porn can dramatically surprise the privacy expectations of the persons depicted. The specific privacy interest that revenge porn implicates is often called "information privacy," that is, the interest that a person has in controlling others' access to information about oneself.<sup>112</sup> The question is whether there might be, an as-yet undiscovered, historical or traditional category of speech that is exempt from

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107. See *supra* notes 79-83 and accompanying text.

108. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.") (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995)).

109. See *supra* notes 79-83 and accompanying text.

110. *Alvarez*, 132 S. Ct. at 2544. See *Entm't Merchs.*, 131 S. Ct. at 2734.

111. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

112. See *Volokh*, *supra* note 73, at 2. Revenge porn can also intrude on the victim's privacy interest in "seclusion," particularly if the pictures in question were taken without the victim's consent. However, the general assumption in the revenge porn context (here, at least) is that the pictures in question were created either by, or with the consent of the persons depicted in them. Invasions of "seclusion" privacy in creating the pictures in the first place would raise a range of other issues, which are left to other discussions.

the rule of strict scrutiny because it conveys private information.

In at least one case involving photographs revealing truthful private information, the Court held the photographs not actionable.<sup>113</sup> However, proponents of restrictions on private-information speech may find solace in the fact that the Court has been careful never to say that First Amendment rights will *always* trump state-created privacy rights.<sup>114</sup> In a number of cases where it might have been apposite to lay down such a rule, the Court has always declined to do so.<sup>115</sup> What is

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113. See *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 252-53 n.5 (1974). However, the *Cantrell* case may be of limited precedential value since the plaintiffs had proceeded on a “false-light theory of invasion of privacy,” *id.* at 249, and the Court did not discuss the “information-privacy” interest. In addition, said the Court, the “case present[ed] no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for . . . false statements injurious to a private individual . . . .” *Id.* at 250.

114. See, e.g., *Citron & Franks*, *supra* note 9, at 378-79.

115. Perhaps the leading case that discusses the prudence of reserving the “information privacy vs. free speech” issue is *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (stating that “our cases have carefully eschewed reaching this ultimate question” of whether truthful publication can ever be punished). Among other important cases, one might list: *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (“The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure.”); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (referring to the Court’s “repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment”); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105 (1979) (“Our holding in this case is narrow . . . there is no issue here of privacy.”); see *Landmark Commc'ns v. Virginia*, 435 U.S. 829, 838-39 (1978); *Cox Broad. Co. v. Cohn*, 420 U.S. 469, 488-97 (1975); *Cantrell*, 419 U.S. at 250; *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967). Indeed, there are several cases in which the Court has explicitly held that it would allow greater restrictions of speech on purely private matters. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-61 (1985); *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976). In these latter cases, however, the speech at issue was *defamatory*, meaning that it was already outside the protection of the First Amendment anyway. *Firestone*, 424 U.S. at 450. In that kind of context, the point of the public/private distinction is not to allow the government to suppress private-concern speech but to prohibit the suppression of public-concern speech. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 299 (1964). That is to say, in cases of defamatory speech, the public/private distinction is invoked as an additional *protection* for speech, not as a justification for restricting it.

more, in its cases that have struck down restrictions on speech revealing private information, the Court has often noted that the speech in question, despite its private aspects, involved a matter of public significance or concern.<sup>116</sup>

The problem is that, even though the Court has never said that truthful speech always trumps privacy interests<sup>117</sup> (which it manifestly does not<sup>118</sup>), it has likewise never suggested that privacy interests could justify bypassing the strict scrutiny rule that normally applies in cases of *content discrimination*.<sup>119</sup> That is to say, the Court has never suggested that the privacy interests could be the basis of a categorical exception to First Amendment protection. If there is, in fact, an information-privacy categorical exception “long familiar to the bar,”<sup>120</sup> this studied omission of the Court to ever say anything at all to acknowledge it seems, at the very least, rather odd. In any

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116. See, e.g., *Bartnicki*, 532 U.S. at 533; *Daily Mail*, 443 U.S. at 104 (“matter of public significance”); *Hill*, 385 U.S. at 387-88. Cf. *Florida Star*, 491 U.S. at 532-34 (information obtained from a public record open to public inspection); *Landmark*, 435 U.S. at 838 (“truthful reporting about public officials in connection with their public duties”); *Cox Broad.*, 420 U.S. at 491 (“obtained from public records”).

Actually, in *Daily Mail*, the Court arguably may not have entirely reserved the issue, having stated, for example, that “state action to punish the publication of truthful information seldom can satisfy constitutional standards,” *Daily Mail*, 443 U.S. at 102, and that “[a]t issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained . . . .” *Id.* at 105-06. See also *id.* at 101-02 (stating that “a penal sanction for publishing lawfully obtained, truthful information . . . requires the highest form of state interest to sustain its validity”). Moreover, the Court never quite said that the information at issue actually involved a matter of public significance, but only that no issue of privacy was involved. *Id.* at 105. Thus, the holding in *Daily Mail* arguably was purely about protecting the publication of truthful information, effectively establishing a standard of strict scrutiny for restrictions on such publication.

117. *But cf. Daily Mail*, discussed in preceding footnote.

118. For example, there seems to be no real question that wiretapping laws are constitutional as privacy protection measures despite the fact that they punish wiretappers for disclosing truthful private information that they illegally obtain. See *Bartnicki*, 532 U.S. at 526-29.

119. See *supra* Parts II.A–B and accompanying notes. For example, in *Bartnicki*, the Court stressed that wiretap laws, whose “basic purpose . . . is to protect the privacy of . . . communications,” do not discriminate on the basis of content. *Bartnicki*, 532 U.S. at 526 (internal quotation marks omitted).

