Robert E, Jones American Inn of Court
Team 4: February 26, 2020

DANGERS OF THE INTERNET

Program Synopsis

This presentation will address misuse of the internet and social media, and resultant legal ramifications as illustrated by state statutes and high-profile incidents reported in case law and the press.

The discussion will center on the effects of misuse on children and adults, whether existing laws are adequate to protect the public, and best practices for legal counsel when advising clients on these issues.

Topics will include:

- Internet hacking
- Sexting
- Solicitation of suicide
- "Revenge Porn"

Legal references:

1. Illinois Statutes:

Non-consensual Dissemination of Private Sexual Images 720 ILCS 5/11-23.5

Minors Involved in Electronic Dissemination of Indecent Visual Depictions
705 ILCS 405/3-40

Transmission of Obscene Messages	720 ILCS 5/26.5-1
Indecent Solicitation of a Child	720 ILCS 5/11-6 (a-5)
Grooming	720 ILCS 5/11-25
Sexual Exploitation of a Child	720 ILCS 5/11-9.1

2. Case Law:

People v. Austin, 2019 IL 123910, ___ N.E.___ (2019)

Commonwealth v. Carter, 474 Mass. 624, 52 N.E.3d 1054 (Mass. 2016)

Commonwealth v. Carter, 481 Mass. 352, 115 N.E.3d 559 (Mass. 2019)

"Worries of the World Wide Web"

A presentation of the Illinois Judges Association (IJA)

Program Description

"Worries of the World Wide Web" is a 50-60 minute program created to address the increasing problem of cyber bullying, electronic harassment, and sexting/pornography. The program is geared toward middle school students. The presentation addresses the social and legal consequences of this potentially criminal conduct with a goal of increasing awareness of what cyber bullying, harassment, and sexting is and how it may affect the lives of those students who participate in it. Kane County Judges Susan Boles and Clint Hull created the program after talking to middle school teachers who indicated that their students were being negatively impacted through their use of social media. Judge Boles and Hull along with other Kane County Judges have been presenting the program throughout Kane County to both students and their parents for the past five years. In 2016-17, the Illinois Judges Association (IJA) worked with Judges Boles and Hull and expanded the program statewide. The first training session for the program was conducted in January of 2017 where over seventy judges were trained to give this presentation. Since 2017, many other judges throughout Illinois have been trained and have presented to schools throughout Illinois.

The Program

The program combines television newscasts, posted social media videos, and the judges' courtroom experiences to make it interactive and engaging for the students. The program starts with a six-minute YouTube viral video titled "The Bully" which has been viewed worldwide over a million times. The video was written and produced by a thirteen-year old junior-high student from St. Charles, Illinois, who was a victim of bullying after moving to the United States from Ireland. The program then explains how using social media to bully a classmate may quickly turn into criminal behavior. After exploring bullying and electronic harassment, the program shifts to discussing sexting and/or child pornography. The judges using real life examples will explain how seemingly private texts, pictures, and videos are actually not private and explain how a semi-nude or nude selfie could be shared with hundreds of their classmates and posted on the internet. Students will learn how a person who possesses and/or shares the picture could be charged criminally with sexting, child pornography, and/or distribution of child pornography. The program will discuss the legal and non-legal consequences of being charged with a crime. The presentation ends with a question and answer session and a video titled "Cyber Bullying Victims Gone Too Soon" which is a compilation of pictures and a short summary of teenagers who have taken their own lives because of being victimized by social media. The goal is to increase awareness of the dangers of social media and to attempt to prevent them from making a mistake that could affect their lives and others in the future.

Parent Program

Many schools have asked the Judges to present the program to the parents the night before they are scheduled to speak at the school. The Judges review the program with the parents and have a question and answer session afterwards.

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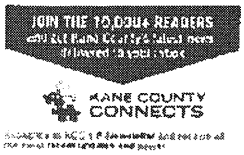

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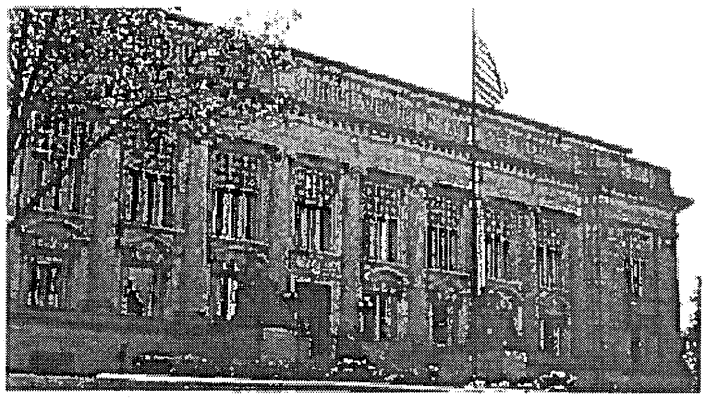
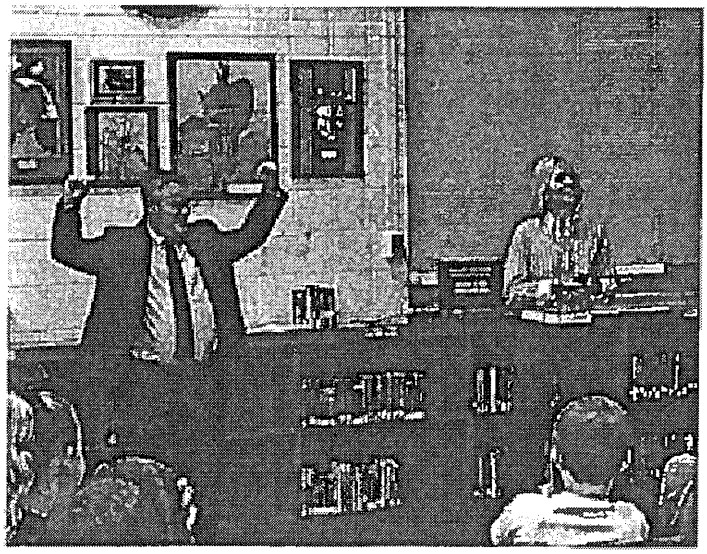


JUDGES BOLES, HULL CHOSEN TO ILLINOIS JUDICIAL COLLEGE EDUCATION COMMITTEE

kanecountyconnects / June 6, 2017 / Leave a comment / 16th Judicial Circuit Court, Awards and Recognition, Government, People



Sixteenth Circuit Court Chief Judge Susan Clancy Boles (right) and Judge Clint Hull (left) talk about cyber safety to students at Thompson

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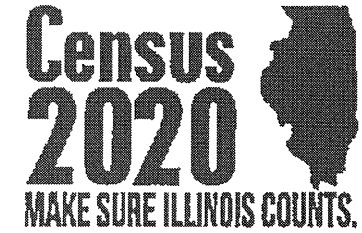

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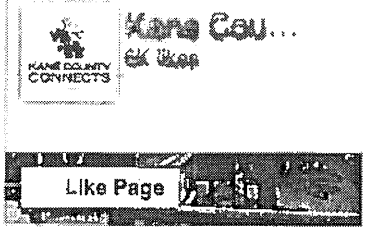

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KANE COUNTY COUNTS!

Middle School. (CREDIT: Photo by Peter Marszalek)

Sixteenth Judicial Circuit Chief Judge Susan Clancy Boles and Judge Clint Hull have been selected to serve on standing committees of the Illinois Judicial College.

Chief Justice Lloyd A. Karmeier and the Illinois Supreme Court have appointed Boles and Hull to serve as members of the Illinois Judicial College standing committee on Judicial Education. The Committee on Judicial Education will provide education and training for all Illinois Judges, including identifying issues that may impact decision making and court administration by Illinois Judges.

"Since the Supreme Court first committed itself to making ongoing education an integral part of judicial service, we have depended on the contributions of committee volunteers to help us understand what needs to be done and how we should do it," Karmeier said.

"For decades, the members of the Judicial Conference Committee on Education have done an extraordinary job in assisting the court in developing the appropriate and effective training programs. As Illinois now moves into a new era with creation of the Judicial College, the court will look to the College's Board of Trustees and these standing committees to take over that vital role and to guide us in the development and implementation of programs that will benefit everyone who serves the judicial branch, staff as well as judges."

Established in January 2016, the Judicial College is designed to provide comprehensive and multidisciplinary educational programs and professional development training to the state's judges and Judicial Branch employees. This will include identifying opportunities to enhance the efficient and effective administration of justice.

The Illinois Judicial College consists of a seven-member Board of Trustees and six standing committees.

"The Illinois Supreme Court created the Judicial College to ensure all of our justice partners are committed to bringing access to justice and procedural fairness to the people of Illinois," said Justice Mary Jane Theis, who serves as Ex Officio to the Judicial College. "A robust training program will enhance public trust and confidence in the integrity of the justice system."

The Committee on Judicial Education will deliver education and training for all Illinois judges, including identifying issues that may impact decision making and court administration by Illinois judges. COJE will recommend and develop continuing education opportunities for both new and experienced Illinois Judges.

The COJE consists of 28 members who are all Illinois judges. The Hon. Robert J. Anderson of DuPage County will serve as chair with the Hon. Robert C. Bollinger of Macon County serving as vice chair.

"Cooperation and collaboration form the foundation for the Illinois Judicial College. Learning from each other, sharing resources and insights, we can better serve the citizens of Illinois," said Cook County Associate Judge Thomas M. Donnelly, who serves as chair of the Judicial College Board. "If judges and those who help judges do justice listen to each other and learn from each other, we will come closer to realizing equal justice under law for all Illinoisans."

Inaugural members of standing committees will serve varied staggered terms."The members of these six committees were identified among the leaders in our justice system and were selected for their skills, experience and passion to serve the College in meeting its charge and purpose," said Michael J. Tardy, Director of the Administrative Office of the Illinois Courts, who also serves as Ex Officio to the Judicial College. "We greatly appreciate the time and commitment that will be required to achieve our collective goals."

The full rosters for each committee are available on the courts website under the new Judicial College tab on the **Illinois Courts website.**

In May, Hull also was selected to serve on a Special Supreme Court Advisory Committee For Justice and Mental Health Planning.

SOURCE: 16th Judicial Court news release, Supreme Court of Illinois news release

Tags: 16th Circuit, Boles, Hull, Illinois SUpreme Court, Judges

ELGIN COURIER-NEWS SUBURBS

Kane judges spread message on internet dangers

By GLORIA CASAS
ELGIN COURIER-NEWS | JAN 24, 2017

A 16th Circuit Court program teaching middle school students in Kane County about the dangers and crimes associated with social media is going statewide, officials said.

The Illinois Judges Association is adding a new component to its judge training called "Worries of the World Wide Web," which was initiated by 16th Circuit Chief Judge Susan Clancy Boles and Judge Clint Hull. Clancy Boles will be teaching a session for new judges this week.

"We are thrilled about it," she said. "We really feel the topic is important. We've gotten such good feedback, not only from teachers and parents but the kids, too. We've had kids come up to us and share personal situations. We really feel we are reaching people at this age and hopefully we can change some behaviors."

Clancy Boles and Hull were instructors for a different program — 7 Reasons to Leave a Party — since 2008 but found the material was too mature for middle school students.

"We knew there was a need to get in front of a younger crowd," Clancy Boles said, because as parents and judges they recognized that electronic communication is affecting the cases in their courtrooms and the lives of teens.

[Most read] Why did the Bears draft Mitch Trubisky over Patrick Mahomes and Deshaun Watson? »

"Worries of the World Wide Web" is geared toward 6th, 7th and 8th graders and covers cyber bullying, electronic harassment and sexting. There are also evening sessions for parents.

Cyber bullying and electronic harassment are closely tied, with the bully not able to see the effect on the person on the other side of the computer and where it might cross into a crime, Clancy Boles said.

Sexting is also risky behavior for teens, she said.

"This generation communicates today with computers in their pockets," she said.

possession of child pornography. "It exp
to criminal behavior even at their age."

. A Warren Township school had a sexting scandal involving 15 students and is discussed as part of the program.

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"We try to explain how things communicated start out privately but it is never private," she said.

Clancy Boles and Hull trained other judges on the curriculum and the feedback on programs around the county has been positive, she said. "The teachers are really appreciative, the administration is really appreciative because they are seeing all of this activity. It is really topical," she said.

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5h

"If you are middle schooler, you live in the moment," Morrill said. But the presentation "really gets their attention and you can see they start to think about it. This really resonates with the kids."

Clancy Boles constantly updates the material because there are so many real life cases happening. It is important to reach parents with the message that they should know their child's password on their phones and be vigilant about computer safety, she said.

She tries to teach students they are accountable for their actions, even if they did not intend to commit a criminal act, she said. Teens often give their phones to friends who may pass on a sexually-explicit photo, and it doesn't matter if you didn't send the photo, you are responsible, she said.

Gloria Casas is a freelance reporter for The Courier-News.

Topics: Middle Schools

Nursing home mogul Philip Esformes sentenced to 20 years for $1.3 billion Medicaid fraud

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Chicago Tribune

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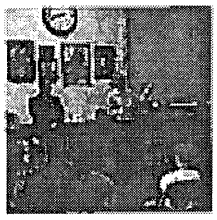
KANE COUNTY JUDGES TEACH SAFETY IN A DIGITAL WORLD

kanecountyconnects / December 15, 2015 / Leave a comment / Court Services, Crime and Safety, Criminal Justice, Education, Good Causes, Parenting, Schools, Youth



Two Kane County judges are helping students understand how to keep from getting tangled in the darker corners of the World Wide Web.

Kane County Judge Clint Hull and Chief Judge Susan Clancy Boles are taking their show on the road, reaching out to schools throughout Kane County, and letting students know that if they participate in some of the more unseemly aspects of social media — cyber bullying, posting of inappropriate images and video, sexting or harassment — there are consequences.

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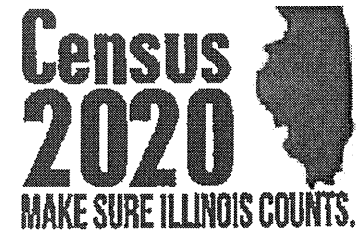

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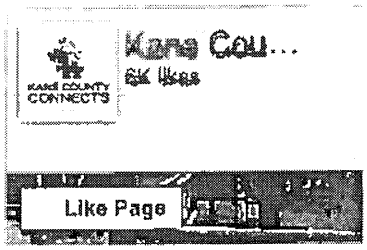

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KANE COUNTY COUNTS!

"As criminal court judges, one of the responsibilities we have is to educate the public on the types of crimes we are seeing in our courtroom and, if possible, to help find ways to prevent them," Hull said. "This is especially true when it comes to the youth in our community."

Too often these days, the consequences of bad behavior on social media include criminal prosecution, and sometimes the consequences are tragic. The judges' fast-moving, tech-savvy Prezi presentation includes lighthearted moments, but it also serves up a serious reminder that teen suicides happen every year, and many of those suicides are directly attributable to the text and images peers post on the Internet.

"If we can make even one student think twice before sending or forwarding on any of this type of material, then we have made an impact," Boles said.

An Increase in Local Cases

Technology has made it much easier for people in general to commit crimes, Hull said, and it's especially true for junior high and high school aged students. Smart phones allow students to communicate with each other 24 hours a day by texting, sharing pictures, and posting both texts and posts.

In the past few years, Hull said, Kane County judges have seen an increase in the number of cases due to teenagers' access to technology.

"Students are using their phones to send texts to harass and bully classmates, to send partially nude or nude photographs of themselves or others to one another, to forward or distribute those same photos to large groups of students, and to take pictures and/or videotape of school fights, underage drinking/drug use, and other types of criminal activity, like vandalism," he said.

