
HELL HATH NO FURY:
WHY FIRST AMENDMENT SCRUTINY HAS LED TO
INEFFECTIVE REVENGE PORN LAWS, AND HOW TO
CHANGE THE ANALYTICAL ARGUMENT TO
OVERCOME THIS ISSUE*

I. INTRODUCTION

In early 2014 Halie Ricketts reported that she was walking through the Shops at La Cantera in Texas when a man stuck a cell phone up her skirt and took a video of her.¹ Although fellow citizens chased the man Ms. Ricketts said took the video, authorities declined to charge him with a crime.² Although at one point Texas had an “improper photography” law that could have protected Ms. Ricketts,³ a court struck down the law as an unconstitutional violation of free speech.⁴ The law, which was also an effective tool for prosecuting pedophiles, was successfully challenged by a man who had been caught taking pictures of children in swimsuits at a water park.⁵ Ms. Ricketts, in an interview with the local news, crystallized the view of many in society: “Currently the law is protecting the criminals and not the victims.”⁶ The question, put bluntly by Ms. Ricketts, is an important one regarding the growth of nonconsensual pornography: Must protection from involuntary sexual exploitation be sacrificed at the altar of free speech?⁷

* Joseph J. Pangaro, J.D. Candidate, Temple University Beasley School of Law, 2016. I would like to dedicate this Comment to the memory of my mother-in-law, Lisa Koch. She spent her whole life taking care of those around her, myself included. Without her support and encouragement, I would never have gone back to school. Lisa, we love you and miss you every day. Many thanks to Professor Laura Little, and the *Temple Law Review* staff for their guidance throughout this process. Thanks to my family, your care and encouragement were a great help: parents, Kathy and Joe; grandparents, Bea and Ted; siblings, Alex, Marisa, Jack, Grant, Kate, and Melissa; and father-in-law, Herb. Finally, I would like to thank my wife, the strongest person I know, for her constant support and all the hard work she did so I could pursue a career in law. I will spend the rest of my life trying to be worthy of the sacrifices she made for me. I love you, Adeline.

1. Phil Anya, *State Law Prohibiting ‘Upskirt Photos’ Thrown Out*, KHOU (Sept. 18, 2014, 2:23 PM), <http://www.khou.com/story/news/local/texas/2014/09/18/states-improper-photography-law-thrown-out/15824287/>.

2. *Id.*

3. Improper Photography or Visual Recording Act, TEX. PENAL CODE ANN. § 21.15 (West 2013), *invalidated by Ex parte Thompson*, 414 S.W.3d 872 (Tex. App. 2013).

4. *See Ex parte Thompson*, 414 S.W.3d at 877 (holding the improper photography statute as an unconstitutional regulation of free speech).

5. Anya, *supra* note 1.

6. *Id.* (quoting Halie Ricketts).

7. Throughout this Comment, victims of revenge porn are generally referred to as women because the majority of—though certainly not all—documented cases to date involve female victims. But see *infra* note 43 and accompanying text for an example of a male victim of nonconsensual pornography.

“Revenge porn,” a subset of nonconsensual pornography, occurs when one party distributes sexually explicit pictures or videos of another in a public forum without the subject’s consent.⁸ This Comment argues that the primary problem with revenge porn is the emotional, mental, and physical harm that posting such content causes to the individuals depicted.⁹ Statutes drafted and analyzed based on an idea that the content itself is somehow “more obscene” than other forms of pornography miss the mark and are not likely to survive First Amendment scrutiny. Based on the nature of the harm resulting from posting these images, statutes should instead qualify revenge porn as unprotected speech within the broad category of “fighting words,” and more specifically, as “true threats.” This categorization would allow statutes to be written in broader language that would more effectively address the proliferation of revenge porn. Section II outlines the emergence of revenge porn, as well as some early attempts by local governments to deal with it. It also provides a basic framework for judicial analysis of the First Amendment issues that must be kept in mind when any speech restriction is proposed. Finally, Section III argues for the alternative categorization of revenge porn as “fighting words” rather than “obscenity,” and closes with a proposed statute.

II. OVERVIEW

This Section explains the problem of revenge porn and describes ineffective attempted solutions. Part II.A provides a framework for understanding revenge porn and details a variety of harms caused by the practice. Part II.B analyzes the theoretical options for redress posed by civil lawsuits, as well as their real-world impotence. Part II.C explains how criminal prosecution could solve some of the problems associated with civil suits and illustrates how courts struggle to fit the realities of the digital age into statutes written decades earlier. Part II.D, focusing on First Amendment free speech protection, answers the question: What’s the problem with making revenge porn illegal, anyway? Part II.D.1 outlines the types of speech courts have allowed statutes to proscribe, as well as some of the more famous cases and tests that apply to speech restrictions. Part II.D.2 briefly describes “obscenity,” the most common category of speech restriction courts consider when evaluating statutes that regulate depictions of nudity or sexuality. “Obscenity” is also where advocates on both sides of the revenge porn debate focus their efforts. Part II.D.3 presents an alternative category of proscribable speech, “fighting words,” as well as the narrower—but most relevant—subcategory of “true threats.” Part II.D.4 explores the scope of free speech protection, as determined by the current Supreme Court. Finally, Part II.D.5 outlines some legislative action taken by states in light of the Court’s recent rulings.

8. Casey Martinez, Comment, *An Argument for States to Outlaw ‘Revenge Porn’ and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims*, 14 U. PITT. J. TECH. L. & POL’Y 236, 237–38 (2014).

9. See *infra* notes 25–40 and accompanying text for a review of some of the harms posed by revenge porn.

A. *The Emergence of Revenge Porn*

Emerging technology has brought with it a new social scourge known commonly as “revenge porn.”¹⁰ Revenge porn is nude or sexually explicit photos or videos of an individual distributed without the individual’s consent, often through the Internet.¹¹ In the majority of cases, a victim provides the intimate media to a distributor during a consensual sexual relationship, and the images are then posted to the Internet in response to the termination of the relationship.¹² It is not uncommon, however, for distributors to take intimate media from victims without their knowledge or consent through computer-hacking schemes¹³ or surreptitious filming.¹⁴ No matter the method of acquisition, once the media appears online, its distribution is often rapid and widespread,¹⁵ whereas its removal can be a long and slow process.¹⁶ The most common—and legally complex—cases involve a person pictured in the media who is over eighteen, consented to participation in the media, and then allowed another person to take possession of the images.¹⁷ Under these circumstances, the issue is regulating the distribution of lawfully acquired content, which implicates First Amendment freedom of expression concerns. The initial

10. END REVENGE PORN, <http://www.endrevengeporn.org> (last visited Nov. 1, 2015).

11. *Id.*

12. Martinez, *supra* note 8, at 236–37 (defining revenge porn and providing a specific example of its impact); see Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2028 (2014) (describing intimate media as “nude or sexually explicit photos or videos”).

13. See, e.g., Daisuke Wakabayashi & Danny Yadron, *Apple Denies iCloud Breach*, WALL ST. J., Sep. 2, 2014, at B1 (describing Apple’s position that a targeted attack on celebrity accounts led to leaks of nude photographs); see also Caille Millner, *‘Revenge Porn’—Shame for Cruelty and Profit*, S.F. CHRON., Feb. 10, 2013, at E6 (noting the original victim in a class action lawsuit took nude photographs to track her weight loss, never shared them with anyone, and had no idea how they ended up online); *At Least 100,000 Snapchat Photos Hacked: Report*, CBS NEWS (Oct. 10, 2014, 12:23 PM), <http://www.cbsnews.com/news/snapchat-photos-hacked-report/> (describing how thousands of images of intimate media had been collected and compiled by a group of hackers for years before being released).

14. *People v. Morriale*, 859 N.Y.S.2d 559 (N.Y. Crim. Ct. 2008) (discussing how the defendant surreptitiously recorded himself having sex with the complainant and disseminated the video through email to at least one other person); see also Abigail Pesta, *The Haunting of Erin Andrews*, MARIE CLAIRE (July 13, 2011, 4:00 AM), <http://www.marieclaire.com/celebrity/a6316/erin-andrews-interview/> (discussing how a stalker acquired a nude video of Ms. Andrews by tampering with her hotel room peephole).

15. See, e.g., Taylor v. Franko, No. 09–00002 JMS/RLP, 2011 WL 2746714, at *5 (D. Haw. July 12, 2011) (where plaintiff counted a total of twenty-three websites that had reposted her images); Jenn Selby, *Jennifer Lawrence and Kate Upton Naked Photos to Be Displayed by Los Angeles Artist at Upcoming Exhibition*, INDEPENDENT (Sept. 4, 2014, 9:44 BST), <http://www.independent.co.uk/news/people/jennifer-lawrence-and-kate-upton-nude-photos-to-be-displayed-by-artist-in-los-angeles-at-upcoming-exhibit-9710683.html> (artist placed recently leaked intimate media of several celebrities in an art exhibit without their permission and against their will).

16. See, e.g., Taylor, 2011 WL 2746714, at *3 (noting that two of at least twenty-three websites continued to host images of the plaintiff).

17. Jenna K. Stokes, Comment, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 BERKELEY TECH. L.J. 929, 929 (2014) (describing this form of revenge porn as making up roughly eighty percent of cases).

academic response has been that the First Amendment protects distributors from criminal liability, as their postings were truthful speech that, no matter how offensive, cannot be proscribed.¹⁸

While it is true most speech receives vigorous protection, there are limited categories of speech that are proscribable.¹⁹ Throughout the years, the primary category of proscribable speech under which the government has attempted to regulate pornography is obscenity.²⁰ Revenge porn cases involve nudity and sexuality. As a result, many view revenge porn as merely a form of pornography, and analyze the legality of its regulation according to pornography standards.²¹ The problem with this approach is that courts generally reject the premise that sexually explicit images of consenting adults rise to the level of “obscene.”²² Acknowledging the general reluctance of courts to allow regulations of pornography, debates on the criminalization of revenge porn seem to force a choice between privacy rights and the First Amendment. As a consequence, drafts of criminal revenge porn statutes use the narrowest possible terms, in hopes that the laws will pass judicial scrutiny. Unfortunately for revenge porn victims, the resultant statutes prove largely ineffective and may still fail review.²³

Regardless of the legal classification of revenge porn material, the harm it causes has serious real-world impact. Former partners, turned distributors, often send the images to victims’ friends, family, or coworkers.²⁴ Over eighty percent

18. *E.g.*, Clay Calvert, *Revenge Porn and Freedom of Expression: Legislative Pushback to an Online Weapon of Emotional and Reputational Destruction*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 673, 678 (2014) (noting that “much of revenge porn involves truthful speech—the images are accurate, unaltered depictions of a sordid sexual reality”).

19. See *infra* notes 97–99 and accompanying text for a discussion of the standard used to determine whether speech maintains First Amendment protection.

20. See, *e.g.*, *Redrup v. New York*, 386 U.S. 767 (1967) (consolidation of cases from New York, Kentucky, and Arkansas relating to the violation of obscenity statutes for selling pornographic magazines); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Mass.*, 383 U.S. 413 (1966) (attempting to declare as obscene a book recounting the life of a prostitute); *Ginzburg v. United States*, 383 U.S. 463 (1965) (declaring the mailing of books that included articles and photo essays on sex and sexual relations a violation of the federal obscenity statute).

21. See, *e.g.*, Calvert, *supra* note 18, at 676–77 (describing revenge porn as “a disturbing niche of ‘the vast and untamed world of amateur erotica’” (quoting Todd Martens, *Pop Music; Rockers and Fans, Fully Exposed; Is Anyone Up? Posts Nude Images of Musicians, Often Without Permission*, *L.A. TIMES*, Dec. 4, 2011, at E1)); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 *WAKE FOREST L. REV.* 345, 346 (2014) (describing the issue of revenge porn as “nonconsensual pornography”); Zak Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 *CALIF. L. REV.* 1303, 1307 (2014) (comparing revenge porn to “other forms of pornography”).

22. *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (“[M]aterial dealing with sex in a manner that advocates ideas or that has literary or scientific or artistic value . . . may not be branded as obscenity and denied the constitutional protection.” (citation omitted)); see also *id.* at 197 (Stewart, J., concurring) (regarding whether or not a sexual scene in a film was obscene: “I know it when I see it, and the motion picture involved in this case is not that”).

