REVENGE PORNOGRAPHY AND FIRST AMENDMENT EXCEPTIONS

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People are marvelously inventive in devising new ways to hurt each other. Some of these new ways involve speech. The Supreme Court has recently declared that speech is protected by the First Amendment unless it is a type of communication that has traditionally been unprotected. If this is the law, then harms will accumulate and the law will be helpless to remedy them.

A recent illustration is the new phenomenon of "revenge pornography"—the online posting of sexually explicit photographs without the subject's consent, usually by rejected ex-boyfriends. The photos are often accompanied by the victim's name, address, phone number, Facebook page, and other personal information. They are sometimes shared with other websites, viewed by thousands of people, and become the first several pages of hits that a search engine produces for the victim's name. The photos are emailed to the victim's family, friends, employers, fellow students, or coworkers. They are seen on the Internet by prospective employers and customers. Victims have been subjected to harassment, stalking, and threats of sexual assault. Some have been fired from their jobs. Others have been forced to change schools. The pictures sometimes follow them to new jobs and schools. The pictures' availability can make it difficult to find new employment. Most victims are female.[1]

Twenty-six states have passed laws prohibiting this practice, and others are considering them.[2] (Civil remedies are often available but have not been much

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[1] *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–54 (2014).

[2] *State Revenge Porn Laws*, C.A. GOLDBERG (Sept. 29, 2015), http://www.cagoldberglaw.com/states-with-revenge-porn-laws/; *26 States Have Revenge Porn Laws*, END REVENGE PORN, http://www.endrevengeporn.org/revenge-porn-laws/ (last visited Feb. 1, 2016). The United Kingdom also recently enacted a criminal statute, and there have already been convictions. Liz Hull & Stephanie Linning,

of a deterrent: victims often cannot afford to sue, and perpetrators often have few assets to collect.[3]) The constitutionality of such laws is uncertain, however.

These laws restrict speech on the basis of its content. Content-based restrictions (unless they fall within one of the categories of unprotected speech) are invalid unless necessary to a compelling state interest.[4] The state's interest in prohibiting revenge pornography, so far from being compelling, may not even be one that the state is permitted to pursue. The central harm that such a prohibition aims to prevent is the acceptance, by the audience of the speech, of the message that this person is degraded and appropriately humiliated because she once displayed her naked body to a camera. The harm, in other words, consists in the acceptance of a viewpoint. Viewpoint-based restrictions on speech are absolutely forbidden.[5]

There are exceptions to the ban on content-based restrictions: the Court has held that the First Amendment does not protect incitement, threats, obscenity, child pornography, defamation of private figures, criminal conspiracies, and criminal solicitation, for example.[6] None of those exceptions is applicable here.

The pathologies of revenge pornography I have just described are the product of entirely new technologies: digital photography and the Internet. Because it is so new, however, it is not a category of speech that has traditionally been denied First Amendment protection. The Court has recently announced that unless speech falls into such a category, it is fully protected. There can be no new categories of unprotected speech.

Laws prohibiting revenge pornography thus violate the First Amendment as the Court now understands it. The crux of the problem is the Court's announced unwillingness to create new categories of non-protection.

Thug Becomes the First Person in Britain Jailed for 'Revenge Porn' After Posting Intimate Picture of His Ex-girlfriend on WhatsApp, DAILY MAIL (Nov. 14, 2014, 6:58 AM), http://www.dailymail.co.uk/news/article-2834509/Thug-person-Britain-jailed-revenge-porn-posting-intimate-picture-ex-girlfriend-WhatsApp.html; Oliver Wheaton, *'Vindictive' Boyfriend Avoids Jail for Posting Revenge Porn of Ex-girlfriend*, METRO (Dec. 4, 2014, 4:01 PM), http://metro.co.uk/2014/12/04/vindictive-boyfriend-avoids-jail-for-posting-revenge-porn-of-ex-girlfriend-4974272/.

[3] DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 121–23 (2014); Citron & Franks, *supra* note 1, at 349.

[4] *See infra* text accompanying notes 11–14.

[5] *See infra* text accompanying notes 24–51.

[6] *See* DANIEL A. FARBER, THE FIRST AMENDMENT 57–146 (3d ed. 2010).

That unwillingness is not a necessary inference from the First Amendment. The present exceptions to free speech protection are judge-made doctrines. The courts that made them are by the same authority free to construct additional exceptions. Those exceptions would be justified by whatever justified the exceptions already on the books.

Free speech is a complex cultural formation that aims at a distinctive set of goods. Its rules must be formulated and reformulated with those specific goods in mind. Pertinently here, one of those goods is a citizenry with the confidence to participate in public discussion. Traumatized, stigmatized women are not the kind of people that a free speech regime aims to create. Revenge pornography threatens to create a class of people who are chronically dogged by a spoiled social identity, and a much larger class of people who know that they could be subjected to such treatment without hope of redress. That state of affairs is directly contrary to the ideal of a regime in which everyone is empowered to participate in public discourse.

Part I of this Article examines the constitutional objections to a statute that bans revenge pornography, and argues that those objections, although they are firmly rooted in the doctrines laid down by the Supreme Court, rest on an indefensibly wooden vision of free speech. Part II argues that this vision rests on an impoverished understanding of liberalism, which does not merely aim at constraint on government but which affirmatively seeks a society whose citizens have certain desirable traits of character, notably the courage to participate in public discourse. I develop this claim with a close reading of John Stuart Mill's *On Liberty*. Part III argues that revenge pornography has a silencing effect on its victims that directly attacks the Millian ideal. Part IV argues that the creation of free speech exceptions cannot persuasively be ruled out in the way the Court has done, but are a normal part of judicial construction of the First Amendment's text. The Conclusion reflects on the mechanical character of the free speech rules that the Court has constructed.

I. THE NEW FREE SPEECH JURISPRUDENCE

A. Present Doctrine Bars a Remedy

As already noted, there are laws against revenge pornography on the books in twenty-six states, and more will probably be enacted.[7] Although some of

[7] *See supra* note 2.

these are clumsily drawn,[8] it is possible for a law to target revenge pornography with precision. Danielle Citron has proposed this:

> An actor commits criminal invasion of privacy if the actor harms another person by knowingly disclosing an image of another person whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows that the other person did not consent to the disclosure and when the actor knows that the other person expected that the image would be kept private, under circumstances where the other person had a reasonable expectation that the image would be kept private.[9]

The statute further specifies the terms it uses, so that, for example, "intimate parts" is defined as "the naked genitals, pubic area, anus, or female adult nipple."[10] This gives the statute specificity.

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[8] *See First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images*, ACLU (Sept. 23, 2014), https://www.aclu.org/free-speech/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images; Ken Paulson, Opinion, *Beware Revenge Porn Laws*, USA TODAY (Oct. 29, 2014, 8:59 PM), http://www.usatoday.com/story/opinion/2014/10/29/beware-revenge-porn-laws-first-amendment-free-speech-column/18149265/.

[9] CITRON, *supra* note 3, at 152. The first proposal for a statutory ban was by Mary Anne Franks, who proposed to focus not on the subject's reasonable expectation of privacy, but on the absence of consent. *See* Mary Anne Franks, *Why We Need a Federal Criminal Law Response to Revenge Porn*, CONCURRING OPINIONS (Feb. 15, 2013), http://concurringopinions.com/archives/2013/02/why-we-need-a-federal-criminal-law-response-to-revenge-porn.html (prohibiting the disclosure of "a sexually graphic visual depiction of an individual without that individual's consent"); Mary Anne Franks, Drafting an Effective "Revenge Porn" Law: A Guide for Legislators 9 (Aug. 17, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823 (prohibiting disclosure "when the actor knows that or consciously disregarded a substantial and unjustified risk that the depicted person has not consented to such disclosure"). Franks's views on the drafting question have shifted over time, and at one point she considered language like Citron's. *See* Mary Anne Franks, Combating Non-Consensual Pornography: A Working Paper 12 (Oct. 7, 2013) (unpublished manuscript), http://www.endrevengeporn.org/main_2013/wp-content/uploads/2013/10/Franks-NCP-Working-Paper-10.7.pdf ("Whoever intentionally discloses a 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 contact without that person's consent, under circumstances in which the person has a reasonable expectation of privacy, commits a crime.").

I worry that Franks's statute may be overbroad. There are many situations in which it is reasonable to disseminate a nude photograph even though the disseminator knows that the depicted person has not consented to the disclosure. The person may have originally disclosed the photograph with the expectation that it be public and available for reposting, as when one posts a nude photo of oneself onto a publicly accessible website. The person may have had no reasonable expectation that the image would be kept private. The person may not know of the dissemination. The photo may be newsworthy, like the Abu Ghraib photos. The person may have died before the photo was distributed: some nude photos are more than a century old.