120. See *supra* note 102.

event, the Court's silence on the issue hardly supports the conclusion that there is such an exception.

There is also a serious policy reason for not elevating the understandable concern for information privacy into a legal right of persons to control what is disclosed about them. The problem is that any such right would amount to a direct inroad on free expression. That is to say, the interest in information privacy (or, at least, in controlling what others disclose about you) is directly opposed to the First Amendment interest in protecting free speech. Put bluntly, *freedom of speech* and *controls on speech* are simply opposite sides of the same coin. As a result, the Court could only protect private-information interests at the direct expense of an *express* constitutional right.<sup>121</sup>

In summary, although the Court has clearly shown concern about privacy interests, it has never even hinted that there is a *categorical exception* to the First Amendment that allows government to discriminate based on content just because the speech in question conveys private information. It is doubtful, therefore, that there can be said to be a *historical foundation* for adding "information privacy" to the list of categorical exceptions that exempt speech from the rule of strict scrutiny.<sup>122</sup>

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121. While the Fourth Amendment somewhat impairs or, at least, complicates the efforts of governmental actors to invade personal private space, U.S. CONST. amend. IV, there is no recognized constitutional right protecting the privacy of private information as such. *NASA v. Nelson*, 131 S. Ct. 746, 756-57 (2011) (expressly declining to recognize such a right); *see also id.* at 764 (Scalia, J., concurring) ("A federal constitutional 'right to information privacy' does not exist."), and *id.* at 769 (Thomas, J., concurring) (stating that "the Constitution does not protect a right to informational privacy"). In recently refusing to decide whether such a right exists, the Court consciously followed "the same approach . . . that the Court took more than three decades ago" in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Notably, all three cases (*Whalen*, *Nixon* and *Nelson*) discussed only the possibility of a constitutional right of information privacy *as against the government*, and none of these cases even hinted (or "left open the question") whether there might be some sort of constitutional right of information privacy that would limit the freedom to speak of *other private persons*. Clearly, on the law as it now stands, to suppress the speech of private individuals in order to protect other people's private information would be to allow a state-created personal right to trump a fundamental right under the federal Constitution.

122. Professor Volokh has argued that "privacy concerns might suffice to

### 3. Speech on Matters Not of Public Concern (Low Value)

The question here is whether revenge porn might fall within an as-yet undiscovered “historic and traditional”<sup>123</sup> category of speech that is excluded from protection *because it does not relate to a matter of public concern*.<sup>124</sup> Although the Court has at least once explicitly refused to recognize such a categorical exception,<sup>125</sup> it has also made occasional statements suggesting that the First Amendment gives less protection to speech on topics that are not considered important to public debate. In the recent case of *Snyder v. Phelps*, for example, the Court approvingly quoted a number of these statements, noting for instance that “not all speech is of equal First Amendment importance,”<sup>126</sup> and adding that “speech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection’”<sup>127</sup> but, “where matters of purely private

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justify narrow restrictions on clearly defined kinds of speech that very rarely have value—public or private,” suggesting nude photos or sex tapes as an example. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws and Cyberstalking*, 107 NW. U. L. REV. 731, 762 (2013). However, for the reasons set out *supra* text accompanying notes 60-75, the premise of this argument—that nude photos rarely have value—seems empirically dubious: The information that such pictures convey may very well matter, to at least some people. While Professor Volokh may not see much value in such photos, it is precisely because different people place different values on information that the First Amendment leaves the valuation of speech for the speakers and listeners to decide. *See supra* text accompanying note 68 & *infra* notes 132-36.

123. *See supra* note 102.

124. There is obviously some overlap between the subject of this subsection (speech unrelated to matters of public concern) and that of the previous section (speech conveying purely private information). The two classes of speech are not necessarily identical. Indeed, there could also conceivably be a third class of speech that combines these two, i.e., speech conveying private information that is not of public concern (as distinguished from private information that is of public concern). There seems to be no evidence in the cases of a “historic or traditional” basis for this combination category, either.

125. *Connick v. Myers*, 461 U.S. 138, 147 (1983) (“We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity . . .”).

126. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

127. *Id.*

significance are at issue, First Amendment protections are often less rigorous.”<sup>128</sup> In other words, while “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection . . . [laws] restricting speech on purely private matters do not implicate the same constitutional concerns as limiting speech on matters of public interest.”<sup>129</sup> Notably, however, these statements in *Snyder* were, strictly speaking, dicta,<sup>130</sup> and the cases that the Court cited as original sources for the quoted language were cases that involved kinds of speech that normally do not merit full First Amendment protection anyway.<sup>131</sup>

Despite the Court’s statements, such as those quoted in the preceding paragraph, the Court has also—perhaps even more frequently—made statements that firmly reject the idea of a two-tiered (or multi-tiered) scheme of free-speech protection based on the “public” value of the speech. For example, even while the Court has noted that “[s]ome . . . ideas and information are vital, some of slight worth,” it has insisted that “the general rule is that the speaker and the audience, not the government, assess the value of the information presented.”<sup>132</sup> After all, the Court has observed, “[m]ost of what we say to one

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128. *Id.*

129. *Id.*

130. It was dicta inasmuch as the Court found that the speech at issue there *did* relate to a matter of public concern, so there was no logical necessity to specify what rules might apply to speech that did not. *Snyder*, 131 S. Ct. at 1216-17.