23. See *infra* Part III.A for a review of the flaws in existing revenge porn legislation.

24. See, *e.g.*, *State v. Parsons*, No. 10-06-01372, 2011 WL 6089210, at *1 (N.J. Super. Ct. Dec. 8, 2011) (intimate media of a public school teacher sent to her supervisor); *People v. Barber*, No.

of victims experience severe emotional distress and anxiety when they learn what has happened.²⁵ Panic attacks, anorexia, and depression are all “common ailments” experienced by victims of online harassment.²⁶ In addition to the reputational damage and humiliation revenge porn causes, such distribution also poses professional consequences. Employees can be fired as a result of a coworker, supervisor, or customer coming across the intimate material.²⁷

But professional consequences can also occur prospectively. Victims may not be offered jobs because a screening of applicants’ Internet reputation reveals “concerns about their ‘lifestyle,’ ‘inappropriate’ online comments, and ‘unsuitable’ photographs, videos, and information about them.”²⁸ For one teacher in a public school, the perpetrator contended that the teacher’s behavior was “not proper” for a person that works with children.²⁹ For another woman working for the U.S. Department of Fish and Wildlife, postings of intimate media threatened to impact her security clearance.³⁰ When she learned her intimate media had been distributed widely, the victim broke out in shingles and required emergency counseling.³¹

From this threshold issue a myriad of disturbing scenarios have emerged. For example, revenge porn images posted to an Internet website may include contact details of a victim.³² A recent survey of revenge porn victims found over fifty percent had their full names and social network profiles included in the posts, and more than twenty percent had their phone numbers and email addresses included as well.³³ Perpetrators who post these images while impersonating the victims often include requests for casual sex, resulting in real-world harassment that ranges from disturbing to dangerous.³⁴ One victim found

2013NY059761, 2014 WL 641316 (N.Y. Crim. Ct. Feb. 18, 2014) (unpublished table decision) (defendant posted nude photographs of his girlfriend to the Internet and sent them to her employer).

25. Citron & Franks, *supra* note 21, at 351.

26. *See id.* at 350–51 (summarizing statistics gathered by the authors from a survey of over 1200 victims).

27. Samantha H. Scheller, Comment, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 552 (2015) (“[S]ubjects of the photos and videos can be fired from their jobs”); *see also* Taylor v. Franko, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *2–3 (D. Haw. July 12, 2011) (information appeared online that threatened the security clearance of a government contractor); *Parsons*, 2011 WL 6089210, at *1 (intimate media of a public school teacher sent to her supervisor in an attempt to get her fired).

28. *See* Citron & Franks, *supra* note 21, at 352 (citing statistics from a study commissioned by Microsoft regarding common hiring practices of employers).

29. *Parsons*, 2011 WL 6089210, at *1 (internal quotation marks omitted).

30. *Taylor*, 2011 WL 2746714, at *2.

31. *Id.*

32. *See id.* at *3 (plaintiff’s contact information was provided alongside intimate media); *see also* United States v. Sayer, 748 F.3d 425, 428–29 (1st Cir. 2014) (defendant provided victim’s name and address along with intimate media); Citron & Franks, *supra* note 21, at 345 (after a breakup, ex-boyfriend posted intimate media and contact information on a revenge porn website).

33. Citron & Franks, *supra* note 21, at 350–51.

34. *E.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009) (woman’s office was “pepper[ed]” with emails, phone calls, and visits from strangers looking for sex in response to a fake Yahoo! profile); *Taylor*, 2011 WL 2746714, at *3 (plaintiff approached by strangers seeking sexual

that her intimate media appeared next to her work phone number and included the following language: “Hello gentlemen, Get the pleasure you need and the satisfaction you deserve. . . . No drama . . . No games . . . Just you and me baby.”³⁵ Revenge porn posts like these increase the risk to victims of being stalked or physically assaulted.³⁶ Thus, victims of revenge porn often feel unsafe leaving their homes.³⁷ As one victim put it: “Normal people don’t subscribe to sites like this Only creeps. [And these] are the kinds of people who know where I live.”³⁸ In another case, a woman was *raped at knifepoint* after her ex-boyfriend posted her photograph and contact information online and, posing as the victim, claimed to be looking for “a real aggressive man with no concern for women.”³⁹

B. Victims Have Largely Been Unsuccessful in Civil Lawsuits

The absence of a strong response from the justice system to punish this type of distribution has emboldened perpetrators and has had an increasingly severe impact on victims. In Texas, a stranger allegedly thrust a camera up the skirt of a woman on the street and took photographs.⁴⁰ Although brought to police, the perpetrator was never charged with a crime because Texas’s “improper photography” statute was “unconstitutional and a violation of free speech.”⁴¹ In a highly publicized New Jersey case, a college freshman committed suicide just days after learning that a roommate had recorded his sexual encounter and publicized it on Twitter without his knowledge or consent.⁴²

In an attempt to curb this practice, victims have turned to the courts, asserting civil claims. Copyright claims, for example, provide a cause of action for authors whose original expressions are appropriated without permission by another party.⁴³ Asserting this cause of action in the context of revenge porn,

relations after recognizing her from her online images); *see also Sayer*, 748 F.3d at 429 (strangers began to show up at victim’s home); Citron & Franks, *supra* note 21, at 345 (victim received numerous Facebook posts and phone calls).

35. *Taylor*, 2011 WL 2746714, at *3 (alteration in original) (internal quotation marks omitted).

36. Citron & Franks, *supra* note 21, at 350.

37. *See id.* at 351 (describing how one victim stayed inside her house for days after learning of the posts).

38. Millner, *supra* note 13, at E6.

39. Caroline Black, *Ex-Marine Jebidiah James Stipe Gets 60 Years for Craigslist Rape Plot*, CBS NEWS (June 29, 2010, 1:30 PM), <http://www.cbsnews.com/news/ex-marine-jebidiah-james-stipe-gets-60-years-for-craigslist-rape-plot/>.

40. Anya, *supra* note 1.

41. *See Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014) (finding the statute at issue unconstitutional).

42. Kate Zernike, *Son’s Suicide Leads to Aid for Students*, N.Y. TIMES, Feb. 2, 2013, at A18 (New Jersey, as the first state to enact a revenge porn law, successfully charged the roommate with a crime).

43. Dennis McCarthy, *Copyright Infringement—Redefining the Scope of Protection Copyright Affords the Non-Literal Elements of a Computer Program—Computer Associates International, Inc., v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992), 66 TEMP. L. REV. 273, 273 (1993) (explaining that the “fundamental principle of copyright law” is to protect an author’s “expression of an idea”).

scholars have noted, has the best chance to succeed when the victim herself took the photographs.⁴⁴ An overwhelming portion of intimate media classified as revenge porn is this type of self-photography.⁴⁵ One estimate places the number at as much as eighty percent.⁴⁶ As such, it appeared at first that copyright actions were a viable option because “these [self-photography] victims . . . have authorship rights in their explicit works.”⁴⁷ Victims have thus brought lawsuits against websites that host and profit from the publication of revenge porn.⁴⁸

Whatever their theoretical potential, civil lawsuits against website operators have proven ineffective as a practical avenue for victims. For one thing, it is difficult to get attorneys to take on this type of case.⁴⁹ This is in part due to the reality that most victims cannot afford the tremendous costs of litigation.⁵⁰ “Having lost their jobs due to the online posts, [victims] cannot pay their rent, let alone cover lawyer’s fees.”⁵¹ The majority of these website operators know this, minimizing the realistic threat of lawsuits from victims.⁵² This, in turn, minimizes civil litigation’s ability to deter possible perpetrators.⁵³ As one attorney in the field explained, “There are only about four or five of us in the whole country. . . . [if more attorneys took this type of work] I wouldn’t have to turn away 90 percent [of cases].”⁵⁴

Even if a case makes it to court, websites enjoy a clear statutory defense: “No *provider or user* of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁵⁵ Courts tend to interpret this statute as protecting websites—including websites hosting revenge porn—against lawsuits stemming from user-generated content.⁵⁶ In other words, if a website allows users to post images or

44. *E.g.*, Citron & Franks, *supra* note 21, at 359–60.

45. *See* Calvert, *supra* note 18, at 689 (explaining that self-photography is when someone takes a “sexual selfie” and shares it with his or her significant other); Stokes, *supra* note 17, at 94; Martinez, *supra* note 8, at 242 (citing that up to eighty percent of revenge porn is self photography).

46. Heather Kelly, *New California ‘Revenge Porn’ Law May Miss Some Victims*, CNN, <http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/index.html> (last updated Oct. 3, 2013, 3:01 PM).

47. Stokes, *supra* note 17, at 937.

48. *E.g.*, *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. Ct. App. 2014).

49. Lorelei Laird, *Striking Back at Revenge Porn*, A.B.A. J., Nov. 2013, at 44, 49.

50. Citron & Franks, *supra* note 21, at 358; Laird, *supra* note 49, at 50 (noting victims are frequently without means to finance a lawsuit and that cases are generally handled pro bono).

51. Citron & Franks, *supra* note 21, at 358.

52. *Id.* at 360.

53. *Id.* at 358.

54. Laird, *supra* note 49, at 49 (internal quotation marks omitted).

55. 47 U.S.C. § 230(c)(1) (2012) (emphasis added).

56. *See, e.g.*, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009) (holding that a plaintiff cannot sue a website for publishing content generated by a third party); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (“[A]n online information system must not ‘be treated as the publisher or speaker of any information provided by’ someone else.” (quoting 47 U.S.C. § 230(c)(1))); *see also* *Backpage.com v. Cooper*, 939 F. Supp. 2d 805, 822 (M.D. Tenn. 2013) (“[S]ection 230 of the CDA prohibits state laws from imposing liability on interactive computer services for third-party content, even if the content is unlawful and the website

videos, responsibility for the content lies with the individual actor, not the website. This is “the same law that protects Facebook and YouTube from legal liability for comments and videos” posted by their users.⁵⁷ Without this statute, “[Facebook and YouTube] could each possibly be held liable for hosting the defamatory material even though none of their employees posted the statement.”⁵⁸ Finally, because U.S. courts cannot assert jurisdiction over foreign websites, “[s]mart website operators will simply move to overseas hosts to avoid any consequences for their actions.”⁵⁹ Such statutory protection, bolstered by the unrealistic chance of litigation, leaves revenge porn website hosts so confident in their immunity that some require payments from the victims in order to remove their intimate media.⁶⁰ In at least one instance, a website operator used this coercive practice as an additional revenue stream, contacting the victims and soliciting payments to remove the images.⁶¹

Civil suits have been successful against individual perpetrators on charges such as public disclosure of private facts, intentional and negligent infliction of emotional distress, and defamation of character.⁶² For the majority of victims, however, this recourse has been ineffective in practice.⁶³ Even if such a claim proves successful, defendants—like their victims—are often financially unstable, and as a result, judgment proof.⁶⁴ As one attorney in the field put it, “The general rule is these people are not wealthy . . . They’re young men and they think it’s funny.”⁶⁵ It is also far from certain that these claims will win in court, as many people feel victims are responsible for their own harm by participating in the intimate media in the first place.⁶⁶ Finally, regardless of which avenue of relief a victim may pursue, a civil litigation victory does not mean the images will be removed from all the websites on which they appear.⁶⁷ Or, even if the images

had reason to know of the unlawfulness.”).

57. Martinez, *supra* note 8, at 245–46.

58. *Id.* at 246.

59. *Id.* at 247 (indicating that websites outside the United States are beyond the jurisdiction of the court).

60. See Laird, *supra* note 49, at 46–47 (describing one revenge porn website’s practice of posting advertisements from a fictional attorney—likely the same person running the website—claiming he could take the photos down quickly for a fee); Millner, *supra* note 13, at E6 (describing one victim’s experience of being told by Texxxan.com that she would have to pay a fee to remove her intimate media from the site).

61. Amanda Marcotte, *California Arrests the Owner of a Revenge Porn Site. Other States Should Follow Its Lead*, SLATE (Dec. 11, 2013, 1:00 PM), http://www.slate.com/blogs/xx_factor/2013/12/11/kevin_bollaert_arrested_for_revenge_porn_california_s_move_is_a_promising.html.