There are likewise reasonable objections to Citron's language, which has problems of vagueness (which is what draws Franks to the language of consent), but I bracket them here. The conversation about appropriate drafting is a continuing one and this Article does not attempt to resolve it.

[10] CITRON, *supra* note 3, at 152.

It is unlikely that this law would restrict any valuable speech. It is, however, a content-based restriction on speech. Such restrictions, the Court has declared, are presumptively unconstitutional.

In *Reed v. Gilbert*, the Court made preexisting doctrine more rigid by categorically declaring that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[11] This implies a presumption of invalidity: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[12] This works a revolution in free speech law, calling into question a huge range of government regulations, such as almost all of securities law.

"The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation," Judge Frank Easterbrook observes. "Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."[13] If a law is unconstitutional if its restrictions "depend entirely on the communicative content"[14] of what is regulated, then any restriction of revenge pornography is in deep trouble.

The First Amendment's protection of free speech does not apply to "low-value" categories of speech, such as threats and incitement.[15] These categories are exceptions to the otherwise strong protection of speech. This much is familiar doctrine.

In *United States v. Stevens*, in which the Court invalidated a law criminalizing depictions of the illegal killing of animals, Chief Justice Roberts announced that there would henceforth be no new categories of unprotected speech:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions

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11 135 S. Ct. 2218, 2227 (2015).

12 *Id.* at 2228 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

13 Norton v. City of Springfield, No. 13-3581, 2015 WL 4714073, at *2 (7th Cir. Aug. 7, 2015).

14 *Reed*, 135 S. Ct. at 2227.

15 *See* Avis Rent A Car System, Inc. v. Aguilar, 529 U.S. 1138, 1141 (2000) (Thomas, J., dissenting) (using term); FARBER, *supra* note 6, at 57–146.

> on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."[16]

Every established exception to free speech protection, Chief Justice Roberts declared, is based upon "a previously recognized, long-established category of unprotected speech."[17] Before speech can be regulated, the state must show a "long-settled tradition of subjecting that speech to regulation."[18] There is no tradition of regulating dogfighting videos, so the Court invalidated a law that criminalized them.[19]

All this is bad news for laws against revenge pornography, even ones as skillfully drawn as Citron's. Like the statute in *Stevens*, a prohibition of revenge pornography is "presumptively invalid" because it "explicitly regulates expression based on content."[20]

No established exception is likely to be helpful here. Geoffrey Stone observes that there is "no long-standing tradition of regulating the publication of non-newsworthy private information."[21] The Court has never addressed the constitutionality of the tort of disclosure of private facts. Even if the tort is permissible—it has been around for a long time[22]—Citron's statute is different because it specifies the content of the speech that is restricted. Moreover, the forbidden content is truthful information, a record of what did in fact occur. Exposure of that information often leads to unfair treatment of the person photographed. That is, after all, what the person who distributes the photograph is hoping to accomplish. But "the 'fear that people would make

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[16] United States v. Stevens, 559 U.S. 460, 470 (2010) (quoting Marbury v. Madison, 1 Cranch 137, 178 (1803)).

[17] *Id.* at 471.

[18] *Id.* at 469–72.

[19] *Id.* at 482. The Court relied on the same logic (and cited *Stevens*) in invalidating a ban on sale of violent video games to minors in *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2732, 2734, 2742 (2011).

[20] *Stevens*, 559 U.S. at 468.

[21] Geoffrey R. Stone, *Privacy, the First Amendment, and the Internet*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 174, 183 (Saul Levmore & Martha C. Nussbaum eds., 2010).

[22] *See* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 970–72 (2003). The *Stevens* Court declared, "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. . . . We need not foreclose the future recognition of such additional categories." 559 U.S. at 472.

bad decisions if given truthful information' cannot justify content-based burdens on speech."[23]

It is even arguable that the proposed statutes are prior restraints on speech, which are very heavily disfavored, because they require the distributor to obtain the consent of the person who was photographed. John Humbach observes that "a law that grants private individuals the absolute discretion, utterly unconstrained by the democratic process, to totally block dissemination of disfavored speech creates a system of censorship that would seem to be even *more* questionable than one controlled by public officials."[24]

The deep problem is viewpoint discrimination. With the animal cruelty statute at issue in *Stevens*, the United States noted in its reply brief, Congress "was concerned about the harms these depictions would cause even if they had no viewers at all—the harm to living animals occurring in the creation of the depictions, as well as associated harms arising from these acts of violence."[25] The harm of revenge pornography, on the other hand, occurs only when the material is made available for viewers. Even worse, it is a harm primarily because some people believe that the display of one's naked body to a camera is shameful. Not everyone has that view.

Another recent Court decision suggests that the state has no power to remedy harms caused by speech, if the harm consists in the communication of a viewpoint that the law deems repellent.

In *Snyder v. Phelps*, the Court ruled that the First Amendment protected the picketing, with signs such as "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," and "God Hates You," of the funeral of a soldier who had been killed in Iraq.[26] The Court relied on a well-established principle: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[27] In this case,

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[23] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2670–71 (2011) (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002)); *see also id.* at 2671 ("The choice 'between the dangers of suppressing information, and the dangers of its misuse if it is freely available' is one that 'the First Amendment makes for us.'" (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976))).

[24] John A. Humbach, *How to Write a Constitutional "Revenge Porn" Law*, 35 PACE L. REV. 215, 248 (2014).

[25] Reply Brief for the United States at 3, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2564714, at *3.

[26] 131 S. Ct. 1207, 1214 (2011).

[27] *Id.* at 1219 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

> [A]ny distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability.[28]

The tort of intentional infliction of emotional distress, the Court explained, must be subject to First Amendment constraints. A jury is "unlikely to be neutral with respect to the content of [the] speech."[29] The speech in question was "certainly hurtful," but it must be protected "to ensure that we do not stifle public debate."[30]

The Court's opinion is ambiguous on a crucial point. Was it confessing its inability to craft a standard that would be confined to the context of funerals? The implication seems rather to be that even if such a standard could be devised (and several were proposed),[31] it would be improperly viewpoint-discriminatory to apply it.

Justice Alito, dissenting, emphasized the "acute emotional vulnerability" of the mourners.[32] The trouble is that this vulnerability is itself viewpoint-based. Justice Elena Kagan observed in an early law review article that a law that aims to prevent harm is nonetheless impermissibly viewpoint-based when "it is speech of a certain viewpoint, and only of that viewpoint, which causes the alleged injury."[33] The protestors' speech is hurtful only to those who disagree with *their* viewpoint—one according to which the death of soldiers in Iraq is a happy manifestation of divine justice.

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[28] *Id.*

[29] *Id.* (citing Bose Corp. v. Consumers Union, 466 U.S. 485, 510 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

[30] *Id.* at 1220.

[31] One could say, for example, that funerals are unique events for free speech purposes, protected despite their public character. *See* Brief *Amicus Curiae* of the Center for Constitutional Jurisprudence in Support of Neither Party Suggesting Reversal at 4, *Snyder*, 131 S. Ct. 1207 (No. 09-751), 2010 WL 2185135, at *4. (That is of course in tension with the reasoning of *Stevens*, then very recently decided, which the amicus did not cite.) Or one could say that it involves "a privacy right similar to individuals in their homes." Phelps-Roper v. Strickland, 539 F.3d 356, 364–65 (6th Cir. 2008).

[32] *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

[33] Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 879 (1993).

The Court mentioned repeatedly that the grieving father "could see no more than the tops of the signs,"[34] but this reflects a failure to think through the logic of its position. How can this be relevant? The Court's reasoning leaves no room for a different result if the signs were in plain sight, so long as the protest "did not itself disrupt that funeral."[35] Absent such interference, did the protesters have a First Amendment right to communicate with the mourners during the funeral? Can the law even cognize the fact that the specific intent of that communication was to inflict pain upon the mourners? What would be the fate of a law that required protesters to be far enough away to be entirely invisible to the funeral party?[36] Such a law obviously rests on the viewpoint-based premise that death is not a matter for celebration, and that one may legitimately exclude from funerals the viewpoint that the deceased deserved his end.[37]

If viewpoint discrimination is absolutely forbidden, then certain kinds of calculated injury to innocents is protected. Restrictions on communication with mourners are enacted solely to protect them from specific viewpoints with which the law disagrees. It is only those viewpoints that cause the injury. A law is content-discriminatory if what it seeks to prevent is "[t]he emotive impact of speech on its audience."[38] Even a general prohibition of demonstrations near funerals is covert viewpoint discrimination, because these specific communications are its avowed target.

