CALIFORNIA'S ANTI-REVENGE PORN LEGISLATION:

Good Intentions, Unconstitutional Result

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INTRODUCTION

> "In a perfect world there would be no bullying and there would be no people like me and there would be no sites like mine . . . [b]ut we don't live in a perfect world."
>
> — Revenge porn website owner, Hunter Moore[1]

"Revenge porn"[2] is a practice in which vengeful ex-lovers post photos shared in confidence during their relationships with the public via the Internet.[3] Websites such as Moore's are dedicated solely to hosting this type of content and have multiplied over the past few years.[4] They provide platforms for users to reveal photos as well as other personal information about their former partners to the public.[5] In fact, users often include with the photos information such as the subject's full name, city and state, and links to their social media profiles, ensuring the photos appear high in Google search results.[6] Some go so far as to include contact information of subjects' family members or coworkers.[7]

Holly Jacobs'[8] experience demonstrates the devastating effects revenge porn postings have on one's life, both personally and profes-

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[1] Jessica Roy, *The Battle Over Revenge Porn: Can Hunter Moore, the Web's Vilest Entrepreneur, Be Stopped?*, BetaBeat (Dec. 4, 2012, 7:46 PM), http://betabeat.com/2012/12/the-battle-over-revenge-porn-can-hunter-moore-the-webs-vilest-entrepreneur-be-stopped/.

[2] "Revenge porn" may also be referred to as "cyber revenge," "cyberrape," or "involuntary pornography." *See, e.g.*, *id.*; Heather Kelly, *New California 'revenge porn' law may miss some victims*, CNN (Oct. 3, 2013, 6:32 AM), http://www.cnn.com/2013/10/03/tech/web/revenge-porn-law-california/; Lorelei Laird, *Victims are taking on 'revenge porn' websites for posting photos they didn't consent to*, ABA Journal (Nov. 1, 2013 4:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly/.

[3] Laird, *supra* note 2.

[4] *Id.*

[5] Roy, *supra* note 1; *id.*

[6] Laird, *supra* note 2.

[7] *Id.*

[8] Holly Jacobs was previously Holli Thometz and has also used the pseudonym "Sarah." *See* Holly Jacobs, *A Message From Our Founder, Dr. Holly Jacobs*, End Revenge Porn (Sept. 8, 2013), http://www.endrevengeporn.org/?p=422/; Roy, *supra* note 1; Jessica Roy, *A Victim Speaks: Standing Up to a Revenge Porn Tormentor*, BetaBeat

sionally.[9] Jacobs shared nude photos with her then-boyfriend during a long-distance portion of their relationship.[10] After they broke up, he posted the photos on hundreds of revenge porn websites and emailed them to all of her coworkers.[11] He also included personal information about Jacobs including her full name, email address, where she worked, and information about the Ph.D. program she was enrolled in.[12] She was horrified.[13] For months, she received harassing emails from people who had seen her photos online.[14] She began to worry she would be physically stalked.[15] In response, she left her job, changed her name, and began carrying a stun gun with her.[16]

She looked to the law for relief. She hired a lawyer, begged three different police stations to file charges against her ex-boyfriend, went to the FBI, and hired an Internet specialist to take the material down.[17] Unable to fund a civil suit, she filed several Digital Millennium Copyright Act takedown requests claiming copyright infringement.[18] However, these attempts proved fruitless.[19] To shed light on her plight and the plights of others similarly situated, Jacobs founded EndRevengePorn.org to support

(May 1, 2013, 1:04 PM), http://betabeat.com/2013/05/revenge-porn-holli-thometz-criminal-case/.

9 Roy, *supra* note 1. Professor of law Eric Goldman has described the effects of these types of postings as "life-altering" because "there are a lot of people who will feel like someone who is depicted naked or is recorded having sex . . . has done something wrong." *See Revenge Porn*, Your Weekly Constitutional (Nov. 22, 2013) http://ywc.podomatic.com/entry/2013-11-22T13_24_26-08_00 [hereinafter *Podcast*]. Victims report being fired from their jobs or expelled from their schools, being shunned by friends, receiving sexual propositions by strangers who have seen their photos online, being subjected to physical stalking and harassment, changing their names, and some victims have even committed suicide. *Id.*

10 Roy, *supra* note 1.

11 *Id.*

12 Jacobs, *supra* note 8.

13 Roy, *supra* note 1.

14 *Id.*

15 *Id.*

16 *Id.*; Roy, *supra* notes 8–10.

17 Jacobs, *supra* note 8.

18 Roy, *supra* note 1.

19 *Id.*; Jacobs, *supra* note 8.

the End Revenge Porn campaign organized by the Cyber Civil Rights Initiative (CCRI).[20]

While Moore may be correct that the world — let alone the United States legal system — is not perfect, must it be that victims and potential victims of revenge porn enjoy little to no legal redress? Many state and federal lawmakers do not believe so.[21] For example, California recognized the gravity of the problem and became the second state after New Jersey to pass legislation targeting the activity when it passed California Penal Code section 647(4) in October 2013.[22] Moreover, legislatures in several states are currently considering laws to combat revenge porn and United States senators have contacted CCRI regarding possible federal legislation.[23]

However, lawmakers interested in combatting revenge porn must tread lightly, as regulations on speech evoke First Amendment freedom of speech concerns.[24] California's legislation has come under fire for possibly regulating constitutionally protected speech and missing many of its

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[20] End Revenge Porn, http://www.endrevengeporn.org (last visited October 30, 2013) (follow "About" hyperlink; then follow "Who We Are" hyperlink).

[21] *See infra* note 23. In Florida, an anti–revenge porn bill was approved unanimously by both the Criminal Justice Committee and the Senate Judiciary Committee, but ultimately died in the appropriations process. Kristina Ramer, *California becomes second state to ban revenge porn, but still legal in Florida*, The Independent Florida Alligator (Oct. 7, 2013, 1:43 AM) http://www.alligator.org/news/local/article_7560a468-2f13-11e3-ac8a-001a4bcf887a.html. State Senator David Simmons believes Florida may still pass such a law. Kelly, *supra* note 2. First Amendment concerns played a part in the ultimate death of Florida's revenge porn law. *Id.*

[22] *See* Kelly, *supra* note 2. New Jersey's law was not passed in response to revenge porn, but in part criminalizes such activity. *Podcast*, *supra* note 9; *see also* N.J. Stat. § 2C:14-9 (West 2012).

[23] The Senate Judiciary Committee of Pennsylvania voted unanimously on a bill proposed by Pennsylvania Senator Judy Schwank that would outlaw revenge porn postings. Associated Press, *Pennsylvania lawmakers advance bill to punish 'revenge porn'*, Fox News (January 15, 2014) http://www.foxnews.com/politics/2014/01/15/pennsylvania-lawmakers-advance-bill-to-punish-revenge-porn/. The legislatures of Maryland, Wisconsin, New York, and Texas, are also currently considering similar legislation. Tal Kopan, *States criminalize 'revenge porn'*, Politico (Oct. 30, 2013, 11:10 AM) http://www.politico.com/story/2013/10/states-criminalize-revenge-porn-99082.html. Further, lawmakers in Delaware, Kansas and Alabama have contacted CCRI regarding co-drafting legislation for their states. *Id.*

[24] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

targeted victims.[25] Lee Rowland, a staff attorney with the American Civil Liberties Union ("ACLU"), stated that overly broad bills could bar normal Internet activities or speech that is worth protecting and that "trying to find a cure by creating a new criminal law that threatens free speech could be worse than the disease."[26] She also opined, "without much evidence that such criminal bills actually protect victims, it's unclear whether it's worth wading into the tricky constitutional waters."[27]

This paper discusses the First Amendment implications of California's recent legislation targeting revenge porn, California Penal Code section 647. Although California's law is a step in the right direction, the law likely fails both practically and constitutionally in several ways. As a content-based regulation on constitutionally protected speech, the law faces exacting constitutional scrutiny.[28] Its narrow construction fails to protect a large portion of its targeted victims, possibly rendering it underinclusive and not narrowly tailored to prevent the harm it aims to prevent. Further, it may be overinclusive for vagueness.

Part I of this paper demonstrates the importance of passing constitutionally-sound legislation targeting revenge porn by demonstrating its harms and highlighting the inadequacy of existing laws in redressing and preventing the practice. Part II discusses relevant First Amendment jurisprudence. Part III takes a closer look at California's anti–revenge porn legislation and the legislative purpose behind it. Part IV analyzes the constitutionality of California's legislation under First Amendment jurisprudence and concludes that California's legislation is likely unconstitutional under the First Amendment. Finally, Part V proposes alternate ways to prevent revenge porn and provide redress to victims within constitutional bounds.

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[25] *See, e.g.*, Cathy Reisenwitz, *Revenge Porn Is Awful, But The Law Against It Is Worse*, Talking Points Memo (Oct. 16, 2013 9:35 AM) http://talkingpointsmemo.com/cafe/revenge-porn-is-awful-but-the-law-against-it-is-worse/; Kopan, *supra* note 23; Jessica Roy, *California's New Anti-Revenge Porn Bill Won't Protect Most Victims*, TIME (Oct. 3, 2013) http://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/.

[26] Kopan, *supra* note 23.

[27] *Id.*

[28] *See infra* Parts A, IV.A.

I. WHY LEGISLATIVE ACTION TARGETING REVENGE PORN IS NECESSARY

Constitutionally-sound legislation is necessary to target revenge porn because of the destructive effects of the practice and the inadequacy of current laws to address the issue.[29] This section highlights the limited effect of existing civil and criminal laws on curtailing the rising pandemic in revenge porn postings.[30] It further details the practice's pervasive and harmful effects, which warrant the creation of more effective legislation.

