MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 47 | Issue 3 Article 9

2021

Minnesota Revenge Porn Law: A Look at the State v. Casillas Decisions

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MINNESOTA REVENGE PORN LAW: A LOOK AT THE *STATE V. CASILLAS* DECISIONS

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I. INTRODUCTION

"Revenge porn,"[1] otherwise known as the dissemination of nonconsensual pornography, is the sharing of images or videos that portray a person engaged in an intimate or sexually explicit act without that person's consent.[2] Although the term "revenge porn" would seem to only entail

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[1] "Revenge porn" and "nonconsensual photography" will be used interchangeably in this Article. The term "revenge porn" has been criticized by scholars as an inaccurate term because the disseminated content is not limited to disseminators seeking revenge. Alisha Kinlaw, *A Snapshot of Justice: Carving Out a Space for Revenge Porn Victims Within the Criminal Justice System*, 91 TEMPLE L. REV. 407, 409 (2019).

[2] Mary A. Franks, *Frequently Asked Questions*, CYBER C.R. INITIATIVE, https://www.cybercivilrights.org/faqs/ [https://perma.cc/EEE2-A9F4] [hereinafter Franks, *Frequently Asked Questions*]. Apeksha Vora, *Into the Shadows: Examining Judicial Language in Revenge Porn Cases*, 18 GEO. J. GENDER & L. 229, 229 (2017) ("Revenge porn, more formally known as nonconsensual pornography, entails the dissemination of intimate and/or sexually explicit images of a person without his or her consent. The victim may have

sexually explicit content distributed with reprisal, its scope encompasses a variety of personal content obtained with or without consent, such as intimate images or videos privately shared with another in the context of a relationship or unshared content obtained by hackers.[3]

Unlike other sex or privacy crimes, "revenge porn perpetuates the violation by allowing the public to witness the crime, memorializing a traumatic experience in the victim's life."[4] It is an act that rips away one's agency.[5] With the rise of internet technology and the use of social media, revenge porn is an ever-present threat to individuals that take record of their bodies. "One in [ten] former partners threaten to post sexually explicit images of their exes online, and an estimated [sixty] percent follow through," and more than eighty percent of revenge porn content was recorded as "selfies."[6] In our society, in which seventy percent of Americans are active social media users,[7] one in eight has been a victim of revenge porn.[8] The "first ever nation-wide study to profile the rates of nonconsensual pornography victimization and perpetration" determined that women are 1.7 times more likely than men to be victimized or threatened to have their content released,[9] and other sources report that at least eighty percent of revenge porn victims are women.[10] These women are most often within the age of fifteen to twenty-nine years old.[11] Forty-seven percent of victims contemplate suicide after learning about the dissemination.[12] Furthermore, revenge porn websites have recently multiplied in number, adding to the already large availability of pornographic sites that likewise allow users to

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taken the photographs herself or the photographs may have been taken, either with or without the victim's consent, by the eventual poster.").

[3] Franks, *Frequently Asked Questions*, *supra* note 2.

[4] Kinlaw, *supra* note 1, at 411.

[5] Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 309 (2005) (defining "agency" as "the power of persons, at the individual or collective levels, to develop and achieve creative goals, including social and political change, within their social environment").

[6] Amanda Levendowski, *Our Best Weapon Against Revenge Porn: Copyright Law?*, THE ATLANTIC (Feb. 4, 2014), https://www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/ [https://perma.cc/XU7E-YUQH].

[7] *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), https://www.pewinternet.org/fact-sheet/social-media/ [https://perma.cc/L4M4-8U6Z].

[8] *Id.*

[9] ASIA A. EATON, HOLLY JACOBS & YANET RUVALCABA, 2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION: A SUMMARY REPORT 4, 12 (2017).

[10] Levendowski, *supra* note 6.

[11] AMANDA LENHART, MICHELE YBARRA & MYESHIA PRICE-FEENEY, NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" 5 (2016).

[12] Cynthia Barmore, *Criminalization in Context: Involuntariness, Obscenity, and the First Amendment*, 67 STAN. L. REV. 447, 449 (2015).

post and reproduce the content.[13] Whether the private content is disseminated by text message, e-mail, on a social media platform, or on a site tailored specifically for revenge porn, the perpetrators often publish the victim's personal information such as her name, address, social media profiles, and employer's information.[14]

Despite these findings, federal and state judicial and legislative systems have remained stagnant in creating laws that help revenge porn victims find recourse. As discussed in further detail below, Congress has yet to pass any federal law that protects victims of revenge porn.[15] Although forty-five states have passed revenge porn laws to date,[16] many such laws are too narrow or too broad in breadth, allowing perpetrators to circumvent them or challenge their constitutional validity.[17] Furthermore, only eleven

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[13] Lorelei Laird, *Victims Are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, A.B.A. J. (Nov. 1, 2013), https://www.abajournal.com/magazine/article/victims_websites_photos_consent [https://perma.cc/T7WB-7U3Z].

[14] Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–51 (2014).

[15] At the time this Article was written, there was no federal law criminalizing the nonconsensual dissemination of sexually explicit or intimate images. In 2017, the "Ending Nonconsensual Online User Graphic Harassment Act of 2017" (also known as the "ENOUGH Act") was introduced in the Senate. The bill "amends the federal criminal code to make it a crime to knowingly distribute (or intentionally threaten to distribute) an intimate visual depiction of an individual with knowledge of or reckless disregard for the individual's lack of consent, reasonable expectation of privacy, and potential harm; and without a reasonable belief that such distribution touches a matter of public concern." S. 2162, 115th Cong. (2017). However, this legislation is yet to pass. *See id.* § 1 (as reported by S. Comm. on the Judiciary, November 28, 2017).

[16] *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER C.R. INITIATIVES, https://www.cybercivilrights.org/revenge-porn-laws/ [https://perma.cc/EFT9-PFB2]. Note that this source does not take into consideration that section 617.261 of the Minnesota Statutes has been invalidated by the court, nor does it have updated data as to whether any other states have invalidated their revenge porn statutes as well.

[17] Although California's original 2013 revenge porn proposal was drafted to be much more inclusive, the language of the final bill was so narrow that it was deemed ineffective by victims and advocates because it only punished people for distributing pictures "that they themselves had taken of the victim." Jessica Roy, *California's New Anti-Revenge Porn Bill Won't Protect Most Victims*, TIME (Oct. 3, 2013), https://nation.time.com/2013/10/03/californias-new-anti-revenge-porn-bill-wont-protect-most-victims/ [https://perma.cc/G7A6-DBYA]; CAL. PENAL STAT. § 647(j)(4) (West, Westlaw through Ch. 17 of 2021 Reg. Sess.). The statutory language has been updated substantially since then and now includes distribution—personally or via a third party—and expands the types of images included. CAL. PENAL STAT. § 647(j)(4) (West, Westlaw through Ch. 17 of 2021 Reg. Sess.). Arizona's original 2014 statute was overly broad and did not require any intent by the distributor to cause emotional harm. Barmore, *supra* note 12, at 452 (citing ARIZ. REV. STAT. ANN. § 13-1425(A) (West, Westlaw through April 20, 2021)) ("It is unlawful to intentionally . . . distribute . . . [an image] of another person in a state of nudity or engaged in specific sexual activities if the person knows or should have known that the depicted person has not consented to the disclosure."). However, the law has since been amended to include an intent element—making it more

states provide civil remedies for victims of revenge porn.[18] On the one hand, the increasing number of state legislatures that enact revenge porn statutes is telling of the severity of the issue and the dire need for a federal law. On the other hand, even where laws that seem to protect victims exist, victims may face gender bias in the courtrooms, a bias of which is often injected directly into a judicial opinion's interpretation of a statute's language.

In this Article, I seek to create urgency around the need for effective revenge porn laws to protect our increasingly vulnerable society. In Part II, I discuss the existing alternative legal frameworks that victims may pursue where revenge porn laws do not exist or have otherwise been held unconstitutional. I shed light on the shadow taxonomy that pervades the judicial language of the very few revenge porn cases that have been litigated vigorously enough for courts to produce opinions. I also explore the history of revenge porn laws in Minnesota with specific reference to Minnesota Statutes section 617.261. In Parts III and IV, I discuss the First Amendment as it applies to the *State v. Casillas*[19] decisions. Specifically, in Part III, I summarize the Minnesota Court of Appeals decision in which the court overturned the respondent's conviction under section 617.261 under the overbreadth doctrine. In Part IV, I analyze the Minnesota Supreme Court's reversal of the court of appeals' holding under the strict-scrutiny analysis.

II. HISTORY

A. Existing Legal Frameworks

Scholars disagree as to what the best routes of recourse for revenge porn victims are. Some scholars suggest that victims should seek legal recourse, while others suggest that commercial solutions, such as obtaining the services of online reputation management firms, is the more practical route.[20] This Section will briefly discuss the existing legal frameworks available to victims of revenge porn in copyright law, tort law, or criminal statutes.

With regard to copyright law, the Copyright Act grants constitutionally-guaranteed copyright protections under federal law to

narrowly tailored. ARIZ. REV. STAT. ANN. § 13-1425(A) (West, Westlaw through April 20, 2021) ("The image is disclosed with the intent to harm, harass, intimidate, threaten or coerce the depicted person.").

[18] Phillip Takhar, *A Proposal for a Notice-and-Takedown Process for Revenge Porn*, HARV. J.L. & TECH. DIG. (2018), https://jolt.law.harvard.edu/digest/a-proposal-for-a-notice-and-takedown-process-for-revenge-porn [https://perma.cc/27ZS-QC76].