"[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."[39] The "in someone's eyes" phrase suggests that any restriction of speech because of its hurtful character partakes of the "inherent subjectiveness" that troubled the

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[34] *Snyder*, 131 S. Ct. at 1220 (majority opinion); *see also id.* at 1213–14, 1218; *id.* at 1221 (Breyer, J., concurring).

[35] *Id.* at 1220 (majority opinion).

[36] The Court expressed no view about the constitutionality of the laws of forty-four states and the federal government imposing restraints on funeral picketing, but its reasoning throws these into doubt. *See id*. at 1218; *see also* McCullen v. Coakley, 134 S. Ct. 2518, 2537 (2014) (invalidating as excessively large a thirty-five-foot buffer zone around abortion clinics).

[37] The analogy with the home, for purposes of determining whether there is a captive audience, presents a similar problem. One can protect the seclusion of the home without regard to viewpoint, but signs in the vicinity of a funeral are of concern only because of their content. For the same reason, such a restriction is not purely one of time, place, and manner, because their obvious purpose is to block communication of a specific unwelcome viewpoint.

[38] Boos v. Barry, 485 U.S. 312, 321 (1988).

[39] *Snyder*, 131 S. Ct. at 1219 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995) (ellipses in original)).

Court about the legal standard of "outrageousness."[40] In fact, human experience is less various, and judgment less subjective, than the Court imagines here: we can confidently predict the emotions felt by parents when they bury their children.[41]

The logic of *Snyder* condemns any law that specifically targets revenge pornography. Revenge pornography, too, is hurtful only "in someone's eyes." It consists of truthful information—a (typically) undoctored photograph—that conveys a message that some people—possibly the women depicted, and certainly some who see the photos—find insulting and discrediting. A law that specifically prohibits revenge pornography aims at the suppression of that message. The person who disseminates the photographs wants to persuade his audience that this woman is a contemptible, worthless slut. The photograph is offered as evidence to support the claim. Evidently many people are persuaded, at least to the extent of firing or refusing to employ her. The harm that the law aims to prohibit consists precisely in the audience's adoption of the speaker's viewpoint.

Free speech law's suspicion of this kind of viewpoint discrimination is appropriate. David Strauss has argued that one principle that underlies the Court's free speech decisions is the principle that government may not "restrict speech on the ground that the speech will persuade people to adopt attitudes that the government considers undesirable."[42] When government violates this "persuasion principle," "it is engaged in a form of thought control."[43] Strauss's principle is directly implicated here. A prohibition of revenge pornography is "deliberately denying information to people for the purpose of influencing their behavior."[44] It is therefore improperly manipulative, "a form of attempting to control the audience's mental processes."[45]

The objection from the persuasion principle is powerful. A restriction on revenge pornography aims to manipulate the public. If a woman's employer, say, were aware of the existence of this photograph, he would fire her. The law

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[40] *Id.*

[41] My analysis of *Snyder* is indebted at many points to Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment*, 45 CONN. L. REV. 101 (2012).

[42] David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 340 (1991).

[43] *Id.* at 360.

[44] *Id.* at 355.

[45] *Id.* at 356. This is not to say that Strauss is necessarily committed to invalidating a revenge pornography law. He also argues that his principle can legitimately be violated in order to prevent serious harms—harms so severe that preventing them would justify manipulative lying. *Id.* at 360–61.

withholds this information in order to prevent him from forming a mental state that he would otherwise form.[46] This is the deepest reason why a revenge pornography statute raises serious free speech issues. There is, and should be, a presumption that such a statute is unconstitutional. Free speech law goes wrong when it declares that the presumption cannot be overcome.

Can the statute be rescued by the obvious fact that publication of these photos invades the privacy of their subjects? The Court has declared several times, albeit in dicta, that the interest in privacy may justify regulation of communications that do not involve matters of public concern, such as the conduct of public officials.[47] On this basis, some lower courts have upheld claims for nonconsensual publication of sex videos.[48] But the Court has never said that this interest can justify a law that discriminates on the basis of content.[49] A law that does that is subject to strict scrutiny, and if the interest in *Snyder* was not sufficient to withstand such scrutiny—and it was not, precisely because it was viewpoint-based—then the same result is likely in this context.[50]

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[46] Another purpose of the law is to prevent the embarrassment of having one's nude photo seen without one's consent. This unwanted exposure would be reprehensible even without the collateral consequences I have been describing. Control over one's public presentation is an indispensable element of liberty. *See* THOMAS NAGEL, *Concealment and Exposure*, *in* CONCEALMENT AND EXPOSURE AND OTHER ESSAYS 3, 4 (2002). It is already protected by the voyeurism statutes that many states have on the books. *See* NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, VOYEURISM STATUTES 2009 (Mar. 2009), http://www.ndaa.org/pdf/voyeurism_statutes_mar_09.pdf. But this harm alone would probably not be enough to trigger the wave of criminal statutes that are now being enacted. Everyone understands that the law aims to prevent other, more severe harms.

[47] *See* CITRON, *supra* note 3, at 207–12 (citing Snyder v. Phelps, 131 S. Ct. 1207 (2011)); *see also* Bartnicki v. Vopper, 532 U.S. 514 (2001); Smith v. Daily Mail, 443 U.S. 97 (1979); Humbach, *supra* note 24, at 17 nn.115–16 (collecting cases).

[48] CITRON, *supra* note 3, at 209–10.

[49] Humbach, *supra* note 24, at 240. The torts of invasion of privacy, disclosure of private facts, or intentional infliction of emotional distress do not facially classify on the basis of content. The Court similarly held that laws against wiretapping, whose "basic purpose . . . is to 'protect the privacy of . . . communications,'" do not discriminate on the basis of content. *Bartnicki*, 532 U.S. at 526. For this reason, Humbach thinks that the only constitutionally permissible revenge pornography law would be a general criminalization of intentional infliction of extreme emotional distress. Humbach, *supra* note 24, at 252. That remedy would be massively overbroad and would give no notice that revenge pornography is specifically prohibited, but Humbach may be correct that it is the best one can do given current free speech doctrine.

[50] Another possible rejoinder is that some laws that restrict the communication of truthful but private information are not even salient for free speech purposes, for example laws protecting the confidentiality of medical records. The protection of those records, however, is entirely derivative from the fiduciary duties of health care providers, and only such providers have such obligations. *See* Colleen K. Sanson, *Cause of Action Against Physician or Other Health Care Practitioner for Wrongful Disclosure of Confidential Patient Information*, 36 CAUSES OF ACTION 2D 299, § 8 (2008); *Covered Entites and Business Associates*, U.S. DEP'T

Viewpoint-neutrality is an indispensable premise of free speech. If the First Amendment is to guarantee "freedom for the thought that we hate," then an artificial framework must be constructed in which our hatred has no weight. An alleged harm that is parasitic on viewpoint, that is harmful only "in someone's eyes," is not cognizable as a justification for restricting speech. These core free speech principles bar a specific, content-based prohibition of revenge pornography—unless revenge pornography is an unprotected category of speech.

Citron's model statute is skillfully drafted to reach only a narrowly defined subset of speech. It is narrowly tailored, and the interest in question is arguably compelling. (The Court has never established a criterion for determining what is a compelling interest.) But if that interest is viewpoint-based, it cannot be compelling. It is not even permissible.

B. A Mechanical Doctrine

None of this, however, is necessarily a criticism of the rejection of new unprotected speech categories in *Stevens*. I have merely been working out its implications. If this is indeed what the First Amendment means, then that is the law, like it or not.

But this is not and cannot be what the First Amendment means.

At the threshold, the Court's claim that—absent narrow exceptions—content-based restrictions are impermissible is manifestly false. Law is full of content-based restrictions on speech that are, not so much exceptions to the

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OF HEALTH & HUMAN SERVS., http://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html (last visited Jan. 10, 2016).

Such laws impose no significant free speech burden because medical records are no part of any discourse generally recognized as legitimate. The law preserves a settled practice of excluding them from public discourse. Photos of nude people, on the other hand, are ubiquitous, and any legal presumption that they are always private would be massively overbroad. One study found that 49% of people use their cell phones to send or receive sexual content via pictures or text messages. *Sext Much? If So, You're Not Alone,* SCI. AM. (Feb. 4, 2014), http://www.scientificamerican.com/article/sext-much-if-so-youre-not-alone/. Among eighteen- to twenty-four-year-olds, the figure is 70%. *Study Reveals Majority of Adults Share Intimate Details Via Unsecured Digital Devices*, INTEL SECURITY (Feb. 4, 2014), http://www.mcafee.com/us/about/news/2014/q1/20140204-01.aspx. In 2012, 15% of adult cell users said they had received a sexual image of someone they knew, 6% had sent such an image, and 3% had *forwarded* a sexually suggestive nude or nearly nude photo or video of someone that they knew. Aaron Smith, *The Best (and Worst) of Mobile Connectivity, Part V: Cell Phone Usage*, PEW RES. CTR. (Nov. 30, 2012), http://www.pewinternet.org/2012/11/30/part-v-cell-phone-usage/. (The "reasonable expectation" of privacy language in the model statute excludes most of this activity from its reach.) Thanks to Kaylynn Bradley and Mary Anne Franks for raising this analogy, and to Peter Mayer for these citations.