Teachers in Kane County have noticed that trend, as well, and asked the judges to put together a presentation to give to students advice about the potential criminal consequences of using technology.

There is just a little bit of "scared straight" in the judges' "Worries of the World Wide Web" presentation, which includes national- and local-news television reports detailing how junior high and high school students — "just like them," Hull says — have been charged in sexting and child pornography cases.

What Constitutes a Crime?

In Illinois, a student can use a phone to commit the crime of sexting, and in some cases the same behavior can constitute child pornography and distribution of child pornography if the teen forwards the pictures. Students who use their phones to harass other students can be charged with harassment by electronic communication. The photographs and videotape of underage drinking and/or drug use, while not being enough in certain cases to charge someone criminally, can be used to suspend students from school-related activities like sports, band and clubs, due to the student violating a school's Code of Conduct.

"What students need to understand is the moment they press 'send,' they lose control over the text or picture they just sent," Hull said. "The text or picture, which they have hoped would remain private, can be forwarded, posted, and/or shared with anyone on the internet. The end result is that 'private' picture just became the property of the World Wide Web."

In the presentation, the judges post a redacted criminal complaint from a case in Kane County in which a young adult was charged with harassment due to posting death threats on Facebook. It also includes a video obtained from YouTube that memorializes young students who have committed suicide as a result of on-line bullying and electronic harassment.

"Ultimately, our hope is that we make the students think and, in the future, make better decisions, so that we never see them in the courthouse," Hull said.

The judges' most recent presentation was Thursday, Dec. 3, at Thompson Middle School. Hull and Boles are scheduled to give the presentation to Wredling Middle Schools on Jan. 28 and Jan. 29 and to Haines Middle School on Feb. 17. Schools that are interested in hosting a presentation are encouraged contact the Chief Judge's Office at (630) 232-3440.

"Judge Hull and I have seen the devastating results that can occur as a result of one bad decision of a young person," Boles said. "If we can get these students to think, 'Wow, that could be me' or 'I didn't realize what could really happen because of just forwarding on a picture or a text,' then we have begun to make at least a dent in the way young people communicate today."

SOURCES: Kane County Chief Judges Office; Photos by Peter Marszalek

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HACKING

I. When data, such as a naked photo, is uploaded to the Internet. It is available for use by anyone who can get access to it.

A. Celebgate – 2014.

THE HACK. A collection of almost 500 private, naked pictures of various celebrities, including Jennifer Lawrence, Kate Upton, and Kirsten Dunst, were posted on various social media websites, including Reddit, without permission of the celebrities. Within one day of posting, the webpage containing the photos amassed over 100,000 followers. It took Reddit 7 days before Reddit took the webpage offline, and it only did so after one of the celebrities, an Olympic Gymnast, claimed that the naked photos of her were taken when she was minor.

HOW IT HAPPENED? A group of hackers accessed the celebrities' ICloud accounts through a phishing scheme. In a phishing scheme, a user is tricked into giving out sensitive information by malicious e-mail accounts or websites that appear to be legitimate. In Celebgate, the hackers created a fake e-mail account called "appleprivacysecurity" and used the e-mail account to ask celebrities to input security information, such as passwords and e-mail address by clicking on a link to a webpage that the hackers controlled. Once the hackers had the usernames and passwords of the celebrities, they downloaded all of the celebrities' Icloud data, including all of the photos, text messages, call logs. and e-mails. The hackers then curated the data, and posted their favorites online.

WHAT HAPPENED TO THE HACKERS? Five men have pled guilty to participating in the scheme including two from Chicago. Two received sentences of less than a year in prison. One got 16 months. One got 18 months. The fifth man got 34 months, who admitted that he not only targeted celebrities, but he also targeted his underage sister-in law and teachers and students at the school where he used to teach.

B. Ring Home Security – 2019

THE HACK. Someone gained access to the Ring security camera of a Mississippi family and used the speaker feature to harass the family's 8 year old daughter telling her that he was Santa Claus and encouraging her to destroy her room. The horrifying details of this incident made its way to local news in Chicago as well as to CNN, the Today Show and Good Morning America.

RING'S RESPONSE. Ring said that the hacker did not gain access through a data breach or compromise of Ring's security. Instead, Ring claimed that the person likely took advantage of the family's weak account security and that the family used a very common password and that the family had used the same password for various accounts and subscriptions.

WHAT HAPPENED TO THE HACKERS? So far, no criminal charges have been filed. The identity of the hacker has not been made public.

II. How to We Protect Ourselves and Our Kids?

A. Data Sccurity Experts Recommcnd:

1. Do Not Use the Same Passwords.

- You are only as strong as your weakest link.
- It only takes one compromised account for all accounts to be at risk.

2. Don't Be Predictable.

-A dictionary of just 100 words can compromise 10% of all passwords.

3. Use complex passwords.

- 8 Character Password (a-z): 200 billion combinations.
- 8 Character Password (a-z & A-Z): 50 trillion combinations
- 8 Character Password (a-z, A-Z, 0-9): 218 trillion combinations.
- 8 Character Password (a-z, A-Z, 0-9, special characters); 900 trillion.

4. Reset Passwords.

- Data Security Experts Now Recommend Every 3 months.
- Passwords at least 13 characters in length that are not dictionary words.

QUESTIONS

– Average person has 90 online accounts. How practical is it to change 90 passwords every three months?

- Is there a better a way to protect our data?

- Should there be more than a simple username and password required in order to gain access to confidential data?

Dear valued customer of TrustedBank,

We have recieved notice that you have recently attempted to withdraw the following amount from your checking account while in another country: $135.25.

If this information is not correct, someone unknown may have access to your account. As a safety measure, please visit our website via the link below to verify your personal information:

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The Washington Post
Democracy Dies in Darkness

The shockingly simple way the nude photos of 'Celebgate' were stolen

By **Abby Ohlheiser**

May 24, 2016 at 1:45 p.m. CDT

Note: *We have updated and republished this post, originally published on March 16, in light of the news that Ryan Collins pleaded guilty to a felony violation of the Computer Fraud and Abuse Act on Tuesday.*

After a ton of speculation about how "celebgate," one of the biggest celebrity hacks in recent memory happened, it appears that the answer is relatively simple. The man who pled guilty to stealing private, nude photographs of celebrities used an email phishing scheme to access more than a hundred personal accounts.

Ryan Collins, a 36-year-old Pennsylvania man, was charged in March with a computer hacking felony for his part in the theft of hundreds of nude photos of female celebrities in 2014, which were then posted online in an event known as "Celebgate." Collins pled guilty to a felony count of unauthorized access to a protected computer to obtain information in May, a charge that carries a maximum of 5 years in jail and a $250,000 fine.

Based on what we know from the plea agreement and prosecutors, it appears that one major part of Celebgate is much less elaborate than what some 4chan users claimed at the time: that many of the photos were stolen through a clever exploitation of a previously unknown iCloud security flaw — a claim that Apple had denied.

Instead, Collins used a method of gaining access to password-protected accounts that can victimize pretty much anyone. Phishing schemes come in a lot of different flavors, but all follow the same basic outline: Users are tricked into giving out sensitive information by malicious email accounts or websites that appear legitimate. Spear phishing, which appears to be what happened here, involves targeting specific users by impersonating businesses or individuals they might already know.

Although the information these emails request — usernames and passwords, personal data, financial information — are things that a legitimate company would never ask its users to provide in an email, the scammers are hoping that if their target believes they can trust the source of the request, they might be more likely to comply.

Phishing attempts like the one now connected to Celebgate are more or less a constant threat for anyone on the Internet. Even if you've never actually taken a nude selfie using a digital device, there's probably something else stored in your digital life that you'd rather not share with the whole world — and there's someone out there who would like to access it.

According to court filings, Collins stole photos, videos and sometimes entire iPhone backups from at least 50 iCloud accounts and 72 Gmail accounts, "mostly belonging to celebrities," between November 2012 and September 2014, when the photos were posted online. The U.S. attorney's office in the Central District of California has confirmed that Collins was charged as a result of a federal investigation into Celebgate, although court documents and statements pertaining to his plea deal do not name any of his famous victims.

Jennifer Lawrence, Kate Upton, Kirsten Dunst, Avril Lavigne, Lea Michele, McKayla Maroney and Ariana Grande were among the celebrities whose photos were said to be in the Celebgate dump. Some, like Lawrence, Upton and Dunst, confirmed that the photos were genuine.

Collins allegedly gained access by setting up emails designed to look like official accounts associated with the Google or Apple services used by his celebrity targets. Some of the emails he used included "e-mail.protection318@icloud.com," "noreply_helpdesko11@outlook.com," and "secure.helpdesko019@gmail.com," according to court documents. Then, it seems that whoever was managing the personal accounts of several of the targeted celebrities complied, replying to those messages with the requested access information: the usernames and passwords for their accounts.

Once he had that information, Collins also had access to everything stored within. He took photos and videos, and sometimes used "a software program to download the entire contents of the victims' Apple iCloud backups," the U.S. attorney's office said.

David Bowdich, assistant director in charge of the FBI's Los Angeles Field Office, released a statement urging everyone to take precautions against schemes like the one linked to Collins. "We continue to see both celebrities and victims from all walks of life suffer the consequences of this crime and strongly encourage users of Internet-connected devices to strengthen passwords and to be skeptical when replying to emails asking for personal information," he said.

But there's more you can do, particularly on the specific services named in this case: Both iCloud and Gmail allow users to turn on two-factor authentication, which adds an additional step to logging on to an account. Instead of just a username and password (which, by the way, should be different for each account), an account with two-factor enabled also requires a unique code, sent to the user's phone at the time of login. More and more services are starting to enable two-factor security measures. Turn it on if it's available.

We still know very little about how the photos went from people like Collins to the whole Internet. At the time, 4Chan users were talking about a secret, very creepy-sounding underground ring that connected the people who hacked celebrity accounts with those who wanted to sell or collect them. The U.S. attorney's office said investigators had "not uncovered any evidence linking Collins to the actual leaks or that Collins shared or uploaded the information he obtained."

It seems unlikely that investigators believe Collins is the sole source of the photos in the Celebgate cache. Gawker reported in January that two Chicago homes were raided in connection with the Celebgate investigation. In both cases, according to court documents obtained by Gawker, investigators believed that the individuals in question had also used phishing schemes to target the iCloud accounts of celebrities connected to the stolen photo cache. The district attorney's office told Gawker on Tuesday that the Chicago raids and the charge against Collins were "directly related."

Collins is the first to be charged in connection with the FBI's investigation. As part of a plea deal, prosecutors said in March that they will recommend an 18-month prison sentence

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Abby Ohlheiser

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Hacker of Nude Photos of Jennifer Lawrence Gets 8 Months in Prison

By Laura M. Holson

Aug. 30, 2018

A Connecticut man was sentenced on Wednesday to eight months in prison for his part in a hacking scandal in which nude photographs of the actress Jennifer Lawrence and other celebrities were made public on the internet, according to the man's lawyer.

The man, George Garofano, 26, had pleaded guilty in April to gaining access to about 240 Apple iCloud accounts and stealing users' private information. He was one of four hackers involved in a 2014 phishing scheme that tricked people into revealing their usernames and passwords. The other three hackers have been sentenced.

Mr. Garofano's lawyer, Richard Lynch, said that Judge Victor A. Bolden, who oversaw sentencing in the United States District Court in Bridgeport, Conn., gave his client a lighter sentence than prosecutors had requested. Prosecutors in the case had argued that Mr. Garofano should serve at least 10 to 16 months in prison, saying the hacking was a serious crime.

Mr. Lynch said he and his team asked the judge for a more lenient sentence: five months in prison and another five months of home confinement. "The judge listened," he said. But, Mr. Lynch added, "it was a difficult case because of the number of victims."

After Mr. Garofano serves his sentence, he will be subject to three years of supervised release.

Mr. Garofano, who is from North Branford, Conn., breached not only the accounts of celebrities like Ms. Lawrence, Kate Upton and Kirsten Dunst, but also those of users who were not famous. Ms. Lawrence told Vanity Fair in 2014 that she was worried about how the release of the stolen photos would affect her career.

"Just because I'm a public figure, just because I'm an actress, does not mean that I asked for this," she told the magazine. She called the hacking a "sex crime."

"It's disgusting," she added. "The law needs to be changed, and we need to change."

A spokeswoman for Ms. Lawrence said on Thursday that the actress declined to comment on the sentencing news.

Mr. Lynch said his client was apologetic. "When he gets behind a computer, he forgets what he does impacts other people," he said.

A version of this article appears in print on Aug. 31, 2018, Section A, Page 19 of the New York edition with the headline: Hacker of Nude Photos Is Sentenced

A hacker accessed a family's Ring security camera and told their 8-year-old daughter he was Santa Claus

By Elizabeth Wolfe and Brian Ries, CNN

Updated 4:36 PM ET, Fri December 13, 2019

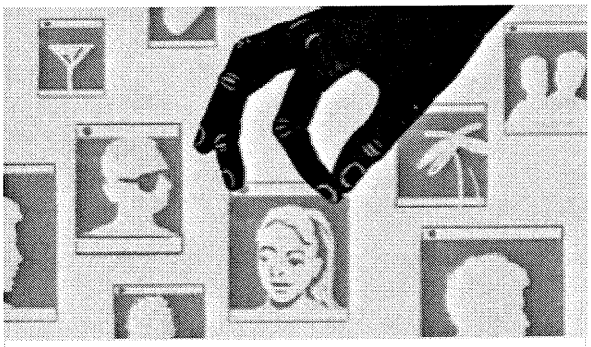
(CNN) – Someone gained access to the Ring security camera of a Mississippi family and used the speaker feature to harass their 8-year-old daughter, telling her he was Santa Claus and encouraging her to destroy the room.

The horrifying ordeal is one of several recent incidents in which hackers have figure out a way to log into Ring accounts without the user's knowledge.

Ashley LeMay told CNN affiliate WMC she installed the camera in her daughters' room so she could watch over them while she works overnight nursing shifts. "I did a lot of research on these before I got them. You know, I really felt like it was safe," she told the affiliate.

The intrusion happened just four days after she installed it when she was running an errand and her husband was at home with the kids.

When her daughter Alyssa heard noises coming from her bedroom, the child went in to see what it was.



Related Article: We asked a hacker to try and steal a CNN tech reporter's data. Here's what happened

The Ring camera footage, obtained by WMC, shows Alyssa standing nervously in her room while Tiny Tim's rendition of "Tiptoe through the Tulips," a warbling song featured in the horror movie "Insidious," plays over the camera's speaker.

"Who is that," Alyssa asks, after a man's voice fills her room.

"I'm your best friend. I'm Santa Claus," the voice says. "I'm Santa Claus. Don't you want to be my best friend?"

WMC reported the unidentified person continued to harass the girl, taunting her and encouraging her to destroy her room.

"I watched the video and I mean my heart just like ... I didn't even get to the end where she is screaming 'Mommy, mommy' before I like ran inside," LeMay said.

Ring responds

In a statement sent to CNN, Ring said the hacker did not gain access through a data breach or compromise of Ring's security. Instead, the person likely took advantage of the family's weak account security.

"Customer trust is important to us and we take the security of our devices seriously," the statement said. "We have investigated this incident and can confirm it is in no way related to a breach or compromise of Ring's security."