131. The original source cases that the *Snyder* Court cited for the above quotations (*supra* notes 126-30 and accompanying text) were *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (defamation) and *Connick v. Myers*, 461 U.S. 138 (1983) (government-employee speech). In these cases, the point of citing the “public concern” factor was not to justify *withholding* protection from speech because it was not on a matter of public concern but, quite the opposite, to *confer* protection on normally unprotected speech by invoking an exception to an exception for the speech that *is* on a matter of public concern. To run this wording from these cases in reverse would be to convert an exception that was designed to protect speech into an exception that suppresses it—a rather perverse result. *Snyder* itself did involve speech on a matter of public concern, but *Snyder* did not decide that the outcome would have been different if it had not—any implication to that effect in *Snyder* would have been dictum.

132. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671-72 (2011) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

another lacks . . . serious value . . . but it is still sheltered from Government regulation” and even “[w]holly neutral futilities . . . come under the protection of free speech *as fully as* do Keats’ poems or Donne’s sermons.”<sup>133</sup> “Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny . . . . Even if we can see in them ‘nothing of any possible value to society . . . they are as much entitled to the protection of free speech as the best of literature.’”<sup>134</sup> The Court has considered the idea that the rights of free speech and press are solely “the preserve of political expression or comment upon public affairs” and flatly rejected it.<sup>135</sup> In short, despite some statements of the Court, it simply cannot be taken as a general principle that legislatures are empowered to restrict or punish speech whenever the majority of legislators deem it to be “no essential part of any exposition of ideas” or only of “slight social value.”<sup>136</sup>

There are, moreover, good policy reasons for rejecting the idea that there is any sort of “public concern” pre-requisite or qualifier on the scope of the First Amendment’s protection.

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133. *United States v. Stevens*, 559 U.S. 460, 479-80 (2010) (emphasis added).

134. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2737 (2011) (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

135. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *see also Connick*, 461 U.S. at 147 (“[The] First Amendment does not protect speech and assembly only to the extent it can be characterized as political. ‘Great secular causes, with smaller ones, are guarded.’”).

136. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Interestingly, the Court’s rationale for striking down the law in *Snyder* was apparently, simply, that: “What Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.” *Snyder*, 131 S. Ct. at 1219. Having said that, the Court did not consider it necessary to consider whether the law would pass strict scrutiny. In other words, in *Snyder*, the mere fact that the speech in question was political speech in a public forum provided enough reason in itself to strike down the law restricting it. Perhaps by dispensing with strict scrutiny for such very “specially” protected speech in *Snyder*, the Court was signaling to a new *higher* category of protected speech, while reserving the possibility of speech restrictions being valid under the strict scrutiny rule to cases that do not involve political speech on matters of public interest. That is to say, maybe there *is* a nascent hierarchy here consisting of public-forum political speech, which is practically inviolable, as opposed to speech that is protected “merely” by the strict scrutiny rule.

One reason is that, as we have already seen, people need to have many kinds of information, not just important “public debate” information, to make informed and intelligent decisions in their daily lives.<sup>137</sup> As the Supreme Court has recognized as far back as 1940: “Freedom . . . must embrace *all* issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>138</sup> In modern times, for example, a “consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.”<sup>139</sup> “If the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating . . . .”<sup>140</sup>

There is also another problem with placing a narrow “public-interest” scope on First Amendment freedoms. Even though not all speech is equally necessary to operate as a democratic society, it would be dangerous to entrust legislatures with the power to make decisions, binding on all, that some speech (which it happens not to like) is unimportant enough to be dispensed with. A First Amendment that conferred government with the power to censor and ban so-called “unimportant” speech would give no real protection at all.<sup>141</sup> Indeed, the Supreme Court has expressed strong

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137. See Volokh, *supra* note 73 (“daily life matters”); see generally *supra* text accompanying notes 66-74. See also *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (indicating that it is not necessary for a speaker “to spread his views before the public” in order to qualify to his message for protection as a matter of public concern). *Accord Rankin v. McPherson*, 483 U.S. 378, 387 n.11 & 388 n.13 (1987).

138. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (emphasis added).

139. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)). See also *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (“[T]hose whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups.”).

140. *Consol. Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 537-38 (1980) (internal quotation marks omitted).

141. The fundamental problem is that all the people who act in the name of government and wield its power have interests of their own, personal and institutional, and they are inevitably tempted to take those interests into account when making choices, bending their biases in their own favor. These temptations toward self-preference will apply as much to choices about speech restrictions as to other governmental choices that they make. The

reservations as to whether even judges should “decide on an *ad hoc* basis which publications address issues of general or public interest.”<sup>142</sup> And this is not to mention the chilling effect on truthful speakers if people could be punished based on after-the-fact determinations that the truths they spoke were not of sufficient public concern.

Perhaps most importantly, even though the Court has frequently *said* that political and other public-interest speech is entitled to the greatest protection, it has never actually *held* that low-value speech is entitled to a lesser level of protection. On the contrary, it has specifically denied (as mentioned earlier) that there is any “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”<sup>143</sup> That statement in itself suffices to conclude that there is no *historical* or *traditional* basis for recognizing a generic categorical exception for lower-value speech. And when one considers some of the kinds of speech that have recently been confirmed to have constitutional protection against restrictive laws,<sup>144</sup> it seems highly doubtful that the Court is inclined to incur the risks entailed in letting government declare classes of speech to be too unimportant for protection.

