



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 4, 2014

Senator Betsy Close
900 Court Street NE S303
Salem OR 97301

Re: "Revenge porn" and Oregon law

Dear Senator Close:

You asked our office whether any current Oregon statutes prohibit "revenge porn" and, if not, whether an Oregon bill prohibiting revenge porn, similar to one from the New York State Assembly, would violate the Oregon or United States Constitution.

Under current Oregon law, it is unlawful to create a video or photograph of a person in a state of nudity without that person's consent if the person is in a place and circumstances where the person has a reasonable expectation of personal privacy.¹ It is also unlawful to create, possess or distribute a video or photograph of a minor engaged in sexually explicit conduct.² However, if a pornographic video or photograph was consensually created and no minors were involved, in Oregon it is not a criminal offense to later distribute the video or photograph, even without the consent of the person who is the subject of the pornographic video or photograph.³

There are two states that have enacted legislation⁴ and several other states that have introduced bills to criminalize the nonconsensual distribution of pornographic videos and photographs that were created consensually. One example of such legislation is the bill from the New York State Assembly that you included with your opinion request.⁵ However, drafting a bill here in Oregon that was based on the New York bill would be problematic due to the protections contained in Article I, section 8, Oregon's constitutional guarantee of free expression.

Article I, section 8, of the Oregon Constitution, states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." The protection of the guarantee of free expression "extends not only to written and spoken communications, but also to verbal and nonverbal expressions in film, photographs, and the

¹ ORS 163.700.

² ORS 163.670, 163.684, 163.686, 163.687.

³ There is a civil cause of action for distributing a video or photo of a person in a state of nudity without the person's consent. ORS 30.865.

⁴ New Jersey and California.

⁵ Bill No. A08214 (2013).

like.” *State v. Stoneman*, 323 Or. 536, 541 (1996). When confronted with an Article I, section 8, challenge, Oregon courts employ a test first developed in *State v. Robertson*, 293 Or. 402 (1982). The first step in this test is to divide the universe of expression-related statutes into two categories: “those that focus on the content of speech and those that focus on the effect of speech.” *Stoneman* at 544. Laws placed in the first category, those that focus on the content of speech, are unconstitutional unless they are “wholly confined within some historical exception.”⁶ *Robertson* at 412. Laws placed in the second category,⁷ those that focus on the effect of speech, will survive constitutional scrutiny as long as they do not reach “privileged communication.” *Robertson* at 417-418.

An Oregon court would likely find that a statute based on the New York State Assembly bill is focused on the content of a communication protected by Article I, section 8, and is unconstitutional. However, if the statute instead focused on the harm caused by a particular type of communication rather than the content of the communication, an Oregon court would likely find the statute to be constitutional unless it is overbroad. As an example in current law, the crime of harassment prohibits the harassment or annoyance of a person and specifies that one way of causing that harm is by speech.⁸

If a revenge porn statute prohibited harassing, intimidating or causing distress to a person by distributing a pornographic video or photograph of the person without that person’s consent, rather than prohibiting the act of distribution itself, such a statute would have a much better chance of surviving constitutional scrutiny by Oregon courts. In order to survive an overbreadth challenge, the statute would also need to be drafted in such a way as to not sweep in forms of expression that do not cause harm and should not be punished. *State v. Johnson*, 345 Or. 190, 196 (2008). A statute that was both tailored to focus on the harm caused by speech and limited in scope would very likely survive a First Amendment analysis as well.⁹

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⁶ The historical exception to Article I, section 8, includes “perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.” *Robertson* at 412. The court has declined numerous opportunities to expand upon this list. See, e.g., *State v. Moyle*, 299 Or. 691, 696 (1985) (rejecting historical exception for “non-extortionate written threats”); *State v. Henry*, 302 Or. 510, 521 (1987) (rejecting historical exception for obscenity); *State v. Ciancanelli*, 339 Or. 282, 321-322 (2005) (rejecting historical exception for live sex shows). It is unlikely that the court would find a statute prohibiting revenge porn to be wholly contained within this exception.

⁷ The court also recognizes a third *Robertson* category for laws that do not explicitly refer to expression but, under the facts of a particular case, are applied to restrict expressive activity. See *City of Eugene v. Miller*, 318 Or. 480 (1994). While these laws are facially valid, a defendant charged for expressive activities may assert that the laws violate Article I, section 8, as applied.

⁸ ORS 166.065. Note, however, that the Oregon Supreme Court has held that at least one part of the harassment statute, ORS 166.065 (1)(a)(B), is unconstitutionally overbroad. *State v. Johnson*, 345 Or. 190 (2008).

⁹ *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012).

private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to read "Dexter A. Johnson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

By
Jessica L. Minifie
Deputy Legislative Counsel