First Amendment, but areas in which the Amendment is not even salient. No free speech issue is raised by prohibitions of perjury, price-fixing, screaming in the gallery of Congress, and many other things that can be done with language.[51] Contract law consists almost entirely of visiting unwanted consequences on persons because of words that they have said. If we are to discern the boundaries of the free speech principle, we must explain why these are excluded.[52]

Until recently, one of those areas of nonsalience was copyright law. Like contract law, copyright has not been an exception to free speech protection so much as an area in which the First Amendment is not even relevant.[53] Copyright is relevant to the revenge pornography question because, if the photograph in question is one that the victim took of herself, then she owns the rights to the picture and can force websites to take it down.[54] If her ex-boyfriend took the photo, on the other hand, this recourse is unavailable. The law mandates dramatically different treatment of images that are functionally identical, for reasons that have nothing to do either with the purposes of free speech or the harm in question.[55] This pattern is the product of pure path dependency.

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[51] Hostile environment sexual harassment, which often consists of slurs and epithets, has not been deemed by the Court to raise any free speech issue. Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 360 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 1. This is unlikely to change even after *Reed v. Town of Gilbert. See supra* text and discussion accompanying notes 11–14. "Robert Post, the dean of Yale Law School and an authority on free speech, said the [*Reed*] decision was so bold and so sweeping that the Supreme Court could not have thought through its consequences." Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES: SIDEBAR (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html. On the ambiguities of free speech law in the context of hostile environment harassment, see Andrew Koppelman, *A Free Speech Solution to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. (forthcoming 2016).

[52] *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

[53] *See* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 35 (2008); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 3 (2002). The Court's most recent decisions give it some weight, but still allow a degree of content-based regulation that would be unconstitutional outside the context of copyright. Neil Weinstock Netanel, *First Amendment Constraints on Copyright After* Golan v. Holder, 60 UCLA L. REV. 1082, 1084–85 (2013).

[54] *See* Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, ATLANTIC (Feb. 4, 2014), http://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/. *But see* Jeff John Roberts, *No, Copyright Is Not the Answer to Revenge Porn*, GIGAOM (Feb. 6, 2014, 7:24 AM), https://gigaom.com/2014/02/06/no-copyright-is-not-the-answer-to-revenge-porn/.

[55] This problem could be partly remedied by a federal revenge pornography law that included, as one of the sanctions for a proven violation, the transfer of copyright from the convicted photographer to the victim.

A similar path dependency is strikingly evident in the exceptions that the Court recognizes. *Stevens* involved a statute criminalizing the creation, sale, or possession of certain depictions of animal cruelty.[56] The law aimed to suppress videos of dogfighting and cockfighting, the sale of which helps to finance those already illegal activities, and "crush videos"—films that depict the intentional torture and killing of helpless animals, and are sold to persons who find such images sexually exciting.[57]

The law was so broadly worded that it prohibited films of hunting and bullfighting, and documentaries designed to document the mistreatment of animals.[58] But the Court should not have foreclosed the possibility of a more narrowly crafted statute.

Congress responded to the Court, but in a pretty arbitrary way. The arbitrariness was demanded by the restrictions that the Court laid down. The revised statute prohibits animal cruelty that is obscene[59]—appealing to the prurient interest. Since material can be pornographic even when it only appeals to very specialized tastes, absolutely anything can be "obscene" as long it is sexually appealing to someone.[60] Since the audience for crush videos is sexually inflected, the revised statute evidently passes muster.[61] A nonsexual taste for cruelty, on the other hand, is excluded from consideration. That taste exists, and works exist that cater to it, but they are evidently beyond the reach of the law. The revised statute cannot reach the dogfighting videos that Stevens distributed.[62]

That remedy is, however, possible only if a revenge pornography prohibition does not violate the First Amendment.

[56] United States v. Stevens, 559 U.S. 460, 464–65 (2010).

[57] *Id.* at 465–66.

[58] *Id.* at 477–82.

[59] 18 U.S.C. § 48 (2012).

[60] Joel Feinberg observed that, since a work can be obscene if it appeals to the prurient interest of any small specialized audience (one with unusual paraphilias, for example), "if there are seventeen people in the entire United States who achieve their sexual gratification primarily by fondling stones, then a magazine aimed directly at them which publishes lurid color photographs of rocks and pebbles would be obscene." JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 181 (1985). Feinberg observes that such a magazine would be rescued by the requirement that obscene publications be "offensive." *Id.* Animal torture videos, on the other hand, *are* offensive, but for reasons that have nothing to do with sex.

[61] *See* United States v. Richards, 755 F.3d 269, 279 (5th Cir. 2014) (upholding revised statute on this basis).

[62] Another problem with reliance upon the category of "obscenity" is that the entire category is based on assumptions that are now demonstrably preposterous, notably the notion that masturbation destroys a young person's health. *See* HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA 92–93, 97–107, 394–403 (2002); WALTER KENDRICK, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE 138–43 (1987). The best general history of the

An even more fundamental problem is that, as Genevieve Lakier has shown, *Stevens* misrepresents the history of speech regulation in the United States. The idea of categories of low-value speech is an invention of the Court that has been developed since the 1940s. The history the Court deems dispositive is a history that does not exist.[63] The decision about what kind of speech is unprotected, embodied in present doctrine, cannot be attributed to "a judgment by the American people." At the time of the First Amendment's enactment, there was remarkably little reflection about what it would mean in practice.[64] That task has been left to judges.[65] Modern free speech law is a product of common-law development, not of text.[66]

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masturbation panic, which began in the early 1700s and survives in attenuated form today, is THOMAS W. LAQUEUR, SOLITARY SEX: A CULTURAL HISTORY OF MASTURBATION (2003). There is a legitimate continuing concern about moral harm, but it is not intelligibly confined to sexual material. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1636 (2005) [hereinafter Koppelman, *Does Obscenity Cause Moral Harm?*]; Andrew Koppelman, *Eros, Civilization, and Harry Clor*, 31 N.Y.U. REV. L. & SOC. CHANGE 855, 857 (2007). The immunity of dogfighting videos is a striking illustration.

63 *See generally* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015) (arguing history has never been the basis for determining when the First Amendment protections apply).

64 *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 191 (1985).

65 The idea that a constitutional provision incorporates traditional exceptions is not original with the *Stevens* Court. It was laid down in 1897 in *Robertson v. Baldwin*, 165 U.S. 275 (1897), in which a divided Court upheld against a Thirteenth Amendment challenge a statute authorizing the forcible return of deserting seamen to their vessels. Justice Brown, writing for the Court, explained that

> the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.

Id. at 281. This reading of constitutional rights was cited by the Court as a reliable guide to the interpretation of the First Amendment in *Dennis v. United States*, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring in affirmance); *see also id.* at 534; *id.* at 571 (Jackson, J., concurring in the judgment) (quoting Frohwerk v. United States, 249 U.S. 204, 206 (1919)). But *Dennis* has since been discredited. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 112–21 (1970); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 190–210 (Jamie Kalven ed., 1988); MARTIN H. REDISH, THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA 80–106 (2005). And so has *Robertson*. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 523–26 (1990). The notion of "services which have from time immemorial been treated as exceptional" has generally been neglected by the Supreme Court and has not been much relied on by the lower courts, probably because it simply makes no sense; how can there be an exception that antedates the rule? Justice Harlan, dissenting in *Robertson*, observed that the reliance on established usage was misplaced, since "the clear reading of a constitutional provision relating to the liberty of man [was] departed from in deference to what is called usage which has existed, for the most part, under monarchical and despotic governments." *Robertson*, 165 U.S. at 302. Here, as in another, better known Civil War Amendments case, Harlan's lone dissent seems to

A better account of First Amendment exceptions has been offered by Elena Kagan, in an article written before she became a Justice. Kagan observed that the nonprotection of some kinds of speech represents a contestable value judgment, and may even involve viewpoint discrimination.[67] The category of unprotected obscenity, for example, restricts "a single (disfavored) viewpoint about sexual matters," and "invokes community standards of offensiveness."[68] The viewpoint discrimination rests on the view that "only the restricted ideas cause great harm and have sparse value."[69] Nonetheless, "partly because of the long-established nature of the category, such regulation may give rise to fewer concerns of compromising First Amendment principles."[70] Slippery slope and chilling effect arguments are predictive. If the prediction has been falsified by experience, then these concerns are ameliorated. "A long tradition of regulating a particular category of low value speech," a law professors' brief in *Stevens* observed, "creates a historical understanding of the contours and definition of the category and demonstrates from experience that the category can be regulated without doing undue damage to the First Amendment."[71] The *Stevens* Court cited "historic and traditional categories long familiar to the bar,"[72] but it took the existence of these as evidence for its bogus historical narrative when it is really just an aid to judicial construction.