#### 4. Badly Motivated Speech

At least one revenge porn statute expressly limits its prohibition to disclosures that are intended to cause harm to the person depicted.<sup>145</sup> However, truthful speech that is otherwise protected under the First Amendment does not lose that protection merely because it was prompted by bad motivations.<sup>146</sup> The reason is that, even when an ill-motivated

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persistent prevalence of corruption, both petty and grand, at every level of government, everywhere, counsels strongly against ignoring this possibility.

142. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (internal quotation marks omitted) (emphasis added). *See also Thornhill*, 310 U.S. at 102 (“Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”).

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

144. *See supra* notes 88-93 and accompanying text.

145. *See, e.g.*, CAL. PENAL CODE § 647(j)(4)(A) (West 2013).

146. *See Garrison v. Louisiana*, 379 U.S. 64, 73 (1964); *see also* *FEC v.*

speaker does speak out of hatred, the “utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”<sup>147</sup> Therefore based on the precedents, there appears to be no historical or traditional basis for a “bad motivation” that exempt speech from the requirement of strict scrutiny under the First Amendment.

### 5. Non-Consented to Speech

Recently enacted and proposed revenge porn statutes typically make their restrictions applicable only if the persons in the pictures did not give advance consent to the disclosures of the images in question. Consent provisos do not, however, necessarily redeem restrictions on speech protected by the Constitution.<sup>148</sup>

While the Supreme Court has occasionally upheld “consent” limitations on First Amendment rights, these cases involved statutory rights of individuals to be protected from *receiving* unwanted messages or communications.<sup>149</sup> The Court has never even hinted that the First Amendment permits laws that give private individuals a power of *censorship*, allowing them to control the content or messages that others express.<sup>150</sup>

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Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007) (“a speaker’s motivation is entirely irrelevant”); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (highly offensive parody).

147. *Id.* See generally *Volokh, supra* note 122, at 773-76.

148. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669-70 (2011) (disapproving a consent proviso which, like the ones in recently enacted revenge porn statutes, “forced [acquiescence] in the State’s goal of burdening disfavored speech by disfavored speakers”).

149. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 734 (2000) (“Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider.”); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728 (1970) (refusal to receive pandering mail); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (refusal to receive literature distributed to homes).

150. See *Hill*, 530 U.S. at 734 n.43 (acknowledging that “prior cases found governmental grants of power to private actors constitutionally problematic . . . [where] the regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners” and where the Court had expressed concern that “[i]t would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech . . . .” (citing *Reno v. ACLU*, 521 U.S. 844, 880 (1997))).

After all, the guarantees of speech and press are fundamentally built on the idea that people should not *have* to get permission before being allowed to speak, even when they speak on sensitive topics or express disfavored viewpoints.

The consent requirement in revenge porn laws is essentially just another name for *prior restraint*—a legal requirement to obtain “consent” before communicating.<sup>151</sup> And prior restraints are a form of advance censorship that are among the least tolerated of restrictions on speech.<sup>152</sup> While it is true that past concerns about “‘prior restraints’ . . . relate to restrictions imposed by official censorship,”<sup>153</sup> a law that grants private individuals the absolute discretion, utterly unconstrained by the democratic process, to totally block dissemination of disfavored speech creates a system of censorship that would seem to be even *more* questionable than one controlled by public officials.<sup>154</sup>

The conclusion so far is this: Unless the Supreme Court

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151. While it is true that the term prior restraint is “not self-defining” and may have in itself have “slight utility,” *Alexander v. United States*, 509 U.S. 544, 567 (1993) (Kennedy, J., dissenting), what is clear is that a process “which requires the prior submission . . . to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system” —including a requirement that the censor bear the burden of proving that the speech content is unprotected and that there a provision for quick judicial review. *Freeman v. Maryland*, 380 U.S. 51, 58 (1965). A reasonable way to understand the difference between “prior restraints” and other kinds of restrictions is that prior restraints are essentially requirements to pre-clear speech before it can be lawfully uttered, meaning that a mere failure to pre-clear is subject to a sanction irrespective of whether the speech itself was otherwise subject to sanction.

152. *See Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979) (“Prior restraints have been accorded the most exacting scrutiny in previous cases.”); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 592 (1976) (the government “carries a heavy burden of showing justification for the imposition of such a restraint”); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that prior restraints on expression come to the court with “a heavy presumption’ against its constitutional validity”); *see also Near v. Minnesota*, 283 U.S. 697 (1931).

153. *Hill*, 530 U.S. at 734 (internal quotation marks omitted).

154. *See Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). In any case, because revenge porn laws make the targeted speech *prima facie* illegal to utter, it is probably specious to say that the restraint on speech is anything but an *official* prior restraint by government on speech that it officially disfavors.

significantly changes the law, it is very doubtful that revenge porn laws along the lines of the ones currently enacted and proposed can be drafted in such a way that they will either (a) pass strict scrutiny, or (b) fit into one of the existing categorical exceptions. However, this still leaves a third possibility for writing a valid revenge-porn law, namely, framing it in such a way that it can qualify under the rule permitting merely “incidental burdens” on speech.<sup>155</sup> In the next section we consider the potential for fashioning a revenge porn statute that could be upheld as a merely “incidental” burden.

### C. *Incidental Burdens (the O’Brien Rule)*

Even when a statute is meant to regulate non-speech conduct, it can still have “incidental” impacts on free expression. For example, the laws forbidding trespass can incidentally limit a speaker’s freedom to express herself on premises where she has no right to be.<sup>156</sup> However, statutes that impose merely “incidental” burdens on speech do not need to pass strict scrutiny; they are subject instead to a lesser level of scrutiny, now known as “intermediate scrutiny.”<sup>157</sup> Such intermediate scrutiny requires only that the law:

- be otherwise within legislature’s constitutional power;<sup>158</sup>
- further a governmental interest that is both:
  - an important or substantial interest
  - unrelated to suppression of free expression; and

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155. See *supra* text accompanying note 45.