[19] 938 N.W.2d 74, 74 (Minn. Ct. App. 2019); 952 N.W.2d 629, 634 (Minn. 2020).

[20] Vora, *supra* note 2, at 233.

authors that create original work, including photographs and videos.[21] Victims may bring copyright infringement claims against their perpetrator in civil court.[22] However, typically only victims who took their own picture or video have standing to bring forth copyright infringement claims.[23] Shockingly, "[t]o obtain copyright privileges necessary to enable a copyright infringement claim against a website in instances where the images were taken with consent by another person other than the victim, the victim must copyright the exposed parts of her body by registering it with the government."[24] This route requires the victim to voluntarily expose the most intimate parts of her body to the government in order for the government to be equipped to protect her.[25] Without undergoing this arduous process, some websites will continue to host the content online, as they are very likely protected by section 230 of the Communications Decency Act ("CDA").[26]

Under the Digital Millennium Copyright Act ("DMCA"), victims may bring copyright infringement claims against service providers that host their photographs or videos in order to obtain injunctive relief.[27] However, once the service provider removes the content, it is immune from liability, even when other service providers or viewers have saved or reproduced the content.[28] Furthermore, victims face additional nuanced issues in bringing forth copyright infringement claims: (1) the victim is likely unable to stop further reproduction of their content, (2) it would be costly to pursue multiple cases against other individuals or service providers that shared the content, and (3) the victim cannot stop their content from being archived on

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[21] U.S. CONST. art. 1, § 8, cl. 8 ("The Congress shall have Power . . . to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."); Copyright Act, 17 U.S.C. § 102(a)(5) (2012); Copyright Act, 17 U.S.C. § 201(a) (2012) ("Copyright in a work protected under this title vests initially in the author or authors of the work."). Samantha H. Scheller, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 583 (2015).

[22] Scheller, *supra* note 21, at 583.

[23] *Id.* Victims who were photographed or filmed by another typically would not be able to bring forth copyright infringement claims against that person because ownership of the content only extends to the person who took the photo or video. *Id.*

[24] Erica Fink, *To Fight Revenge Porn, I had to Copyright my Breasts*, CNN (Apr. 27, 2015), money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html?iid=EL [https://perma.cc/45KT-KT3J].

[25] *Id.*

[26] Although the nonconsensual dissemination of private sexual images and videos is not recognized as an exception under section 230, this law does not apply to: (1) federal criminal laws, (2) intellectual property laws, (3) laws "consistent with" section 230; the Electronic Communications Privacy Act of 1986, and (5) laws that prohibit sex trafficking. VALERIE C. BRANNON, LIABILITY FOR CONTENT HOSTS: AN OVERVIEW OF THE COMMUNICATION DECENCY ACT'S SECTION 230, at 3 (2019).

[27] Vora, *supra* note 2, at 233–34.

[28] *Id.*

the Internet. Realistically, the most the victim may do is regularly check to see if the images or videos appear on websites, and then individually request those websites to remove the content.[29] Without question, this constant monitoring can very quickly become costly and futile as it repeatedly traumatizes victims into perpetual states of shame and paranoia.

With regard to tort law, victims may pursue various tort claims against their perpetrators, such as intentional infliction of emotional distress ("IIED"),[30] public disclosure of private facts,[31] defamation,[32] false light,[33] and intrusion upon seclusion.[34] Although victims may be successful in their tort claims, these claims typically have many limitations. For example, oftentimes, the victim must be able to identify the perpetrator.[35] However, this is not always the case—perpetrators may use pseudonyms to hide their identities or their Internet Protocol (IP) addresses.[36] Without the ability to immediately identify the poster or posters to bring claims, the victim may have to collect identifying information.[37] Where such information is

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[29] *Id.* at 234–35.

[30] DAN B. DOBBS, THE LAW OF TORTS § 303, at 826 (2000). To prove IIED, a victim must show that there was (1) an intentional or reckless act (2) that is extreme and outrageous and (3) causes severe emotional distress. *See* Scheller, *supra* note 21, at 581–82 (explaining the elements of IIED).

[31] Scheller, *supra* note 21, at 578. Public disclosure of private facts requires a public disclosure of private facts that are "highly offensive to a reasonable person (an objective standard) and that the subject matter must not be of legitimate public concern." *Id.* The victim must show that there was public disclosure, that the private facts or content were true and not a part of a public record, that the dissemination would be highly offensive to a reasonable person, and that the public would not have a significant interest in the content. *Id.* at 579.

[32] *Id.* at 569. Under a defamation claim, the plaintiff must show that the defendant caused actual damages resulting from the publication of defamatory statements about the plaintiff. If there is no falsity at issue, then there is no defamation claim. *Id.* Furthermore, plaintiffs must show that the dissemination of the sexual content included an injurious false communication. *See* Taylor v. Franko, No. CIV. 09-00002 JMS, 2011 WL 2746714, at *1 (D. Haw. July 12, 2011) (holding defendant liable for defamation, among other rights of action, for posting sexual images of plaintiff with her contact information, claiming that she was interested in a "visit or phone call").

[33] RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977) (stating that one may be liable to another under if "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.").

[34] RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

[35] Vora, *supra* note 2, at 240.

[36] *Id.*

[37] Robert G. Larson & Paul A. Godfread, *Bringing John Doe to Court: Procedural Issues in Unmasking Anonymous Internet Defendants*, 38 WM. MITCHELL L. REV. 328, 329–30 (2011).

available—as it is possible that internet users are able to maintain untraceable anonymity—victims may use that information to name defendants "pseudonymously" and then work to obtain more identifying information through an expedited discovery stage.[38] These measures usually require the victim to seek professional investigation services.

Yet, even where the victim knows the identity of the perpetrator, the ability to pursue civil cases is mostly reserved for plaintiffs who have trust in the judicial system and access to the financial means to use it.[39] Thus, because tort claims fall within the realm of civil litigation, the pursuit of a tort claim arguably is practical only for middle- and upper-class White victims because low-income victims or victims of color may not have the economic and legal resources to pursue civil cases or may not trust the United States court systems.[40] Furthermore, even in instances where a victim does have the means to both identify and sue the perpetrator, a successful holding in favor of the victim's claim may still be insufficient because the defendant may not have the financial means to pay damages.[41] Disseminating revenge porn is as easy as pressing "send," and anyone with the intention to do so can, regardless of their class, social status, and inability to pay the repercussions.

With regard to criminal statutes, there is no federal law that criminalizes the dissemination of private sexual content.[42] Within the realm of Congress's powers to enact law, Congress may only regulate: (1) the use of the channels of interstate commerce, (2) the instrumentalities, persons or things in interstate commerce, and (3) activities having a substantial relation to interstate commerce.[43] Although victims and prosecutors may try to seek

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[38] *Id.* at 338.

[39] *Id.* at 339–41 ("In practice, first, the plaintiff sues a fictitious 'John Doe.' The plaintiff then obtains the court's permission to subpoena identifying information from the relevant OSPs [online service providers]. Once the plaintiff obtains such information from the OSPs, the plaintiff amends the complaint to name the person identified by the OSPs. . . . [I]t appears that courts are generally willing to allow the plaintiff to proceed with expedited discovery so as to uncover the identity of the would-be defendant.").

[40] Sara S. Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1288–89 (2016) (explaining that inaction to pursue civil cases was due to (1) past experiences and perceptions of the criminal and civil justice systems discouraged trust of the civil system; (2) belief that the judicial system was unfair and tended to favor the party that had "money to pay for an expensive lawyer;" (3) negative experiences with the courts and other public institutions caused for negative feelings about the legal system; and (4) respondents' self-sufficiency beliefs that they could handle their own problems without reliance of the judicial system). Moreover, Black people are more likely than White people to believe that the judicial system is corrupted. *Id.* at 1307.

[41] Vora, *supra* note 2, at 237–38.

[42] *State Revenge Porn Policy*, ELEC. PRIV. INFO. CTR., https://epic.org/state-policy/revenge-porn/ [https://perma.cc/6XH3-LJKS] ("[F]ederal law does not provide a remedy to victims of nonconsensual pornography . . . .").

[43] United States v. Lopez, 514 U.S. 549, 558 (1995).

justice through other federal laws,[44] Congress has not recognized nonconsensual pornography or its "disclosure" as a category of interstate commerce. Yet, one could argue that revenge porn content should be regulated as interstate commerce due to a general consensus among states that the contents of revenge porn are tangible, that the dissemination needs to be regulated, and that the content and nature of its dissemination crosses state lines through the Internet.[45]

In 2017, Vice President Kamala Harris, in her role then as a United States Senator, introduced to Congress the "Ending Nonconsensual Online User Graphic Harassment Act of 2017," otherwise known as the ENOUGH Act.[46] The bill, which was drafted to fit within Congress's commerce powers, made it "unlawful to knowingly distribute a private, visual depiction of an individual's intimate parts or of an individual engaging in sexually explicit conduct, with reckless disregard for the individual's lack of consent to the distribution, and for other purposes."[47] However, Congress did not enact the bill.[48] Thus, we have yet to see a federal law emerge that successfully expands, or perhaps a case that effectively challenges, the scope of interstate commerce to include the dissemination of nonconsensual pornography.[49]

In absence of a federal law, victims must rely on their state legislatures to pass or create these protections. Revenge porn laws vary from state to state, as there is no general consensus standardizing the definition of the crime or selection of statutory language. For example, state legislatures have failed to pass proposed bills addressing nonconsensual dissemination of sexual images or videos in Alabama, Connecticut, Florida, Kentucky, Rhode Island, Tennessee, and Washington.[50] Many of the state statutes that were indeed passed may not withstand judicial scrutiny and may need to undergo legislative reconstruction.[51] Furthermore, in consideration

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[44] Mary Anne Franks, Combating Non-Consensual Pornography: A Working Paper 5–7 (Sept. 7, 2014) (unpublished manuscript) (on file with author) [hereinafter Franks, Combating] (discussing potentiality and limitations of existing federal laws that prosecutors and victims may rely upon, those being the federal laws regarding sexual exploitation and abuse of children, the Interstate Anti-Stalking Punishment and Prevention Act, the Video Voyeurism Prevention Act of 2004, and the Computer Fraud and Abuse Act).