62. *E.g.*, Taylor v. Franko, No. 09–00002 JMS/RLP, 2011 WL 2746714, at *5 (D. Haw. July 12, 2011).

63. Citron & Franks, *supra* note 21, at 349.

64. *Id.* at 358.

65. Laird, *supra* note 49, at 50 (internal quotation marks omitted).

66. *Id.* at 47–48; see also Calvert, *supra* note 18, at 702 (concluding that as more people learn about the harm that has resulted from creating intimate media, a “wake-up call to reality” will get them to stop making such images in the first place); Martinez, *supra* note 8, at 250 (noting an attitude in the public that the victims of revenge porn “brought it upon themselves”).

67. Laird, *supra* note 49, at 49.

are removed, a victim may find them posted to another website shortly thereafter, creating a “game [of] Whac-a-Mole [sic]” between the victim and website operator.⁶⁸

C. *Victims Have Been Unsuccessful in Criminal Prosecutions*

Given the inconsistent success of civil litigation, victims have also used existing criminal laws in their pursuit of justice.⁶⁹ Criminal charges eliminate the financial burden to the victim and pose a credible threat to judgment-proof perpetrators.⁷⁰ In *People v. Barber*,⁷¹ the defendant posted intimate photographs of his former partner to his Twitter account, and also sent them to both the victim’s sister and her employer.⁷² The defendant was charged with aggravated harassment in the second degree, public display of offensive sexual material, and dissemination of an unlawful surveillance image in the second degree.⁷³

The statutes in *Barber*, however, did not contemplate the reality of the Internet age. For example, the court in *Barber* reviewed the dissemination statute and noted: “[I]t is clear that this section, by its very terms, requires more than the mere posting of an image on a social networking site such as Twitter or the sending of an image [of] other persons.”⁷⁴ After a similarly narrow reading of all three statutes, the court concluded (1) posting pictures on Twitter or sending the pictures to a small group of people did not fit within the statutory definition of “public display,”⁷⁵ (2) the statutory definition of “harassment” required direct contact with the victim rather than just her friends or colleagues,⁷⁶ and (3) the complaint pleaded insufficient facts to suggest that the defendant engaged in “unlawful conduct” when he obtained the images.⁷⁷ As a result, the court dismissed each charge, noting that “the defendant’s conduct, while reprehensible, d[id] not violate any of the criminal statutes under which he [wa]s charged.”⁷⁸

68. *Id.*

69. *See, e.g.,* *People v. Stone*, 982 N.Y.S.2d 733, 734 (N.Y. Crim. Ct. 2014) (charging the defendant with misdemeanor second-degree menacing); *People v. Barber*, No. 2013NY059761, 2014 WL 641316, at *1–2 (N.Y. Crim. Ct. Feb. 18, 2014) (unpublished table decision) (charging the defendant with aggravated harassment in the second degree, public display of offensive sexual material, and dissemination of an unlawful surveillance image in the second degree).

70. *See* Citron & Franks, *supra* note 21, at 361 (arguing that a criminal law solution is needed to deter revenge porn because, while perpetrators with few assets may have little fear of litigation, the threat of criminal charges is less likely to be ignored).

71. No. 2013NY059761, 2014 WL 641316 (N.Y. Crim. Ct. Feb. 18, 2014) (unpublished table decision).

72. *Barber*, 2014 WL 641316, at *1.

73. *Id.* at *1–2.

74. *Id.* at *3.

75. *Id.* at *7.

76. *Id.* at *5–6.

77. *Id.* at *3–4.

78. *Id.* at *1.

*People v. Stone*⁷⁹ is an earlier case, also from New York, that illustrates courts' reluctance to acknowledge the impact of digital images as warranting criminal culpability. In *Stone*, the victim broke up with her boyfriend, who responded by sending a text which read: "I annihilate people who try to hurt me, I will be good if you give me another chance."⁸⁰ Two days later, the defendant texted a photograph of "a masked man *holding up a knife*" from the same phone number.⁸¹ Upon his arrest, the defendant admitted to police that he was the person in the photograph wearing the mask and holding the knife.⁸² The man was charged with menacing in the second degree, which requires, in pertinent part, that the defendant place the victim in reasonable fear by "displaying a deadly weapon."⁸³ Citing the definition of "display" as something actually witnessed by the victim, the court again felt its hands were tied, concluding "that sending the photograph via text message was more like a written communication than an actual, physical display, and [wa]s insufficient to establish the display element."⁸⁴

Responding to the inadequacy of existing criminal statutes, many states, including Pennsylvania, have proposed legislation to specifically criminalize revenge porn.⁸⁵ However, as many legal scholars have noted, to criminalize the distribution of images taken and possessed with consent threatens the perpetrators' constitutional rights.⁸⁶

D. First Amendment Guarantees and Exceptions

The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech."⁸⁷ Courts have interpreted freedom of speech to extend to freedom of expression.⁸⁸ The First Amendment is applicable to the states by way of the Due Process Clause of the Fourteenth Amendment.⁸⁹ Courts evaluate government regulations of speech under a strict scrutiny standard, which requires a compelling government interest

79. 982 N.Y.S.2d 733 (N.Y. Crim. Ct. 2014).

80. *Stone*, 982 N.Y.S.2d at 734–35.

81. *Id.* at 735 (emphasis added).

82. *Id.*

83. *Id.* (citing N.Y. PENAL LAW § 120.14(1) (McKinney 2014)).

84. *Stone*, 982 N.Y.S.2d at 739.

85. See, e.g., N.J. STAT. ANN. § 2C:14-9 (West 2015); UTAH CODE ANN. § 76-5b-203 (West 2015).

86. See, e.g., Calvert, *supra* note 18, at 674–678 (arguing that revenge porn frequently consists of a "truthful" representation of what a person looks like, and laws which suppress or punish publication of "even hurtful truths" pose a First Amendment issue).

87. U.S. CONST. amend. I.

88. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.").

89. See, e.g., Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

and a regulation narrowly drawn to achieve its purpose.⁹⁰ For this reason, attempts by the government to regulate speech or expression often fail in the courts.⁹¹ The Supreme Court has protected speech related to flag burning,⁹² animal cruelty,⁹³ and Ku Klux Klan rallies advocating “crime, sabotage, violence, or unlawful methods of terrorism.”⁹⁴ The policy behind such vigorous protection is grounded in the belief that the open debate of ideas, no matter how unpopular, ensures that the political and social movements of the nation reflect the desires of the American people.⁹⁵

1. Speech that Can Be Restricted

Despite a broad policy of protection, the Supreme Court has recognized that “the right of free speech is not absolute at all times and under all circumstances.”⁹⁶ Regulations surviving strict scrutiny have addressed two questions. First, does the regulation restrict constitutionally protected expressive content?⁹⁷ Second, can the government state a compelling or substantial interest in regulation beyond regulation of the speech itself?⁹⁸

a. Content-Versus-Conduct Restrictions

In analyzing the constitutionality of a speech restriction, courts must first determine if the restriction relates to the content of the speech, or to the conduct

90. See, e.g., *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (“[T]he State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”).

91. See *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (“[A]s a general matter, ‘the First Amendment means that *government has no power* to restrict expression because of its message, its ideas, its subject matter, or its content.’” (alteration in original) (emphasis added) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983))); see also *United States v. Alvarez*, 132 S. Ct. 2537, 2543–44 (2012) (overturning a statute which made it a crime to falsely claim receipt of the Medal of Honor); *Redrup v. New York*, 386 U.S. 767, 770 (1967) (“[A] *State is utterly without power to suppress, control or punish* the distribution of any writings or pictures upon the ground of their ‘obscenity.’” (emphasis added)); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (declaring unconstitutional a law which prohibited all distribution of literary material that contained passages unfit for children because it “burn[ed] the house to roast the pig” to reduce “the adult population of Michigan to reading only what is fit for children”).

92. See *Texas v. Johnson*, 491 U.S. 397 (1989).

93. See *United States v. Stevens*, 559 U.S. 460 (2010), *superseded by statute*, Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, § 3(a), Dec. 9, 2010, 124 Stat. 3178 (codified as amended at 18 U.S.C. § 48 (2012)).

94. See *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969).

95. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (“[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”).

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

97. *Id.* at 571–72.

98. *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

of the speaker.⁹⁹ The statute at issue in *Texas v. Johnson*¹⁰⁰ illustrates a content-based restriction. Johnson was arrested after he stood in front of Dallas's City Hall, lit an American flag on fire, and led a group chanting, "America, the red, white, and blue, we spit on you."¹⁰¹ The state of Texas asserted a governmental interest in "preserving the flag as a symbol of nationhood and national unity."¹⁰² The Supreme Court reasoned that concerns about the preservation of the flag as a symbol existed only if it was conceded that "a person's treatment of the flag communicate[d] some message."¹⁰³ If that was the case, his *conduct* expressed an *idea* and was thus entitled to protection.¹⁰⁴ Put another way, burning the flag could be proscribed by an ordinance against starting outdoor fires, but not by an ordinance against dishonoring the flag.¹⁰⁵

In *United States v. O'Brien*,¹⁰⁶ the Court considered the legality of a conduct restriction that had only a collateral impact on expressive speech. To protest the Vietnam War, David O'Brien burned his Selective Service registration on the steps of a Boston courthouse, in violation of the Universal Military Training and Service Act of 1948.¹⁰⁷ Faced with a statute designed to regulate conduct that could potentially also restrict expression, the Court outlined the parameters for a restriction to pass strict scrutiny, in what has come to be known as the "*O'Brien* test"¹⁰⁸:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁰⁹

The Court upheld the regulation, finding that (1) Congress had a legitimate interest in making Selective Service registration certificates available to facilitate its Article I power to raise and support the army; (2) a law criminalizing destruction of the certificates was the most precise way to achieve such "continuing availability"; and (3) the law was aimed not at preventing O'Brien's

99. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

100. 491 U.S. 397 (1989).

101. *Johnson*, 491 U.S. at 399.

102. *Id.* at 400.

103. *Id.* at 410.

104. *Id.*

105. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992).

106. 391 U.S. 367 (1968).

107. *O'Brien*, 391 U.S. at 369–70.

108. *See, e.g., Johnson*, 491 U.S. at 403 (referring to the "*O'Brien* test").

109. *O'Brien*, 391 U.S. at 377; *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (quoting *O'Brien*, 391 U.S. at 376–77).

ability to communicate his displeasure with government policy, but instead at maintaining the functioning of the Selective Service system.¹¹⁰

b. Overbreadth and Content Discrimination

Beyond the content-versus-conduct distinction, there are two drafting principles that restrictions on speech must avoid: overbreadth and content discrimination.¹¹¹ An overbroad statute restricts not just speech that falls outside the scope of constitutional protection, but also speech that warrants such protection.¹¹² Generally, attacks on a statute are treated as valid only when the statute impacts the party at issue. But an exception to this rule exists for First Amendment challenges.¹¹³ When “substantial” overbreadth is present, “the law may not be enforced against *anyone*, including the party before the court,” even if his speech or expression could otherwise have been legitimately proscribed.¹¹⁴ Litigants may challenge a statute based on the assumption that “the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”¹¹⁵ Essentially, the overbreadth doctrine focuses on avoiding the “chilling” of protected expression.¹¹⁶

“Content discrimination,” meanwhile, addresses the danger that the government could suppress a viewpoint by criminalizing constitutionally proscribable speech related to only one *side* of an issue of social or political concern.¹¹⁷ In other words, by proscribing only a narrow class of unprotected speech, the government could promote a position on an issue of public concern by silencing only the other side of the debate. While a statute could make it illegal in general to threaten the President, a statute could not criminalize threats to the President related to only, for example, the Affordable Care Act.¹¹⁸

However, when the “basis” for a speech regulation consists of “the very reason the entire class of speech at issue is proscribable,” there is no evidence of viewpoint discrimination that would threaten the statute’s constitutionality.¹¹⁹ For example, since obscenity is a proscribable class of speech, it would be valid

110. *O’Brien*, 391 U.S. at 380–82.

111. *R.A.V.*, 505 U.S. 377, 400–02 (1992) (White, J., concurring).