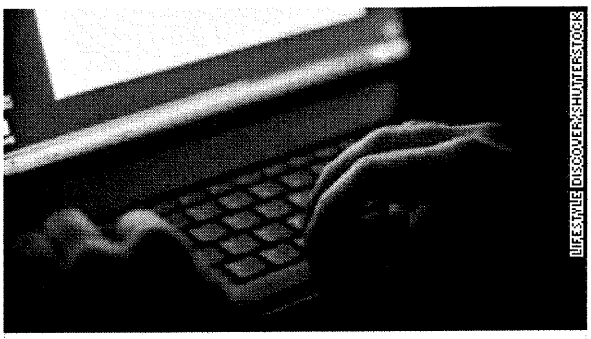
According to the statement, Ring users "often use the same username and password for their various accounts and subscriptions." If those were to fall into the wrong hands, those devices could be compromised.

"As a precaution, we highly and openly encourage all Ring users to enable two-factor authentication on their Ring account, add Shared Users (instead of sharing login credentials), use strong passwords, and regularly change their passwords," the statement said.

Others have been hacked and harassed

There were at least three other instances in the past week alone involving Ring devices.

On Wednesday morning, a father in Nebraska was shocked to hear a voice talking to his daughter through the Ring camera on their kitchen counter. He told CNN affiliate WOWT that he immediately unplugged the device and called Ring, who told him a third-party device had logged into his account.



Related Article: How hackable is your password?

Earlier this week, an Atlanta woman was in her bed when a man's voice came over her bedroom Ring camera, yelling that he could see her and demanding that she wake up, CNN affiliate WSB-TV reported.

On Sunday night in Florida, a Cape Coral couple was harassed by a person over their Ring camera who made racist comments about their biracial family, revealing that he had likely been watching them for days.

On each of these occasions, Ring said the system invasion was not the result of a breach or failure of Ring's security. Instead, the hacker had likely gained access to the family's account through weak or stolen login credentials.

How to avoid being a victim

Most customers, called "neighbors" by Ring, buy the cameras hoping to get the peace of mind and protection the company advertises.

Steps can be taken to protect your personal data and make it more difficult for unknown people to gain access to your accounts.

Practicing good security habits with strong and unique passwords is the first step towards strengthening your account security.

Change default password immediately and avoid using phrases or dates that are significant to you, like birthdays or relatives' names.

Remembering multiple passwords is difficult, but password managers like 1Password or LastPass can help you keep your passwords secure but on hand for when you need to use them.

Two-factor or two-step authentication, like Ring encourages its users to set up, adds an additional layer of security on your accounts.

Two-step authentication involves a user entering a password followed by a prompt to either enter a code sent via text or email, swipe a fingerprint or provide another way to prove their identity.

An earlier version of this story misidentified the state where the LeMay family lives. They live in Mississippi.

Inns of Court – Team 4 – February 26, 2020

Applicable Statutes

I. Non-Consensual Dissemination of Private Sexual Images – 720 ILCS 5/11-23.5

A. Elements

1. Intentionally disseminates an image of another person:
   a. At 18 years of age; and
   b. Who is identifiable from the image itself or information displayed in connection with the image; and
   c. Who is engag3ed in a sexual act or whose intimate parts are exposed, in whole or in part; and
2. Obtains the image under circumstances in which a reasonable person would know or understand what the image was to remain private; and
3. Knows or should have known that the person in the image has not consented to the dissemination.

B. Definitions

1. "Sexual act" = penetration, masturbation or sexual activity.
2. "Sexual Activity" means any:
   a. touching or fondling by the victim or another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for the purpose of sexual gratification or arousal; or
   b. transfer of semen for the purpose of sexual gratification
   c. act of urination within a sexual context
   d. any bondage, deter, or sadism masochism; or
   e. sadomasochism abuse in any sexual context.

C. Caselaw

1. Statute criminalizing nonconsensual dissemination of private sexual image if a "reasonable person would know or understand that the image was to remain private" was not rendered unreasonable vague in violation of due process based on use of "reasonable person negligence standard, though defendant asserted that it required her to "read the minds of others" as to whether image was intended to remain private, as such negligent mental state was valid basis for imposing criminal liability and did not violate due process. People v. Austin, 2019 IL 123910.

D. Penalty – Class 4 felony punishable up to a year in prison.

II. Juvenile Court Act: Minors Requiring Authoritative Intervention
705 ILCS 405/3-40: Minors involved in electronic dissemination of indecent visual depictions in need of supervision

A. Elements

1. Distribution or dissemination
2. Indecent visual depiction
3. Another minor
4. Via computer or electronic communication device

B. Penalties

Court ordered counseling; community service.

Other convictions and penalties remain available for disorderly conduct, public indecency, child pornography, and harassing and obscene communications.

III. Criminal Code: Offenses Affecting Public Health, Safety and Decency - 720 ILCS 5/26.5-1: Transmission of Obscene Messages

A. Elements

1. Transmission of messages
2. By telephone, telegraph or wire
3. Using obscene, lewd or immoral language
4. With intent to offend (may be inferred)

B. Penalties:

Class B Misdemeanor, punishable by minimum 14 days in jail or 240 hours of public service;

May be elevated to Class 4 Felony if offender was at least 18 and the victim was under 18.

Court may order psychiatric evaluation for any offender.

IV. Indecent Solicitation of a Child – 720 ILCS 5/11-6 (a-5)

A. Elements

1. A person 17 years or older
2. Discusses an act of sexual conduct or sexual penetration
3. With a child or one whom he or she believes to be a child
4. By means of the internet
5. With the intent that Agg. Crim. Sx. Abuse, Predatory Criminal Sexual Assault of a Child or Agg. Crim. Sx. Assault be committed.
6. (a-6) It is not a defense to subsection (a-5) that the person did ot solicit the child to perform sexual conduct or sexual penetration with the person.

B. Definitions

1. "Child" means a person under 17 years of age.
2. "Solicit" means to command, authorize, urge, incite, request, or advise another to perform an act by any means including, but not limited to, in person, over the phone, in writing, by computer, or by advertisement of any kind.

C. Penalties

1. Indecent solicitation of a child under subsection (a-5) is a Class 4 felony.

D. Caselaw

1. Defendant was properly convicted of indecent solicitation of a child, although he was actually talking to an adult detective posing as a 14 year-old. People v. Ruppenthal, 265 Ill. Dec. 43 (1st Dist. 2002).

V. Grooming 720 ILCS 5/11-25

A. Elements

1. A person
2. Knowingly
3. Uses a computer on-line service, internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to
4. Seduce, solicit lure, or entice, or attempt to seduce, solicit, lure, or entice
5. A child, child's guardian, or another person believed by the person to be a child or a child's guardian
6. To commit any sex offense as defined in Section 2 of the Sex Offender Registration Act
7. To distribute photographs depicting the sex organs of the child, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child.
8. "Child" means person under 17 years of age.

B. Penalty – Class 4 felony

C. Caselaw

1. Defendant's interpretation that the statute requires no that the defendant would commit the offense but that the child would be enticed to commit the offense would be inconsistent with the legislative intent and would lead to an absurd result. People v. Vara, 409 Ill. Dec. 910 (2nd Dist. 2016).

VI. Sexual exploitation of a child 720 ILCS 5/11-9.1

A. Elements

1. A person commits sexual exploitation of a child if in the presence or virtual presence, or both, of a child
2. With knowledge that a child or one who he or she believes to be a child would view his or her acts, that person:
   a. Engages in a sexual act; or
   b. Exposes his or her sex organs, anus or breast for the purpose of sexual arousal or gratification of such person or the child or one who he or she believes to be a child.
3. (a-5) A person commits sexual exploitation of a child who knowingly entices, coerces, or persuades a child to remove the child's clothing for the purpose of sexual arousal or gratification of the person or the child, or both.

B. Definitions

1. "Virtual Presence" means an environment that is created with software and presented to the user and or receiver via the Internet, in such a way that the user appears in front of the receiver on the computer monitor or screen or hand-held portable electronic device, usually through a web camming program. "virtual presence" includes primarily experiencing through sight or sound, o both, a video image that can be explored interactively at a personal computer or hand-held communication device or both.

C. Penalties
   1. Class A Misdemeanor.
   2. 2nd violation is a Class 4 felony.
   3. Class 4 felony if previously convicted of a sex offense.
   4. Class 4 felony if the victim was under 13 years of age.
   5. Class 4 felony if committed by a person 18 years of age or older within 500 feet of an elementary or secondary school with children present.

481 Mass. 352
Supreme Judicial Court of Massachusetts,
Bristol..

COMMONWEALTH
v.
Michelle CARTER.

SJC-12502
|
Argued October 4, 2018.
|
Decided February 6, 2019.

Synopsis

Background: Defendant, who was 17 years old at time of victim's death by suicide, was convicted following bench trial in the Superior Court Department, Bristol County, Lawrence Moniz, J., of involuntary manslaughter as a youthful offender. Defendant applied for direct appellate review.

Holdings: The Supreme Judicial Court, Kafker, J., held that:

[1] defendant's extrajudicial confession was corroborated by sufficient evidence;

[2] law of involuntary manslaughter was not unconstitutionally vague in violation of due process as applied to defendant;

[3] no violation of defendant's free speech rights resulted from conviction;

[4] evidence supported finding that defendant's actions were wanton or reckless; and

[5] trial court acted within its discretion in denying defendant's motion in limine to admit expert testimony by forensic psychologist.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (20)

[1] **Criminal Law**
Homicide, mayhem, and assault with intent to kill

Homicide
Involuntary manslaughter

Defendant's extrajudicial confession that she had ordered victim to get back into truck, which victim had filled with carbon monoxide in his attempt to commit suicide, was corroborated by sufficient evidence in prosecution for involuntary manslaughter; statement was corroborated not only by victim's death but also by text messages exchanged with victim encouraging him to commit suicide and by fact that defendant and victim were in voice contact while suicide was in progress.

[2] **Criminal Law**
Corroboration

A conviction cannot be based solely on the defendant's extrajudicial confession.

[3] **Criminal Law**
Corroboration

The corroboration rule, which requires evidence beyond a defendant's extrajudicial conviction, requires only that there be some evidence, besides the confession, that the criminal act was committed by someone, that is, that the crime was real and not imaginary.

[4] **Criminal Law**
Homicide, mayhem, and assault with intent to kill

In a homicide case, the corroborating evidence beyond the defendant's extrajudicial confession need only tend to show that the alleged victim is dead.

[5] **Homicide**
Manslaughter in general

Indictment charging defendant with manslaughter by wanton and reckless conduct subsumed both the theories that charge was based on wanton or reckless conduct and that charge was based on wanton and reckless failure to act.

1 Cases that cite this headnote

[6] **Criminal Law**
Presumptions

Judges in jury-waived trials are presumed to know and correctly apply the law.

1 Cases that cite this headnote

[7] **Constitutional Law**
Homicide, mayhem, and assault with intent to kill

Homicide
Nature of act causing death

Law of involuntary manslaughter was not unconstitutionally vague in violation of due process as applied to defendant who was convicted for her role in victim's suicide; common law provided sufficient notice that a person might be charged with involuntary manslaughter for reckless or wanton conduct, including verbal conduct, causing victim to commit suicide. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[8] **Constitutional Law**
Statutes in general

A statute is unconstitutionally vague if people of common intelligence must necessarily guess at its meaning.

[9] **Constitutional Law**
Statutes in general

If a statute has been clarified by judicial explanation, it will withstand a challenge on grounds of unconstitutional vagueness.

[10] **Homicide**
What constitutes involuntary manslaughter, in general

Wanton or reckless conduct that causes a person's death constitutes involuntary manslaughter.

1 Cases that cite this headnote

[11] **Homicide**
Nature of act or omission causing death

Procuring a suicide by advice or otherwise may constitute a homicide.

[12] **Constitutional Law**
Particular offenses in general

Constitutional Law
Offenses

Homicide
Nature of act causing death

No violation of defendant's free speech rights resulted from convicting her of involuntary manslaughter for reckless and wanton conduct, pressuring text messages and phone calls, preying upon well-known weaknesses, fears, anxieties and promises, that finally overcame willpower to live of mentally ill, vulnerable, young person, thereby coercing him to commit suicide. U.S. Const. Amend. 1.

[13] **Homicide**
What constitutes involuntary manslaughter, in general

The crime of involuntary manslaughter proscribes reckless or wanton conduct causing the death of another.

2 Cases that cite this headnote

[14] **Constitutional Law**
Law Enforcement; Criminal Conduct

It is not an abridgment of freedom of speech to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or

carried out by means of language, either spoken, written, or printed; crimes committed using text messages or other electronic communications are treated no differently. U.S. Const. Amend. 1.

[15] **Infants**

Assault and battery

The term "infliction" of serious bodily harm in the youthful offender statute does not require direct, physical causation of harm; the statute requires that the offense involve the infliction of serious bodily harm, not that the defendant herself be the one who directly inflicted it.

Mass. Gen. Laws Ann. ch. 119, § 54.

[16] **Homicide**

Recklessness, wantonness, or extreme indifference

Whether conduct is wanton or reckless, in support of a charge of involuntary manslaughter, is determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances.

[17] **Homicide**

Recklessness, wantonness, or extreme indifference

If based on the objective measure of recklessness, the defendant's actions constitute wanton or reckless conduct, in support of a charge of involuntary manslaughter, if an ordinary normal person under the same circumstances would have realized the gravity of the danger.

1 Cases that cite this headnote

[18] **Homicide**

Recklessness, wantonness, or extreme indifference

If based on the subjective measure of recklessness, i.e., the defendant's own knowledge, in support of a charge of involuntary manslaughter, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his or her conduct so as to avoid the act or omission which caused the harm.

[19] **Homicide**

Involuntary manslaughter

Infants

Homicide and assault with intent to kill

Evidence supported finding that 17-year-old defendant's actions were wanton or reckless under subjective standard in support of conviction of involuntary manslaughter as a youthful offender; defendant encouraged victim to get back into truck, which victim had filled with carbon monoxide in suicide attempt, trial court considered defendant's age and maturity when evaluating her actions, and defendant's actions were not spontaneous or impulsive.

Mass. Gen. Laws Ann. ch. 119, § 54.

[20] **Criminal Law**

Mental condition or capacity

In bench trial, trial court acted within its discretion in involuntary manslaughter prosecution in denying defendant's motion in limine to admit expert testimony by forensic psychologist to testify as to general principles and characteristics of undeveloped adolescent brain but not as to defendant specifically.

****561** Homicide. Youthful Offender Act. Due Process of Law, Vagueness of statute. Constitutional Law, Vagueness of statute. Wanton or Reckless Conduct. Evidence, Verbal conduct, Expert opinion. Witness, Expert.

INDICTMENT found and returned in the Superior Court Department on February 6, 2015.

The case was heard by Lawrence Moniz, J.

The Supreme Judicial Court granted an application for direct appellate review.

Attorneys and Law Firms

Daniel N. Marx (William W. Fick, Nancy Gertner, Cambridge, Joseph P. Cataldo, & Cornelius J. Madera, III, Franklin, also present) for the defendant.

Shoshana E. Stern, Assistant District Attorney (Maryclare Flynn, Assistant District Attorney, also present) for the Commonwealth.

Eva G. Jellison, for youth advocacy division of the Committee for Public Counsel Services & another, amici curiae, submitted a brief.

Brian Hauss, of New York, Matthew R. Segal, & Ruth A. Bourquin, for American Civil Liberties Union & another, amici curiae, submitted a brief.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Opinion

KAFKER, J.