[45] *Id.* at 11 (stating that information transmitted through the Internet qualifies as "interstate commerce" and is within the powers of Congress to regulate).

[46] ENOUGH Act, S. 2162, 115th Cong. (2017).

[47] *Id.*

[48] *Id.*

[49] *See* Franks, Combating, *supra* note 44, at 11.

[50] Barmore, *supra* note 12, at 455–56.

[51] *See* MINN. STAT. § 617.261 (2016) (struck down by the Minnesota Court of Appeals in 2019). *See* TEX. PENAL CODE ANN. § 21.16 (West, Westlaw through end of 2019 Reg. Sess. 86th Leg.) (passed in 2015 and reformed by Texas legislature in 2019 to include "intent to harm").

of the First Amendment, these criminal statutes are often too narrow to apply to all cases of revenge porn or too broad, both of which give rise to issues of constitutionality and prompt courts to strike them down.[52]

Arkansas's revenge porn statute is an example of an overly narrow law.[53] It protects only victims whose perpetrator was a family member, a member of the victim's household, or a person with whom the victim is currently or formerly in a dating relationship with.[54] Thus, under this law, victims in Arkansas have no recourse against a perpetrator who does not fit into these strict categories, leaving victims unprotected in the context of subsequent dissemination, such as reproduction of the content that takes place online, through the mail, or through text message.

Criminal statutes today lack a solution for victims whose content has been posted on wider mediums, such as social media platforms, pornography websites, and other service providers.[55] Critics argue that although criminal liability may act as a deterrent, it does not provide victims with complete justice.[56] Even though victims may see their perpetrators successfully prosecuted under the law and be entitled to monetary damages, these laws do not seek to remove the images from the Internet, nor do they protect victims from future social and mental harm caused by the further dissemination of their private content from other posters.[57] These critics argue that federal and state laws need to "provide more robust remedies" that include: (1) a private right of action against anyone who posts the private content without consent regardless of whether the person created the image and (2) an injunction against any website that hosts the content.[58] With that said, an injunction of this caliber may be difficult, if not impossible, for state legislatures, as websites and service providers are generally protected by immunity under section 230 of the federal Communications Decency Act (CDA).[59]

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[52] *State Revenge Porn Policy*, *supra* note 42 ("The purpose of state revenge porn laws should be to protect victims from harassment and abuse as well as the ongoing harms that result from distribution of nonconsensual pornography. But some of the state laws include provisions do not help victims and, in some cases, could make things worse.").

[53] ARK. CODE ANN. § 5-26-314 (West, Westlaw through April 15, 2021).

[54] *Id. See also* S.D. CODIFIED LAWS § 22-21-4 (West, Westlaw through March 25, 2021) (limiting nonconsensual pornography to only photographs and videos that were taken without consent).

[55] *State Revenge Porn Policy*, *supra* note 42.

[56] *Id.* ("Criminal liability for the perpetrator, while important, is not enough. While criminal liability may have a deterrent effect, victims face ongoing harm from the dissemination and access to their images without consent. This harm can be more effectively remedied by removing the nonconsensual pornographic material.").

[57] *Id.*

[58] *Id.*

[59] Communications Decency Act, 47 U.S.C. § 230 (2018).

State statutes that criminalize revenge porn must be carefully written because they cannot supersede federal law. Section 230 "provides interactive computer services with immunity [because] the interactive computer services are not considered publishers of the content their users post."[60] This legislation protects websites and service providers in both tort and criminal proceedings even when the websites are the very source that enables the content to be continuously shared and reproduced.[61] They are essentially untouchable in terms of liability, with exclusion to violations of child pornography, obscenity, criminal, or intellectual property laws.[62] Where victims consented to the image or video being taken but did not consent to the upload, section 230 offers no remedy beyond a safe harbor exception in which the victim must produce a copyright infringement claim.[63] This may be an effective route for most revenge porn victims because, as stated, eighty percent of revenge porn content are "selfies." Yet, again, only individuals who took their own photos or videos of their bodies are considered "original creators," which is necessary to make a copyright claim to the content, resulting in a large demographic of revenge porn victims being precluded from this legal remedy.[64]

Furthermore, courts rarely hold these websites and service providers liable for their involvement in the perpetuation of revenge porn content and instead often uphold the immunity privileges provided to these companies. In *Carafano v. Metrosplash.com*, a case in which an actress sued Matchmaker.com for a profile created of her by an unknown person, the court held that the website had no liability because it "did not play a significant role in creating, developing, or 'transforming' the relevant information."[65] The court reasoned that Congress's intent in granting service providers immunity under section 230 was to "promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material."[66]

In *GoDaddy.com v. Toups*, victims brought suit against GoDaddy, an interactive computer service provider that hosted two revenge porn websites where the victims' photos were posted.[67] The Texas Court of Appeals reversed the lower court's ruling against *GoDaddy.com*.[68] The

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[60] Vora, *supra* note 2, at 238. *See* 47 U.S.C. § 230(c)(1) (2018) ("No provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider.").
[61] Vora, *supra* note 2, at 238.
[62] Levendowski, *supra* note 6.
[63] *Id.*
[64] *See* Section II.A.
[65] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1125 (9th Cir. 2003).
[66] *Id.* at 1122.
[67] *See generally* GoDaddy.com, LLC v. Toups, 429 S.W.3d 752 (Tex. App. 2014).
[68] *Id.* at 753.

court ruled that GoDaddy.com was not liable because of congressional intent for the CDA to have a broad application of immunity[69] and because the CDA is not limited to constitutionally-protected material.[70] With this said, victims are highly unlikely to find resolution against the websites that host such content as long as the content was posted by a third party.

In line with the existing legal frameworks, victims may seek the alternative route of employing extralegal commercial remedies. For example, online reputation management firms use search engine optimization to "push[] positive content and information about an individual towards the first page of search results," which simultaneously pushes the negative material, such as site locations, deeper into the search query.[71] By doing so, although the firms lack the ability to remove the content, the firms help the victims better control their reputations by decreasing the likelihood that such content would be found.[72]

Yet, commercial remedies are not accessible to all victims because these services are expensive and often need to be employed over long periods of time.[73] Online reputation management firms may charge anywhere from $100 to $100,000.[74] For example, one such firm, Reputation-Defender, charges anywhere between $3,000 to $15,000 for its services.[75] Costs may become excessively steep because victims will require ongoing monitoring and search engine optimization to prevent the content from being easily discoverable.[76] This route, like that of civil suits, is primarily reserved for victims who have the financial means to pursue it.

In conclusion, criminal statutes and civil remedies that are applicable or related to revenge porn laws at best and when constitutional, still fail to address all the systemic and nuanced parts of victim suffering.[77] For example, "stalking and harassment laws are not applicable to revenge porn submitters because there is no repeated course of conduct or direct communication with the victim."[78] Criminal statutes must be enacted to provide victims appropriate remedies, particularly because many victims lack the financial and legal means to pursue civil cases against their perpetrators. Even for those victims who can afford to pursue such civil

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[69] *Id.* at 759.
[70] *Id.*
[71] Vora, *supra* note 2, at 241.
[72] *Id.*
[73] *Id.*
[74] *See generally* Joseph Torrillo, *Online Reputation Management Cost & Pricing Explained*, REPUTATIONMANAGEMENT.COM (Jan. 22, 2021), https://www.reputationmanagement.com/blog/reputation-management-pricing/ [https://perma.cc/FFT2-XEVG].
[75] Vora, *supra* note 2, at 241.
[76] *Id.*
[77] Barmore, *supra* note 12, at 456.
[78] Levendowski, *supra* note 6.

claims, a successful ruling in their favor does not guarantee protection from future harm, as the laws do not specifically prevent the subsequent dissemination of the harmful content. Neither does a favorable ruling guarantee paid damages. Lastly, a victim risks "unleashing more unwanted publicity" merely by attaching their real name to a suit.[79]

B. The Shadow Taxonomy of Judicial Language

Notwithstanding the fact that very few revenge porn cases are litigated to the extent that judicial opinions are written, several courts that have produced opinions ruled in favor of defendants. Critics argue that victims are undermined in the courts by a "shadow taxonomy." Scholars define "shadow taxonomy" as judicial language within court opinions that "reveal the underlying power dynamics [that] ultimately reveal that the shadow taxonomy works to trivialize the very harms for which the established legal framework purports to offer remedy."[80] These insidious subtleties folded within judicial language illustrate how courts acknowledge the harms suffered by victims but have the unnerving tendencies to support the defendants.[81]

An analysis of judicial language depicts the existence of a shadow taxonomy and how it minimizes and disregards the harm suffered by revenge porn victims.[82] As scholars have argued, "[w]ithout addressing the actual harms the plaintiff-victims experienced in this case, the court effectively wipes those harms away from existence. Thus, the court is perpetuating a discourse in which women's harms are trivialized."[83] In addition to silencing victim suffering, judicial language typically does not recognize or acknowledge the "amplification effect," otherwise known as the repeated and potentially exponential dissemination of the victim's content by derivative posters.[84] The court's disregard may be due to the protections provided by section 230, but the court's failure to acknowledge how websites

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[79] Citron & Franks, *supra* note 14, at 358. Victims may also hide their identity under the guise of a pseudonym. *Id.*

[80] Vora, *supra* note 2, at 243.