112. *United States v. Stevens*, 559 U.S. 460, 483–84 (2010) (Alito, J., dissenting) (“Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others.”), *superseded by statute*, Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, § 3(a), Dec. 9, 2010, 124 Stat. 3178 (codified as amended at 18 U.S.C. § 48 (2012)).

113. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973).

114. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985) (emphasis added).

115. *Broadrick*, 413 U.S. at 612.

116. *R.A.V.*, 505 U.S. at 402 (White, J., concurring).

117. *Id.* at 387–88 (majority opinion).

118. *See id.* at 388–89 (explaining that if such a narrow restriction was allowed, state or federal legislation could be used to punish speakers who hold a disfavored viewpoint on an important political topic).

119. *Id.* at 388.

for a statute to prohibit all obscene images. It would also be valid for a statute to prohibit a narrow subset of images unrelated to a political issue, such as obscene images of people with blue eyes.¹²⁰ As long as there is no “realistic possibility that official suppression of ideas is afoot,” a statute criminalizing an unprotected form of speech is valid.¹²¹

c. The Categorization of Unprotected Speech

Once courts address these structural limitations, they perform a substantive analysis. In other words, there is a second prong to the question of whether a statute restricts “constitutionally protected” speech: What *kind* of speech is at issue? This question is important because the Supreme Court classifies some speech as “unprotected”—that is, speech the government may regulate.¹²² These categories are not mere exceptions within the broad rule, but are instead considered outside the protection of the First Amendment altogether.¹²³ *Chaplinsky v. New Hampshire*¹²⁴ is among the premiere cases on the issue,¹²⁵ and provides a straightforward categorization of types of proscribable speech.

The *Chaplinsky* Court laid out several categories of speech the government may regulate, “*includ[ing]* the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace.”¹²⁶ The categories cited above are commonly referred to as the “Chaplinsky categories”¹²⁷: (1) lewd and obscene, (2) profane, (3) libelous, and (4) fighting words.¹²⁸ Speech that falls into one of these categories is unprotected because it does not further the First Amendment’s underlying policy of ensuring an open marketplace of ideas.¹²⁹ Speech of this kind is of minimal value to society and can inflict real harm on others. Thus, the government may regulate these types of speech because the

120. *Id.* at 390 (providing this specific example).

121. *Id.*

122. *See, e.g., id.* at 406 (White, J., concurring) (fighting words); *Roth v. United States*, 354 U.S. 476, 483 (1957) (obscurity).

123. *United States v. Stevens*, 599 U.S. 460, 472 (2010) (arguing that while certain categories of speech are outside the scope of the First Amendment, it is a small and closely guarded group that is not easily augmented), *superseded by statute*, Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, § 3(a), Dec. 9, 2010, 124 Stat. 3178 (codified as amended at 18 U.S.C. § 48 (2012)).

124. 315 U.S. 568 (1942).

125. *See* Rodney A. Smolla, *Words “Which by Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 319 (2009) (explaining that the Supreme Court has cited *Chaplinsky* more than one hundred times).

126. *Chaplinsky*, 315 U.S. at 571–72 (emphasis added).

127. *See* Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 54 (1994) (referring to the “*Chaplinsky* categories”).

128. *Chaplinsky*, 315 U.S. at 572.

129. *Id.* (“It has been well observed that such utterances are no essential part of any exposition of ideas . . .”).

benefit of the speech “is clearly outweighed by the social interest in order and morality.”¹³⁰

Application of the language from *Chaplinsky* has evolved over years of heavy scrutiny, and has resulted in disparate Supreme Court opinions that have both expanded and eliminated speech regulations.¹³¹ Today the language of *Chaplinsky*—while seemingly so clear—is perhaps best considered a guide for courts to use when analyzing speech regulations, rather than an exhaustive list of proscribable forms of speech.¹³² As Part II.D.3 will address in further detail, the fighting words doctrine in particular has evolved over time through case law.¹³³

Identifying a particular type of speech or expression as unprotected—such as that falling within a *Chaplinsky* category—is crucial to parties successfully arguing for a statute’s validity because it helps satisfy the requirements of *O’Brien*.¹³⁴ If the speech is unprotected, it is within the power of the government to regulate, and the regulation is by its very nature unrelated to the suppression of First Amendment speech. Thus, for a regulation to survive strict scrutiny it must (1) meet the requirements of unprotected speech or nonspeech, guided by the framework of *Chaplinsky*;¹³⁵ and (2) be based on an “important governmental interest,” satisfying the final prong of the *O’Brien* test.¹³⁶

2. Obscenity

Attempts to regulate depictions of sexuality and nudity overwhelmingly classify the depictions within *Chaplinsky*’s first category as “lewd and obscene.”¹³⁷ In *Miller v. California*,¹³⁸ the Supreme Court laid out the test for the trier of fact to consider when classifying pornography as obscene:

(a) [W]hether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the

130. *Id.*

131. *Compare* *New York v. Ferber*, 458 U.S. 747, 754–55 (1982) (citing *Chaplinsky* to explain the legitimacy of a law banning child pornography), *with* *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (explaining that flag burning did not fall within the “small class of ‘fighting words’” defined by *Chaplinsky*).

132. *See* Smolla, *supra* note 125, at 321 (arguing that because *Chaplinsky* introduces its proscribable categories of speech with the word “include,” the Court was merely providing a few prominent examples of the types of speech that could be regulated, rather than an exhaustive list).

133. *See infra* Part II.D.3 for a detailed discussion of the difference between true threats and fighting words.

134. *See supra* notes 108–10 and accompanying text for a review of the *O’Brien* test.

135. For the purposes of the revenge porn analysis, only two of the four *Chaplinsky* categories—obscenity and fighting words—will be discussed.

136. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

137. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see, e.g.*, *United States v. Stevens*, 559 U.S. 460 (2010) (“crush videos” that appeal to the prurient interest), *superseded by statute*, Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, § 3(a), Dec. 9, 2010, 124 Stat. 3178 (codified as amended at 18 U.S.C. § 48 (2012)); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing in a night club); *Miller v. California*, 413 U.S. 15 (1973) (sexually explicit material in the mail); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (obscene films showed in a movie theater).

138. 413 U.S. 15 (1973).

prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹³⁹

The Court, aware of the dangerous potential impact of the holding, cautioned that “[s]tate statutes designed to regulate obscene materials must be carefully limited.”¹⁴⁰

Applying the proper test for obscenity, the next step is to clarify what type of government interest qualifies as important or substantial under *O’Brien*. States are empowered to provide for the “public health, safety, and morals.”¹⁴¹ The Supreme Court identified as legitimate an interest in “stemming the tide of commercialized obscenity.”¹⁴² Even if the obscene material could be restricted to those in society interested in seeing it, the state maintains an interest in the overall quality of life of the community and can restrict the activity in public spheres.¹⁴³

Prominent examples of such restrictions being upheld include a ban on playing “obscene” films in a public theater¹⁴⁴ and a ban on all-nude dancing in strip clubs.¹⁴⁵ Despite this potential avenue for regulation, attempts to regulate depictions of sexuality are struck down with great frequency.¹⁴⁶ As a result, in general, scholars agree that legislation classifying revenge porn as obscene is unlikely to pass constitutional muster.¹⁴⁷ Regardless of whether material is offensive to some people, the Supreme Court has made it clear that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.”¹⁴⁸

139. *Miller*, 413 U.S. at 24 (citation omitted).

140. *Id.* at 23–24.

141. *Barnes*, 501 U.S. at 569 (emphasis added).

142. *Slaton*, 413 U.S. at 57; see also *Barnes*, 501 U.S. at 568 (“[T]he statute’s purpose of protecting societal order and morality is clear from its text and history.”).

143. *Slaton*, 413 U.S. at 59 (“It concerns the tone of the society, the mode, . . . the style and quality of life A man may be entitled to read an obscene book in his room [b]ut if he demands a right to obtain the books and pictures he wants in the market . . . then to grant him his right is to affect the world about the rest of us” (quoting Alexander Bickel, *On Pornography II: Dissenting and Concurring Opinions*, PUB. INT., Winter 1971, at 25, 25–26)).

144. *Id.* at 69.

145. *Barnes*, 501 U.S. at 560.

146. *E.g.*, *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (declaring unconstitutional a law which prohibited all distribution of literary material that contained passages unfit for children because it “burn[ed] the house to roast the pig” to reduce “the adult population of Michigan to reading only what is fit for children”); see also *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (regarding whether or not a sexual scene in a film was obscene: “I know it when I see it, and the motion picture involved in this case is not that”).

147. See *e.g.*, *Calvert*, *supra* note 18, at 683 (noting that revenge porn sexual images are not obscene within the First Amendment meaning of the word).

148. *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

3. Fighting Words

The implications of the second half of the sentence in *Chaplinsky* that classifies unprotected speech are critical. The Supreme Court described fighting words as “those [words] which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace.”¹⁴⁹ As one scholar concedes, “[i]t is highly unlikely” that the Court intended this explanation to “bear the hard doctrinal weight that is sometimes ascribed to it.”¹⁵⁰ Nonetheless, the word “or” has become important in defining two different classes of speech.¹⁵¹ The first class is speech that has a tendency “to cause [a] violent reaction,”¹⁵² such as the type of speech actually at issue in *Chaplinsky*.¹⁵³ In that case, the appellant called a city official a “God damned racketeer” and “a damned Fascist.”¹⁵⁴ In this form, fighting words are the kind of personally abusive speech that would, as a matter of common knowledge, likely provoke a violent reaction.¹⁵⁵ The second type of speech, more relevant to the purposes of this Comment, is “th[at] which by [its] very utterance inflict[s] injury.”¹⁵⁶ By way of distinction and clarity, one might think of this class as designed to communicate an impending violent action.¹⁵⁷ This type of language is better thought of as a true threat.¹⁵⁸ Essentially it is the difference between telling an antagonist “I challenge you to a duel at 2 p.m.,” and, “I will shoot you at 2 p.m.” Either statement could be proscribed by statute, but it would be an error to conflate the two doctrines.

Fighting words as a whole are considered beyond the scope of First Amendment protection because “[r]esort to epithets or *personal abuse* is not in any proper sense communication of information or opinion safeguarded by the Constitution.”¹⁵⁹ Hence, “punishment as a criminal act would raise no question under that instrument.”¹⁶⁰ The speech at issue must not be just personally abusive, but also directed at a person.¹⁶¹ Further, a violent reaction is not a

149. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (emphasis added).

150. Smolla, *supra* note 125, at 321.

151. *Id.* (“[I]t is plain that *both* approaches to the regulation of expression are being invoked, with the word ‘or’ in the middle.” (emphasis added)).

152. *Cohen v. California*, 403 U.S. 15, 22 (1971).

153. *Chaplinsky*, 315 U.S. at 569.

154. *Id.* (internal quotation marks omitted).

155. *Cohen*, 403 U.S. at 20.

156. *Chaplinsky*, 315 U.S. at 572.

157. *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that the statements made by the petitioner were a “kind of political hyperbole”).

158. *See id.* at 708 (dealing with death threats made against the President during a speech).

159. *Chaplinsky*, 315 U.S. at 572 (emphasis added) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

160. *Id.* at 572 (quoting *Cantwell*, 310 U.S. at 309).