*353 At age seventeen, Michelle Carter was charged with involuntary manslaughter as a youthful offender for the suicide death of Conrad Roy, age eighteen. In Commonwealth v. Carter, 474 Mass. 624, 52 N.E.3d 1054 (2016) (Carter I), we affirmed the Juvenile Court judge's denial of the motion to dismiss the youthful offender indictment, "conclud[ing] that there was probable cause to show that the coercive quality **562 of the defendant's verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression, and that but for the defendant's admonishments, pressure, and instructions, the victim would not have gotten back into [his] truck and poisoned himself to death." Id. at 635-636, 52 N.E.3d 1054. Thereafter, the defendant waived her right to a jury trial, and the case was tried to a judge in the Juvenile Court over several days. The defendant was convicted as charged and has *354 appealed. We now consider whether the evidence at trial was sufficient to support the judge's finding of proof beyond a reasonable doubt that the defendant committed involuntary manslaughter as a youthful offender, and whether the other legal issues raised or revisited by the defense, including that the defendant's verbal conduct was protected by the First Amendment to the United States Constitution, require reversal of the conviction. We conclude that the evidence was sufficient to support the judge's finding of proof beyond a reasonable doubt that the defendant committed involuntary manslaughter as a youthful offender, and that the other legal issues presented by the defendant, including her First Amendment claim, lack merit. We therefore affirm. [1]

Facts. In Carter I, 474 Mass. at 625-630 & nn.3-8, 52 N.E.3d 1054, we discussed at length the facts before the grand jury, including the numerous text messages exchanged between the defendant and the victim in the days leading up the victim's death on July 12, 2014. Viewed in the light most favorable to the Commonwealth, Commonwealth v. Latimore, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979), the evidence supporting the defendant's conviction was not substantially different at trial and revealed the following facts.

On July 13, 2014, the victim's body was found in his truck, which was parked in a store parking lot in Fairhaven. He had committed suicide by inhaling carbon monoxide that was produced by a gasoline powered water pump located in the truck.

The defendant, who lived in Plainville, and the victim, who divided his time between his mother's home in Fairhaven and his father's home in Mattapoisett, first met in 2012, when they were both visiting relatives in Florida. Thereafter, they rarely saw each other in person, but they maintained a long-distance relationship by electronic text messaging [2] and cellular telephone (cell phone) conversations. A frequent subject of their communications was the victim's fragile mental health, including his suicidal thoughts. Between October 2012 and July 2014, the victim attempted suicide several times by various means, including overdosing on over-the-counter medication, drowning, water poisoning, and suffocation. None of these attempts succeeded, as the victim abandoned each attempt or sought rescue.

*355 At first, the defendant urged the victim to seek professional help for his mental illness. Indeed, in early June 2014, the defendant, who was planning to go to McLean Hospital for treatment of an eating disorder, asked the victim to join her, saying that the professionals there could help him with his depression and that they **563 could mutually support each other. The victim rebuffed these efforts, and the tenor of their communications changed. As the victim continued researching suicide methods and sharing his findings with the defendant, the defendant helped plan

how, where, and when he would do so,[3] and downplayed his fears about how his suicide would affect his family.[4] She also repeatedly chastised *356 him for his indecision and delay, texting, for example, that he "better not be bull shiting me and saying you're gonna do this and then purposely get caught" and made him "promise" to kill himself.[5] The trial judge found that the **564 defendant's actions from *357 June 30 to July 12 constituted wanton or reckless conduct in serious disregard of the victim's well-being, but that this behavior did not cause his death. This and other evidence, however, informed and instructed the judge about the nature of their relationship and the defendant's understanding of "the feelings that he has exchanged with her -- his ambiguities, his fears, his concerns," on the next night.

In the days leading to July 12, 2014, the victim continued planning his suicide, including by securing a water pump that he would use to generate carbon monoxide in his closed truck.[6] On July 12, the victim drove his truck to a local store's parking **565 lot *358 and started the pump. While the pump was operating, filling the truck with carbon monoxide, the defendant and victim were in contact by cell phone. Cell phone records showed that one call of over forty minutes had been placed by the victim to the defendant, and a second call of similar length by the defendant to the victim, during the time when police believe the victim was in his truck committing suicide. There is no contemporaneous record of what the defendant and victim said to each other during those calls.

The defendant, however, sent a text to a friend at 8:02 P.M., shortly after the second call: "he just called me and there was a loud noise like a motor and I heard moaning like someone was in pain, and he wouldn't answer when I said his name. I stayed on the phone for like 20 minutes and that's all I heard." And at 8:25 P.M., she again texted that friend: "I think he just killed himself." She sent a similar text to another friend at 9:24 P.M.: "He called me, and I heard like muffled sounds and some type of motor running, and it was like that for 20 minutes, and he wouldn't answer. I think he killed himself." Weeks later, on September 15, 2014, she texted the first friend again, saying in part:

> "I failed [the victim] I wasn't supposed to let that happen and now I'm realizing I failed him. [H]is death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the car because it was working and he got scared and I fucking told him to get back in ... because I knew he would do it all over again the next day and I couldn't have him live the way he was living anymore I couldn't do it I wouldn't let him."

The judge found that the victim got out of the truck, seeking fresh air, in a way similar to how he had abandoned his prior *359 suicide attempts. The judge also focused his verdict, as we predicted in Carter I, supra at 634, 52 N.E.3d 1054, on "those final moments, when the victim had gotten out of his truck, expressing doubts about killing himself." The judge found that when the defendant realized he had gotten out of the truck, she instructed him to get back in, knowing that it had become a toxic environment and knowing the victim's fears, doubts, and fragile mental state. The victim followed that instruction. Thereafter, the defendant, knowing the victim was inside the truck and that the water pump was operating -- the judge noted that she could hear the sound of the pump and the victim's coughing -- took no steps to save him. She did not call emergency personnel, contact the victim's family,[7] or instruct him to get out of the truck. The victim remained in the truck and succumbed to the carbon monoxide. The judge concluded that the defendant's actions and her failure to act constituted, "each and all," wanton and reckless conduct that caused the victim's death.

Discussion. In Carter I, we considered whether there was probable cause for the grand jury to indict the defendant as a youthful offender for involuntary manslaughter, whereas here, we consider whether the evidence at trial was sufficient to support her conviction of that offense beyond a reasonable doubt, a much higher standard for the Commonwealth to meet. In Carter I, however, we also addressed and resolved several legal principles that govern this case. We rejected the defendant's claim that her words to the victim, **566 without any physical act on her part and even without her physical presence at the scene, could not constitute wanton or reckless conduct sufficient to support a charge of manslaughter. Carter I, 474 Mass. at 632-633, 52 N.E.3d 1054. Rather, we determined that verbal conduct in appropriate circumstances could "overcome a person's willpower to live, and therefore ... be the cause of a suicide." Id. at 633, 52 N.E.3d 1054. We also ruled that "there was ample evidence to establish probable cause that the defendant's conduct was wanton or reckless under either a subjective or objective standard." Id. at 635, 52 N.E.3d 1054. See id. at 631, 52 N.E.3d 1054, quoting Commonwealth v. Pugh, 462 Mass. 482, 496-497,

969 N.E.2d 672 (2012) (wanton or reckless conduct may be "determined based either on the defendant's specific knowledge or on what a reasonable person should *360 have known in the circumstances"). As we explained, "an ordinary person under the circumstances would have realized the gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide." Carter I, supra at 635, 52 N.E.3d 1054. We further explained that "the defendant -- the victim's girl friend, with whom he was in constant and perpetual contact -- on a subjective basis knew that she had some control over his actions." Id. We also rejected the defendant's claims that the involuntary manslaughter statute, G. L. c. 265, § 13, was unconstitutionally vague as applied to her, Carter I, supra at 631 n.11, 52 N.E.3d 1054; that her reckless or wanton speech having a direct, causal link to the specific victim's suicide was protected under the First Amendment or art. 16 of the Massachusetts Declaration of Rights, Carter I, supra at 636 n.17, 52 N.E.3d 1054; and that her offense did not involve the infliction or threat of serious bodily harm, as required by G. L. c. 119, § 54, the youthful offender statute, Carter I, supra at 637 n.19, 52 N.E.3d 1054. For the most part, we decline to revisit these legal issues today, as we discern no error in our earlier analysis. With these principles in mind, we turn to the defendant's arguments on appeal, providing further explication, particularly on the First Amendment claim, where we deem necessary or appropriate.

[1] [2] [3] [4] [5] a. Sufficiency of the evidence. The defendant argues that her conviction was unsupported by sufficient evidence.[8] In particular, she argues that, to the extent her conviction was based on the victim's getting out of the truck and her ordering him back into it, it was improperly based on her after-the-fact statement, in her text message to a friend, that the victim "got out of the [truck] because it was working and he got scared and I fucking told him to get back in," a statement she asserts is uncorroborated. It is true that a conviction cannot be based solely on the defendant's extrajudicial *361 confession. Commonwealth v. Forde, 392 Mass. 453, 458, 466 N.E.2d 510 (1984). The **567 defendant's statement, however, was not uncorroborated. "The corroboration rule requires only that there be some evidence, besides the confession, that the criminal act was committed by someone, that is, that the crime was real and not imaginary." Id. Indeed, "in a homicide case, the corroborating evidence need only tend to show that the alleged victim is dead." Id.

Here, the defendant's statement was more than adequately corroborated not only by the victim's death but also by text messages exchanged with the victim encouraging him to commit suicide, and by the fact that the defendant and the victim were in voice contact while the suicide was in progress -- that is, despite the physical distance between them, the defendant was able to communicate with the victim, hear what was going on in the truck, and give him instructions. The trial judge also expressly "looked for independent corroboration of some of the statements that [the defendant] made, to make sure that there was no undue reliance on any one source of evidence." The judge emphasized that the "photos taken at the scene of the crime, where [the victim's] truck was located, clearly illustrate the location of the water pump immediately adjacent to where he would have been sitting in the truck, next to his upper torso and his head, thereby giving a good explanation to [the defendant's description] that the noise was loud within the truck. [The defendant] at that point, therefore, had reason to know that [the victim] had followed her instruction and had placed himself in the toxic environment of that truck." Clearly, the defendant was not "confessing" to an imaginary crime. In sum, the judge was entitled to credit the defendant's statement, and the corroborating details, that the victim had in fact gotten out of the truck and that the defendant ordered him back into the truck, ultimately causing his death.

[6] The defendant also argues that the judge did not properly apply the legal principles set forth in Carter I. She points out that the judge's remarks on the record, explaining the guilty verdict, contain no express finding that her words had a "coercive quality" that caused the victim to follow through with his suicide. See Carter I, 474 Mass. at 634, 52 N.E.3d 1054. However, those remarks were, as the judge stated, not intended as a comprehensive statement of all the facts he found or of all his legal rulings. Moreover, "judges in jury-waived trials are presumed to know and correctly apply the law." Commonwealth v. Healy, 452 Mass. 510, 514, 895 N.E.2d 752 (2008), quoting *362 Commonwealth v. Watkins, 63 Mass. App. Ct. 69, 75, 823 N.E.2d 404 (2005). Finally, and perhaps most importantly, rather than use our formulation, the judge expressly tracked the elements of manslaughter. He found: "She instructs [the victim] to get back into the truck, well knowing of all of the feelings

that he has exchanged with her -- his ambiguities, his fears, his concerns." This, the judge found, constituted "wanton and reckless conduct by [the defendant], creating a situation where there is a high degree of likelihood that substantial harm would result to [the victim]."[9] The judge **568 then further found that this conduct caused the victim's death beyond a reasonable doubt. His finding of causation in this context, at that precise moment in time, includes the concept of coercion, in the sense of overpowering the victim's will.

This finding is supported by the temporal distinctions about causation drawn by the judge. Until the victim got out of the truck, the judge described the victim as the cause of his own suicidal actions and reactions. This period of "self-causation" and "self-help," which is completely consistent with his prior behavior, ended when he got out of the truck. As the judge explained:

> "It is apparent to this Court in reviewing the evidence that [the victim] was struggling with his issues and seeing a way to address them and took significant actions of his own toward that end. His research was extensive. He spoke of it continually. He secured the generator. He secured the water pump. He researched how to fix the generator. He located his vehicle in an unnoticeable area and commenced his attempt by starting the pump.
>
> "However, he breaks that chain of self-causation by exiting the vehicle. He takes himself out of the toxic environment that it has become. This is completely consistent with his earlier *363 attempts at suicide. In October of 2012, when he attempted to drown himself, he literally sought air. When he exited the truck, he literally sought fresh air. And he told a parent of that attempt.
>
> "Several weeks later, in October of 2012 again, he attempts, through the use of pills, to take his life but calls a friend and assistance is sought and treatment secured. That [the victim] may have tried and maybe succeeded another time, after July 12 or 13 of 2014, is of no consequence to this Court's deliberations." (Emphasis added.)

The judge found that, once the victim left the truck, the defendant overpowered the victim's will and thus caused his death. As the defendant herself explained, and we repeat due to its importance, "[The victim's] death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the [truck] because it was working and he got scared and I fucking told him to get back in ... because I knew he would do it all over again the next day and I couldnt have him live the way he was living anymore I couldnt do it I wouldnt let him."

Although we recognize that legal causation in the context of suicide is an incredibly complex inquiry, we conclude that there was sufficient evidence to support a finding of proof of such causation beyond a reasonable doubt in the instant case. The judge could have properly found, based on this evidence, that the vulnerable, confused, mentally ill, eighteen year old victim had managed to save himself once again in the midst of his latest suicide attempt, removing himself from the truck as it filled with carbon monoxide. But then in this weakened state he was badgered back into the gas-infused truck by the defendant, his girlfriend and closest, if not only, confidant in this suicidal planning, the person who had been constantly pressuring him to complete their often discussed plan, fulfill his promise to her, and finally commit suicide. And then after she convinced him to get back into the carbon monoxide filled truck, she did absolutely nothing to help him: she did not call for help or tell him to **569 get out of the truck as she listened to him choke and die.

In sum, the evidence at trial, in the light most favorable to the Commonwealth, was sufficient to establish the defendant's guilt beyond a reasonable doubt.

[7] [8] [9] [10] b. Due process claims. The defendant argues that she lacked fair notice that she could be convicted of involuntary manslaughter *364 for her role in the victim's suicide[10] and that her conviction therefore violated her right to due process. That is, she argues that the law of involuntary manslaughter is unconstitutionally vague as applied to her conduct. We rejected this argument in Carter I, 474 Mass. at 631 n.11, 52 N.E.3d 1054, and we remain of the view that the law is not vague. "A statute is unconstitutionally vague if [people] of common intelligence must necessarily guess at its meaning.... If a statute has been clarified by judicial explanation, however, it will withstand a challenge on grounds of unconstitutional vagueness." Id., quoting Commonwealth v. Crawford, 430 Mass. 683, 689, 722 N.E.2d 960 (2000). "Manslaughter is a common-law crime that has not been codified by statute in Massachusetts." Carter I, supra, quoting Commonwealth v. Rodriquez, 461 Mass. 100, 106, 958 N.E.2d 518 (2011). It has long been established in our common law that wanton or reckless conduct that causes a person's death constitutes involuntary manslaughter. See, e.g., Commonwealth v. Campbell,

352 Mass. 387, 397, 226 N.E.2d 211 (1967), and cases cited ("Involuntary manslaughter is an unlawful homicide, unintentionally caused ... by an act which constitutes such a disregard of probable harmful consequences to another as to constitute wanton or reckless conduct"). There is no doubt in this case that the defendant wantonly or recklessly instructed the victim to kill himself, and that her instructions caused his death.