[81] *Id.*

[82] *See* People v. Barber, 42 Misc. 3d 1225(A), *1–8 (N.Y. Crim. Ct. Feb 18, 2014) (making no mention of any harms suffered by the victim as a result of the defendant posting her nude photos to his Twitter account). *See also* GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 753 (Tex. App. 2014) (mentioning only harms suffered by the victim coincidentally while listing the plaintiff's alleged tort claims without any additional description of harm).

[83] Vora, *supra* note 2, at 231, 246 ("As the amplification effect occurs, the amount of viewers of the initial revenge porn post increases exponentially. However, as the amount of viewers increases, so decreases the likelihood that the victim can: (1) locate all of her photos on the Internet and (2) identify all of the subsequent reposters.").

[84] *See GoDaddy.com*, 429 S.W.3d at 753 (court does not mention the harmful effects caused by the revenge porn websites hosting of the victims' images and videos).

perpetuate such harms is a continued act of silencing.[85] "The silencing of these harms works to both erase them from precedent, and from memory, and simultaneously perpetuates the notion that website intermediaries are not responsible for the behavior of subsequent reposters (or other content providers), even though it is the intermediary's platform that sustains such harassment."[86]

When the amplification effect is indeed mentioned, courts merely mention it as background information, often in the context of factual information or the footnotes of an opinion.[87] Courts have also employed specific verbiage that diminishes the seriousness of victims' experiences. For example, in *People v. Barber*, "the court uses trivializing words at least eight times--an average of once per page," by attaching the words "mere," "simply," and "only" when describing the defendant's conduct of posting the victim's private sexual images on his Twitter account.[88] In doing so, victims are ultimately denied full justice and protection of the law because the harms that stem directly from the reproduction of the private content are made inconsequential.

To conclude, these opinions either fail to fully grasp the severity of the defendants' conduct, nor the harms that victims experienced, resulting in the courts, again, ultimately silencing the victims.[89] To remedy this, feminist scholars have argued that courts would have "more compelling argument[s]" against defendants where the harms suffered by the victims are included in the analyses.[90] However, since the court's acts are also deeply rooted in society's treatment and portrayal of women,[91] the courts must approach revenge porn cases with an especially critical eye.

III. APPLYING THE FIRST AMENDMENT

Under the First Amendment, Congress may not pass a law that prohibits the free exercise of speech or abridges the freedom of speech.[92]

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[85] Vora, *supra* note 2, at 246.

[86] *Id.*

[87] *See id.* at 247; Patel v. Hussain, 485 S.W.3d 153, 158–69 (Tex. App. 2016) (the court dedicates ten pages to discussing the defendant's threatening language to victim, but it is presented as background information and not within the analysis itself).

[88] Vora, *supra* note 2, at 248; People v. Barber, 42 Misc. 3d 1225(A), *2–8 (N.Y. Crim. Ct. Feb 18, 2014).

[89] *See* Vora, *supra* note 2, at 246 ("[R]efusing to name or identify someone or something through language is to silence it, wipe it, and censor it from existence; the practice of silencing is 'part and parcel of the veiling process that accompanies the wielding of power.'").

[90] *Id.*

[91] *Id.*

[92] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

However, the Court "reject[s] the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are absolutes."[93] Although there is no dominant theory as to how the First Amendment should be interpreted, the four main theories are that freedom of speech "is protected to further self-governance, to aid the discovery of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance."[94] The theory of advancing autonomy underscores one's personhood, free will, and self-governance.[95] However, critics have argued that this theory "ignores the ways in which protecting freedom of speech for some can undermine the autonomy and self-fulfillment of others,"[96] such as hate speech and racial epithets,[97] or in our case, revenge porn.

A. The Strict Scrutiny Standard

In order to conduct a First Amendment analysis, courts look to whether the law in question is content-based or content-neutral.[98] A "content-based" restriction is one that regulates speech based on its content, viewpoint, or subject matter[99] or if the application of the law depends on such.[100] Content-based laws are presumed to be unconstitutional and must survive strict scrutiny to be upheld.[101] Under a strict scrutiny analysis, the

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the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[93] Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961).

[94] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1238 (Rachel E. Barkow et al. eds., 5th ed. 2017) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW].

[95] *Id.* at 1241.

[96] *Id.*

[97] John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539, 543 (2006) (arguing that hate speech should be proscribed). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992) (invalidating a statute that barred using a symbol, objection, appellation, characterization, or graffiti to arouse anger, alarm, or resentment in others based on race, color, creed, religion, or gender).

[98] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 94, at 1242 (stating courts find this distinction is "crucial" in determining which judicial scrutiny is applicable). *See, e.g.*, Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 865 (1991) (providing an example of content-neutral laws, in which "a prohibition against sound trucks in residential neighborhoods during the nighttime hours would be supported by interests unrelated to the message communicated and would therefore be tested under a much less stringent test than would a content-based regulation.").

[99] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding a restriction is content-based if it was "adopted . . . because of disagreement with the message [the speech] conveys.").

[100] Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000) [hereinafter Chemerinsky, *Content Neutrality*].

[101] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 94, at 1244. The Supreme Court has ruled that "above all else, the First Amendment means that government has no power to

restriction "may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests."[102] "Narrowly tailored" requires that the statute be the "least restrictive means" necessary to carry out the government's compelling interests, although the means used are not required to be perfectly tailored.[103] The state interest must be an "actual problem" that requires solution.[104] The Court has acknowledged that content-based restrictions may allow the government to "effectively drive certain ideas or viewpoints from the marketplace."[105]

However, a content-neutral law is impartial both in terms of the subject matter and the viewpoint.[106] "Content-neutral" laws may be deemed constitutional where the law is justified without reference to the content of the regulated speech.[107] A law is "justified" if it falls within "the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest."[108] If the law is content-neutral, courts must apply intermediate scrutiny.[109] Any law may violate the First Amendment without undergoing judicial scrutiny if the law is unduly vague or overbroad.[110]

B. The Overbreadth Doctrine

Laws that regulate speech may be invalidated under the vagueness and overbreadth doctrines[111] unless they can be cured or partially severed.[112] These doctrines are unique because defendants can challenge the law's constitutionality even if the defendant's own incriminating speech was not

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restrict expression because of its message, its ideas, its subject matter or its content," and that "[c]ontent-based regulations are presumptively invalid." *Id. See also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972); *R.A.V.*, 505 U.S. at 382.

[102] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[103] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 827 (2000).

[104] *Id.* at 822.

[105] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[106] Chemerinsky, *Content Neutrality*, *supra* note 100, at 50.

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

[108] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[109] Chemerinsky, *Content Neutrality*, *supra* note 100, at 55 ("In Turner Broadcasting System, Inc. v. FCC, the Court said that the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulations only need meet intermediate scrutiny.").

[110] *Id.*

[111] The Supreme Court has not made a clear distinction between vagueness and overbreadth. *See generally* Cox v. Louisiana, 379 U.S. 536 (1965); Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415 (1963).

[112] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 94, at 1283.

of a category protected by the First Amendment.[113] With regard to the overbreadth doctrine, it is generally reserved only for laws that target speech, including both "pure" speech and expressive conduct, and it may otherwise not be used for laws that do not pertain to the First Amendment.[114] A law is overbroad, and thus unconstitutional, "if it regulates substantially more speech than the Constitution allows to be regulated, and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others."[115]

The overbreadth doctrine considers two important aspects. First, a law must be substantially overbroad, meaning that the law must restrict a significant amount of protected speech when judged in relation to the statute's plainly legitimate sweep.[116] Although there is no exact definition as to what accounts as "substantially overbroad,"[117] the Court has stated that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."[118] However, if courts find that the law fails to meet this threshold of substantially overbroad in that the law does *not* restrict significant amounts of protected speech, then the law will *not* be deemed overbroad and will stand.[119] Second, a person to whom the law may be constitutionally applied can validly argue that the law would be unconstitutional as applied to others because it would infringe upon their rights to speech.[120] The overbreadth doctrine essentially allows defendants to shift "the focus of the litigation from the alleged criminal to the law itself . . . from the actual

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[113] *Id. See infra* Section III.C.

[114] United States v. Salerno, 481 U.S. 739, 745 (1987) (stating the Court has "recognized an 'overbreadth' doctrine outside the limited context of the First Amendment").

[115] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 94, at 1285.

[116] *Id.* at 1286.

[117] *Id.* at 1287.

[118] Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

[119] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 94, at 1287; *see generally* Virginia v. Hicks, 539 U.S. 113 (2003).

[120] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 94, at 1287. The overbreadth challenge is an exception to the general standing rule that "a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); *see* Fallon, *supra* note 98, at 865 ("[T]he First Amendment enjoys a special status in the constitutional scheme. Any substantial 'chilling' of constitutionally protected expression is intolerable. Third-party rights are too important to go unprotected, and there may often be no better challenger than the one before the court. 'Facial' attacks on and invalidations of overbroad statutes are therefore permitted in this area of the law.").

conduct of the defendant to the hypothetical conduct of others."[121] Because this second prong allows a convicted person to overturn the conviction by successfully bringing forth the overbreadth doctrine, it should only be used as a last resort.[122]

C. Which to Apply?

Although the Supreme Court has never explained in-depth the relationship between the overbreadth doctrine and the strict scrutiny doctrine, the two are separate modes of analysis.[123] Thus, there is no standard rule as to when a court must apply one over the other, which results in redundancy when courts apply both or in confusion when different courts apply different modes of analysis to reach opposite results.[124] Because courts review constitutional challenges de novo, courts are not required to apply the lower court's analysis of the law.