161. *See, e.g., Cohen v. California*, 403 U.S. 15, 20 (1971) (“No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.”); *Cantwell*, 310 U.S. at 308–09 (“It is not claimed that he intended to insult or affront the hearers . . . [H]e wished only to interest them in his propaganda.”).

necessary result, nor is the speaker's intent to elicit a violent reaction (or action); there simply must be a likelihood that a violent reaction could occur.¹⁶²

Applying the proper framework for proscribable "fighting words," courts' next step is to identify the type of government interest that may be considered legitimate. One of the government's primary justifications for regulating fighting words has been that a state may use its police power to protect the health and safety of the citizenry and prevent the fear such words inspire.¹⁶³ For example, the government has used this justification to regulate restricting the location of protests near abortion clinics¹⁶⁴ or punishing someone who caused a panic by "falsely shouting 'fire' in a [movie] theatre."¹⁶⁵ Similarly, the ability to ban true threats stems from the government's interest in protecting individuals from the fear of violence and "from the disruption that fear engenders."¹⁶⁶

Some scholars have expressed concern about allowing the government to regulate speech under the framework of true threats because of "the suggestion that there are occasions when *words alone* may inflict injury that society may redress without abridging the guarantees of the First Amendment."¹⁶⁷ Because "true threats" is a developing area, there is a relative paucity of Supreme Court decisions that explicitly touch on it.¹⁶⁸ Lower courts throughout the United States have also provided limited guidance. Cases upholding regulations that punish expressions often involve issues of either sexuality or race in connection with some physical action that goes beyond the mere language at issue.¹⁶⁹ In one case, a Wisconsin criminal court went so far as to declare that under certain circumstances, resorts to personal abuse, which inflict injury "by their very utterance," could be considered "abusive fighting words" that are "not protected by the First Amendment."¹⁷⁰

162. See, e.g., *Cohen*, 403 U.S. at 20 (noting that there was no evidence that a violent reaction occurred from anyone who observed the defendant's clothing, which contained offensive language); *Cantwell*, 310 U.S. at 309 (noting a person may be guilty of using fighting words if his statement is likely to provoke violence, even if that was not the speaker's intent).

163. See *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

164. *Id.* (explaining that the statute is an exercise of police power intended to protect the health and safety of the citizenry); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994) (finding provisions of an injunction establishing a thirty-six-foot buffer zone surrounding clinic entrances as not violating the First Amendment).

165. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

166. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

167. E.g., Smolla, *supra* note 125, at 319.

168. *Virginia v. Black*, 538 U.S. 343 (2003); *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *Watts v. United States*, 394 U.S. 705 (1969).

169. See, e.g., *In re John M.*, 36 P.3d 772, 777 (Ariz. Ct. App. 2001) (categorizing the defendant's yelling of racial slurs as fighting words); *State v. Hubbard*, No. C6-00-1836, 2001 WL 568973, at *1-2 (Minn. Ct. App. May 29, 2001) (upholding the disorderly conduct conviction of appellant, who repeatedly flashed a sexually suggestive sign at complainant, while both were driving on the highway, because his "predatory conduct did indeed arouse alarm and anger . . . [and] tended to incite a breach of the peace"); *State v. Ovadal*, 671 N.W.2d 865, ¶¶ 2-4, 14-17 (Wis. Ct. App. Oct. 7, 2003) (upholding defendant's conviction for yelling "whore" and "harlot" at a woman who was preparing to go to a nude beach).

170. *Ovadal*, 671 N.W.2d 865, ¶ 17.

However, within a developing area of law, a quantity of decisions on a subject is not nearly so valuable as the quality of those decisions. A recent case, which may serve as precedent for future applications of the true threats principle, can be a valuable guide. *Virginia v. Black*¹⁷¹ is such a case, and deals with an example of expressive speech as a threat that is all too common in America: cross burning. The Virginia statute at issue in *Black* read as follows:

It shall be unlawful for any person or persons, *with the intent of intimidating* any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.¹⁷²

The difficulty of the case was that cross burnings had not only been used to generate fear of impending violence, but had *also* been used to communicate a shared ideology among members of the Ku Klux Klan.¹⁷³ As such, a blanket ban on cross burnings ran the risk of overbreadth by criminalizing legally protected expressive speech, while complete removal of the statute would allow this “particularly virulent form of intimidation” to continue.¹⁷⁴ Because states are permitted to ban true threats, the Court first considered whether cross burning represented a true threat.¹⁷⁵ A ban on true threats protects the target not just from the harm threatened but also from the fear that threats of harm can cause. Thus, speech that intimidates others can be classified as a true threat.¹⁷⁶ In the Court’s words: “Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim *in fear of bodily harm or death.*”¹⁷⁷

To determine if cross burning qualified as an intimidating threat, the Court looked to the United States’ history of cross burning. The Court cited examples of cross burning at synagogues and churches, in front of a proposed housing project, and in front of a labor leader’s home on the eve of an election.¹⁷⁸ This history showed the practice was often intimidating, and done with an intent to instill “pervasive fear in victims.”¹⁷⁹ “These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.”¹⁸⁰

171. 538 U.S. 343 (2003).

172. *Black*, 538 U.S. at 348 (emphasis added) (quoting VA. CODE ANN. § 18.2-423 (1996)).

173. *Id.* at 354.

174. *Id.* at 363.

175. *Id.* at 359.

176. *Id.* at 360.

177. *Id.* (emphasis added).

178. *Id.* at 354–55.

179. *Id.* at 360.

180. *Id.* at 355.

Once cross burning itself was found to fit within the structure of a “true threat,” the Court next analyzed the statute for possible unconstitutional content discrimination.¹⁸¹ The Court noted that the Virginia Supreme Court’s analogy to cases like *R.A.V. v. City of St. Paul*¹⁸² was not dispositive of the issue.¹⁸³ Proper analysis required the Court to revisit and re-explain the policy of content discrimination set forth in *R.A.V.*¹⁸⁴ A content-based discrimination analysis requires an understanding of whether or not the government is trying to endorse one side of an issue of social or political importance by silencing only the other side of the issue.¹⁸⁵ A law can withstand this scrutiny when the regulation is “based on the very reasons why the particular class of speech . . . is proscribable.”¹⁸⁶ Thus, threats are proscribable, and threats against the President are proscribable as a subclass, but threats against the President based on a political position are not proscribable.¹⁸⁷ Likewise, obscenity is proscribable, and obscene images that are deemed the most lewd could be proscribable as a subclass, but the government could not proscribe obscenity containing only offensive political messages.¹⁸⁸

For its content discrimination analysis, the Court once again turned to American history, and noted that people had burned crosses to intimidate on more than just racial or religious grounds.¹⁸⁹ Further, the statute at issue was not concerned with whether the perpetrator acted based on the victim’s race, gender, religion, or sexuality.¹⁹⁰ If the statute had been so specific, it may have been found to regulate only expressive speech of a disfavored political perspective. As a result, it would likely have failed the content-discrimination prong of the analysis. However, the statute did not prevent cross burning when related to only a single political perspective, but instead prevented cross burning because it was a type of threat that the state found particularly dangerous. In the Court’s own words:

The First Amendment permits Virginia to outlaw cross burnings done *with the intent to intimidate* because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia *may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history* as a signal of impending violence. Thus, just as a State may

181. *Id.* at 360.

182. 505 U.S. 377 (1992).

183. *Black*, 538 U.S. at 361.

184. 505 U.S. 377 (1992). See *supra* Part II.D.1.b for a detailed analysis of overbreadth and content discrimination.

185. *Black*, 538 U.S. at 361 (explaining that the *R.A.V.* holding declared a law unconstitutional because it banned fighting words only when used in relation to expression of a specific viewpoint, which would effectively silence citizens who oppose the government’s favored position on a single topic).

186. *R.A.V.*, 505 U.S. at 393.

187. *Black*, 538 U.S. at 362.

188. *Id.*

189. *Id.*

190. *Id.*

regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are *most likely to inspire fear of bodily harm*. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.¹⁹¹

Indeed, several Justices wrote concurring opinions to emphasize the point that cross burning “with the intent to intimidate” would not violate the First Amendment.¹⁹² The Supreme Court majority, however, declared the statute unconstitutional based on a separate provision.¹⁹³ The unconstitutional provision, the majority held, was that which deemed the act of cross burning alone to be *prima facie* evidence of intent to intimidate.¹⁹⁴ The Court found that this provision violated the overbreadth doctrine,¹⁹⁵ stating: “[The law] does not distinguish between a cross burning at a public rally or a cross burning on a neighbor’s lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers.”¹⁹⁶

4. The Present Court’s Free Speech Jurisprudence¹⁹⁷

Despite the value of these cases in identifying legitimate government interests substantial enough to restrict speech, past precedent is not necessarily dispositive in front of the highest court.¹⁹⁸ History has shown that the proper inquiry is not what the Supreme Court *has done*, but rather what the present Supreme Court *will do*.¹⁹⁹ As such, it is recent Supreme Court jurisprudence that

191. *Id.* at 363 (emphasis added).

192. *Id.* at 368 (Stevens, J., concurring) (“Cross burning with ‘an intent to intimidate’ unquestionably qualifies as the kind of threat that is unprotected by the First Amendment.” (citation omitted)); *id.* (Scalia, J., concurring) (“[A] State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate.”).

193. *Id.* at 364 (majority opinion).

194. *Id.* at 348.

195. See *supra* Part II.D.1.b for a detailed analysis of overbreadth and content discrimination.

196. *Black*, 538 U.S. at 366.

197. During the writing of this Comment, the Supreme Court decided *Elonis v. United States*, 135 S. Ct. 2001 (2015), which considered whether threatening messages posted to Facebook constitute unprotected speech. The conviction was reversed because the jury instructions directed that a verdict must be based on what a “reasonable person” would conclude about the communications, instead of focusing on the defendant’s mental state. *Elonis*, 135 S. Ct. at 2011–13. Chief Justice Roberts noted, “There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication . . . with knowledge that the communication will be viewed as a threat.” *Id.* at 2012. The Court focused on the validity of the jury instructions and found it was “not necessary to consider any First Amendment issues.” *Id.*

198. See *Rasul v. Bush*, 542 U.S. 466, 497 (2004) (Scalia, J., dissenting) (“[T]oday’s opinion, and today’s opinion alone, extends the habeas statute No reasons are given for this result; no acknowledgment of its consequences made.”), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739; *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (“In all events we think that our laws and traditions in the past half century are of most relevance here.”).

199. For example, compare *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld segregation

is the most helpful—though by no means definitive—indication of the Court’s willingness to consider regulations on free speech.

In *United States v. Stevens*,²⁰⁰ the Court considered the validity of 18 U.S.C. § 48, which addressed the growing popularity of “crush videos.”²⁰¹ Crush videos are a type of pornography which depict “women slowly crushing animals to death,” including cats, dogs, mice, and hamsters.²⁰² The statute established a criminal penalty for anyone who “create[d], s[old], or possesse[d] a depiction of animal cruelty . . . for commercial gain.”²⁰³ Important to the Court’s analysis was that the statute itself “d[id] not address underlying acts harmful to animals, but only *portrayals* of such conduct.”²⁰⁴ Thus, the statute as written punished not the conduct of animal cruelty but the images themselves, and such a statute was presumed invalid unless classified within a *Chaplinsky* category.²⁰⁵

The government first argued not that such speech fit within one of the enumerated *Chaplinsky* categories, but rather, that depictions of animal cruelty should have been added to the list.²⁰⁶ Using the language of *Chaplinsky* as a guide, the government asserted that the benefit of the speech “[wa]s clearly outweighed by the social interest in order and morality.”²⁰⁷ The Court rejected this argument, and said that to reduce the validity of freedom of speech to a balancing test was “startling and dangerous.”²⁰⁸ The Court explained that *Chaplinsky*’s balancing language did not provide a test for how to identify new categories of unprotected speech, but instead was merely illustrative of how already unprotected speech was evaluated.²⁰⁹

Moving to an alternative argument, the government justified the statute as criminalizing only obscene content and explained that the language of the statute’s exceptions was based heavily on the language of *Miller*.²¹⁰ The government contended that providing an exception for work of “serious literary, artistic, political or scientific value” would protect expressions with legitimate

based on race within train cars, with *Brown v. Board of Education*, 349 U.S. 294 (1955), which famously prohibited racial segregation in public schools and overruled the Court’s *Plessy* decision. Additionally, compare *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), which found that commerce is plainly distinct from production, and therefore not within the power of Congress to regulate, with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which found that intrastate industrial activities impact interstate commerce.

200. 559 U.S. 460 (2010), *superseded by statute*, Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, § 3(a), Dec. 9, 2010, 124 Stat. 3178 (codified as amended at 18 U.S.C. § 48 (2012)).

201. *Stevens*, 559 U.S. at 465.

202. *Id.*

203. 18 U.S.C. § 48(a) (2006), *invalidated by* *United States v. Stevens*, 559 U.S. 460 (2010).

204. *Stevens*, 559 U.S. at 464 (emphasis added).

205. *Id.* at 468–69 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

206. *Id.* at 469.