[11] Moreover, in the development of our common law, "conduct similar to that of the defendant has been deemed unlawful." Carter I, 474 Mass. at 631 n.11, 52 N.E.3d 1054, citing Persampieri v. Commonwealth, 343 Mass. 19, 22-23, 175 N.E.2d 387 (1961). In Persampieri, supra, the defendant was charged with murder, and pleaded guilty to manslaughter, after his wife threatened to commit suicide and he taunted her, saying she was "chicken -- and wouldn't do it," loaded a rifle and handed it to her, and, when she had difficulty firing the rifle, told her to take off her shoes and reach the trigger that way. She did so and killed herself. Id. at 23, 175 N.E.2d 387. We held that these facts would "have warranted a jury in returning a verdict of manslaughter." Id. Nor is Persampieri the only case in which we upheld a defendant's conviction based on his participation in a suicide. See Commonwealth v. Atencio, 345 Mass. 627, 627-628, 189 N.E.2d 223 (1963) (affirming conviction of involuntary manslaughter arising *365 from game of "Russian roulette"). Indeed, the principle that a defendant might be charged and convicted of a homicide offense merely for "repeatedly and frequently advis[ing] and urg[ing] [a victim] to destroy himself," with no physical assistance, can be found in centuries-old Massachusetts common law. Commonwealth v. Bowen, 13 Mass. 356, 356 (1816). In the Bowen case, the defendant was in the adjoining jail cell of the victim, whom the defendant harangued into hanging himself. **570 [11] Id. It is true, as the defendant points out, that the defendant in Bowen, who was charged with murder for such alleged conduct, was in fact acquitted by the jury. Id. at 360-361. But the legal principle that procuring a suicide "by advice or otherwise" may constitute a homicide is clear from the instructions reported in Bowen. Id. at 359. In sum, our common law provides sufficient notice that a person might be charged with involuntary manslaughter for reckless or wanton conduct, including verbal conduct, causing a victim to commit suicide. The law is not unconstitutionally vague as applied to the defendant's conduct. [12]

[12] c. Free speech claims. The defendant argues that her conviction of involuntary manslaughter violated her right to free speech under the First Amendment and art. 16. [13] We disagree and thus reaffirm our conclusion in Carter I that no constitutional violation results from convicting a defendant of involuntary manslaughter for reckless and wanton, pressuring text messages and phone calls, preying upon well-known weaknesses, fears, anxieties and promises, that finally overcame the willpower to live of a mentally ill, vulnerable, young person, thereby coercing him to commit suicide. Carter I, 474 Mass. at 636 n.17, 52 N.E.3d 1054. We more fully explain our reasoning here.

*366 **[13]** The crime of involuntary manslaughter proscribes reckless or wanton conduct causing the death of another. The statute makes no reference to restricting or regulating speech, let alone speech of a particular content or viewpoint: the crime is "directed at a course of conduct, rather than speech, and the conduct it proscribes is not necessarily associated with speech" (quotation and citation omitted). Commonwealth v. Johnson, 470 Mass. 300, 308, 21 N.E.3d 937 (2014). The defendant cannot escape liability just because she happened to use "words to carry out [her] illegal [act]." Id. at 309, 21 N.E.3d 937, quoting United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982). See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949) (upholding conviction for speech used as "essential and inseparable part" of crime).

[14] Although numerous crimes can be committed verbally, they are "intuitively and correctly" understood not to raise First Amendment concerns. Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 279 (1981). See K. Greenawalt, Speech, Crime, and the Uses of Language 6-7 (1989) (listing twenty-one examples of crimes committed using speech). The same is true under art. 16. See, e.g., Commonwealth v. Disler, 451 Mass. 216, 222, 224-226, 884 N.E.2d 500 (2008) (defendant could not assert art. 16 defense to conviction of child enticement even though crime could be committed by "words [spoken or written] **571 and nothing more"); Commonwealth v. Sholley, 432 Mass. 721, 727, 739 N.E.2d 236 (2000), cert. denied, 532 U.S. 980, 121 S.Ct. 1621, 149 L.Ed.2d 484 (2001) ("no violation" of art. 16 where defendant was convicted of making threat under G. L. c. 275, § 2). "It has

never been deemed an abridgment of freedom of speech ... to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed" (citation omitted). Johnson, 470 Mass. at 309, 21 N.E.3d 937.[14] Indeed, the United States Supreme Court has held that "speech or writing used as an integral part of conduct in violation of a valid criminal statute" is not protected by the First Amendment. Giboney, 336 U.S. at 498, 69 S.Ct. 684. Accord *367 United States v. Stevens, 559 U.S. 460, 468-469, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). See Commonwealth v. Chou, 433 Mass. 229, 236, 741 N.E.2d 17 (2001) ("true threats" lack First Amendment protection because "purpose is to cause injury rather than to add to, or to comment on, the public discourse").

The defendant contends nonetheless that prosecuting and convicting her of involuntary manslaughter for encouraging suicide effected a content-based restriction on speech that does not withstand strict scrutiny. In particular, she acknowledges the Commonwealth's compelling interest in preserving human life but argues that we failed to determine in Carter I, 474 Mass. at 636 n.17, 52 N.E.3d 1054, that the restriction on speech was narrowly tailored to further that interest. We disagree. The only speech made punishable in Carter I was "speech integral to [a course of] criminal conduct," Stevens, 559 U.S. at 468, 130 S.Ct. 1577, citing Giboney, 336 U.S. at 498, 69 S.Ct. 684, that is, a "systematic campaign of coercion on which the virtually present defendant embarked -- captured and preserved through her text messages -- that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own," Carter I, supra at 636, 52 N.E.3d 1054. Other involuntary manslaughter prosecutions and convictions have similarly targeted a course of criminal conduct undertaken through manipulative wanton or reckless speech directed at overpowering the will to live of vulnerable victims. See Persampieri, 343 Mass. at 22-23, 175 N.E.2d 387; Bowen, 13 Mass. at 359-360.

As the Supreme Court has explained, "From 1791 to the present ... the First Amendment has permitted restrictions upon the content of speech in a few limited areas ... which have never been thought to raise any constitutional problems," including "speech integral to criminal conduct" (quotations and citations omitted). Stevens, 559 U.S. at 468-469, 130 S.Ct. 1577. We do not apply the narrow tailoring required by strict scrutiny in these contexts but rather determine whether the speech at issue falls within these "well-defined and narrowly limited classes of speech" (quotation and citation omitted). Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 804, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011). Thus, there is nothing in the prosecution or conviction of the defendant in the instant case, or the prior involuntary manslaughter cases in the Commonwealth involving verbal criminal **572 conduct, to suggest that the First Amendment has been violated in any way. The only verbal conduct punished as involuntary manslaughter has been the wanton or reckless pressuring of a vulnerable person to commit suicide, overpowering that person's will to live and resulting in that person's death. We *368 are therefore not punishing words alone, as the defendant claims, but reckless or wanton words causing death. The speech at issue is thus integral to a course of criminal conduct and thus does not raise any constitutional problem.

Regardless, even if we were to apply strict scrutiny to the verbal conduct at issue because it might implicate other constitutionally protected speech regarding suicide or the end of life, we would conclude that the restriction on speech here has been narrowly circumscribed to serve a compelling purpose. As we explained in Carter I, 474 Mass. at 636, 52 N.E.3d 1054, and reemphasize today, this case does not involve the prosecution of end-of-life discussions between a doctor, family member, or friend and a mature, terminally ill adult confronting the difficult personal choices that must be made when faced with the certain physical and mental suffering brought upon by impending death.[15] Nor does it involve prosecutions of general discussions about euthanasia or suicide targeting the ideas themselves. See Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Nothing in Carter I, our decision today, or our earlier involuntary manslaughter cases involving verbal conduct suggests that involuntary manslaughter prosecutions could be brought in these very different contexts without raising important First Amendment concerns. See

Commonwealth v. Bigelow, 475 Mass. 554, 562, 59 N.E.3d 1105 (2016) ("In considering the First Amendment's protective reach, critical to the examination is the context and content of the speech at issue" [quotation omitted]). We emphasize again, however, that the verbal conduct targeted here and in our past involuntary manslaughter cases is different in kind and not degree, and raises no such concerns. Only the wanton or reckless pressuring of a person to commit suicide that overpowers that person's will to live has been proscribed. This restriction is necessary to further *369 the Commonwealth's compelling interest in preserving life. Thus, such a prohibition would survive even strict scrutiny.

[15] d. "Infliction" of serious bodily harm. The defendant argues that her conviction as a youthful offender cannot survive under G. L. c. 119, § 54, because she did not inflict serious bodily harm on the victim. She argues that the term "infliction" in § 54 requires direct, physical causation of harm, not mere proximate causation, and that from her remote location, she could not have inflicted serious bodily harm on the victim within the meaning of **573 the statute. We reject this unduly narrow interpretation of the statutory language. The youthful offender statute authorizes an indictment against a juvenile who is "alleged to have committed an offense ... involv[ing] the infliction or threat of serious bodily harm" (emphasis added). G. L. c. 119, § 54. By its terms, the statute requires that the offense involve the infliction of serious bodily harm, not that the defendant herself be the one who directly inflicted it. If we were to interpret the statute to include such a requirement, it is difficult to see how a juvenile could be indicted as a youthful offender for, say, hiring a third party to carry out an attack on a victim. It is enough, as we said in Carter I, that "involuntary manslaughter in these circumstances inherently involves the infliction of serious bodily harm." Carter I, 474 Mass. at 637 n.19, 52 N.E.3d 1054.

[16] [17] [18] [19] 5. "Reasonable juvenile." The defendant next argues, as she did in Carter I, that her actions should have been evaluated under a "reasonable juvenile" standard rather than a "reasonable person" standard. [16] As we said before,

> "Whether conduct is wanton or reckless is 'determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances.... If based on the objective measure of recklessness, the defendant's actions constitute wanton or reckless conduct ... if an *370 ordinary normal [person] under the same circumstances would have realized the gravity of the danger. ... If based on the subjective measure, i.e., the defendant's own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm' (quotations and citation omitted)."

Carter I, 474 Mass. at 631, 52 N.E.3d 1054, quoting Pugh, 462 Mass. at 496-497, 969 N.E.2d 672. The defendant argues essentially that, when considering a juvenile's actions under the objective measure of recklessness, we should consider whether an ordinary juvenile under the same circumstances would have realized the gravity of the danger. It is clear from the judge's findings, however, that he found the defendant's actions wanton or reckless under the subjective measure, that is, based on her own knowledge of the danger to the victim and on her choice to run the risk that he would comply with her instruction to get back into the truck. That finding is amply supported by the trial record. Because the defendant's conduct was wanton or reckless when evaluated under the subjective standard, there is no need to decide whether a different objective standard should apply to juveniles.

Moreover, it is clear from the judge's sentencing memorandum that he did in fact consider the defendant's age and maturity when evaluating her actions and that he was familiar with the relevant case law and "mindful" of the general principles regarding juvenile brain development. He **574 noted that on the day of the victim's death, she was seventeen years and eleven months of age and at an age-appropriate level of maturity. Her ongoing contact with the victim in the days leading to his suicide, texting with him about suicide methods and his plans and demanding that he carry out his plan rather than continue to delay, as well as the lengthy cell phone conversations on the night itself, showed that her actions were not spontaneous or impulsive. And, as the judge specifically found, "[h]er age or level of maturity does not explain away her knowledge of the effects of her telling [the victim] to enter and remain in that toxic environment, leading to his death." Where the judge found that the defendant ordered the victim back into the truck knowing the danger of doing so, he properly found that her actions were wanton or reckless, giving sufficient consideration to her age and maturity.

[20] 6. Expert witness. Finally, the defendant argues that the judge wrongly denied her motion in limine to admit expert testimony by *371 a forensic psychologist. The witness would have testified as to general principles and characteristics of the undeveloped adolescent brain, but not as to the defendant specifically, as he had never examined her. It is true, as the defendant argues, that we have upheld the admission of similar testimony in the past. See Commonwealth v. Okoro, 471 Mass. 51, 66, 26 N.E.3d 1092 (2015). But the fact that one judge properly exercised his discretion to admit expert testimony in one case does not mean that another judge abused his discretion by excluding similar testimony in a different case. We have reviewed the voir dire testimony of the defendant's expert witness and conclude that the judge did not abuse his discretion by determining that the proffered testimony would not have aided the finder of fact in the circumstances of this case. Moreover, after the judge ruled on the motion in limine, the defendant waived her right to a jury trial and proceeded before the same judge. Where an experienced judge of the Juvenile Court sat as the finder of fact in the defendant's case, we cannot perceive any prejudice to the defendant in his decision to preclude this expert testimony in the circumstances of this case.

Conclusion. The evidence against the defendant proved that, by her wanton or reckless conduct, she caused the victim's death by suicide. Her conviction of involuntary manslaughter as a youthful offender is not legally or constitutionally infirm. The judgment is therefore affirmed.

So ordered.

All Citations

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Footnotes

1 We acknowledge the amicus briefs submitted by the Youth Advocacy Division of the Committee for Public Counsel Services and the Massachusetts Association of Criminal Defense Lawyers, and by the American Civil Liberties Union and the American Civil Liberties Union of Massachusetts.

2 Voluminous text messages between the defendant and victim -- apparently their entire text history -- were admitted in evidence.

3 For example, on July 7, 2014, between 10:57 P.M. and 11:08 P.M., they exchanged the following text messages:
DEFENDANT: "Well there's more ways to make CO. Google ways to make it...."
VICTIM: "Omg"
DEFENDANT: "What"
VICTIM: "portable generator that's it"
DEFENDANT: "That makes CO?"
VICTIM: "yeah! It's an internal combustion engine."
DEFENDANT: "Do you have one of those?"
VICTIM: "There's one at work."
Similarly, on July 11, 2014, at 5:13 P.M., the defendant sent the victim the following text message: "... Well in my opinion, I think u should do the generator because I don't know much about the pump and with a generator u can't fail"
See Commonwealth v. Carter, 474 Mass. 624, 626 n.4, 52 N.E.3d 1054 (2016) (Carter I).

4 During the evening of July 11 and morning of July 12, 2014, the victim and the defendant exchanged the following text messages:
VICTIM: "I have a bad feeling tht this is going to create a lot of depression between my parents/sisters"
...

DEFENDANT: "I think your parents know you're in a really bad place. Im not saying they want you to do it, but I honestly feel like they can except it. They know there's nothing they can do, they've tried helping, everyone's tried. But there's a point that comes where there isn't anything anyone can do to save you, not even yourself, and you've hit that point and I think your parents know you've hit that point. You said you're mom saw a suicide thing on your computer and she didn't say anything. I think she knows it's on your mind, and she's prepared for it"

DEFENDANT: "Everyone will be sad for a while, but they will get over it and move on. They won't be in depression I won't let that happen. They know how sad you are and they know that you're doing this to be happy, and I think they will understand and accept it. They'll always carry u in their hearts"

...

VICTIM: "i don't want anyone hurt in the process though"

VICTIM: "I meant when they open the door, all the carbon monoxide is gonna come out they can't see it or smell it. whoever opens the door"

DEFENDANT: "They will see the generator and know that you died of CO...."

...

VICTIM: "Idk I'm freaking out again"

...

DEFENDANT: "I thought you wanted to do this. The time is right and you're ready, you just need to do it! You can't keep living this way. You just need to do it like you did last time and not think about it and just do it babe. You can't keep doing this every day"

VICTIM: "I do want to. but like I'm freaking for my family. I guess"

VICTIM: "idkkk"

DEFENDANT: "Conrad. I told you I'll take care of them. Everyone will take care of them to make sure they won't be alone and people will help them get thru it. We talked about this, they will be okay and accept it. People who commit suicide don't think this much and they just do it"

See Carter I, 474 Mass. at 627 n.5, 52 N.E.3d 1054.