A. THE INADEQUACY OF EXISTING LAWS

The existing legal avenues for both preventing and redressing revenge porn are scant and unsatisfactory.[31] No federal statute explicitly prohibits the non-consensual disclosure of sexually graphic images and only two states, California and New Jersey, have state criminal laws prohibiting such conduct.[32] Civil suits under existing torts such as intentional infliction of emotional distress or publication of private facts are problematic for victims.[33] For example, plaintiffs may not be able to find attorneys willing to take on their cases because the defendant often does not have any material assets to make the suit worthwhile.[34] Also, litigating the suit would bring further publicity to the media the victim wants to get rid of.[35]

Further, civil suits against website owners or Internet service providers may prove futile because the federal Communications Decency Act (CDA), grants immunity to Internet service providers (ISP) for content posted by

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[29] *See supra* note 9 and accompanying text.

[30] *See Podcast*, *supra* note 9 (referring to the trend as a pandemic).

[31] Ariel Ronneburger, Comment, *Sex, Privacy, And Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1, 11 (2009).

[32] Mary Anne Franks, Combating Non-Consensual Pornography: A Working Paper (Dec. 5, 2013) (unpublished working paper) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537); *see also* Cal. Penal Code § 647 (West 2013); N.J. Stat. § 2C:14-9 (West 2012).

[33] *See Podcast*, *supra* note 9.

[34] *See Podcast*, *supra* note 9.

[35] *See Podcast*, *supra* note 9. Also, "once [revenge porn] pictures are out there, it's really difficult to get them taken down even if [a plaintiff] win[s] on a civil suit." *Id.*

third-party users.[36] The CDA states, "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."[37] Accordingly, section 230 likely bars suits by revenge porn victims against website owners for content uploaded by third-party users, unless the court deems them Internet content providers (ICPs).[38] Courts have construed section 230 immunity quite liberally in the past.[39] For example, in *Carafano v. Metrosplash.com. Inc.*, Christianne Carafano sued Metrosplash.com for an allegedly defamatory and fake profile a third party user posted on the defendant's site, Matchmaker.com.[40] The site provided content in drop-down menus for users to choose from in creating their profiles.[41] Still, the Ninth Circuit held that Metrosplash.com was immune under section 230 because it constituted an Internet service provider.[42] However, courts are

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[36] Ronneburger, *supra* note 31, at 3; *see also* Communications Decency Act, 47 U.S.C. § 230 (1998). Internet service providers (ISPs) "provide[] or enable[] computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Communications Decency Act, 47 U.S.C. § 230(f) (1998). Internet content provider (ICP) "means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.*

[37] Communications Decency Act, 47 U.S.C. § 230 (1998).

[38] Ronneburger, *supra* note 31, at 3. The CDA distinguishes between ISPs and ICPs, generally granting complete immunity to ISPs, but not to ICPs. *See* Ashley Ingber, Comment, *Cyber Crime Control: Will Websites Ever Be Held Accountable For The Legal Activities They Profit From?*, 18 Cardozo J.L. & Gender 423, 429–34 (2012). Congress' purpose in making this distinction was "not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003). Congress recognized that imposing such liability would force ISPs to police a staggering amount of online communication, thereby leaving them no choice but to restrict the amount and type of posts allowed. *Id.* at 1124.

[39] *See* Ingber, *supra* note 38, at 434.

[40] 339 F.3d 1119, 1122 (9th Cir. 2003).

[41] *Id.* at 1121.

[42] *Id.* at 1120, 1125. The court stated that even if it were to find Matchmaker.com an Internet content provider, § 230 "would still bar Carafano's claims unless Matchmaker created or developed *the particular information at issue*." *Id.* at 1125 (emphasis added); *see also* Barnes v. Yahoo! Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *1 (D. Or. Nov. 8, 2005) (holding Yahoo! fell "under the *broad* immunity provided Internet servers by § 230.") (emphasis added).

gradually moving toward a narrower interpretation of section 230 immunity, which "indicates that courts may be willing, or even intending, to find that Section 230 does not provide protections to ISPs or ICPs in the realm of criminal suits."[43] However, only two states criminalize revenge porn thus far.[44] Accordingly, it is unclear whether a court would grant immunity to a revenge porn site such as Moore's, and it is necessary for states to enact constitutionally sound criminal legislation to redress the problem of revenge porn.[45]

Copyright law may be a better avenue, but is likewise inadequate.[46] The CDA does not immunize website owners from copyright claims.[47] Furthermore, it is inexpensive for victims to notify website owners of their copyright infringement.[48] However, it is not guaranteed the website owners will remove the content; "website operators overseas or those who believe they're judgment-proof can and do ignore the notices."[49] It is likewise uncertain whether someone has saved the photos and will repost them on the same site or elsewhere.[50] Moreover, only copyright owners — those who took the photos or videos themselves — may file claims for copyright infringement against websites hosting the copyrighted

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43 *See* Ingber, *supra* note 38, at 434.

44 Franks, *supra* note 32.

45 *See also* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003). It is possible a court could construe a revenge porn website to be an ICP where it actively seeks out and promotes the posting of revenge porn. *See Podcast*, *supra* note 9. However, courts are not in agreement as to how to differentiate between ISPs and ICPs. *Compare* F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009) (finding Accusearch an ICP because it "encourage[d] development of what is offensive about the content" by soliciting requests for legally confidential information and publishing it) *with* Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (holding Craigslist not an ICP because it does not induce users to post specific content or types of content).

46 *See Podcast*, *supra* note 9.

47 Franks, *supra* note 32.

48 Laird, *supra* note 2.

49 *Id*.

50 *See Podcast*, *supra* note 9. Professor Goldman has stated that "once content is released to the internet it's almost impossible to put that digital data back into the bottle . . . . In theory [victims] could go and try and stamp out each and every instance on the internet, but that's not very feasible." *Id*.; *see also* Laird, *supra* note 2.

content.[51] Those who did not create the contested media do not have copyright claims.[52]

Further, current criminal laws are insufficient to address revenge porn.[53] State and federal laws regulating child pornography, stalking, harassment, voyeurism, and computer hacking are limited.[54] State anti-voyeurism laws and the federal Video Voyeurism Prevention Act of 2004 are inadequate because they only protect those whose images were taken without their consent or knowledge.[55] Likewise, federal and state child pornography laws only regulate the age of those depicted in pornographic media, and not whether they consented to the distribution of the images.[56] Laws targeting stalking and harassment only apply if the prosecutor can show that the posting of revenge porn is part of a larger pattern of conduct intended to distress or harm the victim, which may not apply in many revenge porn cases.[57] For example, many revenge porn site operators claim intent only to "obtain notoriety, fulfill some sexual desire, or increase traffic for their websites."[58] Further, some posters are only motivated by financial gain or bragging rights.[59] Thus, the prosecutor may have a hard time proving the intent-to-harm element in prosecutions of such defendants.

Even where a state criminal law does address an individual's predicament, police are reluctant to investigate or file charges.[60] Attorney Erica Johnstone has represented clients in revenge porn cases, and she states that police are accustomed to typical crime scenes and may not think to apply pertinent laws on stalking, voyeurism, or hacking to online revenge porn cases.[61] It is "common for police to say no law was broken unless the

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51 Laird, *supra* note 2.

52 Franks, *supra* note 32. According to a recent study by CCRI, up to 80 percent of revenge porn victims were victimized using photos they took themselves; the remaining 20 percent of victims are unprotected under copyright law. *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 Laird, *supra* note 2.

57 Franks, *supra* note 32.

58 *Id.*

59 *See* Kelly, *supra* note 21.

60 Laird, *supra* note 2.

61 *Id.*

picture is child porn."[62] Jody Westby, a consultant on online privacy and security, says that law enforcement officers are not aware of how existing criminal laws apply to revenge porn cases and are "loath to get involved in domestic problems."[63]

B. THE HARM

Online dissemination of sexually explicit photos without the depicted person's consent causes tremendous harm to that person. As illustrated by Jacobs' story, publication of these types of photos negatively affects many aspects of one's life.[64] Many others have been the subject of revenge porn postings.[65] Mary Anne Franks, board member of CCRI and University of Miami associate law professor, has stated that revenge porn victims are coming out of the woodwork to tell their stories or seek help, especially since Jacobs braved the public eye to tell her story.[66]

According to Franks, these new accounts demonstrate that revenge porn is of serious concern, both in terms of the magnitude of the problem and the degree of harm caused to victims.[67] Once photos have been disseminated via the Internet, women suffer stalking and harassment, they often must leave their jobs, are expelled from their schools, have problems in their relationships, and change their names.[68] In some cases, victims have committed suicide.[69]

The potential for future victims is high as well. It is estimated that one third of young adults have sent or posted nude or semi-nude photos

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[62] *Id.* In fact, police are not always keen on taking up child pornography cases either. *Id.* Las Vegas attorney Marc Randazza's underage client "couldn't get the police or FBI interested in her case." *Id.*

[63] *Id.* Westby states she had to convince police to take up a case in which her client was being cyberstalked. *Id.*

[64] *See supra* Introduction.

[65] Cases of revenge porn are "becoming increasingly common." *See Podcast*, *supra* note 9.

[66] Kopan, *supra* note 23.

[67] *Id.*

[68] "[S]ome . . . victims have had to change their names because, as you can imagine, when you put a person's name into a search engine, if the first 10, 20, 30 hits are going to be these pornographic websites, it can become very difficult to retain any kind of credibility over [one's] own name." *See Podcast*, *supra* note 9.

[69] Kopan, *supra* note 23; *see also Podcast*, *supra* note 9.

of themselves.[70] The vast majority of those who have sent or posted these types of photos have done so to their boyfriends or girlfriends.[71] To deter future posts, constitutionally-sound legislation that directly addresses revenge porn is necessary, because current laws have not prevented revenge porn from becoming "pandemic."[72]

II. CALIFORNIA'S ANTI–REVENGE PORN LEGISLATION

California's anti–revenge porn legislation went into effect on October 1, 2013.[73] The legislation is an amendment to the California Penal Code section 647 prohibiting disorderly conduct.[74] The amendment states that any person who commits any of the following is guilty of disorderly conduct, a misdemeanor:

> (4)(A) Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress. (B) 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.[75]

The law makes the above conduct punishable by up to six months in county jail and/or a fine of up to $1,000.[76] Canella states that there is a need for this law because "[c]urrent law is silent as to the illegality of this

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70 *Sex and Tech: Results from a Survey of Teens and Young Adults*, The National Campaign, http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf [hereinafter *Sex and Tech*] (last visited Dec. 29, 2013).