As discussed below, the Minnesota Court of Appeals used the overbreadth doctrine to analyze the constitutionality of section 617.261 of the Minnesota Statutes, the revenge porn statute that the defendant was convicted under and then challenged, in *State v. Casillas*.[125] The court ruled in favor of the defendant and deemed the statute unconstitutional under the overbreadth doctrine, ultimately invalidating the statute altogether.[126] However, the Minnesota Supreme Court went on to reverse the court of appeals' holding under the strict scrutiny analysis.[127] The court also held that the statute was not necessarily overbroad. In its opinion, the court took a rare opportunity to set a standard where a scrutiny analysis trumps an overbreadth analysis when both doctrines are applicable to a First Amendment issue.[128]

IV. DESCRIPTION AND HISTORY OF MINNESOTA STATUTES § 617.261

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[121] *See* 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 6:4 (2017) (emphasis omitted) (citing NAACP v. Button, 371 U.S. 415, 432 (1963)).

[122] *See Broadrick*, 413 U.S. at 613; *see also* Smith v. Martens, 106 P.3d 28, 37–38 (Kan. 2005); People v. Hickman, 988 P.2d 628, 636 (Colo. 1999).

[123] Marc Rohr, *Parallel Doctrinal Bars: The Unexplained Relationship Between Facial Overbreadth and "Scrutiny" Analysis in the Law of Freedom of Speech*, 11 ELON L. REV. 95, 109 (2019).

[124] *Id.* at 133–34.

[125] 938 N.W.2d 74, 74 (Minn. Ct. App. 2019).

[126] *Id.* at 87–88.

[127] State v. Casillas, 952 N.W.2d 629, 634 (Minn. 2020).

[128] *Id.* at 645–46; *see infra* Part VI.

In 2016, Minnesota became the thirty-third state to criminalize the nonconsensual dissemination of private sexual images.[129] On December 23, 2019, the Minnesota Court of Appeals invalidated the law following their ruling of *State v. Casillas*.[130] When the statute was overturned, revenge porn victims relied on less effective alternatives to protect themselves and to press charges on their perpetrators, relying instead, for example, on emergency harassment restraining orders or defamation charges.[131] On December 30, 2020, the Minnesota Supreme Court reversed and remanded the court of appeals' decision.[132]

Under section 617.261, it is a misdemeanor to

> intentionally disseminate an image of another person who is depicted in a sexual act or whose intimate parts are exposed, in whole or in part, when (1) the person is identifiable; . . . (2) the actor knows or reasonably should know that the person depicted in the image does not consent to the dissemination; and (3) the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy.[133]

However, the criminal penalty will be elevated to a felony charge if the actor's conduct meets any of the factors described in subdivision 2. These factors are:

> (1) the person depicted in the image suffers financial loss due to the dissemination of the image; (2) the actor disseminates the image with intent to profit from the dissemination; (3) the actor maintains an Internet website,

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[129] Sharon Yoo, *A Refresher on Minnesota's Revenge Porn Laws*, KARE 11 (Oct. 29, 2019), kare11.com/article/news/local/breaking-the-news/katiehillsresignationbringsrevengepornto forefront/89-85e5b730-8f87-44fb-9bf9-9a118bc8a3cc [https://perma.cc/A9J5-66UV]. Authored by Minnesota House Representative John Lesch of District 66B, Lesch stated that he was driven to write the bill after hearing the story of Rehtaeh Parsons, a seventeen-year-old girl who committed suicide after photos of her engaged in a sexual act with a school football player were shared around her high school, and the story of Timothy Turner, a Minnesota resident who was convicted of criminal defamation for disseminating photos of his ex-girlfriend and her daughter online. *See* State v. Turner, 864 N.W.2d. 204 (Minn. Ct. App. 2015).

[130] Yoo, *supra* note 129; *Casillas*, 938 N.W.2d at 74.

[131] Briana Bierschbach, *'Revenge Porn' Cases Have Lawmakers Looking for a Fix*, STAR TRIB. (Feb. 3, 2020), http://www.startribune.com/revenge-porn-cases-have-lawmakers-looking-for-a-fix/567494832/ [https://perma.cc/F5TP-Q4FY] (writing about a woman who had to rely on an emergency harassment restraining order after her ex-boyfriend disseminated photos of her on Snapchat after the court of appeals invalidated section 617.261); *see supra* Section II.A.

[132] *Casillas*, 952 N.W.2d. at 634.

[133] MINN. STAT. § 617.261, subdiv. 1 (2016).

> online service, online application, or mobile application for the purpose of disseminating the image; (4) the actor posts the image on a website; (5) the actor disseminates the image with intent to harass the person depicted in the image; (6) the actor obtained the image by committing a violation of section 609.52, 609.746, 609.89, or 609.891; or (7) the actor has previously been convicted under this chapter.[134]

V. STATE V. CASILLAS

A. Facts and Procedural Posture

In 2017, Michael Anthony Casillas was charged with felony nonconsensual dissemination of private sexual images under section 617.261.[135] A.K.M., the victim, alleged in her complaint that she and Casillas were in a relationship and that when the relationship ended, Casillas used her account log-in information to access her wireless and television provider accounts.[136] With access to her cellular device and its contents, he had access to her private sexual images and videos. Casillas then informed A.K.M. that he planned to distribute the content.[137] A.K.M. later received a screenshot of a video depicting herself and another individual engaged in sexual activity, at which point the video had already been sent to forty-four other recipients and posted online.[138]

In district court, Casillas moved to dismiss the charge on the basis that section 617.261 violated the First Amendment for being overbroad and vague.[139] The district court rejected his motion to dismiss because his conduct fit within the scope of the statute in that he "intentionally disseminated an identifiable image of A.K.M. depicted in a sexual act."[140] The court determined that section 617.261 regulated obscenity, which is not a protected speech category under the First Amendment.[141] It reasoned that Casillas's conduct satisfied the statute because he threatened A.K.M. that he

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[134] *Id.* § 617.261, subdiv. 2.
[135] *Casillas*, 938 N.W.2d at 77.
[136] *Id.* at 77–78.
[137] *Id.* at 78.
[138] *Id*; *see* City of Houston v. Hill, 482 U.S. 451 (1987) (holding invalid a law that made it illegal to interrupt working police officers because it "criminalize[d] substantial amount of constitutionally protected speech" after defendant was convicted for shouting at the police).
[139] *Casillas*, 938 N.W.2d at 74.
[140] *Id.*
[141] *Id.* Under Minn. R. Crim. P. 26.01, subdiv. 4, the parties agreed to proceed under the appellant's stipulation to the prosecution's case to obtain review of the district court's dispositive pretrial ruling, in which the district court determined that appellant was guilty of felony nonconsensual dissemination of private sexual images because his conduct satisfied section 617.261's intentional dissemination requirement.

was going to post her image online, demonstrating that he knew A.K.M. would not consent to the dissemination.[142]

The court also found that the State proved "the image was obtained under circumstances in which [Casillas] knew or reasonably should have known [that A.K.M.] had a reasonable expectation of privacy."[143] It reasoned that A.K.M.'s expectation of privacy was "implicitly inherent" because of (1) the sexual nature of the act depicted, (2) Casillas's demonstration of awareness that A.K.M. would not consent to the dissemination, and (3) that Casillas knew, or reasonably should have known, that A.K.M. had a reasonable expectation of privacy.[144] The district court convicted Casillas of felony nonconsensual dissemination of private sexual images, denied his motion for a downward dispositional sentencing departure, and ordered him to serve twenty-three months in prison.[145] Casillas appealed to the Minnesota Court of Appeals.

B. The Minnesota Court of Appeals' Overbreadth Analysis

On appeal, Casillas argued to the court of appeals that the district court erred in its ruling and that section 617.261 was unconstitutionally overbroad and vague and thus facially invalid under the First Amendment.[146] The court evaluated the statute's First Amendment issue under the overbreadth doctrine by determining the following elements: (1) whether the statute had a broad sweep;[147] (2) if its sweep was limited to expressive conduct proscribed by the First Amendment;[148] (3) if it prohibited conduct beyond its legitimate sweep;[149] (4) if it violated the First Amendment by prohibiting a substantial amount of protected speech;[150] and (5) if it could be saved by narrowing or severing certain words, phrases, or provisions.[151]

With regard to the breadth of section 617.261, the court conducted a de novo review of the statute's constitutionality.[152] The court began with a general description of the First Amendment and its

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[142] *Casillas*, 938 N.W.2d at 74.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.* at 77.
[148] *Id.* at 79.
[149] *Id.* at 81.
[150] *Id.* at 84.
[151] *Id.* at 86.
[152] *Id.* at 78 (citing Rew v. Bergstrom, 845 N.W.2d 764, 776 (Minn. 2014)). An appellate court must review a lower court's determination of the constitutionality of a statute under de novo review. Statutes that allegedly restrict the First Amendment rights are not presumed to be constitutional. *See* Dunham v. Roer, 708 N.W.2d 552, 562 (Minn. Ct. App. 2006), *review denied* (Minn. Mar. 28, 2006).

constitutional powers.[153] In evaluating Casillas's argument that section 617.261 was facially overbroad, the court presented the ways one would bring forth an overbreadth challenge: first, "a challenger must establish that no set of circumstances exists under which the challenged statute would be valid or that the statute lacks any plainly legitimate sweep."[154] Second, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[155] The latter option here allows for any litigant, such as Casillas, to contest the statute via a facial overbreadth challenge in a "prophylactic" effort to invalidate it as a means to reverse a conviction,[156] even when the statute may be applied constitutionally to that litigant's set of circumstances.[157]

The court applied the four-step analytical framework established by the United States Supreme Court to evaluate the overbreadth challenge.[158] First, the court must construe, or interpret, the challenged statute to determine its scope and sweep.[159] Second, upon understanding what the statute actually covers, the court must determine whether the statute is limited to unprotected categories of speech or expressive conduct.[160] If the statute is not limited to unprotected speech or expressive conduct, then the court moves to steps three and four, as follows. Third, the court must determine if the statute proscribes a "substantial proportion" of protected speech compared to the unprotected speech.[161] This does not

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[153] *Casillas*, 938 N.W.2d at 79 ("The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech.' It applies to the states through the Fourteenth Amendment. The First Amendment establishes that the government generally may not restrict expression because of its messages, ideas, subject matter, or content. The First Amendment's protections extend beyond expressions regarding matters of public concern, and 'First Amendment principles apply with equal force to speech or expressive conduct on the Internet.' 'The [Supreme] Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books.'") (citations omitted).