156. See, e.g., *Virginia v. Hicks*, 539 U.S. 113 (2003); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-68 (1972) (“[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.”).

157. The term “intermediate scrutiny” did not appear in a majority opinion in the First Amendment context until *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–42 (1994) (“regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny”), decades after elements of intermediate scrutiny review were first established in *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (described in the text that immediately follows).

158. I.e., valid apart from its impacts on speech; for example, as *per* the rational basis test. See *supra* text accompanying notes 20-22.

- impose no greater burden on speech than is essential to further the governmental interest<sup>159</sup>

This test for reviewing “incidental burdens” on speech had its genesis in *United States v. O’Brien*.<sup>160</sup> The defendant in *O’Brien* had been convicted under a statute that prohibited the destruction of draft cards (draft registration certificates). Because the defendant had burned his draft card publicly as a way of expressing protest, he claimed that the burning was a form of speech, protected by the First Amendment. The Court accepted that the act of burning could be deemed a kind of “speech” but it upheld the conviction anyway. In doing so, the Court reasoned that the statute had a constitutionally valid purpose *other than* to regulate speech or the speaker’s message and that the impingement on speech was merely “incidental” to the statute’s valid non-speech-related purpose. For such incidental impingements on speech, the Court established the test for validity (now known as “intermediate scrutiny”) that was set out in the preceding paragraph.

### III. A Proposed Constitutional Revenge Porn Law

The “incidental burdens” rule from the *O’Brien* case<sup>161</sup> offers a possible approach to drafting a law that addresses the principal emotional harms of revenge porn without being subject to the high hurdle of strict scrutiny. The key 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. As long as the law’s primary prohibition can qualify for and pass intermediate scrutiny, any burden that the law incidentally imposes on speech would be constitutionally permissible under *O’Brien*. Indeed, any speech uttered in furtherance of violations of the law would be speech integral to a criminal act and, as such,

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159. *United States v. O’Brien*, 391 U.S. 367 (1968).

160. *Id.*

161. *See supra* II.C.

would fall within a categorical exception.<sup>162</sup>

To write a revenge-porn law whose burden on speech is only “incidental,” one must take care to couch the law’s prohibition in terms that do not show a purpose to target, directly or indirectly, any particular speech-content as such. For example, it would not work to simply prohibit “speech that causes extreme emotional distress,” as this would amount to a content-based regulation of speech.<sup>163</sup> But what a revenge-porn law could validly do is criminalize any *act*<sup>164</sup> intended to cause

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162. See *United States v. Williams*, 553 U.S. 285, 298-300 (2008) (holding that the Constitution does not protect speech that is uttered to further the commission of a crime); *accord* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). See generally *supra* Part II.B. (Categorical Exceptions).

The Supreme Court has not yet clearly explained the relationship between the rule for “incidental” burdens on speech (which are subject to intermediate scrutiny) and the rule for speech “integral” to crime (which is entirely excluded from First Amendment protection). It seems obvious, however, that an utterance cannot be deemed an integral part of a crime unless there is a validly enacted “crime” for the speech to be integral to. If this assumption is correct, then it follows that the categorical exception for speech integral to crime can only apply if there is a predicate crime that can pass intermediate scrutiny under the incidental-burdens rule. In other words, every speech-burdening statute must, to be valid, either be at least able to pass intermediate scrutiny or fall within a categorical exception. While most criminal statutes should have no trouble passing the intermediate-scrutiny test, such passage cannot be taken as a foregone conclusion, especially in the case of crimes enacted out of an animus toward certain speech content. In any event, it is assumed in the present discussion that the statutory language proposed in the text would have to be able to pass intermediate scrutiny.

163. A law that regulates speech based on its effects on listeners is considered to be a content-based regulation. See *supra* note 37 and *infra* text accompanying notes 170-73. And, of course, a law that specifically singles a particular subject matter for restriction (e.g., by prohibiting only sexually themed or nude photos that cause distress) would be even more open to challenge as a content-based regulation of speech.

164. The word “act” as used here and in the language proposed below is to be understood as defined in the Model Penal Code, i.e., “a bodily movement.” MODEL PENAL CODE § 1.13(2). That is to say, it is solely the defendant’s bodily movements (and accompanying mental state) that are defined as elements of the crime, and not the actual *result* or effects that the act may have. To be clear, my argument for the constitutionality of the language proposed below is no way dependent on the supposed distinction between “conduct” and “speech.” Indeed, as the Court has essentially recognized, there is no realistic way to draw such a distinction. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010) (as long as the “conduct triggering coverage under the statute consists of communicating a

or any *attempt* to cause the non-speech harm of extreme emotional distress. A very simple version of such a statute might read as follows:

“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.”

While it is true that the *res gestae* of this crime might usually consist mainly of speech, the fact that speech is used as a means to accomplish a criminal result or attempt does not mean the First Amendment shields the perpetrator’s actions.<sup>165</sup> For example, the Supreme Court made clear in *United States v. Williams*<sup>166</sup> that the First Amendment permits punishment even of pure word crimes as long as the words are spoken as an integral part of an offense under a valid criminal statute. A perhaps closer analogy for the proposed language is the prohibition, contained in Title VII of Civil Rights Act of 1964, that forbids sex discrimination by creating a hostile workplace environment.<sup>167</sup> The Supreme Court has stated its approval of this prohibition explaining that, as long as “the government does not target conduct *on the basis of its expressive content*,

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message,” the strict-scrutiny standard applies). In any event, under the reasoning of *O’Brien*, the distinction is not necessary or constitutionally useful anyway. The more realistic distinction is between conduct that conveys message-content and other (non-expressive) conduct—and the rule is that the former can be regulated just as much as the latter *except*: (1) content-based regulations of the former are generally subject to strict scrutiny, and (2) content-neutral regulations of the former are subject to intermediate scrutiny, under *O’Brien*.