71 *Id*.

72 *See Podcast*, *supra* note 9.

73 Cal. Penal Code § 647 (West 2013). California state senator Anthony Canella proposed the bill on June 3, 2013 with an urgency clause. S. B. 255, Reg. Sess. (Cal. 2013).

74 Cal. Penal Code § 647 (West 2013).

75 *Id*.

76 S. B. 255, Reg. Sess. (Cal. 2013).

disturbing practice."[77] As the justification for the bill, Canella states that "[v]ictims of this cruel act are often so humiliated that they pose a threat to harming themselves, as evidenced by numerous examples of cyber revenge victims who have taken their own lives."[78] According to the bill's legislative history, one specific incident prompted the bill.[79] The incident involved a fifteen-year-old named Audrie in Saratoga, California:

> Audrie became very intoxicated to the point of unconsciousness at a party. Three boys — Audrie's high school classmates — took off some or much of her clothing, sexually assaulted her, wrote crude and demeaning phrases on her body and took at least one cell-phone photo of an intimate part of her body. She awoke in the morning to find her shorts pulled down and the crude drawings or words on her body. When the photo was shown to other students at school, Audrie became very distraught. About a week later, Audrie hung herself.[80]

Media reports indicate that the photos were widely distributed at school and uploaded to social media.[81] The government has filed sexual battery and distribution of child pornography charges against her perpetrators.[82]

Several entities expressed their support for the bill, including the California Partnership to End Domestic Violence, the California Sheriffs' Association, Crime Victims Action Alliance, and Crime Victims United of California.[83] On the other hand, the ACLU opposed the bill, stating, "the posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected."[84] Despite ACLU's

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77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* The legislative history gives other examples of incidents of revenge porn in the United States and California. *Id.* The proposal also mentions the highly publicized 2012 rape case from Steubenville, Ohio and a case in Tulare County where a man named Michael Rosa posted false ads online containing nude photos of his ex-wife. *Id.*

83 *Id.*

84 *Id.* The ACLU states that, in order to criminalize speech, the prohibited speech "must constitute a true threat or violate another otherwise lawful criminal law" and

opposition, the bill was signed into law.[85] It has not been challenged on constitutional grounds as of yet.

III. FIRST AMENDMENT JURISPRUDENCE

Legislators must walk on eggshells when drafting legislation regulating speech.[86] The First Amendment protects the right to freely disseminate and receive ideas and unequivocally prohibits Congress from making laws "abridging the freedom of speech."[87] The judiciary has long considered the right to free speech essential to a democracy.[88] As Justice Thurgood Marshall stated, "[the] right to receive information and ideas, regardless of their social worth, is fundamental to our free society."[89] This Section introduces First Amendment jurisprudence relevant to the constitutional implications of California Penal Code section 647(4). It discusses the standards of review courts use in analyzing the constitutionality of statutes that regulate speech, such as section 647(4), and the high burden proponents of legislation carry when courts subject their laws to strict scrutiny.[90]

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that California's bill does not meet this standard. *Id.* (citing United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011)).

85 *See* Cal. Penal Code § 647 (West 2013).

86 U.S. Const. amend. I.

87 *Id.* Pursuant to the Fourteenth Amendment, First Amendment freedom of expression is guaranteed by the states as well. Cohen v. Cowles Media Co., 501 U.S. 663, 663 (1964) (stating enforcement of an unconstitutional state law constitutes state action). Accordingly, state laws may be invalidated for unconstitutionally infringing on freedom of speech. *Id.*

88 Stanley v. Georgia, 394 U.S. 557, 564 (1969). While the First Amendment only explicitly protects "speech," the Supreme Court has "long recognized that its protection does not end at the spoken or written word." Texas v. Johnson, 491 U.S. 397, 404 (1989). Conduct may be considered protected speech where there exists an "intent to convey a particularized message" and "the likelihood [is] great that the message [will] be understood by those who view[] it." *See id.* (quoting Spence v. Washington, 418 U.S. 405, 410–411 (1974)). Photography, film, and audio recording may be constitutionally protected expression in some circumstances. *Cf.* Glik v. Cunniffe, 655 F. 3d 78, 82 (1st Cir. 2011) (finding videotaping in public to be protected speech); Anderson v. City of Hermosa Beach, 621 F. 3d 1051, 1061–62 (9th Cir. 2010) (stating compositions of "words, realistic or abstract images, symbols, or a combination of these . . . are forms of pure expression").

89 Stanley, 394 U.S. at 564.

90 *See infra* Part III.A.

It also introduces the doctrines of low-level speech,[91] secondary effects,[92] obscenity,[93] indecency,[94] and online speech.[95] Within these categories, the law is uncertain. Internet and indecency jurisprudence is particularly uncertain, making it difficult to predict how the Supreme Court will rule on the constitutionality of a statute regulating indecent expression and online communication.[96]

A. JUDICIAL STANDARDS OF REVIEW OF REGULATIONS ON SPEECH

At the heart of the First Amendment is the idea that the government shall not proscribe speech "simply because society finds the idea itself offensive or disagreeable."[97] As a baseline rule, the government may not regulate speech based on "its message, its ideas, its subject matter, or its content."[98] In other words, the government may not censor expression of any thought and "the essence of this forbidden censorship is content control."[99] Consequently, regulations that proscribe speech based on its content are subject to heightened judicial examination compared with those that do not.[100] Content-based restrictions are presumed invalid.[101] Content-based statutes that go one step further and discriminate based on particular views commit "viewpoint

91 *See infra* Part III.B.

92 *See infra* Part III.C.

93 *See infra* Part III.D.

94 *See infra* Part III.D.

95 *See infra* Part III.E.

96 *See infra* Parts III.D and III.E.

97 Texas v. Johnson, 491 U.S. 397, 414 (1989).

98 *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94 (1972).

99 *Id.* at 95–96.

100 Kevin Francis O'Neill, *A First Amendment Compass: Navigating The Speech Clause With A Five-Step Analytical Framework*, 29 Sw. U. L. Rev. 223, 226–27 (2000). Regulations restricting speech based on its content are generally referred to as "content-based" and such statutes are subject to what courts and legal scholars have coined "strict scrutiny." *Id.*

101 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). As the Supreme Court has emphasized repeatedly, content-based regulations on speech are contrary to "the principle that debate on public issues should be uninhibited, robust, and wide-open." Sullivan, 376 U.S. at 270.

discrimination."[102] The Supreme Court considers viewpoint discrimination to be even more blatantly violative of the First Amendment because it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[103] On the other hand, the government may regulate the time, place, and manner of speech more freely; such laws are considered "content-neutral."[104] Courts examine content-neutral statutes less rigorously under what is often referred to as "intermediate scrutiny."[105]

1. Determining the Applicable Level of Scrutiny

To determine what level of scrutiny to apply, courts must first determine whether a statute is content-based or content-neutral.[106] Content neutrality depends on "whether the government has adopted [the] regulation of speech because of disagreement with the message it conveys."[107] The main inquiry is into the government's purpose or intent in passing the legislation.[108] A speech regulation is content-neutral so long as it is "*justified* without reference to the content of the regulated speech"[109] and "even if it has an incidental effect on some speakers or messages but not others."[110]

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[102] David L. Hudson, Jr., Legal Almanac: The First Amendment: Freedom of Speech § 2:2 (2012); *see also* R.A.V., 505 U.S. at 387–91.

[103] *See* R.A.V., 505 U.S. at 387–91 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)). In *R.A.V.*, the Supreme Court struck down a city ordinance that criminalized "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" *Id.* at 391. The Court stated that St. Paul could not prohibit speakers from speaking on "disfavored subjects" nor "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 391–92. It held that this amounted to unconstitutional viewpoint discrimination. *Id.*

[104] *See e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989); *see also* O'Neill, *supra* note 100, at 227.

[105] O'Neill, *supra* note 100, at 227. There is less of a presumption of invalidity with regard to these types of statutes because they merely regulate the when, where, and how of expression rather than the subject matter of speech. Hudson, *supra* note 102, § 2:3. However, because content neutral statutes are nevertheless restrictions on speech, courts must still analyze their constitutionality, albeit using a milder test. *Id.*

[106] Hudson, *supra* note 102, § 2:3.

[107] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[108] *Id.*

[109] *Id.* (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[110] *Id.*

On the other hand, a content-based regulation "discriminates between lawful and unlawful conduct based upon the content of the [speaker's] communication."[111] For example, the Supreme Court in *United States v. Playboy Entertainment Group, Inc.* held a law to be content-based where it only regulated sexually explicit speech.[112] The justification for the law was the subject matter's effect on young viewers.[113] The Court concluded that the law was content-based because its justification "focus[ed] *only* on the content of the speech and the direct impact that speech has on its listeners."[114]

2. Strict Scrutiny vs. Intermediate Scrutiny

Once the court determines whether the statute is content-based or content-neutral, it must apply the corresponding level of constitutional scrutiny.[115] Courts frequently invalidate content-based statutes upon strict judicial examination.[116] To survive strict scrutiny, a regulation must be (1) necessary to serve a compelling state interest, (2) narrowly drawn to achieve that end, and (3) the least restrictive means of doing so.[117] On the other hand, intermediate scrutiny is "a far cry from strict scrutiny."[118] To survive intermediate scrutiny, content-neutral regulations must be (1) "justified without reference to the content of the regulated speech," (2) "narrowly tailored to serve a significant governmental interest," and (3) "leave open

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111 Carey v. Brown, 447 U.S. 455, 460 (1980); *see also* Consolidated Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980).

112 United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 811 (2000) (analyzing a regulation applying to "sexually explicit adult programming or other programming that is indecent"); *see also* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 410 (1993). In *Cincinnati v. Discovery Network, Inc.*, the Supreme Court analyzed the constitutionality of a city ordinance banning news racks containing "commercial handbills." *See* 507 U.S. at 410. The Court held the ordinance was content-based because it was not justifiable as a time, place, or manner restriction without reference to the content — the commercial nature — of the material on the news racks. *Id.* at 428–31.