[154] *Id.* at 79 (citing United States v. Stevens, 559 U.S. 460, 472 (2010)).

[155] *Id.* (quoting *Stevens*, 559 U.S. at 473). With regard to the First Amendment, the Supreme Court has applied this method of invalidating a law if a substantial number of its applications are unconstitutional when judged against the law's plainly legitimate sweep as an exception to the ordinary rules of standing. The exception was created out of fear that the traditional rules of standing could cause a "chilling effect" on speech. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[156] Fallon, *supra* note 98, at 867–71; Massachusetts v. Oakes, 491 U.S. 576, 581–82 (1989); New York v. Ferber, 458 U.S. 747, 768–69 (1982).

[157] *Casillas*, 938 N.W.2d at 80.

[158] *Id.* at 79 (applying *In re* Welfare of A.J.B., 929 N.W.2d 840, 847 (Minn. 2019)).

[159] *Id.* at 80.

[160] *Id.*

[161] *Id.* (stating that the inquiry is "whether the protected speech and expressive conduct make up a substantial proportion of the behavior the statute prohibits compared with conduct and

mean that the statute may not proscribe some protected speech—"a statute is not substantially overbroad merely because one can conceive of some impermissible applications."[162] Fourth, if a substantial portion of protected speech is conscribed, the court must determine whether it may narrow the statute or sever language to cure it.[163] If the court is unable to cure the statute by narrowing its construction or severing language, the court must turn to the last resort option, which is to invalidate the statute entirely.[164]

With regard to the first step, the court found that the statute's sweep was overly broad. The court stated that the statute's requirements were predicated on a broad negligence mens rea;[165] the statute's language stated that "the disseminator 'knows or reasonably should know that the person depicted in the image does not consent to the dissemination' and 'the image was obtained or created under circumstances in which the actor knew or reasonably should have known the person depicted had a reasonable expectation of privacy.'"[166] The court also reasoned that the statute lacks "harm-causing" and "intent-to-harm" elements except when elevating the disseminator's conduct from a misdemeanor charge to a felony conviction.[167] The lack of intent to harm failed to limit the statute's scope as to what expressive conduct would be criminalized.[168]

With regard to the second step, the court found that the statute's sweep was not limited to unprotected speech.[169] Such unprotected speech, or exceptions to the First Amendment, include: "speech or expressive conduct designed to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and

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speech that are unprotected and may be legitimately criminalized.") (citing *A.J.B.*, 929 N.W.2d at 847–48).

[162] *Id.* (quoting *A.J.B.*, 929 N.W.2d at 847–48).

[163] *Id.* (referencing *A.J.B.*, 929 N.W.2d at 848).

[164] *Id.* (summarizing *A.J.B.*, 929 N.W.2d at 848).

[165] *Id.* at 81.

[166] *Id.* at 81–82; *see A.J.B.*, 929 N.W.2d at 850 (stating that the "'knows or has reason to know' standard—a negligence mens rea—means a person may be convicted under [a statute that criminalizes stalking] even though the person does not intend or even know that his communication would frighten, threaten, oppress, persecute, or intimidate the victim.").

[167] *Casillas*, 938 N.W.2d at 82; MINN. STAT. § 617.261, subdiv. 2(b)(1), (5) (2016) (stating that the penalties are heightened if, among other conduct, the actor "disseminates the image with *intent to harass* the person depicted in the image") (emphasis added).

[168] *Casillas*, 938 N.W.2d at 82.

[169] *Id.* ("[T]he Supreme Court has long permitted some content-based restrictions in a few limited areas, in which speech is of such slight social value as a step to truth that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality.") (citing State v. Melchert-Dinkel, 844 N.W.2d 13, 19 (Minn. 2014)).

imminent threat the government has the power to prevent."[170] The State raised its arguments on reliance of this definition of obscenity;[171] but the court found that this argument misconstrued the application of "patently offensive."[172] The measure of obscenity is the content of the work and not the dissemination of it.[173] Therefore, the court found that section 617.261 would incorrectly subject all images that fall within its regulation as "patently offensive" even when the contents of the images were not *actually* "patently offensive."[174]

The State also raised the argument that section 617.261 offers not a First Amendment issue but a privacy matter.[175] However, privacy was not a recognized form of unprotected speech, and the Supreme Court itself has had a history of reluctance towards expanding the "delineated categories."[176]

Because the court determined that Section 617.26 had a broad sweep and a reach that was not limited to the unprotected categories of speech under the First Amendment, the court proceeded to the third and fourth steps.[177] With regard to the third step, the court analyzed whether section 617.261 proscribed a substantial amount of constitutionally-protected speech compared to the unprotected speech the statute could legitimately prohibit.[178] It raised attention to circumstances that depict

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[170] *Id.*; *A.J.B.*, 929 N.W.2d at 846 ("First Amendment protections are not limitless. There is a point where First Amendment protections end and government regulation of speech or expressive conduct becomes permissible. Exceptions to First Amendment protections generally fall into several delineated categories that include speech or expressive conduct . . . .") (citing United States v. Alvarez, 567 U.S. 709, 717 (2012)); *see also Alvarez*, 567 U.S. at 722 ("[T]he Court has acknowledged that perhaps there exist 'some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law.' Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.'").

[171] *See Casillas*, 938 N.W.2d at 83. The State argued that "[t]he average person would find that [section 617.261] regulates content that appeals to the prurient interest," and "people who disseminate nonconsensual, private sexual images" have a prurient interest in sex. *Id.* Furthermore, disseminating nonconsensual sexual images is "patently offensive," and thereby barred under section 617.261 for "lack[ing] serious literary, artistic, political, and scientific value." *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 83–84.

[176] *See In re* Welfare of A.J.B., 929 N.W.2d 840, 846 (Minn. 2019); United States v. Stevens, 559 U.S. 460, 472 (2010); Connick v. Myers, 461 U.S. 138, 147 (1983) ("We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.").

[177] *See Casillas*, 938 N.W.2d at 84–88.

[178] *Id.* at 88–90.

people engaged in sexual acts in which those people also consent to the dissemination of the photos.[179] The court argued that in such instances,

> [t]he statute does not define or explain the circumstances that should cause someone who observes an image described . . . to reasonably know that the person depicted in the image did not consent to its dissemination or that the image was obtained or created under circumstances in which the person depicted had a reasonable expectation of privacy.[180]

This lack of clarity creates room for a subjective interpretation of the statute in which "reasonable people could reach different conclusions" of images and of the ways such images were obtained.[181] Thus, the court found that section 617.261 proscribed a substantial amount of constitutionally-protected speech because there could be a substantial number of instances in which innocent people could easily be prosecuted for disseminating images that they received without knowledge that the depicted person lacked consent, without knowledge that the image was obtained or created under circumstances in which the person would have had a reasonable expectation of privacy, and without intent to cause harm.[182]

The court also found that section 617.261's reach was substantial enough to have a chilling effect on speech.[183] For example, as the court noted, under the statute, someone with access to a public platform that views an image of another engaged in a sexual act, or whose intimate parts were exposed, could be at risk if they disseminate the content further. She or he could be criminally liable "based on a prosecutor's subjective belief that the image's content should have caused the observer to know that the person depicted did not consent to the dissemination and that the image was obtained or created under circumstances indicating that the person depicted had a reasonable expectation of privacy."[184]

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[179] *Id.* at 88 (referencing various political acts where citizens publicly advocate for a cause, such as the Free the Nipple campaign).

[180] *Id.* at 89 (stating that the district court's reasoning that A.K.M. had an expectation to keep her images private was "implicitly inherent from the nature of the act depicted" suggests that the court recognizes the statute could be subject to one's own subjectivity).

[181] *Id.*

[182] *Id.*

[183] *Id.* This exception was created out of fear that the traditional rules of standing could cause a "chilling effect" on speech. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). *Chilling Effect*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "chilling effect" as "[t]he result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right of free speech."); *see also* State v. Hensel, 901 N.W.2d 166, 170 (Minn. 2017) (stating that the "key concern of the overbreadth doctrine" was to deter the chilling effect on protected speech).

[184] *Casillas*, 938 N.W.2d at 89.