5 On July 12, 2014, between 4:25 A.M. and 4:34 A.M., they exchanged the following text messages:

DEFENDANT: "So I guess you aren't gonna do it then, all that for nothing"

DEFENDANT: "I'm just confused like you were so ready and determined"

VICTIM: "I am gonna eventually"

VICTIM: "I really don't know what I'm waiting for .. but I have everything lined up"

DEFENDANT: "No, you're not, Conrad. Last night was it. You keep pushing it off and you say you'll do it but u never do. Its always gonna be that way if u don't take action"

DEFENDANT: "You're just making it harder on yourself by pushing it off, you just have to do it"

DEFENDANT: "Do u wanna do it now?"

VICTIM: "Is it too late?"

VICTIM: "Idkk it's already light outside"

VICTIM: "I'm gonna go back to sleep, love you I'll text you tomorrow"

DEFENDANT: "No? Its probably the best time now because everyone's sleeping. Just go somewhere in your truck. And no one's really out right now because it's an awkward time"

DEFENDANT: "If u don't do it now you're never gonna do it"

DEFENDANT: "And u can say you'll do it tomorrow but you probably won't"

See Carter I, 474 Mass. at 626 n.4, 52 N.E.3d 1054.

At various times between July 4 and July 12, 2014, the defendant and the victim exchanged several similar text messages:

DEFENDANT: "You're gonna have to prove me wrong because I just don't think you really want this. You just keeps pushing it off to another night and say you'll do it but you never do"

...

DEFENDANT: "SEE THAT'S WHAT I MEAN. YOU KEEP PUSHING IT OFF! You just said you were gonna do it tonight and now you're saying eventually...."

...

DEFENDANT: "But I bet you're gonna be like 'oh, it didn't work because I didn't tape the tube right or something like that' ... I bet you're gonna say an excuse like that"

...

DEFENDANT: "Do you have the generator?"
VICTIM: "not yet lol"
DEFENDANT: "WELL WHEN ARE YOU GETTING IT"

...

DEFENDANT: "You better not be bull shiting me and saying you're gonna do this and then purposely get caught"

...

DEFENDANT: "You just need to do it Conrad or I'm gonna get you help"
DEFENDANT: "You can't keep doing this everyday"
VICTIM: "Okay I'm gonna do it today"
DEFENDANT: "Do you promise"
VICTIM: "I promise babe"
VICTIM: "I have to now"
DEFENDANT: "Like right now?"
VICTIM: "where do I go? :("
DEFENDANT: "And u can't break a promise. And just go in a quiet parking lot or something" (emphasis added).

See Carter I, 474 Mass. at 628 n.6, 52 N.E.3d 1054.

6 During that same time period, the defendant carried out what the prosecutor called a "dry run." On July 10 -- two days before the victim's suicide -- the defendant sent text messages to two friends, stating that the victim was missing, that she had not heard from him, and that his family was looking for him. She sent similar messages to those friends the following day, stating that the victim was still missing and that she was losing hope. In fact, at that time, the defendant was in communication with the victim and knew he was not missing. She also asked a friend in a text message, "Is there any way a portable generator can kill you somehow? Because he said he was getting that and some other tools at the store, and he said he needed to replace the generator at work and fix stuff ... but he didn't go to work today so I don't know why he would have got that stuff." In fact, the defendant and the victim had previously discussed the use of a generator to produce carbon monoxide. As the Commonwealth argued at trial, this dry run demonstrated the defendant's motive to gain her friends' attention and, once she had their attention, not to lose it by being exposed as a liar when the victim failed to commit suicide. Arguably, these desires caused her to disregard the clear danger to the victim.

7 The defendant eventually texted the victim's sister, but not until 10:18 P.M., more than two hours after the second lengthy phone call with the victim. In that text, the defendant asked, "Do you know where your brother is?", and did not explain what she knew about the victim.

8 The defendant suggests that she was indicted for involuntary manslaughter based on wanton or reckless conduct, but wrongly convicted based on a wanton or reckless failure to act. In our view, the indictment charging the defendant with manslaughter "by wanton and reckless conduct" subsumed both theories. See Commonwealth v. Pugh, 462 Mass. 482, 497, 969 N.E.2d 672 (2012), quoting Commonwealth v. Welansky, 316 Mass. 383, 399, 55 N.E.2d 902 (1944) ("the requirement of 'wanton or reckless conduct' may be satisfied by either the commission of an intentional act or an intentional 'omission where there is a duty to act' "). Moreover, it is clear from the judge's findings that the conviction was not based solely on a failure to act but also on the defendant's affirmative conduct, namely, directing the victim to get back in the truck.

9 There is no question in this case that the Commonwealth proved beyond a reasonable doubt that the defendant engaged in wanton or reckless conduct, that is, "intentional conduct ... involv[ing] a high degree of likelihood that substantial harm will result to another." Pugh, 462 Mass. at 496, 969 N.E.2d 672, quoting Welansky, 316 Mass. at 399, 55 N.E.2d 902. Both the objective and subjective standards discussed above are satisfied. Given the victim's mental illness, his previous suicide attempts, and his suicide plans, there can be no doubt that an ordinary person such as the defendant, his girlfriend who constantly communicated with him, would understand the grave danger to his life, and yet she continued to pressure him to follow through with his plan. The difficult issue before us is not whether the defendant's conduct was wanton or reckless, as this is not a close question, but whether her conduct was the cause of the victim's death.

10 The defendant characterizes her conduct as merely "encouraging" the victim's suicide. As we have discussed at length, however, it is clear from the judge's findings that she did not merely encourage the victim, but coerced him to get back into the truck, causing his death.

11 The victim committed suicide by hanging hours before he was to be hanged publicly for his own killing of his father. Commonwealth v. Bowen, 13 Mass. 356, 356 (1816).

12 The defendant points out that, unlike Massachusetts, several other States, rather than relying on the common law, have enacted statutes prohibiting aiding or assisting suicide and specifying what conduct runs afoul of such statutes. However, the fact that some State Legislatures have chosen to address this problem by statute in no way prevents us from concluding that Massachusetts common law provided the defendant with fair notice that her conduct was prohibited.

13 As in Commonwealth v. Walters, 472 Mass. 680, 690 n.26, 37 N.E.3d 980 (2015), S.C., 479 Mass. 277, 94 N.E.3d 764 (2018), we apply the same analysis under the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights.

14 Crimes committed using text messages or other electronic communications are treated no differently. See Walters, 472 Mass. at 696, 37 N.E.3d 980 (threat conveyed by "telecommunication device or electronic communication device" would not receive First Amendment or art. 16 protection [citation omitted]); Commonwealth v. Johnson, 470 Mass. 300, 312, 21 N.E.3d 937 (2014) (there is no First Amendment protection for electronic communications and Internet postings used to commit harassment).

15 In Carter I, 474 Mass. at 636, 52 N.E.3d 1054, we stated: "It is important to articulate what this case is not about. It is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life. These situations are easily distinguishable from the present case, in which the grand jury heard evidence suggesting a systematic campaign of coercion on which the virtually present defendant embarked -- captured and preserved through her text messages -- that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own."

16 Unlike in Carter I, 474 Mass. at 636 n.18, 52 N.E.3d 1054, the defendant raised this claim at trial by moving for a required finding of not guilty on this ground (among others). The judge denied the motion without stating his reasons, making it unclear to us whether he rejected a "reasonable juvenile" standard as a matter of law, determined that the evidence would be sufficient to establish the defendant's guilt under a "reasonable juvenile" standard, or determined that, regardless of whether an objective "reasonable juvenile" standard was proper, the evidence was sufficient to establish her guilt under a subjective standard. The defendant did not press for a "reasonable juvenile" standard in her closing argument. The Commonwealth does not claim that the issue was not preserved.

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474 Mass. 624
Supreme Judicial Court of Massachusetts,
Suffolk.

COMMONWEALTH
v.
Michelle CARTER.

SJC–12043.
|
Submitted April 7, 2016.
|
Decided July 1, 2016.

Synopsis

Background: Defendant was indicted as a youthful offender on charge of involuntary manslaughter. The Juvenile Court Department, Suffolk County, denied motion to dismiss. Defendant filed petition for relief.

[Holding:] The Supreme Judicial Court, Cordy, J., held that evidence was sufficient for finding of probable cause that defendant caused victim's death.

Affirmed.

West Headnotes (15)

[1] **Indictments and Charging Instruments**
Judicial review of evidence

Ordinarily, a court will not inquire into the competency or sufficiency of the evidence before the grand jury.

1 Cases that cite this headnote

[2] **Indictments and Charging Instruments**
Probable cause

To return an indictment, at the very least, the grand jury must hear enough evidence to establish the identity of the accused and to support a finding of probable cause to arrest the accused for the offense charged.

2 Cases that cite this headnote

[3] **Homicide**
Recklessness, wantonness, or extreme indifference

Involuntary manslaughter can be proved under two theories, either (1) wanton or reckless conduct or (2) wanton or reckless failure to act.

[4] **Homicide**
Recklessness, wantonness, or extreme indifference

In proving involuntary manslaughter, "wanton or reckless conduct" is intentional conduct involving a high degree of likelihood that substantial harm will result to another.

1 Cases that cite this headnote

[5] **Homicide**
Recklessness, wantonness, or extreme indifference

In proving involuntary manslaughter, if based on the subjective measure, i.e., the defendant's own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his or her conduct so as to avoid the act or omission that caused the harm.

[6] **Homicide**
Recklessness, wantonness, or extreme indifference

Whether conduct is wanton or reckless, in proving involuntary manslaughter, is determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances.

[7] **Homicide**
Recklessness, wantonness, or extreme indifference

In proving involuntary manslaughter, if based on the objective measure of recklessness, the defendant's actions constitute "wanton or reckless conduct" if an ordinary normal person under the same circumstances would have realized the gravity of the danger.

1 Cases that cite this headnote

[8] **Constitutional Law**
Statutes

A criminal statute must be sufficiently explicit to give clear warning as to proscribed activities.

[9] **Constitutional Law**
Statutes in general

A statute is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning.

[10] **Constitutional Law**
Statutes in general

If a statute has been clarified by judicial explanation it will withstand a challenge on grounds of unconstitutional vagueness.

[11] **Constitutional Law**
Vagueness

Where a statute's literal scope is capable of reaching expression sheltered by the First Amendment, the vagueness doctrine demands a greater degree of specificity than in other contexts. U.S.C.A. Const.Amend. 1.

[12] **Constitutional Law**
Particular offenses in general

Suicide
Advising, aiding, or agreeing to commit

Charge of involuntary manslaughter was not vague in violation of free speech clause as applied to defendant who allegedly encouraged victim to commit suicide; defendant asked victim to delete text messages between the two of them, deleted several of those messages from her own cellular telephone, and, after police began investigating victim's cellular telephone, lied about her involvement and told her friend that, if police uncovered text messages between her and victim, she could go to jail. U.S.C.A. Const.Amend. 1.

[13] **Indictments and Charging Instruments**
Homicide

Evidence before grand jury was sufficient for finding of probable cause that defendant, by wanton or reckless conduct, caused victim's death, even though defendant was not present at scene of death; evidence showed that victim had a delicate mental state, that defendant had previously put constant pressure on victim to commit suicide, and that defendant told victim via text message that he should get back in truck filling with carbon monoxide and "just do it."

[14] **Homicide**
Nature of act causing death

Physical acts are one means by which the Commonwealth can show the commission prong of involuntary manslaughter.

[15] **Constitutional Law**
Particular offenses in general

Suicide
Advising, aiding, or agreeing to commit

Speech in which defendant encouraged victim to kill himself was not protected under First Amendment or Declaration of Rights; Commonwealth had compelling interest in deterring speech that had direct, causal link to specific victim's suicide. U.S.C.A. Const.Amend. 1; M.G.L.A. Const. Pt. 1, Art. 16.

Attorneys and Law Firms

**1056 Dana Alan Curhan, Boston (Joseph P. Cataldo, Franklin, with him) for the defendant.

Shoshana E. Stern, Assistant District Attorney (Katie Cook Rayburn, Assistant District Attorney, with her) for the Commonwealth.

Eva G. Jellison & David J. Nathanson, Boston, for Youth Advocacy Division of the Committee for Public Counsel Services & another, amici curiae, submitted a brief.

Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ.

Opinion

CORDY, J.

*624 On February 6, 2015, the defendant, Michelle Carter, was indicted as a youthful offender under G.L. c. 119, § 54, on *625 a charge of involuntary manslaughter after she, at the age of seventeen, encouraged Conrad Roy (the victim), then eighteen years of age, to commit suicide. To indict a juvenile as a youthful offender, the grand jury must hear evidence establishing probable cause that (1) the juvenile is between the ages of fourteen and eighteen at the time of the underlying offense; (2) the underlying offense, if committed by an adult, would be punishable by imprisonment in State prison; and (3) the underlying offense involves the infliction or threat of serious bodily harm. G.L. c. 119, § 54. The defendant moved in the Juvenile Court to dismiss the youthful offender indictment, arguing that the Commonwealth failed to present the grand jury with sufficient evidence of involuntary manslaughter and that the defendant's conduct did not involve the infliction or threat of serious bodily harm. The motion was denied.

The principal question we consider in this case is whether the evidence was sufficient to warrant the return of an indictment for involuntary manslaughter where the defendant's conduct did not extend beyond words. We conclude that, on the evidence presented to the grand jury, the verbal conduct at issue was sufficient and, because a conviction of involuntary manslaughter is punishable by imprisonment in State prison and inherently involves the infliction of serious bodily harm, the grand jury properly returned an indictment under the youthful offender statute. Accordingly, we affirm the order of the Juvenile Court. [1]

1. *Background.* The grand jury heard evidence from four witnesses over the course of three days. That evidence, viewed in the light most favorable to the Commonwealth, see *Commonwealth v. Moran,* 453 Mass. 880, 885, 906 N.E.2d 343 (2009), included the following:

On the afternoon of July 13, 2014, an officer with the Fairhaven police department located the deceased in his truck, parked in a store parking lot. The medical examiner concluded that the victim had died after inhaling carbon monoxide that was produced by a gasoline powered water pump located in the truck. The manner of death was suicide.

**1057 The victim had been receiving treatment for mental health issues since 2011. In 2013, the victim attempted to commit suicide by overdosing on acetaminophen. A friend saved his life by contacting emergency services.

During the course of the investigation into the victim's suicide, *626 a police review of his recent electronic communications caused them to further explore his relationship with the defendant. The victim and the defendant met in 2011 and had been dating at various times during that period, including at the time of the victim's death. Because they did not live in the same town, the majority of their contact took place through the exchange of voluminous text messages and cellular telephone calls. [2] The grand jury heard testimony and were presented with transcripts concerning the content of those text messages in the minutes, days, weeks, and months leading up to the defendant's suicide. The messages revealed that the defendant was aware of the victim's history of mental illness, and of his previous suicide attempt, and that much of the communication between the defendant and the victim focused on suicide. Specifically, the defendant encouraged the victim to kill himself, [3] instructed him as to when and how he should kill himself, [4] assuaged his concerns *627 over killing himself, [5] and chastised **1058 him when he delayed *628 doing so. [6] The theme of those text messages can be **1059 summed up *629 in the phrase used by the defendant four times between July 11 and July 12, 2014 (the day on which the victim committed suicide): "You just [have] to do it."