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have prevailed over Brown's majority opinion. *See* Plessy v. Ferguson, 163 U.S. 537, 537–52 (1896); *id*. 552–64 (Harlan, J., dissenting). Yet *Robertson*'s reasoning continues to shape the First Amendment. The principal difference between the cases is that in *Robertson* the history was not fake.

[66] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 51–76 (2010).

[67] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 473 (1996).

[68] *Id.* at 473 n.166.

[69] Kagan, *supra* note 33, at 899.

[70] *Id.* at 897. Kagan, as Solicitor General, proposed the balancing test that was rejected by the Court in *Stevens*.

The difference between Kagan's article and her position in her brief for the United States is that in the latter, she did not even concede a strong presumption against new categories. Instead, she declared that speech can be regulated on the basis of its content whenever "the First Amendment value of the speech is 'clearly outweighed' by its societal costs." Brief for the United States at 12, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769), 2009 WL 1615365, at *12 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). The explanation of the difference could be the breadth of the statute she was obligated to defend. The law was so loosely worded that it prohibited films of hunting and bullfighting, and documentaries designed to document the mistreatment of animals. *Stevens*, 559 U.S. at 477–82. She may have judged that only a broad balancing test could sustain that statute. In *Reed v. Gilbert*, she endorsed a milder proposition: "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function." 135 S. Ct. at 2238 (Kagan, J., concurring in the judgment).

[71] Brief of Constitutional Law Scholars Bruce Ackerman et al. as *Amici Curiae* in Support of Respondent at 5–6, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2331222, at *5–6.

[72] *Stevens*, 559 U.S. at 468 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

It is puzzling why Chief Justice Roberts declared the shape of the law fixed for all time and then attributed that decision to the Framers. None of the briefs, not even the ones that directly attacked the government's proposed balancing test,[73] proposed anything as wooden and ahistorical as that.

The *Stevens* Court was wrong to disclaim "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[74] The Court has always had, and has often exercised, that authority. The question is how it ought to exercise it.

II. FREE SPEECH RECONSIDERED

A. Misrepresenting Liberalism

The concepts of viewpoint discrimination and low-value speech are judicial constructs. The Court crafted them in an effort to implement the vague command of the First Amendment. It would be ridiculous to protect everything that is done with words, so it is necessary to draw lines.[75] If courts did it in the past, there is no reason why they cannot do it now. So how should a court proceed? How should it respond to a proposal to add a new category of unprotected speech?

To answer that question, we need to begin with the salience question. We need to know why we are protecting speech at all. That will inform us which speech we should especially concern ourselves with. And that in turn will inform us which exceptions we can allow.

Modern free speech theory is dominated, in the courts and the academy alike, by a style of reasoning that posits a few axiomatic purposes of speech—"It is the purpose of the First Amendment to preserve an uninhibited

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[73] In addition to the Brief of Constitutional Law Scholars, see Brief of Amici Curiae Association of American Publishers, Inc. et al. at 11, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2331225, at *11; Brief for the Cato Institute as *Amicus Curiae* in Support of Respondent at 16–28, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2331221, at *16–28; Brief of the DKT Liberty Project, The American Civil Liberties Union, and The Center for Democracy and Technology, as *Amici Curiae* in Support of Respondent at 4–13, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2247129, at *4–13; Brief of First Amendment Lawyers Association as *Amicus Curiae* in Support of Respondent at 9–10, 15–18, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2331224, at *9–10, *15–18; Brief *Amici Curiae* of The Reporters Committee for Freedom of the Press and Thirteen News Media Organizations in Support of Respondent at 20–22, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2219305, at *20–22.

[74] *Stevens*, 559 U.S. at 472.

[75] *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

marketplace of ideas in which truth will ultimately prevail."[76] "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[77] "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it"[78]—from these axioms one deduces detailed rules of law, and deems irrelevant any consequences that were not taken account of in that deduction. These slogans mask many difficulties.[79] Pertinently here, they exclude ideals from consideration. Ideals are central to the free speech tradition.

Liberalism sometimes presents itself as what Brian Barry called a "want-regarding" theory, which tries to satisfy people's wants and goals, whatever they are.[80] This is contrasted with "ideal-regarding theories," which aim to achieve human excellence whether or not people subjectively happen to want it. Some liberal theorists reject any reliance on ideal-regarding theory.[81] A free society, so goes the story, has no ideals of virtue or personal character: it leaves people free to pursue whatever ends they think appropriate, giving them all-purpose means and freedoms with which to do so.[82] The right to free speech is sometimes understood as one such all-purpose freedom.

That story misrepresents liberalism, which in fact is intensely ideal-regarding. Its covert ideal-regarding character is perhaps clearest in the most abstemious want-regarding formulation, that of utilitarianism. Utilitarianism aims to gratify whatever preferences people actually have, leaving them free to prefer whatever ends they find attractive. For any person to pursue general utility as an end however is an extraordinarily demanding

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[76] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[77] Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[78] Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).

[79] *See* Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647 (2013).

[80] BRIAN BARRY, POLITICAL ARGUMENT 38–41 (1965).

[81] *See, e.g.*, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 65–70 (1984). For critique, see Koppelman, *Does Obscenity Cause Moral Harm?*, *supra* note 62, at 1642–43. Rawls, on the other hand, makes clear that his theory of justice is ideal-regarding because it does not hold that all satisfactions are of equal value. JOHN RAWLS, A THEORY OF JUSTICE 326 (1971). Rawls's ideal, however, is more abstract than the one I discuss here, and its abstractness has costs. *See* Andrew Koppelman, *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, 71 REV. POL. 459 (2009).

[82] Or if there are such virtues, they are merely instrumental ones: the traits of character that citizens must have if a liberal society is to function. *See generally* EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990).

task, requiring that I give as much weight to the happiness of others as I do to my own. If I am to pursue a utilitarian policy, I may have to endure the frustration of my own preferences. Utilitarianism cannot explain why I should do that. An intense and demanding benevolence is built into its formulations from the start.[83]

B. Millian Idealism

A canonical statement of the free speech tradition's ideal-regarding aspect is John Stuart Mill's 1859 book *On Liberty*.[84] I will examine Mill's formulation in some detail. It is impossible to demonstrate in this short Article that an entire tradition is ideal-regarding. *On Liberty* is however probably the most influential defense of free speech ever written. Its reliance on a character ideal, and its capacity to make that ideal attractive to its readers, is an important source of that influence.[85]

The liberty that Mill wants to defend not only encompasses "liberty of expressing and publishing opinions" but also

> liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.[86]

The protection of speech is an exception to his principle that the state may interfere with liberty only to prevent harm to others: almost all speech is

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[83] *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 31 (1989).

[84] JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

[85] It is what is generally meant by the familiar "marketplace of ideas," though that term is more commonly associated with Oliver Wendell Holmes. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes's idea of free speech avoids any reliance on ideals, but for that reason it is likely, on close examination, to be strange to contemporary readers. *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 45. For other examinations of the role of a character ideal in the justification of free speech, see generally Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 60 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter Blasi, *Free Speech and Good Character*]; LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); JOHN DURHAM PETERS, COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION (2005). It is possible to reformulate Mill's argument in a way that excludes such considerations. *See, e.g.*, Joshua Cohen, *Freedom of Expression*, *in* TOLERATION: AN ELUSIVE VIRTUE 173, 188 (David Heyd ed., 1996); Gerald F. Gaus, *State Neutrality and Controversial Values in* On Liberty, *in* MILL'S ON LIBERTY: A CRITICAL GUIDE 83, 84 (C.L. Ten ed., 2008). Such reformulations lose in rhetorical power more than they gain in theoretical parsimony.

[86] MILL, *supra* note 84, at 71.

protected even when it is harmful. But the exception is derived from the same commitments that generate the broader protection of liberty.

All this sounds want-regarding, and has often been taken to be so. The *basis* of these claims, however, is ideal-regarding.