113 *Id.*

114 *Id.*

115 Hudson, *supra* note 102, § 2:2.

116 "Strict scrutiny leaves few survivors." City of Los Angeles v. Alameda Books, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

117 *See e.g.*, Burson v. Freeman, 504 U.S. 191, 197 (1992); Thornburgh v. Abbott, 490 U.S. 401, 408 (1989).

118 City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 434 (1993).

ample alternative channels for communication of the information."[119] Notably, content-neutral regulations need not be justified by a compelling government interest, as content-based statutes must, but rather a significant government interest. Further, content-neutral time, place, and manner restrictions need not be the least restrictive or least intrusive means of achieving the government's purpose.[120]

B. UNPROTECTED AND "LOW-LEVEL" SPEECH

While heightened judicial scrutiny — both strict and intermediate — of speech regulations serves to protect First Amendment interests, not all speech is equally deserving of protection.[121] Accordingly, the judicial standards of review described in Part II.A do not apply in all First Amendment cases.[122] On one end, political speech and speech on matters of public concern garner the highest protection.[123] On the other end, some categories of speech are considered "low-level" or "low-value" speech deserving less protection, and some categories are entirely outside of constitutional protection due to their harm or lack of social value.[124] The following are low-value, unprotected

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119 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

120 Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). The Supreme Court has stated, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

121 Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. Rev. 297, 298 (1995). "Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation," i.e., application of strict scrutiny. Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 Pepp. L. Rev. 273, 283 (2009).

122 Shaman, *supra* note 121, at 298.

123 *Id.* at 302; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

124 Shaman, *supra* note 121, at 298–99, 331. In *Chaplinsky v. New Hampshire*, the Supreme Court first acknowledged the idea that some speech is less deserving of protection and stated, "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." 315 U.S. 568, 571–72. It stated that these categories "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that

categories of speech: incitement to imminent lawless action, fighting words, true threats, obscenity, child pornography, and speech integral to criminal conduct.[125] In these areas, the government has considerable leeway in regulating speech.[126] Some types of speech that are considered low-value, but are not entirely unprotected, are commercial speech, indecent expression, and false statements of fact.[127] The government has more leeway to regulate low-value speech than high-value speech.[128] Where the proscribed speech is of high-value, the Supreme Court requires a sufficiently compelling state interest as justification for its law.[129] The Court "requires much less to sustain the regulation of low-value speech."[130]

The Supreme Court uses definitional balancing[131] for low-value speech.[132] Definitional balancing "focuses upon a category or class of speech, such as libel, and inquires whether the category of speech causes a sufficiently serious harm to justify restricting the speech."[133] If the Court is convinced that the speech causes sufficient harm, it will uphold a regulation on such speech.[134] However, the Court has been "quite reluctant to recognize new 'low value'

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any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

125 Hudson, *supra* note 102, § 2:2; *see also* Stone, *supra* note 121, at 298.

126 However, the government does not have absolute power to regulate speech within unprotected speech categories. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In *R.A.V. v. City of St. Paul*, the Supreme Court held that where the government makes content-based distinctions between types of speech *within* an unprotected speech category, the government's regulation is subject to "greater scrutiny" than strict scrutiny. 505 U.S. at 431.

127 O'Neill, *supra* note 100, at 252; Stone, *supra* note 121, at 285.

128 Shaman, *supra* note 121, at 329.

129 *Id.*

130 *Id.* "The essential difference between the Supreme Court's treatment of high- and low-value speech concerns what the Court will accept as justification for regulating speech." *Id.*

131 *Id.* at 331. Definitional balancing has also been called "categorical balancing." *Id.*; *see also* Stone, *supra* note 121, at 285.

132 Stone, *supra* note 121, at 285; *see also* Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Cal. L. Rev. 935, 942–43 (1968).

133 Shaman, *supra* note 121, at 331.

134 *Id.* However, in established unprotected speech categories, the Supreme Court does not use balancing tests because it has historically considered such categories of little to no value. *Id.* at 331–32.

categories that have not been well established over time."[135] There has been much debate in the past few years over the value of "violent expression, hate speech,[136] pornography,[137] and non-newsworthy invasions of privacy," but the Supreme Court has not yet declared these areas unprotected.[138] These types of expression, which may overlap with revenge porn, fall into a regulatory gray area, making it difficult for legislators to predict how courts will view laws that regulate in these areas.

C. SECONDARY EFFECTS

Under the secondary effects doctrine, where the government justifies a facially content-based law without reference to the communicative impact of the regulated speech, courts will treat the law as content-neutral, and subject it to intermediate scrutiny.[139] The government frequently uses the secondary effects doctrine to defend legislation, arguing that laws "are not aimed at the content of the disfavored expression, but at certain indirect or side effects of the speech that are unrelated to the message of the speech."[140] The secondary effects doctrine arose out of adult entertainment zoning regulation cases, as city officials sought to regulate the locations of adult businesses, such as clubs with nude dancing, adult movie theaters, and adult bookstores.[141]

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135 Stone, *supra* note 121, at 284. University of Chicago Law School Professor Geoffrey R. Stone suggests a four-prong definition for the Supreme Court to use in determining whether speech is of low value. *Id.* "Low value speech does not 'primarily advance political discourse,' is not defined in terms of 'disfavored ideas or political viewpoints,' usually has 'a strong noncognitive' aspect, and has 'long been regulated without undue harm to the overall system of free expression.'" *Id.*

136 Hate speech is generally defined as "highly offensive speech that vilifies, insults, or stigmatizes an individual on the basis of race, ethnicity, national origin, religion, gender, age, handicap, or sexual orientation." Shaman, *supra* note 121, at 324.

137 Webster's Dictionary defines "pornography" as "writings, pictures, etc. intended primarily to arouse sexual desire." HUDSON, *supra* note 102, § 4:1.

138 Stone, *supra* note 121, at 284; Shaman, *supra* note 121, at 319–325 (commentators petition the Supreme Court to deem non-obscene pornography and racist "hate speech" to be low-value, unprotected speech categories).

139 O'Neill, *supra* note 100, at 245.

140 David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration Of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 60 (1997).

141 HUDSON, *supra* note 102, § 2:4; Hudson, *supra* note 140, at 61–62.

The doctrine first came about in *Young v. American Mini Theatres, Inc.*[142] There, the Supreme Court upheld Detroit's "Anti–Skid Row Ordinance" which limited the locations for adult businesses.[143] The government justified its law by arguing that a concentration of such businesses in certain areas has negative secondary effects on the surrounding areas, such as decreased property values and increased crime rate.[144] It supported this argument with corroborating opinions of urban planners and real estate experts.[145] The Court accepted the government's secondary effects justification.[146] Justice Stevens reasoned that the interest in protecting this type of speech "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."[147] Thus, the Court seems to rest its decision on both the secondary effects doctrine and the idea that adult entertainment is of "lesser" social value.

In *City of Renton v. Playtime Theatres, Inc.*, two adult theaters challenged an ordinance prohibiting adult movie theaters within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.[148] The government of the city of Renton supported their secondary effects justification with studies from the nearby city of Seattle and other cities, but not from Renton.[149] The Supreme Court relied heavily on *American Mini Theatres* in concluding the ordinance was facially content-discriminatory, but content-neutral in its justification based on the negative secondary effects of

142 Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

143 Hudson, *supra* note 140, at 61.

144 Am. Mini Theatres, 427 U.S. at 54.

145 *Id.* at 55. After *American Mini Theatres*, courts required that the government support their secondary effects arguments with some factual basis. *See* Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661 (1981) (striking down a law similar to that in *American Mini Theatres* because it was "not based on any studies by social scientists, or on a demonstrated past history of 'adult' theatres causing neighborhood deterioration.").

146 Am. Mini Theatres, 427 U.S. at 71 n.34 (1976) ("The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime . . . . It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.").

147 Am. Mini Theatres, 427 U.S. at 70.

148 City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 41 (1986).

149 *Id.* at 44.

adult theaters.[150] The Court upheld the ordinance.[151] While *Renton* arguably expanded the application of the secondary effects doctrine by indicating that governments need not supply supporting data from the locale the law applies to, the majority opinion has received much criticism.[152]

First, the decision was not unanimous.[153] The dissent, written by Justice Brennan and joined by Justice Marshall, argued the ordinance was content-based.[154] Justice Brennan contended the majority mixes up the secondary effects doctrine with the requirement under strict scrutiny that the government have a compelling interest justifying its law.[155] The dissent also pointed out that only *after* the lawsuit was filed challenging the ordinance did the city amend the ordinance to add a provision claiming its purpose was to prevent negative effects.[156] Second, legal scholars also denounced the decision.[157] For example, Professor Laurence Tribe opined that, "[c]arried to its logical conclusion, such a doctrine could gravely erode the first amendment's protections" and allow government regulation of "most, if not all, speech."[158] Despite this criticism, courts have continued to apply the secondary effects doctrine in adult business zoning cases, albeit inconsistently.[159]

Further, in *Boos v. Barry*, the Supreme Court opened the door for the expansion of the secondary effects doctrine to cases besides those involving

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150 *Id.* at 47.

151 *Id.* at 54.

152 Hudson, *supra* note 140, at 64–67.

153 Playtime Theatres, 475 U.S. at 55.

154 *Id.* at 56.

155 *Id.* Justice Brennan stated that the idea that the targeted speech has negative secondary effects may be support for a compelling government interest, but it does not turn a content-based law into a content-neutral one. *Id.*

156 *Id.*

157 Hudson, *supra* note 140, at 65. Marc Rohr called the *Renton* decision "a wholly unprecedented approach to the understanding of content-neutrality." *Id.* at 66.

158 *Id.* Tribe is a professor of constitutional law at Harvard Law School. Laurence H. Tribe, Harvard Law School, http://www.law.harvard.edu/faculty/directory/10899/Tribe (last visited January 15, 2014).