Cellular telephone records that were presented to the grand jury revealed that the victim and defendant also had two cellular telephone conversations at the time during which police believe that the victim was in his truck committing suicide. [7] The content of those cellular telephone conversations is only available as reported by the defendant to her friend, Samantha Boardman. After the victim's death, the defendant sent a text message to Boardman explaining that, at one point during the suicide, the victim got out of his truck because he was "scared," and the defendant commanded him to get back in. [8]

It was apparent that the defendant understood the repercussions of her role in the victim's death. Prior to his suicide, the defendant sought (apparently unsuccessfully) to have the victim delete the text messages between the two, and after learning that the police were looking through the victim's cellular telephone, the defendant sent the following text message to Boardman: "Sam, [the police] read my messages with him I'm done. His family will hate me and I can go to jail." During the investigation, and after cross-referencing the text messages in the defendant's cellular telephone and those in the victim's cellular telephone, the police discovered that the defendant had erased certain text messages between her and the victim. The defendant also lied to police about the content of her conversations with the victim. Finally, ***630** the defendant acknowledged in a text message to Boardman that she could have stopped the victim from committing suicide: "I helped ease him into it and told him it was okay, I was talking to him on the phone when he did it I coud have easily stopped him or called the police but I didn't."

Based on the foregoing evidence, the Commonwealth successfully sought to indict the defendant for involuntary manslaughter, as a youthful offender, asserting that the defendant's wanton or reckless conduct was the cause of the victim's death. After a judge of the Juvenile Court denied the defendant's motion to dismiss, the defendant filed a petition for relief under G.L. c. 211, § 3. On February 1, 2016, a single justice of this court reserved and reported the case to the full court.

[1] **[2]** 2. *Discussion.* "Ordinarily, a 'court will not inquire into the competency or sufficiency of the evidence before the grand jury.' " *Commonwealth v. Rex,* 469 Mass. 36, 39, 11 N.E.3d 1060 (2014), quoting *Commonwealth v. Robinson,* 373 Mass. 591, 592, 368 N.E.2d 1210 (1977). However, in *Commonwealth v. McCarthy,* 385 Mass. 160, 163, 430 N.E.2d 1195 (1982), we recognized a limited exception for when the grand jury "fail[ ] to hear any evidence of criminal activity by the defendant." "At the very least, the grand jury must hear enough evidence to establish the identity of the accused and to support a finding of probable cause to arrest the accused for the offense charged" (footnote omitted). ****1060** *Rex, supra* at 40, 11 N.E.3d 1060. "Probable cause requires sufficient facts to warrant a person of reasonable caution in believing that an offense has been committed ...; this standard requires considerably less than that which is required to warrant a finding of guilt" (citations omitted). *Commonwealth v. Levesque,* 436 Mass. 443, 447, 766 N.E.2d 50 (2002).

[3] a. *Involuntary manslaughter.* [9] Involuntary manslaughter can be proved under two theories, either (1) wanton or reckless conduct ***631** or (2) wanton or reckless failure to act. *Commonwealth v. Life Care Ctrs. of Am., Inc.,* 456 Mass. 826, 832, 926 N.E.2d 206 (2010). The indictment was returned on the basis of the defendant's wanton or reckless conduct. [10]

[4] **[5]** **[6]** **[7]** Wanton or reckless conduct is "intentional conduct ... involv[ing] a high degree of likelihood that substantial harm will result to another." *Commonwealth v. Pugh,* 462 Mass. 482, 496, 969 N.E.2d 672 (2012), quoting *Commonwealth v. Welansky,* 316 Mass. 383, 399, 55 N.E.2d 902 (1944). Whether conduct is wanton or reckless is

> "determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances.... If based on the objective measure of recklessness, the defendant's actions constitute wanton or reckless conduct ... if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger.... If based on the subjective measure, i.e., the defendant's own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm" (quotations and citations omitted).

Pugh, supra at 496–497, 969 N.E.2d 672.

[8] **[9]** **[10]** **[11]** **[12]** b. *Sufficiency of the evidence presented to the grand jury.* [11] The ****1061** ***632** Commonwealth bore the burden of presenting the grand jury

with sufficient evidence to support a finding of probable cause that the defendant's conduct (1) was intentional; [12] (2) was wanton or reckless; and (3) caused the victim's death. *Life Care Ctrs. of Am., Inc.*, 456 Mass. at 832, 926 N.E.2d 206.

[13] The defendant argues that, because she neither was physically present when the victim killed himself nor provided the victim with the instrument with which he killed himself, she did not cause his death by wanton or reckless conduct. [13] She maintains that verbally encouraging someone to commit suicide, no matter ***633** how forcefully, cannot constitute wanton or reckless conduct. Effectively, the argument is that verbal conduct can never overcome a person's willpower to live, and therefore cannot be the cause of a suicide. We disagree.

[14] We have never required in the return of an indictment for involuntary manslaughter that a defendant commit a physical act in perpetrating a victim's death. [14] We also never have had occasion ****1062** to consider such an indictment against a defendant on the basis of words alone. This is not, however, the first time that we have contemplated the charge of involuntary manslaughter against a defendant where the death of the victim is self-inflicted. See, e.g., *Commonwealth v. Atencio,* 345 Mass. 627, 189 N.E.2d 223 (1963); *Persampieri v. Commonwealth,* 343 Mass. 19, 175 N.E.2d 387 (1961).

At issue in *Atencio* was a "game" of "Russian roulette" played by the two defendants, Atencio and Marshall, and the deceased. *Atencio, supra* at 628, 189 N.E.2d 223. Marshall took the gun first, pointed it at his own head, and pulled the trigger; nothing happened. *Id.* at 628–629, 189 N.E.2d 223. He passed the gun to Atencio, who also pointed the gun at his own head and pulled the trigger, again with no result. *Id.* at 629, 189 N.E.2d 223. Atencio then passed the gun to the deceased; when he pointed it at his own head and pulled the trigger, "[t]he cartridge exploded, and he fell over dead." *Id.*

In affirming the involuntary manslaughter convictions against both defendants, we reasoned that "the Commonwealth had an interest that the deceased should not be killed by the wanton or reckless conduct *of himself and others*" (emphasis added). *Id.* "Such conduct could be found in the concerted action and cooperation of the defendants in helping to bring about the deceased's foolish act," *id.*, as "[i]t would not be necessary that the defendants force the deceased to play or suggest that he play." *Id.* at 630, 189 N.E.2d 223. We concluded that it did not matter that Atencio was the one who handed the gun to the deceased, as opposed to Marshall, affirming both defendants' convictions. *Id.* at 630, 189 N.E.2d 223. Indeed, had the deceased been the first to participate in the "game," and killed himself before either Atencio or Marshall touched the gun, his acts would still have been imputable to the defendants. *Id.* It was, instead, the atmosphere created in the decision to play the "game" ***634** that caused the deceased to shoot himself, as there was "mutual encouragement" to participate. *Id.*

In *Persampieri,* 343 Mass. at 22, 175 N.E.2d 387, the defendant told his wife that he intended to divorce her. She threatened to commit suicide. *Id.* The defendant, knowing that the victim had already attempted suicide twice, said she was "chicken—and wouldn't do it." *Id.* When she retrieved a .22 caliber rifle, he helped her to load it and handed it to her, noting that the safety was off. *Id.* With the gun barrel on the floor, the victim struggled to pull the trigger. *Id.* at 23, 175 N.E.2d 387. The defendant told her that if she took off her shoe she could reach the trigger, at which point she successfully shot and killed herself. *Id.* We concluded that the jury were warranted in returning a verdict of involuntary manslaughter based on the theory of wanton or reckless conduct, *id.*, noting that the defendant, "instead of trying to bring [the victim] to her senses, taunted her, told her where the gun was, loaded it for her, saw that the safety was off, and told her the means by which she could pull the trigger. He thus showed a reckless disregard of his wife's safety and the possible consequences of his conduct." *Id.*

These cases elucidate that, because wanton or reckless conduct requires a consideration of the likelihood of a result occurring, the inquiry is by its nature entirely fact-specific. The circumstances of the situation ****1063** dictate whether the conduct is or is not wanton or reckless. We need not—and indeed cannot—define where on the spectrum between speech and physical acts involuntary manslaughter must fall. Instead, the inquiry must be made on a case-by-case basis.

Here, the particular circumstances of the defendant's relationship with the victim may have caused her verbal communications with him in the last minutes of his life on July 12, 2014, to carry more weight than mere words, overcoming any independent will to live he might have had.

It is in those final moments, when the victim had gotten out of his truck, expressing doubts about killing himself, on which a verdict in this case may ultimately turn. In that moment of equivocation, the victim could have continued to delay his death, perhaps attempting suicide again at a later date, or perhaps seeking treatment; or he could have gotten back into the truck and followed through on his suicide. The grand jury heard that the victim, after the defendant commanded him to "get back in," obeyed, returning to the truck, closing the door, and succumbing to the carbon monoxide.

In our view, the coercive quality of that final directive was sufficient in the specific circumstances of this case to support a ***635** finding of probable cause. Those circumstances included the defendant's virtual presence at the time of the suicide, the previous constant pressure the defendant had put on the victim, and his already delicate mental state. [15] In sum, there was ample evidence to establish probable cause that the defendant's conduct was wanton or reckless, under either a subjective or an objective standard. The grand jury could have found that an ordinary person under the circumstances would have realized the gravity of the danger posed by telling the victim, who was mentally fragile, predisposed to suicidal inclinations, and in the process of killing himself, to get back in a truck filling with carbon monoxide and "just do it." See *Levesque,* 436 Mass. at 452, 766 N.E.2d 50. And significantly, the grand jury also could have found that the defendant—the victim's girl friend, with whom he was in constant and perpetual contact—on a subjective basis knew that she had some control over his actions. [16]

[15] The defendant argues that, even if she was wanton or reckless, her words (spoken when she was miles away from the victim) could not be the cause of the victim's death. Instead, it was his decision to get back in the truck that resulted in his suicide. We are not convinced. Because there was evidence that the defendant's actions overbore the victim's willpower, there was probable cause to believe that the victim's return to the truck after the defendant told him to do so was not "an independent or intervening act" that, as a matter of law, would preclude his action from being imputable to her. See *Atencio,* 345 Mass. at 629–630, 189 N.E.2d 223. The text messages suggest that the victim had been delaying suicide for weeks; to ignore the influence the defendant had ****1064** over the victim would be to oversimplify the circumstances surrounding his death. His delay of that suicide and subsequent excuses for such delays were followed by his girl friend's disappointment, frustration, and threats to seek unwanted treatment on his behalf. In sum, we conclude that there was probable cause to show that ***636** the coercive quality of the defendant's verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression, and that but for the defendant's admonishments, pressure, and instructions, the victim would not have gotten back into the truck and poisoned himself to death. Consequently, the evidence before the grand jury was sufficient for a finding of probable cause that the defendant, by wanton or reckless conduct, caused the victim's death. [17]

It is important to articulate what this case is not about. It is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life. These situations are easily distinguishable from the present case, in which the grand jury heard evidence suggesting a systematic campaign of coercion on which the virtually present defendant embarked—captured and preserved through her text messages—that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own. On the specific facts of this case, there was sufficient evidence to support a probable cause finding that the defendant's command to the victim in the final moments of his life to follow through on his suicide attempt was a direct, causal link to his death.

3. *Conclusion.* [18] The grand jury were justified in returning an indictment of involuntary manslaughter against the defendant. ***637** Because involuntary manslaughter ****1065** carries a potential punishment of incarceration in State prison and is inherently a crime that involves the infliction of serious bodily harm, [19] and because the defendant was seventeen years of age at the time of the offense, her indictment as a youthful offender on the underlying involuntary manslaughter charge was also supported by the evidence. The motion judge's denial of the defendant's motion to dismiss is affirmed.

So ordered.

All Citations

474 Mass. 624, 52 N.E.3d 1054

Footnotes

1 We acknowledge the amicus brief submitted by the Youth Advocacy Division of the Committee for Public Counsel Services and the American Civil Liberties Union of Massachusetts.

2 In a written memorandum of decision, the judge stated that, although the defendant and the victim rarely were in the same physical location, "[t]he rapidity of the[ir] electronic exchanges was almost immediate, similar to a conversation."

3 On July 8, 2014, between 8:09 P.M. and 8:18 P.M., the defendant and victim exchanged the following text messages:
DEFENDANT: "So are you sure you don't wanna [kill yourself] tonight?"
VICTIM: "what do you mean am I sure?"
DEFENDANT: "Like, are you definitely not doing it tonight?"
VICTIM: "Idk yet I'll let you know"
DEFENDANT: "Because I'll stay up with you if you wanna do it tonight"
VICTIM: "another day wouldn't hurt"
DEFENDANT: "You can't keep pushing it off, tho, that's all you keep doing"

4 The defendant helped the victim determine the method he eventually used to kill himself. On July 7, 2014, between 10:57 P.M. and 11:04 P.M., they exchanged the following text messages:
DEFENDANT: "Well there's more ways to make CO. Google ways to make it ..."
VICTIM: "Omg"
DEFENDANT: "What"
VICTIM: "portable generator that's it"
On July 11, 2014, at 5:13 P.M., the defendant sent the victim the following text message: " ... Well in my opinion, I think u should do the generator because I don't know much about the pump and with a generator u can't fail"
On July 12, 2014, between 4:25 A.M. and 4:34 A.M., they exchanged the following text messages:
DEFENDANT: "So I guess you aren't gonna do it then, all that for nothing"
DEFENDANT: "I'm just confused like you were so ready and determined"
VICTIM: "I am gonna eventually"
VICTIM: "I really don't know what I'm waiting for ... but I have everything lined up"
DEFENDANT: "No, you're not, Conrad. Last night was it. You keep pushing it off and you say you'll do it but u never do. Its always gonna be that way if u don't take action"
DEFENDANT: "You're just making it harder on yourself by pushing it off, you just have to do it"
DEFENDANT: "Do u wanna do it now?"
VICTIM: "Is it too late?"
VICTIM: "Idkk it's already light outside"
VICTIM: "I'm gonna go back to sleep, love you I'll text you tomorrow"
DEFENDANT: "No? Its probably the best time now because everyone's sleeping. Just go somewhere in your truck. And no one's really out right now because it's an awkward time"
DEFENDANT: "If u don't do it now you're never gonna do it"
DEFENDANT: "And u can say you'll do it tomorrow but you probably won't"

5 During the evening of July 11, 2014, and morning of July 12, 2014, the victim and the defendant exchanged the following text messages:
VICTIM: "I'm just to sensitive. I want my family to know there was nothing they could do. I am entrapped in my own thoughts"
VICTIM: "like no I would be happy if they had no guilt about it. because I have a bad feeling tht this is going to create a lot of depression between my parents/sisters"
VICTIM: "i'm overthinking everything ... fuck. I gotta stop and just do it"

DEFENDANT: "I think your parents know you're in a really bad place. Im not saying they want you to do it, but I honestly feel like they can except it. They know there's nothing they can do, they've tried helping, everyone's tried. But there's a point that comes where there isn't anything anyone can do to save you, not even yourself, and you've hit that point and I think your parents know you've hit that point. You said you're mom saw a suicide thing on your computer and she didn't say anything. I think she knows it's on your mind and she's prepared for it"

DEFENDANT: "Everyone will be sad for a while, but they will get over it and move on. They won't be in depression I won't let that happen. They know how sad you are and they know that you're doing this to be happy, and I think they will understand and accept it. They'll always carry u in their hearts"

...

VICTIM: "i don't want anyone hurt in the process though"

VICTIM: "I meant when they open the door, all the carbon monoxide is gonna come out they can't see it or smell it. whoever opens the door"

DEFENDANT: "They will see the generator and know that you died of CO...."

...

VICTIM: "hey can you do me a favor"

DEFENDANT: "Yes of course"

VICTIM: "just be there for my family :)"

DEFENDANT: "Conrad, of course I will be there for your family. I will help them as much as I can to get thru this, ill tell them about how amazing their son/brother truly was"

...