With regard to the fourth step, the court determined that it was impossible to cure section 617.261 by narrowly construing it or by severing language.[185] Curing the statute was not within the court's powers because to do so would require the court to rewrite it.[186] Even in the instance that the court were to construe the statute per the State's request, a conflict would arise as to whether the criminal penalty constitutes a misdemeanor or felony charge.[187] Furthermore, the court would not be able to construe or sever the penalties without adding new language.[188] Because the court found that it was unable to cure the statute, the court invalidated the statute altogether.[189]

C. The Minnesota Supreme Court's Strict Scrutiny Analysis

The Minnesota Supreme Court began its analysis of *Casillas* by determining whether the statute restricted protected speech.[190] If the statute proscribed only unprotected speech, the respondent's overbreadth challenge would fail.[191] The court refused to recognize "substantial invasions of privacy" as a new category of unprotected speech because the State failed to present sufficient evidence that the category was a part of "a long (if heretofore unrecognized) tradition of proscription."[192] The court also rejected the State's arguments that the statute applied only to unprotected categories of speech: indecent speech, speech integral to criminal conduct, and child pornography.[193] Instead, the court held that the statute covered some protected speech.[194]

The court concluded that it was not necessary to determine whether the statute was content-neutral (which requires intermediate scrutiny) or content-based (which requires strict scrutiny) because it found that the State "met its burden under the more searching strict scrutiny analysis."[195] It found that the State had a compelling interest to "safeguard its

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[185] *Id.* at 86.
[186] *Id.* at 90.
[187] *Id.* at 85. MINN. STAT. § 617.261, subdiv. 2(a) states "whoever violates subdivision 1 is guilty of a gross misdemeanor," but subdivision 2(b)(5) states that the person is guilty of a felony if "the actor disseminates the image with intent to harass . . . ."
[188] *Casillas*, 938 N.W.2d at 90. The Supreme Court has held that rewriting a statute exceeds the bounds of judicial power. *See* U.S. v. Stevens, 559 U.S. 460, 480 (2010). Furthermore, adding statutory language by judicial fiat could deviate starkly from the legislature's intent. *See Hensel*, 901 N.W.2d at 180.
[189] *Casillas*, 938 N.W.2d at 86. Invalidating a statute is only permissible as a last resort. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); United States v. Williams, 553 U.S. 285, 292 (2008); State v. Washington-Davis, 881 N.W.2d 531, 533 (Minn. 2016).
[190] State v. Casillas, 952 N.W.2d 629, 637 (Minn. 2020).
[191] *Id.*
[192] *Id.* (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011)).
[193] *Id.*
[194] *Id.*
[195] *Id.* at 641.

citizens' health and safety" by "criminalizing the nonconsensual dissemination of private sexual images" because of the severe suffering revenge porn victims endure.[196] The court also found that the State successfully showed that the statute satisfied the "narrowly tailored" prong as a "least restrictive means" for several reasons.[197]

First, "the Legislature explicitly defined the type of" proscribed image as one that is "of another person who is depicted in a sexual act or whose intimate parts are exposed," to which "sexual act," "intimate parts," and "image" were all defined.[198] Second, the statute only applies to intentional dissemination of the image.[199] The defendant must "knowingly and voluntarily disseminate" the image.[200] Dissemination committed with "negligent, accidental, or even reckless" mens rea does not fall within the statute.[201] Third, the statute has several exceptions that further narrow its scope.[202] Fourth, the statute requires the defendant to have acted without consent.[203] Lastly, the statute only covers private speech, to which "'[s]peech on matters of purely private concern is of less First Amendment concern' than speech on public matters that go to the heart of our democratic system."[204] Here, the court distinguishes *Casillas* from *In re Welfare of A.J.B.*[205] and *State v. Jorgenson*[206] in that section 617.261 only covers "private sexual images," not speech that is "at the core of protected First Amendment speech."[207]

Finding that the means were narrowly tailored, the court moved on to address the overbreadth doctrine. It clarified for the first time when to apply strict scrutiny instead of an overbreadth challenge: "When a statute is challenged on both scrutiny and overbreadth grounds, a scrutiny analysis

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[196] *Id.* (recognizing the detrimental effects that nonconsensual dissemination of private sexual images has on a victim's mental and emotional wellbeing, including minors, by citing several statistics).
[197] *Id.* at 643.
[198] *Id.* (citing MINN. STAT. § 617.261, subdiv. 1) (internal quotations omitted).
[199] *Id.* (citing MINN. STAT. § 617.261, subdiv. 1).
[200] *Id.*
[201] *Id.*
[202] *Id.* The court lists several exemptions recognized within MINN. STAT. § 617.261, subdiv. 5. These include instances where prosecution may need to disseminate the image; when the images need to be distributed for medical or mental health treatment; when the images are "obtained in a commercial setting"; when journalists use the images in matters of public interest; and when educators and scientists use private sexual images for "legitimate scientific research or educational purposes." *Id.* (internal quotations omitted).
[203] *Id.*
[204] *Id.* at 644 (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011)).
[205] 929 N.W.2d 840, 853 (2019).
[206] 946 N.W.2d 596, 605 (2020).
[207] *Casillas*, 952 N.W.2d at 629 (citing *In re* Welfare of A.J.B., 929 N.W.2d 840, 853 (Minn. 2019)).

should be conducted first. This approach is best because a statute that survives a scrutiny analysis will necessarily survive the overbreadth challenge.[208] The overbreadth analysis would be "needlessly redundant."[209] In conclusion of its analysis, the court reversed and remanded the case, thereby reinstating section 617.261.[210]

VI. A LOOK AT THE MINNESOTA SUPREME COURT'S STRICT SCRUTINY LEGAL ANALYSIS

The court's strict scrutiny analysis of section 617.261 was incomplete because it did not determine whether the government showed that section 617.261 was the least restrictive means to address revenge porn.[211] Notably, the analysis began by setting out that the statute must be "narrowly tailored" with "the least restrictive means," but it then ends with "the restriction is justified by a compelling government interest and is narrowly tailored to serve that interest," never delving into the whether there are less restrictive means.[212] Yet, a look at precedent reveals that strict scrutiny analyses have traditionally required an examination of this latter element. For example, in *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court held that the statute at issue failed strict scrutiny because the government failed to meet the least-restrictive-means element.[213] The Court emphasized that "[n]o one disputes that [the statute] is narrowly tailored . . . ."[214] Yet, "[i]t was for the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective, and [the statute] to be the least restrictive available means."[215]

This issue was indeed presented to the court. In *Casillas*, the respondent argued that a less restrictive alternative existed: civil remedies.[216] The State goes on to reject this alternative on the grounds that civil remedies are insufficient because they minimize the seriousness of nonconsensual pornography and many victims are financially unable to pursue civil cases against their perpetrators.[217] Yet, the court here does not weigh in on this issue at all within its analysis.

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[208] *Id.*
[209] *Id.*
[210] *Id.* at 646–47.
[211] *See id.*
[212] *Id.* at 640, 644 (internal citations omitted).
[213] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).
[214] *Id.* at 804.
[215] *Id.* at 812–13.
[216] Brief for Respondent at 45–46, State v. Casillas, 952 N.W.2d 629 (Minn. 2020) (No. A19-0576).
[217] Brief for Appellant at 49, State v. Casillas, 952 N.W.2d 629 (Minn. 2020) (No. A19-0576); *see also supra* Section II.A.

Had the court completed its strict scrutiny analysis, it may have likely rejected the respondent's argument that civil remedies were the least restrictive means because of the inequitable systemic barriers that prevent most victims from pursuing such a route.[218] The court's acknowledgments of victim suffering, the complexities in the identification of posters, and the immunity provided to internet providers seem to suggest that the court would have found that no less restrictive means did in fact exist. Interestingly, the question as to the court's failure, whether by choice or neglect, to complete their strict scrutiny analysis would have likely served as additional grounds for a valid appeal to the Supreme Court, as the case itself meets the Supreme Court's minimal standards of consideration in that the case's central issue arises under the First Amendment and that there are conflicting decisions on the matter in a number of state courts of last resort.[219]

VII. ASSESSING THE LANGUAGE OF THE TWO OPINIONS

The difference between the Minnesota Court of Appeals' and the Minnesota Supreme Court's approaches to victims' experiences is striking. It is immediately apparent from reading both opinions that the court of appeals' analysis was formalistic in nature,[220] whereas the supreme court applied a much more functional analysis.[221] The court of appeals' decision mentioned little to nothing of the effects that nonconsensual dissemination of sexual content has on victims. The court mentions that in today's "age of expansive internet communication, images may be disseminated, received, and observed with ease."[222] Yet, the court provides no contextual framework as to how today's "age of expansive internet communication" has actually resulted in the creation and the gross prevalence of revenge porn. Instead,

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[218] *Supra* Section II.A.

[219] *See* SUP. CT. R. 10. The Court has broad discretion in its power to grant writs of certiorari. *Id.* Two factors that the Court may use to determine whether it grant such a petition include, but are not limited to, whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" and whether "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." *Id.* It would seem that revenge porn cases argued under free speech violations would fit the Court's considerations, but because the Court grants so few petitions a year, the likelihood of hearing such a case remains low.

[220] State v. Casillas, 938 N.W.2d 74, 91 (Minn. Ct. App. 2019) (stating that the court is "constitutionally obligated to faithfully apply the law," despite the harmful effects disseminating nonconsensual private sexual images cause).

[221] State v. Casillas, 952 N.W.2d 629, 646 (Minn. 2020) (noting that in addition to the legal analysis, the court must balance the government's goal of protecting Minnesotans from the harmful nonconsensual dissemination of private sexual images with the protection of free speech).