207. *Id.* at 470 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)).

208. *Id.*; *see also* *Miller v. California*, 413 U.S. 15, 25 (1973) (deriding the applicability of a balancing test to determine a regulation on speech by declaring “that concept has never commanded the adherence of more than three Justices at one time”).

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

210. *Id.* at 479.

merit, but permit regulation of obscene crush videos.²¹¹ The Court also rejected this “serious value” exception, saying it could not be the test for protected speech because “[m]ost of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from government regulation.”²¹²

Finally, in a manner instructive of the Court’s statutory analysis, the *Stevens* majority considered the overbreadth doctrine.²¹³ The plain language of the statute prohibited depictions of animal cruelty, which included any depiction where a living animal was “maimed, mutilated, tortured, wounded, or killed.”²¹⁴ Although Congress’s intent was to prevent cruelty to animals, the words “wounded” and “killed” did not necessarily imply cruel treatment.²¹⁵ Further, while the statute prohibited only “illegal conduct” that harmed animals, that term was broad. “Illegal conduct” could have included violations related to anything from fishing licenses to livestock regulations, and the definition was subject to the variances of each jurisdiction.²¹⁶

Within this framework, the Court described the criminal statute as one of “alarming breadth.”²¹⁷ By way of example, the Court noted that all hunting is illegal in Washington D.C., and so the sale of hunting magazines within the district would automatically fall under the prohibited conduct of the statute.²¹⁸ Justice Alito, alone in dissent, gave weight to the content of the images: “The animals used in crush videos are living creatures that experience[d] excruciating pain. Our society has long banned such cruelty”²¹⁹

The next year the Court decided *Snyder v. Phelps*.²²⁰ The issue was the Westboro Baptist Church’s practice of picketing funerals to publicize its message that God hates the United States for its tolerance of homosexuality.²²¹ Members of the church stood about a thousand feet from the funeral of a marine killed in Iraq, holding signs that read: “Thank God for Dead Soldiers,” “God Hates Fags,” and “You’re Going to Hell.”²²² The marine’s father testified that “he [was] unable to separate the thought of his dead son from his thoughts of Westboro’s picketing.”²²³ In addition to more than six hundred military funerals, the church had already also picketed, for example, the funerals of police officers, firefighters, and victims of “shocking crimes,” sending out press releases of their

211. *Id.* (quoting *Miller*, 413 U.S. at 24).

212. *Id.*

213. *Id.* at 473.

214. *Id.* at 474.

215. *Id.*

216. *Id.* at 475–76.

217. *Id.* at 474.

218. *Id.* at 476.

219. *Id.* at 496 (Alito, J., dissenting).

220. 562 U.S. 443 (2011).

221. *Snyder*, 562 U.S. at 448.

222. *Id.*

223. *Id.* at 450.

plans in advance.²²⁴ Justice Alito's dissent captured a visceral response to the church's actions: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."²²⁵

The majority, however, saw the speech not as a personal attack, but instead as a contribution to public discourse.²²⁶ This distinction was extremely important. While the First Amendment reflects a national commitment that debate on public issues be "wide-open,"²²⁷ when purely private concerns are at issue, "First Amendment protections are often less rigorous."²²⁸ Speech can be considered public when it relates to political or social issues, is newsworthy, or is generally of concern to the public.²²⁹ On the other hand, the Court cited as an example of private speech the underlying facts in *City of San Diego v. Roe*,²³⁰ which found that "videos of an employee engaging in sexually explicit acts did not address a public concern."²³¹

Guided by this framework, the content of Westboro Baptist Church's protests—while they "may [have] fall[en] short of refined social or political commentary"—were public in that they related to issues such as the moral conduct of the United States and homosexuality in the military.²³² The Court found that public speech was too important to be regulated just because it was "upsetting or arouses contempt."²³³ The Court set aside the jury verdict and dismissed the civil charges against Westboro Baptist Church because "[i]n a case such as this, a jury is unlikely to be neutral with respect to the content of [the] speech, posing a real danger of becoming an instrument for the suppression of . . . vehement, caustic, and sometimes unpleasan[t] expression."²³⁴

5. Legislative Response in Light of First Amendment Rulings

Although a growing number of states have proposed criminal legislation to curb revenge porn, there is general acknowledgment that broad criminal statutes would likely prove unconstitutional.²³⁵ This sentiment is buoyed by the recent

224. *Id.* at 466–67 (Alito, J., dissenting).

225. *Id.* at 463.

226. *Id.* at 454 (majority opinion) ("[T]he overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues [than the decedent].").

227. *Id.* at 452 (internal quotation marks omitted).

228. *Id.*

229. *Id.* at 453.

230. 543 U.S. 77 (2004) (police officer was discharged for selling homemade sexually explicit videos).

231. *Snyder*, 562 U.S. at 453.

232. *Id.* at 454.

233. *Id.* at 458.

234. *Id.* (internal quotation marks omitted) (second and third alterations in original) (ellipsis in original).

235. See Calvert, *supra* note 18, at 683 (noting that recent decisions of the Supreme Court indicate it is highly unlikely that revenge porn will be classified either as obscene or as a new category of unprotected speech); Laird, *supra* note 49, at 48 (noting criticism from the American Civil Liberties Union that such laws restrict free speech); Stokes, *supra* note 17, at 942 (declaring that the criminal

decisions of the Supreme Court.²³⁶ As a consequence, there is also a growing trend to narrow statutes in order to withstand First Amendment scrutiny.²³⁷ For example, Pennsylvania's proposed legislation reads:

A person commits the crime of intimate partner harassment by exposing a photograph, film, videotape or similar recording of the identifiable image of an intimate partner who is nude or explicitly engaged in a sexual act to the view of a third party *for no legitimate purpose* and *with the intent* to harass, annoy or alarm the person depicted.²³⁸

The language "legitimate purpose" implies a legal standard of "rational basis" scrutiny, which has been historically easy to overcome.²³⁹ Additionally, the inclusion of "intent" creates another triable issue of fact regarding the defendant's state of mind in relation to his actions.²⁴⁰

California maintains a statute that criminalizes the intentional distribution of an "image of the intimate body part or parts of another identifiable person, or an image of the person engaged in an act of sexual intercourse . . . under circumstances in which the persons agree or understand that the image shall remain private."²⁴¹ New Jersey offers the longest standing, and much celebrated,²⁴² version of such a law. An actor commits a crime when "knowing that he is not licensed or privileged to do so, he discloses any . . . reproduction of the image of another person whose intimate parts are exposed."²⁴³ The statute also includes an affirmative defense where, "the actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified."²⁴⁴ The disposition of recent First Amendment cases, and the proliferation of revenge porn laws, underscores a broader point: while judges and legislators debate the finer points of constitutional doctrines, real people are being hurt by revenge porn every day. Something must be done to balance the protection of our nation's fundamental freedoms and its citizens' basic human dignity, or soon one will be sacrificed to satisfy the other.

regulations appeared "overbroad and potentially unconstitutional").

236. See *supra* Part II.D.4 for a discussion of recent Supreme Court cases dealing with the First Amendment.

237. See, e.g., Danielle Keats Citron, 'Revenge Porn' Should Be a Crime in U.S., CNN, <http://www.cnn.com/2013/08/29/opinion/citron-revenge-porn/index.html> (arguing a "narrowly crafted criminal statute" can be reconciled with the First Amendment) (last updated Jan. 16, 2014); Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <http://www.volokh.com/2013/04/10/florida-revenge-porn-bill/> ("[A] suitably clear and narrow statute . . . would likely be upheld by the courts.").

238. S.B. 1167, 197th Gen. Assemb., Sess. of 2013 (Pa. 2013) (emphasis added).

239. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (establishing a standard of review that is extremely deferential to the legislature, allowing laws to stand so long as the government can assert a "rational basis" for them).

240. See *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

241. CAL. PENAL CODE § 647(j)(4)(A) (West 2015).

242. See *infra* notes 250–51 for a discussion of those who applaud the New Jersey law.

243. N.J. STAT. ANN. § 2C:14-9(c) (West 2015).

244. *Id.* § 2C:14-9(d)(1).

III. DISCUSSION

Courts should analyze revenge porn as proscribable speech based on its impact, rather than its content. That is, the inquiry should not be whether or not its content is obscene, but rather whether its impact causes harm and fear that rises to the level of a true threat.²⁴⁵ Revenge porn, by definition, involves depictions of nudity and sexuality. The general trend to regulate depictions of sexually explicit material has been to classify it as obscene. But the Supreme Court has demonstrated an unwillingness to label images that appeal “to the prurient interest” as obscene.²⁴⁶ Furthermore, cases such as *Stevens* and *Snyder*, discussed in Section II, indicate the present Court will vehemently defend speech, even when such a defense protects depictions as offensive as animal cruelty or funeral protests. With this backdrop, legislators are looking to criminalize revenge porn by crafting statutes with elaborate restrictions and exceptions, in what seems to be anticipation of having to defend them in court.²⁴⁷ These qualifiers, however, make the statutes so narrow as to render them virtually useless.²⁴⁸ To paraphrase Justice Frankfurter, these statutes roast a pig when they need to burn the house.²⁴⁹

This Section argues that the primary problem with drafting legislation to prevent revenge porn is the drafters’ and interpreters’ perspective of the statute. The mere presence of nudity in this form of intimate media is not the reason the practice should be criminalized. Rather, it is the *harm* the postings cause to the subjects of the media, in terms of both mental well-being and physical danger. Part III.A reviews the existing legislation, and the gaps created by overly cautious legislators concerned with violating free speech protections. Part III.B argues that posting revenge porn should be classified as a true threat. Finally, Part III.C illustrates what an effective revenge porn statute might look like if drafted with the true threats doctrine in mind, rather than focused on the Court’s obscenity jurisprudence.

A. Existing State Legislation Is Ineffective

To appreciate the impact these statutes may have, it is helpful to take a deeper look at a few of them. Many view the New Jersey statute as the

245. See *supra* Part II.D.3 for a review of the framework of the fighting words analysis.

246. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997) (affirming that sexual expressions, even if indecent or offensive, do not rise to the level of obscenity); see also *Stokes, supra* note 17, at 944 (“Some have argued that revenge porn does fit within the ‘obscenity’ category and that criminalization is therefore constitutional. This argument, however, relies on an extension of the relevant case law that precedent does not support.” (footnote omitted)).

247. See, e.g., *Stokes, supra* note 17, at 941–44 (describing how the language of the California statute was dramatically cut back before being passed, and how the Florida bill was shot down in part due to First Amendment concerns).

248. See, e.g., *id.* at 942 (describing revenge porn laws as either unconstitutionally overbroad, or so narrow they will be ineffective in the majority of cases).

249. *Butler v. Michigan*, 352 U.S. 380, 383–84 (1957) (coining the phrase “burning the house to roast a pig” to describe a statute’s overbreadth).

preeminent revenge porn law in the country.²⁵⁰ One important advocate of criminalization described the statute as “treat[ing] the conduct seriously while providing specific definitions and affirmative defenses that guard the statute against First Amendment overbreadth.”²⁵¹ Section 2C:14-9 states:

c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. . . .

d. It is an affirmative defense to a crime under this section that:

(1) the actor posted *or otherwise provided prior notice* to the person of the actor’s intent to engage in the conduct specified in subsection a., b., or c²⁵²

This statute is indeed at the vanguard of revenge porn criminalization, so it is useful to highlight what the legislators got right. First, an important aspect of the New Jersey law is that it gives clear definitions of words that courts may otherwise struggle with.²⁵³ Second, a violation of the statute is a felony rather than a misdemeanor.²⁵⁴ Not only is felony status a stronger deterrent to perpetrators, but it also signals to the police officers and district attorneys, who identify and prosecute such offenses, that they should attribute a greater level of importance to statutory violations. For example, in one case, a victim got help from U.S. Senator Marco Rubio, who directed the Florida Office of the Attorney General to take her case after the police initially declined to assist.²⁵⁵ Prosecutors traced the leak of her intimate media to the IP address of the victim’s ex-boyfriend.²⁵⁶ But then the charges were dismissed.²⁵⁷ The prosecutors could not search the ex-boyfriend’s computer without a warrant, and they could not justify seeking a warrant for a misdemeanor.²⁵⁸

250. See Stokes, *supra* note 17, at 942 (noting that the New Jersey statute has been described as being “an extremely promising approach”).