159 Hudson, *supra* note 140, at 67–71. Some courts apply the secondary effects doctrine even where the legislature claims such a purpose after the litigation has commenced or where there is evidence of a content discriminatory purpose. *Id.* Other courts are reluctant to apply the secondary effects doctrine and require the government "show some evidence or probability that adult businesses will create harmful effects." *Id.*

adult businesses.[160] In *Boos*, the Court invalidated a law banning the "display [of] any sign that tends to bring [a] foreign government into 'public odium' or 'public disrepute'" within 500 feet of that foreign country's embassy.[161] However, Justice O'Connor opened the door for application of the secondary effects doctrine to political speech by stating, "Respondents and the United States do not point to the 'secondary effects' . . . . They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies."[162] This suggests that these secondary effects justifications may have been sufficient to uphold a content-based statute regulating political speech.[163] Since *Boos*, courts have applied the secondary effects doctrine in cases of regulation of several different types of speech such as, "indecent speech, commercial speech, and even political speech."[164] The secondary effects jurisprudence illustrates one route legislators may take in combating revenge porn. *Boos* indicates that courts may accept a secondary effects justification even where the regulated speech is of high value, while *American Mini Theatres* demonstrates that courts may be more likely to accept a secondary effects argument where the regulated speech is of low value. However, the *Renton* decision and the criticism it garnered illustrate the existence of diverging views in this area.

D. OBSCENITY, INDECENCY, AND PORNOGRAPHY

"All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full [First Amendment] protection."[165] However, this principle is not absolute.[166] As discussed above, the Supreme Court

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160 *Id.* at 74–76; *see also* Boos v. Barry, 485 U.S. 312 (1988).

161 Boos, 485 U.S. at 312.

162 *Id.* at 321.

163 Hudson, *supra* note 140, at 75–76.

164 *Id.* at 76–77 (citing Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (applying the secondary effects doctrine to obscenity); Maryland II Ent., Inc. v. City of Dallas, 28 F.3d 492 (5th Cir. 1994) (applying the secondary effects doctrine to commercial speech); Johnson v. Bax, 63 F.3d 154 (2d Cir. 1995) (applying the secondary effects doctrine to political speech)).

165 Roth v. United States, 354 U.S. 476, 484 (1957).

166 Shaman, *supra* note 121, at 298.

considers some categories of speech of such low value or high harm as to be considered unprotected, and has upheld regulations on adult entertainment under the secondary effects doctrine.[167] The Supreme Court clearly considers some speech less worthy of protection and more susceptible to regulation than other speech.[168]

Obscenity is one such type. Obscenity has been called one of the most "controversial and confounding areas of First Amendment jurisprudence."[169] In *Roth v. United States*, the Supreme Court held that "obscenity is not within the area of constitutionally protected speech or press."[170] The Court stated that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[171] To determine what constitutes obscene material, the Court laid out the test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."[172] It defined "prurient" interest as "material having a tendency to excite lustful thoughts" and "having morbid or lascivious longings."[173] It further clarified that "sex and obscenity are not synonymous."[174]

Post-*Roth*, the Supreme Court continued to struggle to define obscenity.[175] In his concurring opinion in *Jacobellis v. Ohio*, Justice Stewart attempted clarification by stating that "criminal laws in this area are constitutionally limited to hard-core pornography."[176] Years after the Supreme

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167 *See supra* Parts III.B and III.C.

168 Shaman, *supra* note 121, at 298.

169 Hudson, *supra* note 102, § 4:2. In *Jacobellis v. Ohio*, the Supreme Court was faced with the task of determining whether a film was obscene. 378 U.S. 184, 186–87 (1964). Justice Stewart stated he felt the Court was "faced with the task of trying to define what may be indefinable. *Id.* at 197 (Stewart, J., concurring).

170 Roth, 354 U.S. at 485.

171 *Id.* at 484.

172 *Id.* at 489.

173 *Id.* at 488 n.20.

174 *Id.* at 487.

175 Hudson, *supra* note 102, § 4:2.

176 Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring). Beyond that, however, Justice Stewart could not further define obscene material, except to state "I know it when I see it." *Id.*

Court heard *Jacobellis* and *Roth*, it adjusted the obscenity test in *Miller v. California*.[177] The *Miller* test instructs consideration of

> (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[178]

The Court left it up to the states to regulate obscene speech according to their community standards, but gave the following two examples of "what a state statute could define for regulation": "(a) [p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated"; and "(b) [p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[179] Today, the *Miller* test is still used to determine what is obscene.[180] It is clear today that states may regulate within the unprotected realm of obscenity.[181]

However, there is a plethora of sexual speech that does not fall within the category of obscenity.[182] Pornography is not a legal term.[183] Pornography and sex are not synonymous with obscenity, but overlap with obscenity.[184] Some pornography is legally obscene, but much is protected because it does not meet the *Miller* requirements.[185] States have an interest in regulating "indecent" sexual expression that does not amount to obscenity, but the

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177 Hudson, *supra* note 102, § 4:2.

178 *Id.*; *see also* Miller v. California, 413 U.S. 15, 24 (1973).

179 *Miller*, 413 U.S. at 25.

180 Hudson, *supra* note 102, § 4:2.

181 Shaman, *supra* note 121, at 306–07; *see also* Hudson, *supra* note 102, § 4:2.

182 Hudson, *supra* note 102, § 4:5.

183 *Id.* at § 4:1. However, one type of pornography, child pornography, is an unprotected speech category under the First Amendment. *Id.*

184 *See id.*; Roth v. United States, 354 U.S. 476, 487 (1957).

185 Hudson, *supra* note 102, § 4:1. The Supreme Court in *Jacobellis v. Ohio* stated that only hard-core pornography is legally obscene. 378 U.S. 184, 197 (Stewart, J., concurring). Courts struggle to determine the line between protected and unprotected pornography. David L. Hudson, Jr., *Pornography & obscenity*, First Amendment Center (Sept. 13, 2002) http://www.firstamendmentcenter.org/pornography-obscenity.

Supreme Court has not declared indecent speech an unprotected speech category.[186]

In *FCC v. Pacifica*, the Supreme Court held that the Federal Communications Commission (FCC) could regulate indecent speech on broadcast radio in some situations.[187] In *Pacifica*, the FCC granted a complaint it received against Pacifica, a radio station that had broadcast a comedian's monologue entitled "Filthy Words," which contained repeated curse words, during the day.[188] Pacifica challenged the FCC's order on First Amendment grounds.[189] The Court found the content of the broadcast to be "vulgar, offensive, and shocking" and stated that, while some "patently offensive references to excretory and sexual organs and activities" may be protected, "they surely lie at the periphery of First Amendment concern."[190] However, the Court declined to declare indecency an unprotected category of speech.[191] Rather, it stated that whether indecent expression is protected varies with the context; "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances."[192] Later, in *Sable*, the Supreme Court definitively stated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," but the government may regulate such speech so long as the regulation passes strict scrutiny.[193]

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186 Hudson, *supra* note 102, § 4:5.

187 FCC v. Pacifica, 438 U.S. 726 (1978).

188 *Id.* at 730. The FCC's order stated that Pacifica "could have been the subject of administrative sanctions," and that the FCC has the power to regulate the use of "any obscene, indecent, or profane language by means of radio communications." *Id.*

189 *Id.* at 734.

190 *Id.* at 743, 747 (internal quotations omitted). The Court compared indecency with the unprotected category of low-value speech, obscenity; it stated, "These words offend for the same reasons that obscenity offends." *Id.* at 746.

191 *Id.* at 747.

192 *Id.* at 747. In this case, the Court made clear that the 'circumstances' of this broadcast, i.e., that the monologue was disseminated via broadcast radio during the day when children would be listening, were of tantamount importance. *Id.*

193 Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 126 (1989); *see also* C. Richard Martin, *Censorship in Cyberspace*, 34 Hous. Law. 45, 47 (1996) ("[T]he government cannot regulate 'indecent' speech unless the restriction promotes a compelling interest, and the government uses the least restrictive means to further that interest.").

Following *Pacifica*, the FCC was reluctant to end licenses with broadcast stations based on indecency complaints, stating its "inten[tion] strictly to observe the narrowness of the *Pacifica* holding."[194] However, in 2003, the FCC began to "crack down" on licensees.[195] That year, in response to a complaint regarding a singer's isolated use of the word "fuck" on the Golden Globe awards, the FCC ruled that the word is inherently indecent.[196] In a subsequent order, the FCC also deemed "shit" to be per se indecent.[197] Unlike the "Filthy Words" monologue, these were cases of isolated instances of profanity, so-called "fleeting expletives."[198] In its orders, the FCC made clear that it considered fleeting expletives to be indecent, regardless of context or usage.[199] These orders marked a striking change in policy.[200]

Several television networks challenged the FCC's Golden Globes order.[201] The Supreme Court heard the case twice.[202] In *Fox I*, the Court avoided the First Amendment issue entirely.[203] In *Fox II*, the Court held that the FCC failed to give the television networks adequate notice of their new policy before the broadcasts.[204] The Court again sidestepped the constitutional issue.[205] Accordingly, First Amendment indecency jurisprudence is plagued with uncertainty. It is unclear at which point the Supreme Court would consider speech that crosses the line into indecent expression

194 FCC v. Fox Television Stations (*Fox I*), 556 U.S. 502, 507 (2009).

195 George B. Delta & Jeffrey H. Matsuura, Law of the Internet §12.01 (Supp. 2014-1), *available at* 2013 Westlaw 3924202.

196 *Id.*

197 *Id.*

198 *Fox I*, 556 U.S. at 502; *see also* Delta & Matsuura, *supra* note 195, § 12.01.

199 Delta & Matsuura, *supra* note 195, § 12.01.

200 *Fox I*, 556 U.S. at 502, 508–09; Delta & Matsuura, *supra* note 195, § 12.01.

201 *See Fox I*, 556 U.S. at 502.

202 *See id.*; FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307 (2012).

203 *See Fox I*, 556 U.S. at 502, 529. *Fox I* consisted entirely of discussion on whether an administrative agency need give an explanation when drastically changing its policy. *Id.* The Court remanded the case to the Second Circuit for consideration of the First Amendment issues. *Id.* On remand, the Second Circuit held the FCC's policy was unconstitutionally vague and the FCC appealed. Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010) (vacated and remanded by *Fox II*, 132 S. Ct. 2307 (2012)).