[222] *Casillas*, 938 N.W.2d at 88.

the court only goes so far as to discuss an individual's consensual sharing of his or her own content.[223] Furthermore, there is no mention of the amplification effect or the like, and A.K.M.'s suffering is merely discussed as factual background information.[224] In so doing, the court of appeals' opinion is one that fits quite squarely into feminist scholars' criticisms as previously discussed[225]: the court's judicial language is plagued with a shadow taxonomy that ultimately trivialized and minimized victims' experiences, hindering the administration of full justice.

The Minnesota Supreme Court presents a rather policy-driven opinion and evaluates revenge porn with a much more critical analysis.[226] Its functional approach was heavily steeped in research about victims' realities. For example, the court discussed how revenge porn stripped victims of their agency and exposed their "most intimate moments to others against [their] will."[227] It discussed how the content can be shared with the victim's "friends, family, bosses, co-workers, teachers, fellow students, or random strangers on the internet," emphasizing that "[t]he effects of revenge porn are so profound that victims have psychological profiles that match sexual assault survivors," to which some victims resort to suicide.[228] It even touches on the amplification effect in its acknowledgment of the various number of online websites that can host the content, stating that "[an estimate of ten thousand] websites feature revenge porn, and social media platforms, such as Twitter, Facebook, Instagram, and Snapchat, allow for explicit content to spread rapidly."[229] Although strict scrutiny analyses are very rigid and hard to overcome, this method may allow courts to critically evaluate the humanity that drives laws into action.

VIII. CONCLUSION

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[223] *Id.*

[224] *See id.* at 77–78.

[225] *See supra* Section II.A.

[226] *Casillas*, 952 N.W.2d at 629 (discussing in detail the research regarding the dangers of revenge porn in both Parts III and IV).

[227] *Id.* (citing Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998)).

[228] *Id.* (citing Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 FEMINIST CRIMINOLOGY 3 (2016)) (arguing that the effects of revenge porn are so profound that victims have psychological profiles that match sexual assault survivors); *see* Sophia Ankel, *Many Revenge Porn Victims Consider Suicide—Why Aren't Schools Doing More to Stop it?*, THE GUARDIAN (May 7, 2018), https://www.theguardian.com/lifeandstyle/2018/may/07/many-revenge-porn-victims-consider-suicide-why-arent-schools-doing-more-to-stop-it [https://perma.cc/YY2G-P6RX] ("Tragically, not every victim survives this experience and some commit suicide as a result of their exposure online.").

[229] *Casillas*, 952 N.W.2d at 629.

The concept of revenge porn is not new. The practice of using sexuality against a person as a means to oppress, objectify, and humiliate has always been prevalent in our society.[230] Yet, revenge porn statutes themselves are fairly new.[231] These statutes raise tough questions about the First Amendment and blur the line between legislative intent and freedom of expression.

Following the Minnesota Supreme Court's holding in *State v. Casillas*, section 617.261 was reinstated.[232] Although it appears that Casillas did not petition for a writ of certiorari to the Supreme Court,[233] any revenge porn case argued under the First Amendment would likely present to the Court the opportunity to set a judicial standard as to when and whether a strict scrutiny analysis precludes the overbreadth doctrine. Most importantly, with such a case, the Court would provide wider protection to victims and set judicial parameters that state legislatures may apply for more effective revenge porn statutes. Yet, our constitutional treasure that is the First Amendment is profound, and it is protected, and the Court will not merely hear a case for the sake of public interest.[234]

To best tackle revenge porn, we need to "deconstruct societal conceptions about who is worthy of being believed."[235] Unlike rape cases, where societal stereotypes around virginity lead to the artificial construction of an "ideal victim" based on factors such as the victim's race, age, relationship to the perpetrator, activity at the time of the offense, use of drugs or alcohol, and criminal history, no such construct exists in revenge porn cases.[236] Without an "ideal" victim, society and state actors such as law

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[230] *See, e.g.*, Clare McGlynn, Erika Rackley & Ruth Houghton, *Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse*, FEMINIST LEGAL STUD. 25, 27–29 (2017) (examining the "continuum of sexual violence" developed by Liz Kelly and using it as a framework to analyze revenge porn).

[231] Tal Kopan, *States Criminalize 'Revenge Porn'*, POLITICO (2013), https://www.politico.com/story/2013/10/states-criminalize-revenge-porn-099082 [https://perma.cc/JT9H-DDRD] (describing how New Jersey was the first state to enact a revenge porn statute, which was passed in 2004).

[232] *Casillas*, 952 N.W.2d at 646–47.

[233] Following the Minnesota Supreme Court's holding on December 30, 2020, the defendant had ninety days to appeal to the United States Supreme Court. *See* SUP. CT. R. 13. (stating that "[u]nless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case . . . is timely when it is filed with the Clerk of this Court within [ninety] days after entry of the judgment."). A search of the United States Supreme Court's docket yields no history of the case nor that such a petition was ever filed, although it is possible that such a petition is pending.

[234] *See* SUP. CT. R. 10.

[235] Kinlaw, *supra* note 1, at 431.

[236] *Id.* at 421 (arguing that "ideal victim theory is a framework for discussing how believability politics arise in the context of victimhood").

> [T]he ideal victim is

enforcement and prosecutors often blame revenge porn victims for taking sexual images or videos of themselves.[237] Furthermore, the socioeconomic and racial backgrounds of victims often determine victims' status. "In addition to the inherent tension between the idea of virginal purity and revenge porn, marginalized groups experience additional barriers to being perceived as innocent victims."[238] Minority victims are seen as less innocent and less pure, and thus they face more barriers in convincing state actors, the media, and society to recognize and address their victimhood.[239] For example,

> [t]he hypersexualization of black women's bodies is a systemic stereotype that is reflected in "society's attribution of sex as part of the 'natural' role of Black women and girls." These stereotypes inform how Black women and girls are perceived today, as "these stereotypes underlie the implicit bias that shapes many adults' views of Black females as sexually promiscuous, hedonistic, and in need of socialization."[240]

Until Congress successfully enacts a federal law or revises section 230 of the CDA, revenge porn victims of all genders and races will have to put their trust in state legislatures to craft effective laws, even though such laws may be found unconstitutional. By simply having a law in place, states validate the humiliation, trauma, and violations suffered by victims through the statute's categorical identifications of revenge porn as a definitive crime and the subsequent punitive damages available against perpetrators. Furthermore, it validates the significance of victims' experiences to the police, who, as the first state actors that push a case towards prosecution, very often resort to blaming the victim, refusing to obtain search warrants against perpetrators, and disregarding the perpetrator's acts altogether.[241]

> 1. "weak," which can be someone who is "sick, old, or very young," or . . . innocent; 2. "carrying out a respectable project" when victimized;
> 3. present somewhere that the victim could not be blamed for being;
> 4. victimized by an offender who is "big and bad";
> 5. victimized by an offender who is unknown to the victim and has no personal relationship to the victim; and
> 6. powerful enough to make their case known.

Id. at 422 (internal citations omitted).

[237] *Id.* at 432 (stating "'the ideal rape victim'" is a virgin, and the "'perfect virgin'" is someone who is "'young, good-looking, straight, and white.'") (citations omitted).

[238] *Id.*

[239] *Id.* (stating a study conducted by Georgetown Law's Center on Poverty and Inequality which found that "black girls are perceived as less innocent than white girls.").

[240] *Id.* at 423 (internal citations omitted).

[241] Citron & Franks, *supra* note 14, at 367 (stating "[v]ictims are often told that the behavior is not serious enough for an in-depth investigation. 'They are shooed away because, officers say, they are to blame for the whole mess, since they chose to share their intimate pictures[]'"

"The normalization of victim blaming not only affects public perception of victims but also police's willingness to assist victims. . . . The mere act of having taken a naked picture delegitimizes victimhood status in the eyes of police officers."[242] Thus, although the availability of a law does not guarantee that police will treat revenge porn victims with respect and urgency, at the very least, (1) a law legitimizes the criminal nature of revenge porn and better equips police to recognize and investigate the facts preceding prosecution, and (2) it simultaneously provides victims relief that the State will have a legally cognizable claim against their perpetrator.[243]

In the age of the #MeToo movement, we must give voice to victims, not silence them. Adequately addressing revenge porn forces police, prosecutors, judges, and juries to shift away from victim blaming to a more proper, and equitable, recognition of victimhood in and outside of revenge porn cases. These actors must come to detach virginal attributes, such as chastity and purity, apart from victim realities.[244] Courts must additionally consider the actual harms suffered by victims, such as the amplification effect of victims' photos across the web, in their legal analyses and not merely within the background information.[245] Such facts should equate to more than a contextual fact or a footnote. Congress must reform section 230 of the CDA to dispel the immunity provided to companies that perpetuate the worldwide exposure of non-consensually disseminated sexual content. And finally, state legislatures must think forwardly as to what First Amendment challenges will inevitably come to confront prospective revenge porn laws in order to best construct the statutes to withstand judicial scrutiny.

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and police failed to obtain a warrant or search a defendant's computer or home due to disregard of the victim's experience).

[242] Kinlaw, *supra* note 1, at 434–35.

[243] *Id.* at 427–28.

[244] *See* Christina E. Wells & Erin Elliott, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 148–49 (2001) ("At all stages of prosecution, they argued, police, prosecutors, judges, and juries relied on rape myths to discount the possibility that a rape had occurred. Such myths included . . . that only 'bad' women are raped, and that women provoke rape through their appearance and behavior.") (citations omitted).

[245] Vora, *supra* note 2, at 246.