165. See *Williams*, 553 U.S. at 298-300; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992), quoted *infra* text accompanying note 168.

166. 553 U.S. 285, 298 (2008) (upholding a law that criminalizes offers to sell child pornography or other material that the offeror describes as such). “Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech . . . that is intended to induce or commence illegal activities.” *Id.* Indeed, words are a crucial component of many crimes and attempts to commit crimes (e.g., uttering “your money or your life,” or “how’d you like to buy some cocaine?”).

167. 42 U.S.C. § 2000e-2 (2012); 29 CFR § 1604.11 (1991); see also 18 U.S.C. § 242 (2012); 42 U.S.C. §§ 1981, 1982 (2012); *R.A.V.*, 505 U.S. 390.

acts are not shielded from regulation merely because” of what they express.<sup>168</sup> Based on this reasoning, the First Amendment does not automatically prevent enforcing Title VII to redress workplace sexual harassment *even when the harassment is effectuated by means of speech*. The reason is that Title VII:

- is targeted at employment discrimination (in essence, a non-speech result), but
- does *not* restrict any particular speech, message content or viewpoint as such.<sup>169</sup>

There is, however, an objection to this reasoning. As Professor Volokh points out in an analogous context, when a law restricts or punishes speech *because* listeners are distressed or outraged by its content, the law should be treated as a content-based regulation and, therefore, subject to strict scrutiny.<sup>170</sup> The leading case is *Boos v. Barry*,<sup>171</sup> which held

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168. *R.A.V.*, 505 U.S. at 390 (using Title VII as an example; emphasis added); *see also* *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) (“Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment.”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

169. This is not to say that Title VII analysis is always simple or clear cut. Sometimes discrimination might inhere in the very ideas that a person expresses. For example, a campus worker might cause some of her co-workers feel very uncomfortable by propounding serious and reasoned arguments that old white males should not remain in college teaching (e.g., because students don’t easily relate to them, etc.). *See Should Older Academics Be Forced to Retire?*, THESIS WHISPERER (Sept. 10, 2014), <http://thesiswhisperer.com/2014/09/10/older-academics-please-retire-now/>. It is said, however, that “when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech”—which seems to mean that Title VII cannot be constitutionally applied against bigoted expressive conduct, no matter how hostile it is to co-workers. *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 597 (5th Cir. 1995). *See also Rodriguez*, 605 F.3d at 710. Even if the First Amendment analysis under Title VII is not entirely free of doubt, however, it nonetheless seems clear enough that the First Amendment leaves ample room for taking verbal behavior into account in determining whether a “hostile workplace environment” has been created or allowed. The reasoning used to uphold such prohibitions provides a model for upholding laws that punish communicative-acts in furtherance of purposes to cause other prohibited harms as well.

170. Volokh, *supra* note 122, at 769 (quoting *Snyder v. Phelps*, 131 S. Ct.

that regulations of speech are considered to be content discrimination if they restrict speech based on the “direct impact the speech has on its listeners . . . [its] emotive impact on its audience”<sup>172</sup> Accordingly, Professor Volokh argues, a law can be considered a content-based regulation of speech even when the law does not mention content at all.<sup>173</sup> It is enough if the law restricts speech-content based on listeners’ reactions to it.

Whatever the merit of Professor Volokh’s arguments (and there is much to support them<sup>174</sup>), they should not pose an obstacle to a statute that creates an otherwise valid criminal offense, even if it “incidentally” burdens speech. The question is, then, whether the statutory language proposed here could be considered to create a valid criminal offense despite the fact that it would almost inevitably place disproportionate burdens on certain speech.<sup>175</sup>

The first step in answering this question is to determine whether a law embodying the above-proposed language would, *apart from* its burden on speech, create a valid criminal offense. The answer is almost certainly yes: the conduct that the proposed language prohibits (*viz.* acting with an intention to cause or otherwise attempting to cause extreme emotional distress) is a form of socially harmful conduct that a legislature

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1207, 1218-19 (2011)).

171. 485 U.S. 312 (1988).

172. *Boos*, 485 U.S. at 321; *see also* *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”).

173. Volokh, *supra* note 122, at 768-70.

174. *See, e.g.*, *McCullen v. Coakley*, 134 S.Ct. 2518 (2014) (upholding the content-neutrality of a law restricting abortion-clinic picketing). In that case, the Court made the following distinction:

If . . . the speech [in question] caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise *irrespective* of any listener’s reactions.

*Id.* at 2532 (emphasis added).

175. The *O’Brien* (incidental burdens) rule “does not provide the applicable standard for reviewing a content-based regulation of speech . . .” *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010).

has, at least presumptively, the constitutional power to deter.<sup>176</sup> That is to say, such a prohibition seems to fall easily within the legislature’s “large discretion . . . to determine . . . what the interests of the public require, [and] what measures are necessary for the protection of such interests.”<sup>177</sup>

The next step is to determine whether the law could be valid even though it would likely burden some kinds of speech-content more than others. Again, the answer is almost certainly yes: as the Court recently stated: “a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.”<sup>178</sup> To paraphrase the Court: “[The prohibited harms] are problems no matter what caused them.”<sup>179</sup> What is more, even though the above-proposed language would punish expressive acts in some<sup>180</sup> of its applications, they are not punished because of the defendant’s *communicative* purpose or impact<sup>181</sup> but rather

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176. Under the “rational basis” test. *See supra* text accompanying notes 20-22.