Mill's primary reason for demanding this broad liberty is an ideal of individuality. Every individual has an obligation to respond to an inwardly felt calling, which if courageously pursued will bring him closer to the ultimate good. Free speech and freedom of conduct are valuable as means, because they smooth the path toward this ideal.[87]

Society needs "open, fearless characters."[88] Mill cares about the capacity to grasp truth inwardly, not just by outward show. He values "the clearer perception and livelier impression of truth produced by its collision with error."[89] If the reasons for even a true opinion are held without understanding the arguments both for and against it, "it will be held as a dead dogma, not a living truth."[90] Truth held dogmatically "is but one superstition the more, accidentally clinging to the words which enunciate a truth."[91] The pursuit matters more than the attainment: "Truth gains more even by the errors of one who, with due study and preparation, thinks for himself than by the true opinions of those who only hold them because they do not suffer themselves to think."[92] Mill thinks that the moral distress of contemplating ways of life antithetical to your own is good for you.[93] "[T]he most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves . . . ."[94] Freedom is good because it produces better people:

> It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits

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87 *See* FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 271–74 (1984).

88 MILL, *supra* note 84, at 94.

89 *Id.* at 76.

90 *Id.* at 97.

91 *Id.*

92 *Id.* at 95.

93 *See* JEREMY WALDRON, *Mill and the Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 115 (1993).

94 JOHN STUART MILL, *Considerations on Representative Government*, *reprinted in* ESSAYS ON POLITICS AND SOCIETY, COLLECTED WORKS OF JOHN STUART MILL vol. XIX 390 (John M. Robson ed., 1996). The importance of ideals of virtue in Mill is explored in PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM 134–69 (1999).

> imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant ailment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to.[95]

As John Durham Peters observes, Mill's ideal of character is an unstable mix of stoicism and romanticism. As listeners, citizens must be willing to subject their dearest beliefs to challenge and criticism, and learn to articulate views the opposite of their own. Yet as speakers, they must present their ideas powerfully and with conviction.[96]

The valuable character traits promoted by a regime of free speech have a negative counterpart in the malign effects of censorship. "The greatest harm done is to those who are not heretics, and whose whole mental development is cramped and their reason cowed by the fear of heresy."[97] The consequence is "a low, abject, servile type of character,"[98] whose "human capacities are withered and starved."[99] Mill bombards it with nasty metaphors: automatons in human form, apes, cattle, sheep; a "stagnant pool."[100] The rhetorical aim is to make the reader see the value of the kind of character that Mill prizes. Alan Ryan observes that *On Liberty* "does not so much lay out logically compelling arguments as depict a type of character to which one can react favourably or unfavourably."[101]

One of the central character traits that concern Mill is the "moral courage of the human mind."[102] He feared "social tyranny more formidable than many kinds of political oppression," which "leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul

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95 MILL, *supra* note 84, at 127. The same theme is apparent in his essay *The Subjection of Women*, which condemns "the dull and hopeless life to which [society] often condemns them, by forbidding them to exercise the practical abilities which many of them are conscious of, in any wider field than one [childrearing] which to some of them never was, and to others is no longer, open." JOHN STUART MILL, THE SUBJECTION OF WOMEN 99–100 (M.I.T. Press 1970) (1869).

96 PETERS, *supra* note 85, at 130–36.

97 MILL, *supra* note 84, at 95.

98 *Id.* at 114.

99 *Id.* at 126.

100 *Id.* at 129.

101 ALAN RYAN, J. S. MILL 141 (1974). For a similar reading of Mill, see ISAIAH BERLIN, *John Stuart Mill and the Ends of Life*, *in* FOUR ESSAYS ON LIBERTY 173 (1969).

102 MILL, *supra* note 84, at 94.

itself."[103] This could only be prevented by a shared understanding of the value of individuality and choice. "Genius can only breathe freely in an *atmosphere* of freedom."[104]

C. The Persistence of the Ideal

I have focused on Mill, whose statement of his ideal is unusually well developed and influential, but he is hardly idiosyncratic. Similar aspirations can be found in many of the classic defenders of free speech. Milton thought that a regime of free speech was valuable because it was a stimulant to an indispensable spiritual exercise: "Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary."[105] Justice Brandeis thought that free speech was valuable because it would produce "courageous, self-reliant men, with confidence in the power of free and fearless reasoning."[106] He thought it "hazardous to discourage thought, hope and imagination," because "the greatest menace to freedom is an inert people."[107] The same theme appears, in somewhat rarefied form, in contemporary theorists who try to reduce free speech to a single value, such as democracy, autonomy, or self-realization.[108]

To some extent, these virtues are instrumentally necessary for democracy to function.[109] But they are not only valued for that reason. As Justice Brandeis observed, liberty is valuable "both as an end and as a means."[110] These traits of character are deemed valuable in themselves.

The individual- and democracy-based accounts of free speech complement one another. Both of them give weight to the views of each individual. All must be able to participate in public discourse. No one may be silenced.

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103 *Id.* at 63.

104 *Id.* at 129.

105 John Milton, *Areopagitica*, *reprinted in* COMPLETE POEMS AND MAJOR PROSE 728 (Merritt Y. Hughes ed., 1957); *see* Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment* (Yale L. Sch. Occasional Papers, Paper No. 6, 1995), http://lsr.nellco.org/yale/ylsop/papers/6.

106 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see* Blasi, *Free Speech and Good Character*, *supra* note 85, at 78, 84; Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 668, 670 (1988).

107 *Whitney*, 274 U.S. at 375.

108 *See generally* Koppelman, *supra* note 79 (discussing many of these).

109 *See supra* note 82.

110 *Whitney*, 274 U.S. at 375.

We have some experience with an America in which these virtues are neglected. During our most repressive periods, during the Palmer raids after World War I and the McCarthy period in the 1950s, the sense of being watched was pervasive. During the loyalty probes of the latter period, the government was empowered to decide what thoughts and ideas would be permitted and which were "disloyal."[111] The consequence was a climate of fear. Everyone understood that severe punishment could be imposed for the mere holding of unpopular political positions.[112] Its effect was to deprive the electorate of legitimate political choices.

The ideal is a broadly democratic public discourse in which everyone has an opportunity to participate in the formation of public opinion. Free speech law has been shaped by the need for widespread opportunities for expression. Public fora such as streets and parks must be available for speakers;[113] so must any public forum designated by the state;[114] cheap means of communication, such as handbills or signs in the windows of homes, cannot be prohibited.[115] Otherwise valid restrictions on speech may be invalid if they create a chilling effect on protected speech.[116]

Free speech is a tradition that is fundamentally concerned with bringing about a state of affairs in the world: the maintenance of the complex system of practices and goods that constitutes public discourse. Robert Post observes that this autonomous sphere of discussion has a specific, collective goal: "to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society."[117] That goal shapes the doctrine. "At root, First Amendment prohibitions against viewpoint and content discrimination express the essential postulate that all persons within public discourse should be

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111 GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 352 (2004).

112 *See* REDISH, *supra* note 65 (discussing abuses during the McCarthy era).

113 Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).

114 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44–46 (1983).

115 City of Ladue v. Gilleo, 512 U.S. 43, 45, 58–59 (1994); Schneider v. State, 308 U.S. 147, 164, 165 (1939).

116 United States v. Williams, 553 U.S. 285, 292 (2008); N.Y. Times v. Sullivan, 376 U.S. 254, 271–80 (1964).

117 ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 145 (1995). The goal is democracy broadly understood, reaching beyond government to popular control of culture. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3–4 (2004). One goal is a kind of mutual transparency. *See* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMMENT. 283, 285–86, 301–02 (2011).

equally free to say or not say what they choose."[118] In order to realize that aspiration, citizens have to have the kind of character that facilitates and inclines toward participation in that discourse.

Protection of some kinds of speech helps to promote that ideal. Other kinds of speech are tangential to it, or even irrelevant. That explains the limited salience of free speech. Contract law, for example, is outside the scope of protection—it is not even an exception to free speech protection—because it is not within the sphere of public discourse.

The central ideal-regarding goal of free speech is a distinctive type of human flourishing, one that cannot occur except in what Mill called "an atmosphere of freedom."[119] A part of that flourishing is the unquestioned assumption of one's right to speak and to play with ideas. Courage is not quite the right term because it implies that one is aware of danger and has the fortitude to proceed nonetheless. The state of mind one seeks is rather the confidence characteristic of young people who have never suffered serious injury, and who perform impressive and dangerous feats because they unconsciously, irrationally feel sure that they cannot really be hurt. Speakers should have the kind of confidence that does not even imagine that their opinions could get them into trouble with the police. That confidence is vulnerable.[120] When it is attacked, the free speech ideal is a reason for deploying the law to defend it.