251. Martinez, *supra* note 8, at 241 (alteration in original) (citing quoting Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper* (Sept. 7, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537&download=yes).

252. N.J. STAT. ANN. § 2C:14-9(c)–(d)(1) (West 2015) (emphasis added).

253. See, e.g., *People v. Stone*, 982 N.Y.S.2d 733, 735 (N.Y. Crim. Ct. 2014) (text message of a photograph did not constitute a “display”); *People v. Barber*, No. 2013NY059761, 2014 WL 641316, at *8 (N.Y. Crim. Ct. Feb. 18, 2014) (unpublished table decision) (posting images to the Internet did not constitute a “public display”).

254. Martinez, *supra* note 8, at 241.

255. Citron & Franks, *supra* note 21, at 367.

256. *Id.*

257. *Id.*

258. *Id.*

Some supporters extol the virtue of the affirmative defenses in the statute, which appear to provide cover to the adult film industry.²⁵⁹ But that statutory defense is exactly what is wrong with this law. It is true the law “has never faced a serious challenge.”²⁶⁰ But it is not hard to imagine how a clever person who intended to distribute intimate images could get around the law. The statute provides that “[i]t is an affirmative defense to a crime under this section that . . . the actor posted or otherwise provided prior notice to the person of the actor’s intent.”²⁶¹ All a distributor would have to do is tell the victim about his plan. Not only is this an obvious loophole that perpetrators will no doubt exploit once they learn of it, but it also protects some of the most egregious and violent versions of revenge porn. With so much for victims to lose, from reputation to career prospects, perpetrators have used the threat of posting intimate media as a means to dominate their partners within their relationships.²⁶² In one case, a woman was told by her ex-boyfriend that he was going to auction off a CD of her intimate media on eBay.²⁶³ In another case, a victim was told her pictures would be posted to Facebook.²⁶⁴ In short, the *threat* of putting intimate media online is a means for a person to manipulate and control his romantic partner, and is seen by some as a form of domestic abuse.²⁶⁵ Yet this much-lauded New Jersey statute makes such a threat a specific affirmative defense to punishment.

Turning to California, the relevant portion of the statute makes it a misdemeanor when:

(4)(A) Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress. . . .

(C) As used in this paragraph, “intimate body part” means any portion of the genitals, the anus and in the case of a female, also includes any portion of the breasts below the top of the areola, that is either uncovered or clearly visible through clothing.²⁶⁶

Like the New Jersey law, the California law has positive aspects. First, there are again clear definitions of specific portions of the law, including “intimate

259. *E.g.*, Martinez, *supra* note 8, at 241.

260. Stokes, *supra* note 17, at 941.

261. N.J. STAT. ANN. § 2C:14-9(d)(1) (West 2015).

262. *See* Citron & Franks, *supra* note 21, at 351–52 (discussing revenge porn’s serious impact on victims); *see also* State v. Parsons, No. 10-06-01372, 2011 WL 6089210, at *1 (N.J. Super. Ct. Dec. 8, 2011) (defendant posted pictures of his former partner to Twitter after getting angry that she “told [him] off”).

263. Stokes, *supra* note 17, at 943.

264. *Id.*

265. *See* Citron & Franks, *supra* note 21, at 351.

266. CAL. PENAL CODE § 647(j)(4)(A) (West 2015).

body parts,” which reduce the possibility of confusion in the courtroom. Second, the California law follows a trend that the proposed Pennsylvania law, and many other proposed laws, have adopted: including statutory provisions requiring that the image must be of another *identifiable* person.²⁶⁷ This is almost certainly an attempt to narrow the statutes to survive overbreadth scrutiny, but unlike other such attempts, it is a step in the right direction. It addresses online posts that include the victim’s name, address, contact details, or social networking pages. If a major reason for these posts is to humiliate or harass the victim, making identification of the victim an element of the crime deals with this problem.

The California statute also improves the efficiency of adjudication, while addressing the possibility of a defendant being charged with a crime he did not commit. For example, without this qualifier, a defendant might be charged with posting intimate media of Person A, when actually the media was of Person B. If the image was unidentifiable, it could be difficult to prove his innocence. Of course, this is more likely a theoretical than practical issue, as there are so many ways that a defendant could meet this burden, all of which do not merit attention. Still, it is overall a valuable element within the statute because it reduces the effectiveness of a “parade of horrors” argument seeking to overturn the law.

Recent emendation to the cited California statute aimed to address a heavily criticized aspect of the original legislative language.²⁶⁸ Before, the statute had punished any person who “*photographs or records . . . another identifiable person.*”²⁶⁹ In order to appreciate the change, it is useful to consider the implications of the previous statutory text. The language of the original law, addressing only intimate media of “another identifiable person,” explicitly excluded from coverage distribution of any self-photography. As noted earlier, the vast majority of revenge porn is self-photography.²⁷⁰ Thus, the California law eliminated from its scope the majority of victims. This may have been a drafting error, or perhaps it was drafted to reflect the public opinion that victims of revenge porn “brought it upon themselves” by creating the media.²⁷¹ But even though self-photography is a strong indication of consent, it is not inherently more consensual than intimate media where a partner captures the images.

The statute, as amended, punishes any person who “intentionally *distributes* the image of the intimate body part or parts of another identifiable

267. See *supra* note 85 and accompanying text for a sample of some of the states that have included the identifiable person requirement in their laws.

268. See, e.g., Martinez, *supra* note 98, at 241–43 (pointing out several drafting holes which create huge exceptions to punishment); Stokes, *supra* note 17, at 941 (criticizing the breadth of perpetrators exempted from punishment under the California law); Kelly, *supra* note 46.

269. See *People v. Johnson*, 234 Cal. App. 4th 1432 (Cal. Ct. App. 2015) (emphasis added) (quoting the original statutory language).

270. See *supra* note 45 and accompanying text, which describes how the overwhelming majority of intimate media is self-photography.

271. See *supra* note 66 and accompanying text for an explanation of society’s general feelings toward revenge porn victims.

person.”²⁷² While this change ameliorated a serious flaw in the statute’s language, it is doubtful that it will change the statute’s ineffectiveness. The California law makes it a crime to distribute these images only “under circumstances where the parties agree or understand that the image shall remain private.”²⁷³ Like its New Jersey counterpart, the California law has an exception that almost completely swallows the rule. In the absence of some sort of binding written contract between the parties, all a defendant needs to do to evade punishment is contest the understanding of privacy between him and his partner.²⁷⁴ Given the (1) lack of public sympathy towards victims of revenge porn,²⁷⁵ (2) growing popularity and number of revenge porn websites,²⁷⁶ (3) presence of hackers,²⁷⁷ and (4) possibility that phones or laptops that contain intimate media could be misplaced, a defendant could credibly argue that it was not his understanding that the images would remain private. Finally, in contrast to the New Jersey law, the California law makes distribution of revenge porn a misdemeanor. For the reasons discussed above, making the punishment a misdemeanor rather than a felony reduces the effectiveness of the law.²⁷⁸

The California legislature created a law that does little more than pay lip service to the issues surrounding revenge porn. The law reaches almost no one, gives police very little ability or incentive to enforce it, and provides a nearly insurmountable defense. The law essentially allows its drafters to attend fundraisers as champions of both free speech and women’s rights, without taking a meaningful stance on either issue. Despite what advocates may say, victims in California are sure to learn that while this law identifies an issue, it provides no practical solution.

B. Revenge Porn Should Be Classified as True Threats

As existing statutes, case law, and scholarship have shown, to argue that depictions of consensual sexual acts of adults rise to the level of obscenity is futile. Given the Supreme Court’s obscenity decisions, lower courts would almost certainly find statutes classifying revenge porn as obscene unconstitutional. Thus, legislators have attempted to make the statutes more palatable for judges. However, what these statutes accomplish in practice is to avoid judicial scrutiny by another means; they are so narrow they are not

272. CAL. PENAL CODE §647(j)(4)(A) (West 2015) (emphasis added).

273. *Id.*

274. See Martinez, *supra* note 8, at 243 (arguing that if the defendant and victim disagree about the level of privacy associated with the tapes, conviction could become difficult or impossible).

275. See *supra* note 66 and accompanying text for a review of public sentiment towards revenge porn victims.

276. See Steven Brill, *The Growing Trend of ‘Revenge Porn’ and the Criminal Laws that May Follow*, HUFFPOST CRIME (Feb. 25, 2014, 5:33 PM), http://www.huffingtonpost.com/steven-brill/the-growing-trend-of-revenge-porn_b_4849990.html.

277. See *supra* notes 13–14 and accompanying text for information on hackers who acquire intimate media.

278. See *supra* notes 254–58 and accompanying text for an explanation of the consequences that making revenge porn a misdemeanor, rather than a felony, has on its prosecution in court.

applicable to any defendant.²⁷⁹ This cannot be the solution. The Constitution is not so feeble and inflexible a document that the advent of new technology can change not only its application, but also its substance.

As discussed in Part II.D.3, fighting words are not protected by the First Amendment because “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.”²⁸⁰ To constitute fighting words, the speech at issue must not merely be personally abusive, but indeed must be directed at a person.²⁸¹ When this occurs, the government can ban threats of violence to protect the individual not just from the harm being threatened, but also from the fear of that harm and “from the disruption that fear engenders.”²⁸² A violent reaction is not a necessary result, nor is it required that the speaker even intend a violent reaction, so long as a violent reaction would be likely to occur.²⁸³ Lower courts interpreting this language have proven sympathetic to victims when the scenario involves issues of sexuality and includes some sort of physical action.²⁸⁴

With this skeletal framework, we can turn to application of the true threats doctrine to revenge porn. *Virginia v. Black* is an excellent guide for the analysis of the concept of true threats, as well as an indicator of the sort of statutory language that courts may uphold when analyzing the proscribed language.

The first step in this analysis is to classify revenge porn. The category of true threats developed as an outgrowth of the proscription of fighting words.²⁸⁵ Actions intended to intimidate can be a type of true threat.²⁸⁶ To determine the constitutionality of proscribing the act of cross burning, as an equivalent to intimidating fighting words, the Court looked to the history of the practice. Therefore, so must an analysis of revenge porn. The advent of the Internet, and the even more recent advances in cell phone technology, have both played a role in the growth of revenge porn. Although the history of revenge porn is not as

279. See, e.g., Stokes, *supra* note 17, at 941 (noting that as of January 2014, only two revenge porn defendants had been prosecuted despite the New Jersey law being on the books since 2004).

280. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940)).

281. See *Cantwell*, 310 U.S. at 308–09 (“It is not claimed that he intended to insult or affront the hearers . . . [H]e wished only to interest them in his propaganda.”); see also *Cohen v. California*, 403 U.S. 15, 20 (1971) (“No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.”).

282. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

283. See *Cantwell*, 310 U.S. at 309 (noting a person may be guilty of using fighting words if his statement is likely to provoke violence, even if that was not the speaker’s intent); see also *Cohen*, 403 U.S. at 20 (noting that there was no evidence that anyone who observed the defendant’s offensive clothing reacted violently).

284. See, e.g., *State v. Hubbard*, No. C6-00-1836, 2001 WL 568973, at *1–2 (Minn. Ct. App. May 29, 2001) (convicting appellant of disorderly conduct for repeatedly flashing a sexually suggestive sign at complainant while both were driving on the highway); *State v. Ovadal*, No. 03-0377-CR, 671 N.W.2d 865, at *3 (Wis. Ct. App. Oct. 7, 2003) (upholding defendant’s conviction for yelling “whore” and “harlot” at a woman who was preparing to go to a nude beach).

285. Smolla, *supra* note 125, at 320–21.

286. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

lengthy as the history of cross burning, there is an overwhelming amount of evidence to demonstrate the significant impact it has made on individual victims and society as a whole.