177. *Id.*

178. *Coakley*, 134 S. Ct. at 2531.

179. *Id.* Indeed, the harms in a revenge-porn case (extreme emotional distress) are likely to be vastly more serious than the prohibit harms referred to in the Court’s statement quoted in the text (blocking the sidewalk).

180. It goes without saying (though perhaps is not crucial) that there are ways to inflict emotional distress other than by means of speech. It therefore seems fair to say that a law based on the proposed language would punish expressive acts only in “some” instances.

181. *See* *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (noting a distinction between expressive acts that “seek to disseminate a message to the general public” and those that merely “intrude upon the targeted [listener], and to do so in an especially offensive way”); *see also* *Hill v. Colorado*, 530 U.S. 703, 714-18 (2000); *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) (“For instance, racial insults or sexual advances directed at particular individuals in the workplace may be prohibited on the basis of their non-expressive qualities . . . as they do not ‘seek to disseminate a message to the general public’”). While *Frisby* also suggested, in the residential picketing context, that even a “broader communicative purpose” may not save the offensive picketing in question, *Frisby*, 487 U.S. at 486, that suggestion may merely reflect the fact that the particular picketing in the case—deliberately targeted to disturb the sanctity of a person’s home—entailed geographical privacy effects that can be regulated as time, place and manner restrictions (also subject to intermediate scrutiny). That kind of geographical time-place-manner justification would not, however, be applicable in cases involving communications via the Internet, which are not location-specific. So even though revenge porn raises serious privacy concerns, those concerns (unlike the picketing in *Frisby*) are content or

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because the defendant, without communicative purpose, acted in furtherance of a legislatively prohibited objective. They are punished because the defendant endeavored, without communicative purpose, to produce a result that an otherwise valid law has makes it a crime to endeavor to produce.

Unpacking the Court's points quoted in the prior paragraph, we can see two potentially relevant distinctions between the "disproportionate" burdens entailed in the statutory language proposed above and laws (such as those in *Boos v. Barry*) that discriminate impermissibly based on listeners' reactions. First, there is the distinction between basing speech restrictions on (a) the listener impacts that the speaker *intends* to have, vs. (b) those that the speech *actually* has. Second, there is the distinction between punishing a person who acts with a communicative purpose vs. punishing one who acts without such a purpose.

The first of these two distinctions (intended vs. actual impacts) is, obviously, a rather nice one—perhaps too nice to be tenable. At any rate, although the Court has apparently never ruled on the point, there is good reason to think that the first distinction would not be sufficient in itself to distinguish the revenge-porn law proposed above from laws that were disapproved in cases like *Boos v. Barry*.<sup>182</sup> An argument that it should *not* be sufficient might go something like this:

The fundamental point of speech is to have impacts on listeners' minds—increasing their knowledge, changing their opinions, affecting emotional states, and so on. It would therefore be a rank evasion of the First Amendment if legislatures could discriminate against content and viewpoints they do not like by cagily basing their speech restrictions, not on the actual impacts the speech has on listeners, but on the listener-impacts that speakers *intend*. Consider,

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viewpoint concerns and not concerns about time, *place*, or manner. A speech regulation that discriminates based on content or viewpoint concerns must, unlike time, place and manner discrimination, pass strict scrutiny (unless the speech falls within a categorical exception).

182. Discussed *supra* text accompanying notes 170-73.

for example, a law that forbids “trying to engender feelings of hate or animosity toward people of Sharmandian ancestry.” There may be obvious good reasons for wanting to enact such a law, but doing so would nonetheless be (under this argument) a pure evasion of the First Amendment. That is to say, there is (arguably) a First Amendment right to urge others to feel hate or animosity toward any group one chooses, whether it be the innocent Sharmandians, on one hand, or pedophiles, terrorists, drug traffickers, cyberbullies, misogynists, capitalists, lawyers or whatever.<sup>183</sup>

Assuming the foregoing argument is correct, then the first of the two potential distinctions (actual vs. intended impacts on listeners) is not in itself sufficient save a law from invalidity as content discrimination. That is to say, there is a good possibility the Court would find speech restrictions based on *intended* listener impacts to be just as much content discrimination as restrictions based on *actual* listener impacts. That being so, the question would then be how laws like the (invalid) Sharmandian law could be distinguished from laws that forbid, for example, verbal conduct creating a hostile workplace environment or inflicting extreme emotional distress.