III. REVENGE PORNOGRAPHY AND SILENCING

A paradigmatic antonym to this confidence is the disrupted state of mind induced by threats. Fear is one of the basic emotions. The mechanism of its arousal is based in the brain stem, a part of the neurological system we share

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[118] ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 22 (2012). This is not to unqualifiedly embrace Post's free speech theory, see Koppelman, *supra* note 79, at 677–79, but our differences are not pertinent here.

[119] MILL, *supra* note 84, at 129 (emphasis omitted).

[120] The persistent effect of repression is nicely illustrated by this story told by Clancy Sigal, a writer whose parents were arrested and jailed during the Palmer raids of 1920. Decades later, when FBI agents arrived to question Sigal about his politics during the cold war, Sigal noted,

> [M]y mother politely met them at the door, invited them in for coffee and charmed them out of their intended purpose. But she was pale and terrified when I got home. In an understandable slip of the tongue she said: "The Palmers have been here. What have you done?"

Clancy Sigal, Opinion, *John Ashcroft's Palmer Raids*, N.Y. TIMES (Mar. 13, 2002), http://www.nytimes.com/2002/03/13/opinion/john-ashcroft-s-palmer-raids.html. Thanks to Bonnie Honig for the reference.

with reptiles. The anxiety that is triggered can preoccupy a person long after the danger has disappeared. This is the most fundamental reason why threats are not protected speech.[121] A person in fear is a poor participant in democratic deliberation. One cannot think about the objects of public discourse because it is hard to concentrate on anything.

Revenge pornography sometimes has that effect, and is intended to have that effect.[122] "I just feel like I'm now a prime target for actual rape," one victim reported. "I never walk alone at night, and I get chills when I catch someone staring at me. I always wonder to myself, 'Are they staring at me because they recognize me from the Internet?'"[123] She closed her Facebook page and LinkedIn profile, withdrew from online activities, and considered fleeing the job market altogether and starting a business partnership with a friend who would keep her name out of the marketing materials.[124] Other victims report post-traumatic stress disorder, anorexia nervosa, depression, and anxiety, which grows more severe over time.[125] A common reaction is to try to make oneself as invisible as possible. Revenge pornography has induced women to quit their jobs, disappear from the Internet, and move away from their homes.[126]

Certain feminist and critical race theorists, arguing for the restriction of misogynistic pornography and hate speech, have argued that such speech is antagonistic to free speech values because it silences its targets. This silencing happens through direct intimidation and by creating a cultural climate that discredits what women and African Americans have to say.[127]

These arguments have not been persuasive, and while they are still made, they are less prominent than they once were. The reason they failed was that,

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121 *See* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1339–46 (2006).

122 The question, which the Court recently failed to resolve, whether the fear engendered by a threat, in order to be unprotected, must be caused intentionally or merely recklessly, thus is not pertinent here, where both are the case. *See* Elonis v. United States, 135 S. Ct. 2001, 2004, 2013 (2015).

123 CITRON, *supra* note 3, at 48.

124 *Id.*

125 *Id.* at 10–11.

126 *See id.* at 1–21, 45–50.

127 *See, e.g.*, RAE LANGTON, SEXUAL SOLIPSISM: PHILOSOPHICAL ESSAYS ON PORNOGRAPHY AND OBJECTIFICATION 2, 3–4 (2009); CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 163–97 (1987); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7 (1993). A useful rejoinder is HENRY LOUIS GATES ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994).

while free speech theory can hardly be indifferent to silencing when it occurs, and although such silencing effects are clearly part of the daily experience of African Americans and women, the advocates of censorship were never able to establish a persuasive causal nexus between silencing and any particular speech act. It was impossible to show that any single instance of racist speech or pornography could have that kind of devastating effect on a person.[128] Speech is certainly integral to the problem: racism and sexism are ideas in people's heads, and those ideas get transmitted from one generation to the next by means of language. Antidiscrimination law is necessarily committed to the reshaping of culture to eliminate or marginalize such malign ideologies.[129] But censorship is the wrong tool for this job. The cost to free speech of a hate speech prohibition—and there is every reason to think that it would be substantial[130]—would not buy much.

Revenge pornography is different. There is a tight causal connection between speech and harm. A single posting to a website can have a permanently life-altering effect on its target, imposing a spoiled identity that it is impossible to ever escape.[131]

Free speech depends on a willingness to disclose one's thoughts with no fear of crushing reprisal. It aims "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[132] That aim is thwarted if you protect *this* speech.

Only a small minority is likely to be placed in this position. But there is still a free speech problem if the aspiration is to enable everyone to participate

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[128] Compare Rae Langton, *Subordination, Silence, and Pornography's Authority*, *in* CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 261, 261–83 (Robert C. Post ed., 1998), with the skeptical response in Leslie Green, *Pornographizing, Subordinating, and Silencing*, in CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION, *supra*, at 285, 285–311. *See also* SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH (Ishani Maitra & Mary Kate McGowan eds., 2012) (reviewed in Andrew Koppelman, Book Review, 123 ETHICS 768 (2013)). Catharine MacKinnon claims that her anti-pornography statute would merely allow "anyone hurt through pornography to prove its role in their abuse." CATHERINE A. MACKINNON, ONLY WORDS 92 (1993). That, however, really means that juries would be empowered to do what they like to producers of pornography. Learned Hand observed long ago that a test for unprotected speech that leaves great discretion to juries would likely be used improperly to suppress unpopular speech. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 721 (1975).

[129] *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 8 (1996).

[130] *Id.* at 220–65.

[131] *See generally* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

[132] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).

in public discourse. Part of the legitimating force of public discourse is that there are low barriers to entry.

I am not claiming that this egalitarianism is a necessary part of any possible free speech ideal. My claim is historically contingent. In early America, the audience for books and newspapers was presumptively white, male, and upper class. Indeed, printing was one of the markers that constituted a specifically white community.[133] A lively debate took place among Southern white Americans, in the late nineteenth century, over the proposal to disenfranchise black citizens. The proposal was adopted.[134] Many public spheres imply narrow audiences.

The question is what ideal animates *our* public sphere. I submit that our ideal is an egalitarian one. I have not just brought equality into free speech theory because I happen to like it. It is integral to the prevailing ideal.

What does it mean if the harms of revenge pornography go unredressed? Criminal law is about equal status in society. If harm to a class of people is tolerated by the law, then that signifies the inferior status of those who can be harmed with impunity.[135] The state thereby ratifies spoiled identity. If the harm of revenge pornography is not remediable, it means that the targets are fair game.

I have been arguing that an important justification of freedom of speech is an ideal of character. Recognition of that ideal makes possible a response to a certain postmodern objection to the idea of free speech.[136] The objection is that censorship in some form is inevitable. By constituting limited possibilities of expression, any social order will generate a pattern of both speech and silence. Recognition of that fact threatens to enfeeble censorship as a normative concept.[137] There simply is no fact in the world that can be singled out as

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[133] MICHAEL WARNER, THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA 12 (1990).

[134] *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 67–109 (3d rev. ed. 1974).

[135] Jean Hampton, *A New Theory of Retribution*, *in* LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS 377, 387–88 (R.G. Frey & Christopher W. Morris eds., 1991); Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 122 (Jeffrie G. Murphy & Jean Hampton eds., 1988); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 115–32 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1679 (1992).

[136] For one prominent formulation, see STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994), further critiqued in Koppelman, *supra* note 79, at 686–87.

[137] Robert C. Post, *Censorship and Silencing*, *in* CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION, *supra* note 128, at 1–2.

censorship. "Censorship" is a conclusion, not a premise; it is the label we place on the speech restriction that we have decided on other grounds to stigmatize as wrongful.[138]

The normative claim can be rehabilitated if one acknowledges, with Foucault, that power can be productive.[139] Free speech is the aspiration to deploy power to produce a distinctive kind of person in a distinctive kind of society. It lives up to that aspiration if it succeeds in its productive ambitions—if it actually produces the kind of people it hopes to produce: people who measure up to the Mill–Brandeis ideal.[140]

Revenge pornography is a new problem, and one may wonder whether it will be persistent enough to justify modifying free speech law. Humbach speculates that "in a few years' time, people will look back and wonder what all the fuss was about—and the sooner it becomes known . . . just how common it is to take such pictures, the sooner people will stop acting as though doing so is somehow reprehensible or outré."[141] If he is right, then this particular type of bad behavior will become increasingly harmless—no more discrediting than the observation that a married woman sometimes has sex with her husband. It will no longer damage a woman's employability or reputation.

I don't buy it. In a world in which women are pervasively integrated into professional workplaces, they still have to struggle with a cultural context in which being sexualized is discrediting. The question of what to wear to work is far more fraught for women than for men. So is the question of professional demeanor. Justice Ginsburg observes that the ban on sex discrimination is violated when "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed"[142]—or, as she put it more pithily in oral argument, when "one sex has to put up with something that the other sex doesn't have to put up with."[143] If, however, this is the test, then antidiscrimination law is routinely violated because women routinely put up with nonsense at work that men do not have to put up

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138 Frederick Schauer, *The Ontology of Censorship*, *in* CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION, *supra* note 128, at 147, 160.