204 *Fox II*, 132 S. Ct. at 2320.

205 *Id.* ("[I]t is unnecessary for the Court to address the constitutionality of the current indecency policy.").

is "at the periphery of First Amendment concern."[206] It is thereby unclear the extent to which indecent material may be regulated within the bounds of the Constitution. What we do know, however, is that the Supreme Court has not yet declared indecency to be unworthy of First Amendment protection and *Sable* is still good law.[207]

E. THE INTERSECTION OF THE FIRST AMENDMENT AND THE INTERNET

The Supreme Court has afforded different types of media varying levels of protection under the First Amendment.[208] The Internet is no different. The nature of the Internet creates unique First Amendment challenges.[209] Its creation sparked debate among legislators, parents, and politicians regarding how to protect children from adult material online.[210] In 1996 Congress passed the Communications Decency Act (CDA), which in part, sought to address these issues.[211] In particular, two provisions sparked controversy.[212] One provision criminalized the online transmission of "obscene" or "indecent" material to a person the sender knows to be under eighteen years of age.[213] The prohibition of indecent communication sparked criticism because the Supreme Court had distinguished indecency

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206 FCC v. Pacifica, 438 U.S. 726, 743, 747 (1978) (internal quotations omitted). The spectrum of uncertainty ranges from Carlin's clearly indecent monologue to fleeting expletives in arguably innocuous contexts.

207 *See* Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

208 *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . may present its own problems."); Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115 (1989) (discussing a regulation on telephonic communications); FCC v. Pacifica, 438 U.S. 726 (1978) (considering a regulation on broadcast media).

209 Kim L. Rappaport, Comment, *In The Wake Of* Reno v. ACLU*: The Continued Struggle In Western Constitutional Democracies With Internet Censorship And Freedom Of Speech Onlin*e, 13 Am. U. Int'l L. Rev. 765, 773 (1998). "[The Internet] allows any of the literally tens of millions of people with access to the Internet to exchange information . . . almost instantaneously . . . either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole." ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

210 *See* Martin, *supra* note 193, at 47; *see also* Rappaport, *supra* note 209, at 766.

211 Rappaport, *supra* note 209, at 766.

212 Martin, *supra* note 193, at 47.

213 Rappaport, *supra* note 209, at 775–76; *see also* Communications Decency Act, 47 U.S.C. § 223(a) (Supp. II 1994).

from obscenity as a protected category of speech.[214] The other provision criminalized the transmission or display of "patently offensive" material "in a manner available to a person under 18 years of age."[215]

Although the CDA included affirmative defenses for content providers and ISPs, its opponents requested an injunction on the two provisions on First Amendment grounds in *ACLU v. Reno*.[216] The district court granted the injunction and the government appealed.[217] In *Reno v. ACLU*, the Supreme Court affirmed the district court's decision.[218] Nearly two decades prior, the Supreme Court stated that it grants broadcast media the most limited First Amendment protection of all expressive media because it is a "uniquely pervasive presence in the lives of all Americans" and "uniquely accessible to children."[219]

In *Reno*, the Court differentiated broadcast media from the Internet; it stated that unlike the Internet, broadcast media has a "history of extensive Government regulation," a frequency-scarcity element, and is uniquely "invasive."[220] The Court emphasized that the Internet is not as invasive as radio or television and that "odds are slim that a user would come across a sexually explicit sight by accident."[221] As for the regulation itself, the Court found the CDA to be a content-based regulation, applied strict scrutiny,

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214 *See supra* Part III.D; *see also* Martin, *supra* note 193, at 47.

215 Rappaport, *supra* note 209, at 777; *see also* Communications Decency Act, 47 U.S.C. § 223(d) (Supp. II 1994).

216 *Id.* at 777–78.

217 ACLU v. Reno, 929 F. Supp. 824, 851–83 (E.D. Pa. 1996).

218 Reno v. ACLU, 521 U.S. 844, 844 (1997).

219 FCC v. Pacifica, 438 U.S. 726, 748 (1978). In other words, the government has more freedom to regulate broadcast media than other types of media. *Id.*

220 Reno, 521 U.S. at 867. Spectrum scarcity refers to the idea that available broadcast frequencies are finite. FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933). It allowed Congress to delegate power to the FCC to regulate licensing of frequencies. *Id.* The Supreme Court has cited spectrum scarcity as one of the reasons broadcast media may be regulated more strictly than other types of media. *See, e.g.*, Turner Broad. System, Inc. v. FCC, 512 U.S. 622, 622 (1994); NBC v. United States, 319 U.S. 190, 213 (1943); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969) (stating the broadcast medium is "of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress.").

221 Reno, 521 U.S. at 869 (internal quotations omitted).

and held it unconstitutionally vague and overbroad.[222] The Court invalidated the provisions despite its recognition that it had "repeatedly recognized the governmental interest in protecting children from harmful materials."[223] This decision demonstrates the constitutional hurdles legislators face in attempting to regulate online communications. The Court explicitly granted the Internet the utmost First Amendment protection, even where it is pitted against an interest the Supreme Court has previously found compelling.[224]

The inception of the Internet has also created a difficulty in the realm of obscenity jurisprudence. In *Miller*, the Court stated that courts and juries must apply "contemporary community standards" in deciding what "appeals to the prurient interest."[225] However, as the district court found in *ACLU v. Reno*, the Internet is a "*global medium* of communications that links people, institutions, corporations, and governments *around the world*."[226] The Internet knows no geographic boundaries. The community standards measure as applied to Internet communications has thus received harsh criticism.[227] Content creators risk being penalized for content

[222] *Id.* at 868, 871, 878. The Court found the CDA to be vague because one of the provisions uses "indecent" to describe the prohibited expression, while the other defines the prohibited expression as material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *See id.* at 871; *see also* Communications Decency Act, 47 U.S.C. § 223(a), (d) (Supp. II 1994). With two differing descriptions and absent a definition of "indecency," it was unclear what speech was prohibited. Reno, 521 U.S. at 873. Moreover, the second provision uses some of the language from the *Miller* test for obscenity, but omits important narrowing aspects, as well as the limiting social value prong, rendering it overbroad. *Id.*

[223] *See* Reno, 521 U.S. 875 ("[T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'") (quoting Denver Area Ed. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996)).

[224] *See, e.g.*, Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *see also* FCC v. Pacifica, 438 U.S. 726, 749–750 (1978) (upholding a regulation justified in part by an interest in protecting children from indecent programming); *see also* Ginsberg v. New York, 390 U.S. 629, 640 (1968) ("The State also has an independent interest in the well-being of its youth.").

[225] Miller v. California, 413 U.S. 15, 32 (1973).

[226] ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (emphasis added).

[227] *See, e.g.*, Noah Hertz-Bunzl, Note, *A Nation of One? Community Standards in the Internet Era*, 22 Fordham Intell. Prop. Media & Ent. L.J. 145 (2011); Matthew

that is constitutionally protected in one community, but considered obscene in a less liberal community.[228]

In *Ashcroft v. ACLU*, the Supreme Court addressed whether the Child Online Protection Act's (COPA) reliance on community standards to identify material harmful to minors renders it overbroad under the First Amendment.[229] The Supreme Court, in a plurality opinion, held that "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment."[230] It upheld the statute as constitutional.[231] Notably, only three justices stated they believed the community standards measure is constitutional in online obscenity cases.[232] The other four justices questioned the constitutionality of local community standards as applied to Internet communications, and two explicitly supported a move to a national standard.[233] In the realm of Internet communication, First Amendment jurisprudence is still developing. *Ashcroft* indicates that the Supreme Court may prefer objective national standards over subjective standards that vary with geographic location when it comes to Internet regulations.

IV. THE CONSTITUTIONALITY OF CALIFORNIA PENAL CODE SECTION 647(4)

California Penal Code section 647(4) raises several First Amendment issues. First, the law is likely a content-based regulation warranting the application of strict scrutiny.[234] Second, the secondary effects doctrine likely does not apply, as the California Legislature intended to prevent the

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Dawson, Comment, *The Intractable Obscenity Problem 2.0: The Emerging Circuit Split Over the Constitutionality of "Local Community Standards" Online*, 60 CATH. U. L. REV. 719 (2011).

228 Dawson, *supra* note 227, at 721–22.

229 Ashcroft v. ACLU, 535 U.S. 564, 585 (2002).

230 *Id.* at 584–85.

231 *Id.*

232 *Id.* at 583.

233 *Id.* at 587, 589–90. Justice O'Connor stated a national standard is necessary in cases of online speech and Justice Breyer stated, "A nationally uniform adult-based standard . . . significantly alleviates any special need for First Amendment protection." *Id.*

234 *See infra* Part IV.A.

direct effect the speech has on its listeners, as opposed to any indirect effects.[235] Third, much of the targeted speech undoubtedly falls outside of the unprotected category of obscenity.[236] Lastly, revenge porn may fall within the low-value speech category of indecency, but indecency jurisprudence is not well defined and indecent speech is not unprotected.[237] Section 647(4) is likely unconstitutional as written, but California and other states can and should work toward passing constitutional laws to deter the destructive trend of posting revenge porn. Part V discusses possible alterations to California's law that could strengthen it against attacks on its constitutionality and render it more effective in combating revenge porn.[238]

A. APPLYING STRICT SCRUTINY

Strict scrutiny is the applicable standard of review because section 647(4) is a content-based statute. Section 647(4) is not a time, place, or manner restriction on speech because it is not "*justified* without reference to the content of the regulated speech."[239] It prohibits the dissemination of media based on the content of the images or videos.[240] In other words, in order for one to determine whether an individual who has posted an image online has violated section 647(4), one must know the content of the image posted. As in *United States v. Playboy Entertainment*

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235 *See infra* Part III.B; *see also* Boos v. Barry, 485 U.S. 312, 321 (1988).

236 *See infra* Part III.C.