The humiliation associated with exposing the intimate details of a person's life results in everything from counseling²⁸⁷ to suicide.²⁸⁸ Data gathered on revenge porn reveal that victims often suffer panic attacks, anorexia, and depression.²⁸⁹ But the most distressing side effect of revenge porn is the resulting harassment of victims by complete strangers. When personal information is included within a post of intimate media, victims can receive harassing phone calls and emails at work²⁹⁰ and at home.²⁹¹ In some circumstance, the harassment escalates beyond phone calls to physical confrontations.²⁹² In at least one case, such a confrontation led to rape with a deadly weapon.²⁹³ Many victims are aware not just of the humiliation that revenge porn causes, but the danger to their personal safety as well.²⁹⁴ The fear of sexual assault as a result of these posts is profound, and some victims no longer feel safe leaving their homes.²⁹⁵ In other cases, it is not even the distribution, but the threat of distribution that allows one partner in a relationship to manipulate and dominate the other to the point of domestic abuse.²⁹⁶

Judges, legislators, and academics may cast aside with ease concerns that a victim might break out in shingles or lose her security clearance with the Department of Fish and Wildlife.²⁹⁷ It is to be expected—and perhaps even hoped—that our lawmakers view those laws that threaten the principles of the Constitution with skepticism and even a willingness to accept some unpleasantness. Humiliation and loss of income likely do not satisfy the requirements of the *Black* test. But the harm caused by revenge porn includes stalking, rape, and suicide. It leaves victims afraid to leave their homes out of fear of being assaulted.²⁹⁸ The severity of this direct harm surely meets the

287. *Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *2 (D. Haw. July 12, 2011) (victim required emergency counseling).

288. *See Zernike, supra* note 42 (describing the New Jersey case where a college student committed suicide shortly after a sexual encounter was posted online).

289. Citron & Franks, *supra* note 21 at 351 (citing statistics gathered by the authors from a survey of over 1200 victims).

290. *E.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009).

291. *Taylor*, 2011 WL 2746714, at *3 (explaining that over a period of eighteen months, plaintiff received an average of three calls a day related to the posting of her intimate media and phone number).

292. *United States v. Sayer*, 748 F.3d 425, 428 (1st Cir. 2014).

293. *Black, supra* note 39.

294. Millner, *supra* note 13.

295. Citron & Franks, *supra* note 22, at 351.

296. *Id.*

297. *See Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *2-3 (D. Haw. July 12, 2011).

298. *See, e.g., United States v. Sayer*, 748 F.3d 425, 428 (1st Cir. 2014) (describing that the victim no longer felt safe in her home).

definition of proscribable intimidation.²⁹⁹ States have the power to protect people not just from the harm being threatened—in this case, stalking and possible sexual assault—but also from the fear of that harm and “the disruption that fear engenders.”³⁰⁰

As in *Black*, once courts establish that revenge porn can at times fall within the sphere of proscribable threats, the next step is to analyze a statute for possible content discrimination.³⁰¹ A law can withstand this phase of scrutiny when the regulation is based on the “very reason the entire class of speech at issue is proscribable.”³⁰² But if the law proscribes speech related to only one side of a political or social issue, courts will overturn the statute because of its unconstitutional content discrimination. To understand if cross burning was related to a racial or religious social position, the Supreme Court again looked to history.³⁰³ Presumably, if cross burning was done in response to only race-based political issues such as integration of schools, voting rights, or miscegenation, it would be protected expressive speech. The Ku Klux Klan’s position on these issues, no matter how disfavored, is one side of a political debate. However, the Court’s historical analysis revealed that cross burning was not limited to a specific racial-, religious-, or gender-related issue, thus its proscription by statute did not on its own constitute content discrimination.³⁰⁴

The history and nature of revenge porn reveals that posting intimate media is also unrelated to a specific political issue. Indeed it is difficult to imagine any social or political message present in any of these harmful postings. Revenge porn even escapes a gendered political message. While not as common, revenge porn can certainly impact men and boys in the same ways it does women and girls.³⁰⁵ Under the framework provided by *Black*, there would be no inherent “content discrimination” in a statute that banned revenge porn as a type of threat.

C. *The Effective Revenge Porn Statute: A Proposal*

Statutes criminalizing revenge porn are written in a defensive tone, seemingly apologizing at the outset for proscribing nonobscene expressions in violation of the First Amendment.³⁰⁶ Understanding revenge porn within a framework of true threats would allow legislatures to enact broader regulations that more effectively protect the victims of these crimes. The Justices weighed in

299. *Virginia v. Black*, 538 U.S. 343, 360 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”).

300. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

301. See *supra* Part II.D.1.b for a detailed analysis of overbreadth and content discrimination.

302. *R.A.V.*, 505 U.S. at 388.

303. *Black*, 538 U.S. at 365–66.

304. *Id.*

305. Citron & Franks, *supra* note 21, at 347–48 (noting revenge porn impacts women more often, but not exclusively); see Zernike, *supra* note 42 (describing an instance in which one male roommate posted the dalliance of another male roommate online).

306. See *supra* Part III.A for a review of several current statutes and their flaws.

on the ideal phrasing of a statute that bans particularly virulent threats in *Black*. Combining that guidance with some of the best aspects of the current revenge porn statutes, I propose a framework for an effective statute that does not violate free speech:

1. It shall be a felony of the third degree for any person or persons, with the intent to intimidate or create a true threat of harm against any person or group of persons, to disclose any photograph, film, videotape, recording, or other reproduction of the image of another identifiable person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure.
 - a. As used in this paragraph, “harm” is defined in two ways:
 - i. Violent bodily harm with physical consequences including, but not limited to, rape, murder, suicide, and anorexia; or
 - ii. Extreme and medically verified trauma including, but not limited to, depression and anxiety.
 - b. As used in this paragraph, inclusion of indicators of identity within such a post will be prima facie evidence that the actor directed the post at the subject of the intimate media.
 - c. As used in this paragraph, “disclose” means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise, or offer.
 - d. As used in this paragraph, “intimate body part” means any portion of the genitals, and in the case of a female, also includes any portion of the breasts below the top of the areola that is either uncovered or visible through less than fully opaque clothing.
 - e. As used in this paragraph, “identifiable” refers to personally recognizable features within the intimate media, as well as references to the subject of the media’s name, phone number, address, workplace, email address, social networking profiles, or other related information.

This proposed statute borrows the best portions of the other statutes, and leaves out their worse features. California’s “identifiable person” standard is included, as is its definition of “intimate parts.”³⁰⁷ New Jersey’s description of what qualifies as a violation of the statute—disclosure of the image—is included, which expands the scope to self-photography, as is its definition of “disclose.”³⁰⁸ Finally, the statute makes a violation a felony, not a misdemeanor, providing as much incentive as possible for law enforcement to prosecute.³⁰⁹

307. See *supra* notes 241, 266, and accompanying text for a review of the California statute’s “identifiable person” and “intimate parts” clauses.

308. See *supra* note 252 and accompanying text for a review of the New Jersey statute’s “disclosure” clause.

309. See *supra* notes 254–58 and accompanying text for a discussion of the benefits that accompany classifying revenge porn as a felony, as opposed to a misdemeanor.

Taking a lesson from *Black*, the only narrowing of the statute is the qualifier that disclosure of the media must be done “with the intent to intimidate or create a true threat of harm.”³¹⁰ The intimidation requirement tracks the language of *Black*, but is expanded to address an otherwise significant opportunity for litigants to distinguish revenge porn cases from this Supreme Court precedent. The long and terrible history of cross burning in the United States gave special force to the intimidating nature of that conduct. As a relatively recent phenomenon, revenge porn does not yet have such a history. The addition of the “or create a true threat of harm” language allows the government to employ the precedential value of *Black* without the burden of establishing a history of violence comparable to cross burning.

“Harm” is defined in two ways in the proposed statute. The first form of harm has clearly observable physical consequences.³¹¹ However, such consequences, or even a fear of those consequences, may occur in only limited circumstances. The second form of harm is much more common and expands the reach of the statute.³¹² Defining “harm” in two separate provisions provides the statute with protection from judicial annulment. This is so because, in the event that a court finds one definition unconstitutionally overbroad, the court can sever that provision without overturning the statute as a whole.

Finally, “indicators of identity” constitute evidence that the online post is directed at the subject of the post. This is not evidence of a defendant’s intent to intimidate, but rather only evidence of a defendant’s intent to direct the posting at a specific victim. This addresses situations where a victim is not notified about the posting, but instead finds out through happenstance at some future date. Fighting words jurisprudence generally does not require a speaker’s specific intent to be a violent reaction.³¹³ *Black* indicates the same rule could be extended to threats, and thus the rule could also apply to revenge porn. That is, a violent reaction does not have to be a distributor’s specific intent as long as a violent reaction could be reasonably likely to occur. Evidence of direction reduces the burden on the prosecution. A prosecutor would need to prove only that (1) revenge porn posts placed a victim in fear of violent bodily harm, and (2) a defendant directed his actions at a victim. From this, a fact finder is free to conclude whether or not a particular defendant’s actions rise to the level of an intimidating threat.

Finally, it is worth noting how a court *could* interpret this statute, with the caveat that a judge’s holding in a prior case is not a clear indicator of future opinions. Opinions from analogous cases written by Justices on the present Supreme Court, however, may indicate their general disposition toward such a

310. See *supra* note 191 and accompanying text for a description of the holding in *Black*, as it relates to the “intent to intimidate” language.

311. See *supra* notes 34–39 and accompanying text for a review of some of the most serious physical harms that can result from revenge porn.

312. See *supra* notes 24–27 and accompanying text for a review of some of the less physically serious, but most common, harms resulting from revenge porn.

313. See *supra* notes 159–62 and accompanying text for a discussion regarding the Supreme Court’s characterization of the fighting words doctrine.

statute. Justice Scalia noted in his concurrence in *Black*: “[A] State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate.”³¹⁴ Justice Thomas, in his dissent in *Black*, commented: “In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means.”³¹⁵ Justices Kennedy and Ginsburg joined Justice Souter’s dissent, which focused not on the intimidating nature of cross burning, but on the statute’s “prima facie” evidence provision: “It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning . . .”³¹⁶ Justice Alito delivered dissents in both *Stevens* and *Snyder*, which considered the nature of actual speech at issue—killing puppies and telling a veteran’s family he was going to hell during his funeral—beyond the scope of First Amendment protection.³¹⁷ Finally, in *City of San Diego v. Roe*,³¹⁸ the Court stated, per curiam, that the videos of an employee engaging in sexually explicit acts did not address a public concern.³¹⁹ In sum, five current Justices have voiced opinions on either the structure of a law that could criminalize revenge porn, or the type of speech that could be regulated without issue.

IV. CONCLUSION

When I began my research on this issue, a professor asked me which side of the debate I supported: women or the Constitution. That cannot be the framework our society uses to decide this issue. At the end of the theoretical parade of horrors a judge might concoct, banning revenge porn would mean no one would ever feel safe showing friends the explicit images of an intimate partner. But in the real world, the parade of horrors that victims of this crime must suffer is far worse, and no system that allows it to go unchecked can reasonably tout its inherent justice. Given the reality of the situation, it is unlikely that revenge porn will continue to enjoy protection. But it would be dangerous if, in our fervor to curb this practice, we demand a resolution colored by a personal-dignity-versus-Constitution debate. That forces an unnecessary sacrifice of one principle to the other, and establishes a dangerous precedent. It is important that revenge porn not just be regulated, but that it be regulated properly—as a true threat. The principles and protections of the Constitution are not so feeble that they may be set against each other and rendered impotent by the camera on a college student’s phone. To say that the Constitution forbids the

314. *Virginia v. Black*, 538 U.S. 343, 368 (2003) (Scalia, J., concurring in part and dissenting in part).

315. *Id.* at 388 (Thomas, J., dissenting).

316. *Id.* at 386–87 (Souter, J., dissenting).

317. *See Snyder v. Phelps*, 562 U.S. 443, 463–75 (2011) (Alito, J., dissenting); *United States v. Stevens*, 559 U.S. 460, 496 (2010) (Alito, J., dissenting), *superseded by statute*, Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, § 3(a), Dec. 9, 2010, 124 Stat. 3178 (codified as amended at 18 U.S.C. § 48 (2012)).

318. 543 U.S. 77 (2004).

319. *Roe*, 543 U.S. at 84.

punishment of revenge porn is to fundamentally misunderstand the Constitution, revenge porn, or both.