139 *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 27 (Alan Sheridan trans., Vintage Books 1979) (1975).

140 Foucault is suspicious of productive power, but because the exercise of that power is inevitable, a hermeneutic of unrelieved suspicion leads nowhere. *See* CHARLES TAYLOR, *Foucault on Freedom and Truth*, *in* 2 PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 152 (1985).

141 Humbach, *supra* note 24, at 230 n.69.

142 Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

143 Linda Greenhouse, *Ginsburg at Fore in Court's Give-and-Take*, N.Y. TIMES, Oct. 14, 1993, at A1.

with. Professional discrediting through sexualization of one's identity is a prime example.

This is unlikely to change in our lifetimes. We do not now have a cure for sexism. It is however a disease that can be managed. The key to managing a chronic disease is to frankly acknowledge and respect one's continuing vulnerabilities. Perhaps we must endure a continuing cultural climate of sexism. We need not endure a class of notoriously damaged women.

A familiar example is Monica Lewinsky. The smirk that is often elicited by the mere mention of her name is a powerful marker of her degraded status, years after her widely publicized affair with President Bill Clinton. "I became a social representation, a social canvas on which anybody could project their confusion about women, sex, infidelity, politics, and body issues."[144] She reports the consequences of that identity in a brief memoir written more than fifteen years after the Starr Report "included chapter and verse about my intimate sexual activities."[145] In the years that followed, she found that she either could not get a job or, in a few cases, she "was right for all the wrong reasons": a prospective employer wanted to trade on her notoriety.[146] "I eventually came to realize that traditional employment might not be an option for me."[147] At a taping of a public Q&A for an HBO documentary, she was asked by an audience member, "How does it feel to be America's premier blow-job queen?"[148] During Hillary Clinton's run for the 2008 Democratic presidential nomination, "I remained virtually reclusive, despite being inundated with press requests."[149] She has recently begun to try to craft a new public persona as a public intellectual. But the only thing anyone wants to hear her talk about is her own narrative of humiliation. And it took years for her to get where she is now:

> Unlike the other parties involved, I was so young that I had no established identity to which I could return. I didn't "let this define" me—I simply hadn't had the life experience to establish my own identity in 1998. If you haven't figured out who you are, it's hard not to accept the horrible image of you created by others. (Thus, my compassion for young people who find themselves shamed on the

144 Monica Lewinsky, *Shame and Survival*, VANITY FAIR (June 2014), http://www.vanityfair.com/style/society/2014/06/monica-lewinsky-humiliation-culture.
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*

> Web.) Despite much self-searching and therapy and exploring of different paths, I remained "stuck" for far too many years.[150]

Free speech law threatens to reproduce this effect on a massive scale.

The free speech costs of a revenge pornography law are undoubtedly substantial. The law's purpose is to suppress a viewpoint: that a specific woman is deservedly discredited by her sexuality. Sexism is antithetical to liberalism,[151] but liberalism generally addresses it by means other than the restriction of speech. Here, however, there is no other way to do it. The general principles that appropriately govern free speech law should not govern here.

Revenge pornography produces emotional injury, damages social standing, and is economically destructive. But it misdescribes the problem to say that these harms are to be balanced against the imperatives of the liberal political order. This speech harms the liberal political order by driving some citizens out of it. The harms of dogfighting, or of visible, nasty signs at funerals are severe, I think severe enough to justify regulation, but they do not produce harms of this kind.

IV. HOW TO CARVE OUT EXCEPTIONS

The task of carving out exceptions has a structure that is familiar from the law of religious accommodation. American law sometimes gives religion special treatment. Quakers' and Mennonites' objections to participation in war have been accommodated since Colonial times. Sacramental wine was permitted during Prohibition. Today the Catholic Church is exempted from antidiscrimination laws when it denies ordination to women. We exempt people from generally applicable laws when they have sufficiently urgent reasons (religious scruples have traditionally been held to be such) and the law's purposes won't be thwarted by accommodation.[152]

When an exception to free speech protection (supposing it already settled that we are in the realm of free speech salience) is proposed, the courts have to ask whether the harm in question is sufficiently harmful to modify free speech

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150 *Id.*

151 *See* KOPPELMAN, *supra* note 129, at 115–45.

152 *See* Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 73 (2013), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf; Andrew Koppelman, *Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom*, COMMONWEAL MAG. (Mar. 27, 2015, 12:00 PM), https://www.commonwealmagazine.org/nonexistent-irreplaceable.

doctrine. No formula can help with that step. Harm is a setback to interests, and there is perpetual contestation about which human interests are important. The Court has never devised a test for what counts as a compelling state interest.

Pace the Court, it is not possible to freeze in advance the categories of harm that call for exceptions. Human vulnerability takes many forms, and no one can anticipate all of the harmful things that can be accomplished with speech in the future.

Assessing the degree of harm is inevitably a contestable undertaking. But one factor must be whether the harm reaches into the area of free speech salience. Harm that silences a class of speakers has to be taken seriously.

If the harm is serious enough, it next must be asked whether that harm can be prevented without chilling the "atmosphere of freedom" that free speech seeks to foster. Even some speech that is antithetical to the liberal order has to be tolerated. Communists did not believe in free speech, and so it was argued in the 1950s that their speech should not itself be protected.[153] But the consequence of that non-protection was an atmosphere of fear that reached far beyond the Communists. Much of the flowering of free speech theorizing in the 1960s was born of a determination not to repeat that experience.[154]

That leads us to a lawyer's question: can the category of unprotected speech be crafted with sufficient precision that clear notice is given as to which speech is protected and which is unprotected? Categories of low-value speech must be "well-defined and narrowly limited."[155] That responds to familiar concerns of "chilling effect" and "slippery slope."

If, however, a category of unprotected speech can be crafted with enough precision, then exceptions to ordinary free speech principles, even the prohibition of viewpoint discrimination, can be consistent with the broader purposes of the system of freedom of expression.

A final objection to this kind of exercise is that, even if free speech law is a judicial construct, its stability and effectiveness depend on extreme judicial

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[153] Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 186–89 (1956).

[154] *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–93 (1963). This theory is also discussed in Koppelman, *supra* note 79, at 704–06.

[155] United States v. Stevens, 559 U.S. 460, 468–69 (2010) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942)).

reluctance to carve out new categories of non-protection. Dissenting political speech has often been regarded as having low value, and if courts took for granted a power to make exceptions whenever the benefits of censorship seemed to outweigh the costs, America would be a much more repressive country. Chief Justice Roberts's mythical story may be intellectually indefensible, but it is still better to over-constrain judges than to under-constrain them.

Overconstraint has its costs, however. Free speech doctrine needs to honestly take account of the harm that speech can sometimes do.[156] When the harm is severe enough, a new exception can be created, as happened with child pornography.[157] There is no way to determine whether the danger of non-protection of speech outweighs the benefit without considering the magnitude of the harm at issue.

CONCLUSION

Revenge pornography prohibitions raise a serious free speech problem. They suppress truthful information, and they do so in order to prevent audiences from being persuaded, by that information, to form a viewpoint with which government disagrees: specifically, that this woman is a despicable whore because she allowed this picture to be taken. The harm that this speech causes is, however, so severe that an exception to ordinary free speech principles is justified.

The Court has declared that no new free speech exceptions can be considered, ever again. With that declaration, it has transformed the idea of free speech, one of the great achievements of modern law, into a set of rules to be blindly followed.

Legal rules inevitably tend to become more definite over time as precedents accumulate. This growing clarity is valuable. Notice is a central element of the rule of law. The complex web of free speech rules that the Supreme Court has crafted is an important safeguard against the abuse of government power, one that could not be duplicated by vague standards. But these judge-made rules should not be placed beyond reconsideration.

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156 *See* Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81.

157 *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 210–11, 230–34 (2001).

Roscoe Pound noted more than a century ago the tendency of law to degenerate into a "mechanical jurisprudence," to "stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another."[158] The tendency is inevitable:

> The effect of all system is apt to be petrifaction of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. This is so in all departments of learning.[159]

The twentieth-century Court that constructed free speech doctrine was engaged in the precise creative procedure the present Court deems "startling and dangerous." Today's law purports to be historically grounded but in fact paradoxically depends for its justification on historical amnesia. Whatever else one can say about the jurisprudence the Court has constructed, it certainly is mechanical.

And people, whom free speech is supposed to empower, are being crushed between the gears.

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158 Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908).
159 *Id.*