237 *Id.*

238 No one has attacked the constitutionality of California's law yet, but it may not be long. California Attorney General Kamala Harris is prosecuting an alleged revenge porn website operator and extortionist as of December 10, 2013. Fran Berkman, *Alleged Operator of Revenge Porn Site Pleads Not Guilty in California*, MASHABLE (Jan. 17, 2014) http://mashable.com/2014/01/17/revenge-porn-not-guilty/. Kevin Christopher Bollaert operated two websites, ugotposted.com, which hosted revenge porn, and changemyreputation.com, which charged money to remove the content from ugotposted.com. *Id.* However, Attorney General Harris did not charge Bollaert under the new revenge porn legislation. *Id.* The case indicates that California prosecutors are serious about prosecuting these types of cases and it is only a matter of time before someone is charged under the new law, giving defendants the opportunity to attack its constitutionality.

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

240 *See supra* Part III.A.i. Section 647(4) regulates images "of the intimate body part or parts of another identifiable person." Cal. Penal Code § 647 (West 2013).

Group, Inc., where the Supreme Court held a law applying only to sexually explicit speech to be content-based,[241] section 647(4) only applies to images depicting intimate body parts.[242] Content neutrality further depends on whether the government has passed the legislation because of its "disagreement with the message it conveys."[243] The government in this case passed section 647(4) because it considers the prohibited speech "disturbing."[244] California's intent and the law's construction render it content-based.

As a content-based statute, section 647(4) faces a constitutional uphill battle. Content-based statutes must survive strict scrutiny, a test that "leaves few survivors."[245] To survive strict scrutiny, the law must be necessary to serve a compelling state interest, narrowly drawn, and the least restrictive means of achieving the interest.[246] According to the bill's legislative history, California's interest is in preventing its citizens from the humiliation, emotional distress, and other repercussions caused by the dissemination of revenge porn.[247] In his proposal, Canella cites the "numerous examples of cyber revenge victims who have taken their own lives."[248] Thus, it is likely that a court would find California has at least a substantial interest in criminalizing the cause of these suicides.[249]

However, the Supreme Court has invalidated content-based statutes for violating the First Amendment even in cases where government interests

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241 *See supra* notes 112–14 and accompanying text.

242 *See* Cal. Penal Code § 647 (West 2013).

243 Rock Against Racism, 491 U.S. at 791.

244 S. B. 255, Reg. Sess. (Cal. 2013); *see also supra* Part II.

245 City of Los Angeles v. Alameda Books, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

246 *See supra* Part III.A.

247 S. B. 255, Reg. Sess. (Cal. 2013); *see also supra* Part II.

248 S. B. 255, Reg. Sess. (Cal. 2013); *see also supra* Part II.

249 The legislative history indicates California's interest is partially in the well-being of its children. *See supra* Part II. The Supreme Court may be more likely to find "compelling" an interest in children than an interest in only adults. *See, e.g.*, Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *but see* Reno v. ACLU, 521 U.S. 844, 875 (1997) (rejecting an interest in protecting children from offensive material online to justify a content-based regulation).

seem to be of the highest order.[250] For example, in *The Florida Star v. B.J.F.*, the Supreme Court invalidated a Florida statute that made it "unlawful to print, publish, or broadcast . . . in any instrument of mass communication the name of the victim of a sexual offense."[251] The government cited as its interests the privacy of victims of sexual offenses, their physical safety against retaliation by their assailants, and its interest in encouraging victims of sexual offenses to report the crimes without fearing exposure.[252] Despite the convincing nature of the government's interests, the Court struck down the statute under strict scrutiny.[253] *Florida Star* demonstrates the importance of narrow tailoring in regulations on speech.[254]

Here, section 647(4) runs into similar problems. Assuming the government has a compelling interest, California's anti–revenge porn legislation may not be narrowly tailored nor the least restrictive means of achieving its interest. One aspect of the law that has produced criticism is its failure to cover photos taken by the victims themselves, so-called "self-shots."[255] According to a recent study by CCRI, up to 80 percent of revenge porn victims were victimized using photos they took themselves.[256]

Absent justification for such an exclusion, section 647(4)'s exclusion of self-shots is constitutionally problematic for two reasons. First, one could infer from the exclusion impermissible viewpoint discrimination on the government's part. Viewpoint discrimination is considered even more constitutionally untenable than content discrimination.[257] The government has not supplied any reason to distinguish between images that are taken by an individual's partner versus those taken by the individual, and there is no obvious justification. The harm caused by the online dissemination of intimate images of an individual presumably does not depend

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250 *See e.g.*, Sable, 492 U.S. at 126; Reno, 521 U.S. at 875.

251 The Florida Star v. B.J.F., 491 U.S. 524, 524 (1989) (quotations omitted).

252 *Id.* at 537.

253 *Id.* at 538–41. It held that the statute was not narrowly tailored nor the least restrictive means. *Id.*

254 *Id.*

255 Franks, *supra* note 32. California's law only applies to "[a]ny person who photographs or records by any means the image of the intimate body part or parts of *another* identifiable person." Cal. Penal Code § 647 (West 2013) (emphasis added).

256 *Id.*

257 *See supra* notes 102–03 and accompanying text.

on the photographer; regardless of the photographer, the victim's photos have been publicized without their consent. The exclusion may amount to viewpoint discrimination because it indicates a government belief that those who took the photos of themselves are less deserving of protection than those who did not. Franks, in discussing California's exclusion of self-shots stated, "I think we are really looking at a 'blame the victim' mentality here," meaning a government mentality that those who take photos of themselves are "asking for it."[258]

A tenuous justification for California's exclusion may be that the government felt that self-shots are sufficiently covered by copyright law.[259] However, the fact that another law may apply to some conduct does not mean that legislators are precluded from addressing overlapping conduct in another statute. It is unlikely that this was the government's logic because the statute does not likewise exclude minors even though child pornography laws apply to the dissemination of their photos.[260] Thus, the government's exclusion is suspect.

Second, the exclusion of self-shots indicates the law is not narrowly drawn to achieve its stated end. Under the "narrow tailoring" prong of strict scrutiny, courts may invalidate statutes for being underinclusive, overinclusive, or both.[261] Here, the exclusion of self-shots renders the statute underinclusive. There is no apparent justification for such a distinction. If the government's purpose in passing the statute is to protect individuals from the harm caused by having photos of intimate areas of their bodies splashed across the Internet, then the statute effectively misses a large portion of its targeted victims. As in Holly Jacobs' case and as the CCRI study indicates, the vast majority of revenge porn victims took the photos themselves.[262] Where a content-based statute misses its target, First Amendment

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258 *See* Kelly, *supra* note 2.

259 *See supra* notes 46–52 and accompanying text.

260 *See supra* notes 53–56 and accompanying text.

261 *See, e.g.*, The Florida Star v. B.J.F., 491 U.S. 524, 540 (1989); Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2658 (2011). An underinclusive statute regulates less speech than necessary to achieve the government's purpose in enacting the statute. *Id.* An overinclusive or overbroad statute prohibits mores speech than necessary to meet the government's stated end. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227–29 (1987).

262 *See supra* notes 8–20, 257 and accompanying text.

jurisprudence tells us the government's true purpose becomes particularly suspect and the statute is more likely than not unconstitutional.[263]

Moreover, section 647(4) may be underinclusive for another reason. The law requires proof of the poster's intent to cause the depicted person serious emotional distress.[264] There is indication that some revenge porn disseminators post the material solely for financial gain or for bragging rights.[265] In such cases, California would be hard-pressed to prove intent to harm the victim, rendering the law inadequate, similar to laws targeting stalking and harassment.[266] Regardless of the poster's intent, the harm to the victim is arguably the same. The victim did not consent to publication of the photo, yet their ex disseminated it to the public. Thus, section 647(4) may not address some types of the harmful conduct it aims to prevent.

Lastly, the statute may be effectively overinclusive due to vagueness.[267] One aspect of the statute in particular raises vagueness issues. As Franks has stated, the requirement of "'circumstances where the parties agree or understand that the image shall remain private' uses a subjective rather than objective standard" and "[s]uch standards are inherently ambiguous and less likely to withstand constitutional scrutiny."[268] Where a statute is vague, it deters more speech than is necessary because people do not understand what expression the law prohibits and are overly deterred from speaking.[269] Consequently, section 647(4) is not likely to withstand strict scrutiny because it is not narrowly tailored nor the least restrictive means to achieving the government's goal.[270]

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263 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387–91 (1992).

264 Cal. Penal Code § 647 (West 2013) (requiring the poster have "the intent to cause serious emotional distress" to the person depicted).

265 *See, e.g.*, Franks, *supra* note 32; Ronneburger, *supra* note 31, at 29 ("The blog 'Ex Girlfriend Pictures' allows users to submit photos of ex-girlfriends for 'revenge or bragging rights.'"); *see also supra* Part I.A.

266 *See supra* notes 57–59 and accompanying text.

267 *See supra* note 222 and accompanying text.

268 Cal. Penal Code § 647 (West 2013); Franks, *supra* note 32.

269 *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 871 (1997) (stating that, where a statute lacks definitions of key terms, the statute leads to uncertainty and has an "obvious chilling effect on free speech").

270 *See id.* at 873.

B. SECONDARY EFFECTS

Courts may deem a content-based statute content-neutral for constitutional purposes where the government's purpose is not based on the direct impact of the targeted speech on its listeners, but on some secondary effects of the speech.[271] The secondary effects doctrine is unlikely to apply to section 647(4). The Legislature has stated its purpose as preventing the humiliation of victims of the prohibited speech.[272] The government's target is to prevent the harmful, direct communicative impact of the speech on its listeners. Furthermore, the secondary effects doctrine has typically been applied in zoning regulation cases involving adult businesses.

However, *Boos* opened the door for expansion of the doctrine to cases involving different types of speech.[273] Furthermore, some courts have applied the doctrine even where the legislature claims such a purpose after the litigation has commenced or where there is evidence of a content discriminatory purpose.[274] Accordingly, although the government has not cited a secondary effects justification yet, it is not out of the realm of possibility that a court would accept one. One possible secondary effect is the promotion of extortion. In some instances, when victims of revenge porn have requested website operators to take down their photos, the owners have agreed, but only for a fee.[275] One website "claims to hold an 'independent' partnership with another site that charges a $250 fee for the removal of photos."[276] The proliferation of revenge porn creates an avenue not only for humiliation of its subjects, but also for their extortion. The government may have a legitimate argument for secondary effects, but it is by no means

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271 *See supra* Part III.C.