Assuming that, indeed, these two kinds of laws can be constitutionally distinguished at all, the most plausible basis would seem to focus on the defendant’s communicative purpose—or lack thereof. The law in the Sharmandian example presupposes that engendering hate or animosity

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183. *See* Am. Booksellers Ass’n v. Hudnut, 771 F. 2d 323 (7th Cir. 1985); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *Cf.* Stanley v Georgia, 394 U.S. 557, 565 (1969) (“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”). Although a government is no doubt permitted to guide or influence public opinion, it is not permitted to do so by banning speech that it does not favor. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671-72 (2011)(reasoning that “a State’s failure to persuade does not allow it to hamstring the opposition” and “the State cannot engage in content-based discrimination to advance its own side of a debate”).

precisely *is* the defendant's communicative purpose, and it seeks to punish, probably impermissibly, the use of communication to further that purpose. By contrast, hostile-workplace laws and emotional-distress laws do not presuppose a communicative purpose (such as, for instance, "seek[ing] to disseminate a message to the general public"<sup>184</sup>), and they are framed in such a way that they can operate irrespective of such a purpose. The underlying legal principle to make this distinction might be formulated like this: the application of a statute cannot be said to be content-discrimination unless there is purposeful communicative content for it to apply to. When the conduct triggering coverage under a statute does not consist of communicating a message, "then the less stringent standard . . . announced in *O'Brien* for regulations of noncommunicative conduct controls."<sup>185</sup> Accordingly, the crucial distinction that may save the above-proposed revenge-porn law (along with hostile-workplace laws and emotional-distress laws) is its requirement<sup>186</sup> that the defendant has pursued a prohibited intention in the absence of a purpose to communicate facts or ideas.<sup>187</sup>

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184. *Frisby*, 487 U.S. at 486, *quoted to similar effect in Rodriguez*, 605 F.3d at 710. *See generally supra* note 181.

185. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010). Note that the first part of the sentence closely tracks, but states the obverse of, the Supreme Court's wording at the same place, *quoted supra* note 164. Notably, the seminal *O'Brien* case, which established the incidental-burdens rule, took pains to make clear that the governmental interest and statutory impingement on speech in that case were limited to the *noncommunicative* aspects of the defendant's conduct, that the defendant was convicted solely for the *noncommunicative* impact of his conduct "and nothing else." *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968).

186. *See, e.g., Rodriguez*, 605 F.3d at 710.

187. It is possible that a lack of communicative purpose may be, in itself, enough deprive a defendant's acts of First Amendment protection. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (reiterating that, in order for conduct to be considered protectable as speech, the defendant must have "[a]n intent to convey a particularized message")). On the other hand, there is good reason to be reluctant to establish a rule that invites courts and juries to decide that a given archetypally communicative act (such as talking or Internet posting) lacks communicative purpose and is, therefore, punishable. Such a rule would, however, be less problematic if its application were limited to cases in which it was also found that the defendant intentionally endeavored to produce a certain result and the legislature otherwise has the power to criminalize such an endeavor.

If the foregoing analysis is correct, then a legislature has presumptive power to prohibit the harm of doing acts intended to cause extreme emotional distress and, as per *Coakley*, that legislative power is not diminished by the fact that the prohibition may “disproportionately affect speech on certain topics.”<sup>188</sup> Thus, the proposed statutory language should satisfy the first prong of intermediate scrutiny for “incidental” burdens, *viz.* that the prohibition be within legislature’s constitutional power to enact. The statute employing the proposed language also would satisfy the other three qualifications of intermediate scrutiny (set out above), namely:

1. The government has an interest that is obviously an important one – the emotional well-being of its citizens.
2. That governmental interest is, in itself, unrelated to suppression of free expression.
3. The burden on speech is “no greater than essential” to further the government interest because the law would define the defendant’s actions as a crime only in the “absence of a purpose to convey or disseminate truthful information or ideas” and it takes into account the rule that protects even badly motivated efforts to express the truth.<sup>189</sup>

Finally, by not limiting statute’s prohibition specifically to explicit photographic and video images, the proposal avoids the implication from “underinclusiveness” that the legislature’s real aim is not to address the emotional and privacy harms of revenge porn but, rather, to discriminate on the basis on content against sexual messages that it does not like.<sup>190</sup>

#### IV. Conclusion

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188. *McCullen v. Coakley*, 134 S.Ct. 2518, 2531 (2014).

189. *See supra* notes 145-47 and accompanying text.

190. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 214-15 (1975) (“By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes . . . would be any less” harmful to the alleged governmental interest); *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and in the judgment); *Carey v. Brown*, 447 U.S. 455, 465-67 (1980).

It appears that most of the revenge-porn laws recently proposed and enacted, which simply punish sexually-themed images disseminated without consent of persons depicted, are unconstitutional as content-based regulations of speech that cannot pass strict scrutiny or fit within a categorical exception to the First Amendment. However, by framing a law in such a way that it establishes an otherwise valid non-speech crime whose burden on speech is only incidental to that crime, a legislature should be able to address the primary harms of revenge porn without its law being subject to strict scrutiny as content discrimination, viewpoint discrimination or speaker discrimination—in the exactly same way that Title VII presumably does not illicitly rely on any of these discriminations to achieve its statutory goals. However, even though there is reason to believe that a statute along these lines could survive constitutional scrutiny as an incidental burden on speech, one cannot be sure.<sup>191</sup> After all, such a law would still represent, in the final analysis, an initiative by government to suppress speech that it does not favor, and the basic meaning of the First Amendment is to prohibit exactly that sort of thing.

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191. *See supra* note 170-87. Nor is it necessarily certain that such a law would be a good idea. *See* Budde, *supra* note 8, at 35-40. While few would disagree that it would be nice to be rid of revenge porn, there is still the separate question of whether it is a good idea to criminalize the infliction of extreme emotional distress. Compare Leslie Yalof Garfield, *The Case for a Criminal Law Theory of Intentional Infliction of Emotional Distress*, 5 CRIM. L. BRIEF 33 (2009), available at <http://digitalcommons.pace.edu/lawfaculty/571/>, with John A. Humbach, *Is America Becoming a Nation of Ex-Cons?* \_\_\_ OHIO ST. J. CRIM. L. \_\_\_ (forthcoming).