272 As in *ACLU v. Reno*, a court would likely find that California's interest is in the "primary effects of 'indecent' and 'patently offensive' speech, rather than any "secondary" effect of such speech." 521 U.S. at 868.

273 Boos v. Barry, 485 U.S. 312, 321 (1988); *see also supra* notes 160–64 and accompanying text.

274 Hudson, *supra* note 140, at 76–77 (citing Phillips v. Borough of Keyport, 107 F.3d 164, 168–69 (3d Cir. 1997)).

275 *See* Laird, *supra* note 2.

276 Jessica Roy, *Victims of Revenge Porn Speak Out Against Craig Brittain, Founder of Is Anybody Down*, BETABEAT (Feb. 4, 2013 2:40 PM), http://betabeat.com/2013/02/victims-of-revenge-porn-speak-out-against-craig-brittain-and-is-anybody-down/#ixzz2ljSYqAxA.

certain a court would be persuaded by it.[277] And even if a court did buy such an argument, the statute would still be subject to intermediate scrutiny, which requires narrow tailoring.[278] As discussed above, the statute likely fails this prong and thus, likely fails intermediate scrutiny as well.[279]

C. OBSCENITY, INDECENCY, AND PORNOGRAPHY

The Supreme Court would likely consider speech that constitutes "revenge porn" to be low-value, indecent expression.[280] But, indecency is not a currently established unprotected category of speech.[281] Revenge porn is of low social value because it is not likely that its protection is essential to a free marketplace of ideas.[282] However, a baseline rule of First Amendment jurisprudence is that the government may not prohibit speech based on its offensiveness to society. While obscenity has been deemed to be so worthless as to fall outside of First Amendment protection, indecency is still considered protected expression. Here, because pornography is not synonymous with obscenity, the government may not regulate revenge porn without limit and will face several problems in attempting to regulate it as either obscene or indecent.[283]

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277 Even were a court to apply the secondary effects doctrine, it would still subject the statute to intermediate scrutiny, which requires a significant government interest. *See* Part III.A. A court may not find as significant an interest in preventing extortion than an interest in protecting against the repercussions of revenge porn as discussed *supra* in Part I.B.

278 *See supra* Part IV.A.

279 *Id.*

280 *See supra* notes 190–192 and accompanying text.

281 *See* FCC v. Pacifica, 438 U.S. 726, 747 (1978).

282 Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, Wakeforest L. Rev. (forthcoming 2014). "The publication of revenge porn does not produce better democratic citizens . . . . It does not promote civic character or educate us about cultural, religious, or political issues." *Id.* However, the argument can and has been made that sexual material may convey information or have artistic value. *See* Shaman, *supra* note 121, at 305–06. Moreover, Eric Goldman has argued that there may be social value in the dissemination of indecent photos that are of public concern. *See infra* notes 289–91 and accompanying text. However, the existence of a narrow exception for material of public concern or of high artistic value would safeguard against such concerns. *Id.*

283 *See supra* Part III.D.

First, revenge porn media does not necessarily fall within obscenity.[284] To constitute obscenity, an image would have to "appeal to the prurient interest," be "patently offensive," and depict "sexual conduct."[285] As California's legislation does not require the image depict "sexual conduct," but rather only "intimate body parts," much of what the law covers would fall outside of obscenity jurisprudence.[286]

Second, because indecency is a protected speech category, laws regulating such speech are subject to the traditional standards of review. It is safe to say that nearly all, if not all, material falling within California's statute is indecent.[287] However, such material and the mode of expressing it inherently conveys an idea — specifically, that of revenge. The First Amendment stands to prohibit the government from prohibiting speech based on its disagreeability.[288] Michael Perry has stated, "That the ideas conveyed by obscene materials may be hateful does not make them any less ideational," and that "even reprehensible ideas such as Nazi ideology are nonetheless ideas."[289] Accordingly, it is likely that a court would apply the strict scrutiny analysis detailed in Part IV.A and conclude that section 647(4) is likely unconstitutional.

Furthermore, indecency jurisprudence revolves primarily around when the government may regulate speech to shield minors from viewing offensive content online. California's justification for its revenge porn legislation does not purport to protect children from encountering offensive content online.[290] It is unclear what amount of regulation of indecent

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284 *See* Roth v. United States, 354 U.S. 476, 487 (1957).

285 Miller v. California, 413 U.S. 15, 25 (1973).

286 *See* Cal. Penal Code § 647 (West 2013).

287 To fall under section 647(4), media must depict "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." Cal. Penal Code § 647 (West 2013).

288 Texas v. Johnson, 491 U.S. 397, 414 (1989).

289 Shaman, *supra* note 121, at 305.

290 *See supra* Part II. The legislative history cites the case of Audrie, a fifteen-year-old whose nude photos were posted without her consent online. *Id.* The law does not aim to protect children from viewing offensive content online, but rather aims to protect both children and adults from having their depictions posted online without their consent. *Id.*

online communication courts will tolerate as constitutional.[291] However, these cases also indicate that, as a low-value speech category, indecent speech may be regulated to some extent. For example, if the Supreme Court had felt strongly about the FCC's harsh definition of and policy on indecency, it presumably would not have sidestepped the constitutional issues in *Fox Television II*.[292] Accordingly, the only certainty is that California may regulate indecent material without violating the First Amendment, so long as its regulation passes the applicable standard of review.

V. LOOKING FORWARD: RECONCILING COMPETING GOALS TO ACHIEVE CONSTITUTIONALLY-SOUND LEGISLATION

The problem of revenge porn proves to be a constitutionally tricky one. California's legislation is a step in the right direction, but needs modification to be effective and withstand constitutional scrutiny. Other states should learn from section 647(4)'s shortcomings in drafting their own anti–revenge porn legislation. As a start, in order to narrowly tailor legislation to achieve California's purpose, legislators ought to include self-shots.[293] Many past victims took the photos themselves and the exclusion of such victims renders the law inadequate.[294]

Second, legislators should consider including an exception that excludes material with serious literary, artistic, political, or scientific value, as does the *Miller* test.[295] Franks cites as a constitutional weakness of the California law its lack of "clear exceptions for commercial images, reporting, investigation, and prosecution of unlawful conduct, or images relating to the public interest."[296] Exceptions such as these would keep the law from chilling constitutionally valuable speech. Professor of law Eric Goldman

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291 *See supra* notes 205–07 and accompanying text.

292 *Id*. However, it is important to note that the FCC acts in a special capacity. *See supra* note 220. Congress delegated power to the FCC to regulate broadcast media, authorization that states do not enjoy. *Id*.

293 *Podcast*, *supra* note 9.

294 *See supra* note 256 and accompanying text; *see also supra* Part IV.A.

295 *See supra* note 178 and accompanying text.

296 Franks, *supra* note 32.

gave the example of Anthony Weiner's infamous nude self-shots.[297] As a person of legitimate public interest, Anthony Weiner's actions are of public concern.[298] Goldman stated that a recipient of such photos "might want to divulge [them] to prove his or her story as part of their ability to engage in this important social discourse."[299] An exception for media of public concern would allow people to participate in such dialogue. Further, the exception for serious literary, artistic, political, or scientific value should be an objective, national standard because in *Ashcroft v. ACLU* some Supreme Court justices have voiced their beliefs that subjective standards that vary with geographic location are unconstitutional as applied to the Internet.[300]

Third, anti–revenge porn statutes should be entirely based on objective standards, rather than subjective.[301] For example, Franks has suggested that a statute could prohibit dissemination of photos where the subject has a "reasonable expectation of privacy or confidentiality" in the photo.[302] Section 647(4)'s requirement of "circumstances where the parties agree or understand that the image shall remain private" is a subjective standard.[303]

Fourth, criminal laws targeting revenge porn are preferable to civil laws.[304] Civil litigation is expensive and further publicizes the embarrassing material.[305] Further, courts are tending to interpret section 230 immunity more narrowly and decline to grant immunity to sites that induce users to engage in criminal activity.[306] Where a state criminalizes revenge porn, victims may also have a remedy under the CDA.[307]

Lastly, the New Jersey statute serves as a more comprehensive and constitutionally sound statute. The pertinent part of the statute states:

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297 *Podcast*, *supra* note 9.

298 *See id.*

299 *Id.* In such a case, Goldman states that the recipient "has no credibility in the media" and "the proof is in the photos." *Id.*

300 *See* 535 U.S. 564, 589–90 (2002); *see also supra* notes 229–33 and accompanying text.

301 *See supra* note 268 and accompanying text.

302 Franks, *supra* note 32; *see also id.*

303 *See supra* note 268 and accompanying text.

304 *See supra* notes 33–43 and accompanying text.

305 *Id.*

306 *See supra* notes 43–45 and accompanying text.

307 *Id.*

> 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.[308]

New Jersey's law is commendable because it does not exclude self-shots and it deems revenge porn an invasion of privacy.[309] The statute has proved successful in prosecuting revenge porn cases already and has not yet been challenged on constitutional grounds.[310] Further, Franks believes that "California's categorization of revenge porn as a misdemeanor sends a weak message to would-be perpetrators and will be a less effective deterrent than a law like New Jersey's."[311] New Jersey's law makes it a third-degree crime and carries a prison sentence of three to five years.[312] California's law threatens only a six-month jail sentence.[313]

Looking forward, California, as well as other states contemplating passing anti–revenge porn legislation should study First Amendment jurisprudence carefully to determine how to achieve constitutionally-sound legislation. The problem of revenge porn is real, and victims and potential victims deserve legal redress, which they lack in the vast majority of jurisdictions today.

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308 Franks, *supra* note 32; *see also* N.J. Stat. § 2C:14-9 (West 2012).

309 *Podcast*, *supra* note 9.

310 *Id.*

311 Keats & Franks, *supra* note 282.

312 N.J. Stat. § 2C:14-9 (West 2012).

313 S. B. 255, Reg. Sess. (Cal. 2013).