VICTIM: "Idk I'm freaking out again"

VICTIM: "I'm overthinking"

DEFENDANT: "I thought you wanted to do this. The time is right and you're ready, you just need to do it! You can't keep living this way. You just need to do it like you did last time and not think about it and just do it babe. You can't keep doing this every day"

VICTIM: "I do want to. but like I'm freaking for my family. I guess"

VICTIM: "idkkk"

DEFENDANT: "Conrad. I told you I'll take care of them. Everyone will take care of them to make sure they won't be alone and people will help them get thru it. We talked about this, they will be okay and accept it. People who commit suicide don't think this much and they just do it"

6 At various times between July 4, 2014, and July 12, 2014, the defendant and the victim exchanged several text messages:

DEFENDANT: "You're gonna have to prove me wrong because I just don't think you really want this. You just keeps pushing it off to another night and say you'll do it but you never do"

...

DEFENDANT: "SEE THAT'S WHAT I MEAN. YOU KEEP PUSHING IT OFF! You just said you were gonna do it tonight and now you're saying eventually...."

...

DEFENDANT: "But I bet you're gonna be like 'oh, it didn't work because I didn't tape the tube right or something like that' ... I bet you're gonna say an excuse like that"

...

DEFENDANT: "Do you have the generator?"

VICTIM: "not yet lol"

DEFENDANT: "WELL WHEN ARE YOU GETTING IT"

...

DEFENDANT: "You better not be bull shiting me and saying you're gonna do this and then purposely get caught"

...

DEFENDANT: "You just need to do it Conrad or I'm gonna get you help"
DEFENDANT: "You can't keep doing this everyday"
VICTIM: "Okay I'm gonna do it today"
DEFENDANT: "Do you promise"
VICTIM: "I promise babe"
VICTIM: "I have to now"
DEFENDANT: "Like right now?"
VICTIM: "where do I go? :("
DEFENDANT: "And u can't break a promise. And *just go in a quiet parking lot or something*" (emphasis added).

7 One call, at 6:28 P.M. on July 12, came from the victim's cellular telephone and the other, at 7:12 P.M., came from the defendant's cellular telephone. Each call lasted over forty minutes.

8 The text message to Samantha Boardman, in relevant part, stated: "Sam, [the victim's] death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the [truck] because it was working and he got scared and I fucking told him to get back in Sam because I knew he would do it all over again the next day and I couldnt have him live the way he was living anymore I couldnt do it I wouldnt let him."

9 The Model Jury Instructions on Homicide 73 (2013) define "[i]nvoluntary manslaughter" as "an unlawful killing unintentionally caused by wanton and reckless conduct." Wanton or reckless conduct

> "is conduct that creates a high degree of likelihood that substantial harm will result to another. It is conduct involving a grave risk of harm to another that a person undertakes with indifference to or disregard of the consequences of such conduct. Whether conduct is wanton and reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew. If the defendant realized the grave risk created by his conduct, his subsequent act amounts to wanton and reckless conduct whether or not a reasonable person would have realized the risk of grave danger. Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton and reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another. It is not enough for the Commonwealth to prove the defendant acted negligently, that is, in a manner that a reasonably careful person would not have acted. The Commonwealth must prove that the defendant's actions went beyond negligence and amounted to wanton and reckless conduct as ... defined...."

Id. at 76–79. The 2016 proposed model jury instructions are substantially similar in content to the 2013 model jury instructions.

10 Our case law uses the phrases "wanton and reckless conduct" and "wanton or reckless conduct" interchangeably. See, e.g., *Commonwealth v. Pugh,* 462 Mass. 482, 496–497, 969 N.E.2d 672 (2012).

11 Before we consider whether the grand jury heard testimony sufficient to warrant an indictment against the defendant for involuntary manslaughter, we address her argument that G.L. c. 265, § 13 (punishing involuntary manslaughter), is unconstitutionally vague as applied to her. Specifically, the defendant argues that no one of ordinary intelligence—never mind a juvenile—would understand that encouraging suicide is prosecutable under existing law.

A criminal statute must be "sufficiently explicit to give clear warning as to proscribed activities." *Commonwealth v. Orlando,* 371 Mass. 732, 734, 359 N.E.2d 310 (1977). "A statute is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning.... If a statute has been clarified by judicial explanation, however, it will withstand a challenge on grounds of unconstitutional

vagueness" (quotation and citation omitted). *Commonwealth v. Crawford,* 430 Mass. 683, 689, 722 N.E.2d 960 (2000). "Where a statute's literal scope ... is capable of reaching expression sheltered by the First Amendment [to the United States Constitution], the [vagueness] doctrine demands a greater degree of specificity than in other contexts" (citation omitted). *Commonwealth v. Abramms,* 66 Mass.App.Ct. 576, 581, 849 N.E.2d 867 (2006).

The crime the defendant is charged with is neither objectively nor subjectively vague as applied to the defendant. "Manslaughter is a common-law crime that has not been codified by statute in Massachusetts" (citation omitted). *Commonwealth v. Rodriquez,* 461 Mass. 100, 106, 958 N.E.2d 518 (2011). General Laws c. 265, § 13, does not describe the crime; instead, it sets out only the punishment, while the elements of the crime are created as part of the common law. Under common law, conduct similar to that of the defendant has been deemed unlawful, see *Persampieri v. Commonwealth,* 343 Mass. 19, 22–23, 175 N.E.2d 387 (1961) (jury warranted in convicting defendant of involuntary manslaughter where he provided wife with gun, taunted her, and encouraged her to commit suicide, resulting in her killing herself), and it is therefore not objectively vague.

On a subjective basis, the evidence presented by the Commonwealth showed that the defendant was personally aware that her conduct was both reprehensible and punishable: the defendant asked the victim to delete the text messages between the two of them, deleted several of those messages from her own cellular telephone, and, after police began investigating the victim's cellular telephone, lied about her involvement and told her friend that, if the police uncovered the text messages between her and the victim, she could go to jail. The charge of involuntary manslaughter is not vague as applied to the defendant.

12 Viewed in the light most favorable to the Commonwealth, there was evidence that the defendant intended to pressure the victim into killing himself. The defendant told her friend, Samantha Boardman, that she "couldn't have [the victim] live the way he was living anymore. [She] couldn't do it. [She] wouldn't let him."

13 Although not physically present when the victim committed suicide, the constant communication with him by text message and by telephone leading up to and during the suicide made the defendant's presence at least virtual.

14 Physical acts are certainly one means by which the Commonwealth can show the commission prong of involuntary manslaughter. See *Pugh,* 462 Mass. at 497, 969 N.E.2d 672. However, the defendant does not point to—and our research has not uncovered—any case in which physical acts have been made a prerequisite of involuntary manslaughter.

15 As in the case against the husband in *Persampieri,* the Commonwealth's evidence here shows that the defendant fully understood and took advantage of the victim's fragility. Prior to July 12, 2014, the defendant had helped to plan the victim's suicide, assuaged the victim's guilt about leaving his family, expressed her frustration that the victim had, at various times, delayed killing himself, and threatened to seek mental health treatment for the victim (despite his protestations) if he did not kill himself.

16 The defendant admitted to Boardman: "I helped ease him into it and told him it was okay, I was talking to him on the phone when he did it I coud have easily stopped him or called the police but I didn't."

17 The speech at issue in this case is not protected under the First Amendment to the United States Constitution or art. 16 of the Massachusetts Declaration of Rights because the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific victim's suicide. See *Mendoza v. Licensing Bd. of Fall River,* 444 Mass. 188, 197 n. 12, 827 N.E.2d 180 (2005) (content-based restrictions on expressive conduct must satisfy "strict scrutiny" standard, meaning government must "demonstrate that the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" [citation omitted]); *Brown v. Entertainment Merchants Ass'n,* 564 U.S. 786, 799, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011); *Washington v. Glucksberg,* 521 U.S. 702, 728, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (State "has an unqualified interest in the preservation of human life" [citation omitted]). See also *State v. Melchert–*

Dinkel, 844 N.W.2d 13, 23 (Minn.2014) (affirming in part constitutionality of statute prohibiting "assist[ing]" suicide as against First Amendment challenge).

18 The defendant argues that the indictment is flawed where the grand jurors did not consider the charges from the perspective of a "reasonable juvenile of the same age" standard. Massachusetts currently does not require that a grand jury consider charges based on such a standard. This issue was not raised below. See G.L. c. 277, § 47A ("In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised ... by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure"). There was not an evidentiary hearing on the issue, the judge did not offer any opinion as to the argument's merits, and the arguments presented by the defendant and amici at this stage regarding the impact of juvenile indictments are being raised for the first time on appeal. The argument was therefore waived.

19 The defendant argues that her conduct cannot constitute the infliction or threat of serious bodily harm, as is required for an indictment under the youthful offender statute, G.L. c. 119, § 54. Having concluded that the grand jury were justified in returning an indictment for involuntary manslaughter, we are convinced that they were also justified in returning such indictment under the youthful offender statute, given that involuntary manslaughter under these circumstances inherently involves the infliction of serious bodily harm.

End of Document

Is "Revenge Porn" Protected Speech? Dangers of Dissemination of Sexual Images via Social Media

(*People v. Austin*)

Is it constitutional to prohibit a person from disseminating pictures voluntarily sent to that person? Does criminalization of non-consensual dissemination of private sexual images *voluntarily* sent by someone else violate our 1st Amended Right to Freedom of Speech?

This inquiry takes us to *People v. Austin*, 2019 IL 123910, –N.E.3d– (Ill. S. Ct.). To understand *Austin*, we need to provide some history. Defendant was charged with violating 720 ILCS 5/11-23.5(b), which criminalizes the non-consensual dissemination of private sexual images, and states as follows:

> (b) A person commits non-consensual dissemination of private sexual images when he or she:
>
> (1) intentionally disseminates an image of another person:
>
> > (A) who is at least 8 years of age; and
> > (B) who is identifiable from the image itself or information displayed in connection with the image; and
> > © who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and
>
> (2) obtains the under circumstances in which a reasonable person would know or understand that the image was to remain private; and
>
> (3) knows or should have known that the person in the image has not consented to the dissemination.

720 ILCS 5/11-23.5(b) (Class 4 Felony). It is important to note that the relevant explicit images were sent by the victim to the defendant (now x-fiancé) voluntarily. No issue of hidden cameras or victim coercion or improper usurping or stealing of the images. When the defendant and victim broke up, the defendant shared the sexual images with a third-party. Defendant was charged.

The Defendant moved to dismiss the charge claiming that the statute was facially unconstitutional because it was "content-based" restriction of speech and is not narrowly tailored to serve a compelling government interest, thereby violating U.S. Const., Amend. I and State Constitution 1970, Art. I, § 4. State opposed arguing that this type of speech was not constitutionally protected and the statute was narrowly tailored to serve a compelling state interest. Trial court agreed with defendant that the Statute improperly restricted free speech based on its content and was not narrowly tailored to serve a compelling government interest and granted the motion to dismiss.

The Supreme Court had a thorough discussion of the Statute addressing the problem of non-consensual dissemination of private sexual images, colloquially referred to as "revenge porn". The court pointed out that the statute need not apply merely when used as "revenge". The crux of revenge porn lies in the fact the victim did not consent to its distribution, even though the victim may have consented to its recording or taking. "As a result, the rise of revenge porn has (unsurprisingly) gone hand-in-hand with the increasing use of social media and the Internet . . . ." *Austin*, at ¶18. Thus, "revenge" porn does not only derive from personal vengeance, but "perpetrators may also be motivated by the desire for profit, notoriety, entertainment, or for no specific reason at all." *Id.* As stated by the Court: "This is a unique crime fueled by technology: . . . ." Because this non-consensual dissemination of private sexual images voluntarily given "so often involves the Internet and social media, the public, law enforcement, and the judiciary sometimes struggle to understand the mechanics of the conduct and the devastation it can cause." *Austin*, at ¶19. As pointed out by the Court, four percent of American users of the internet "have either had intimate images posted online without their consent or have been threatened with this heinous act. . . . . [This] is a serious social problem that has devastating impact on those victimized by it. The 4 percent of American Internet users affected by it amounts to millions of individuals." *Austin* , at ¶21. To date, 46 states and D.C. have enacted legislation prohibiting this conduct.

Thus, does a person who voluntarily texts a nude selfie to a third-party boyfriend/girlfriend thereby relinquish all expectations of privacy in the image? If one cannot reasonably expect that image to remain private, then does the act of sharing it in the first place demonstrate the person never *intended* the image to remain private? Albeit the Trial Court said yes, the Supreme Court disagreed stating that sharing of private sexual image in a personal and direct communication with an intended recipient does not demonstrate that the transmission was never intended to remain private. *Austin*, at ¶20.

The Supreme Court went through the traditional discussion of the importance of the 1st Amendment right to free speech and emphasized that it is still important to apply to ever-advancing technology. However, the Court likewise reminded us that the 1st Amendment does not guarantee the right to communicate one's views all the time in any manner desired. The Circuit court found that the Statute imposed "content-based" speech restrictions because it does not target all pictures, videos, etc. but only those showing nudity or sexual activity. Albeit the parties premised their arguments on the assumption strict scrutiny standard was required, the Supreme Court disagreed.

The court first determined if the particular statute was "content based or content neutral". If "content based", higher standard of strict scrutiny requiring compelling state interest and least restrictive alternative must be used. *Id.* At ¶20. If "content neutral" intermediate level of scrutiny is used requiring an important or substantial governmental interest and narrowly tailored to serve that interest with unnecessarily interfering with 1st Amended freedoms. *Id.* At 59. "Content-neutral" laws are subject to intermediate level of scrutiny because generally presents less risk of excising certain ideas or viewpoints from the public dialogue. *Id.* At ¶ 51.

The Supreme Court concluded the statue was "content neutral." A statute is "content neutral" for one of two reasons: First, the restriction is content-neutral in time, place and manner; or Second, the statute regulates a purely private matter. *Id.* At ¶43. The Supreme Court held that the statute was subject to intermediate level of scrutiny because the statute regulates purely private matters and justified on the grounds of protecting privacy. *Id.* At ¶53 The statute does not pose serious risk to free expression or present potential for censorship or manipulation to justify strict scrutiny application. *Id* at ¶57. The statute distinguishes the dissemination of sexual image not based on the content of the image itself, but, instead, based on whether the disseminator obtained the image under circumstances in which a reasonable person would know the image was to remain private and knows or should have known that the person in the image has not consented to the dissemination. As pointed out, there is no criminal liability for dissemination of the very same image obtained and distributed with consent. It is the *manner* of the image's acquisition and publication, and not its *content*, that is the crux to the illegality of its dissemination. *Id.* At ¶49. The Court acknowledged three consistent themes in this context. First, speech relating to matters of private concern that invade nonpublic figures does not enjoy the same degree of 1st amendment protections as speech relating to public concerns or public figures. Second, laws protecting individual privacy rights are long established and not necessarily subordinate to the 1st amendment. Third, the Court is wary of rules or categorical holdings framing relationship between laws protecting individual privacy verses the 1st amendment. *Id.* At ¶65

The Supreme Court concluded that the Statute serves a substantial government interest of the States' police powers to protect the health and safety of its citizens for many of the concerns set forth above relating to problems surrounding revenge porn and that the interest was unrelated to the suppression of speech. *Id.* At ¶61-69. Thus, the next issue was whether the statute was narrowly tailored to serve the substantial government interest without unnecessarily interfering with the 1st Amendment. *Id.* At ¶70. Thus, unlike strict scrutiny requiring the least restrictive means to accomplish a compelling government interest, the "narrowly tailored" requirement scrutiny is less demanding. To satisfy the "narrowly tailored" requirement, the law must reasonably fit the substantial government interest. *Id.* The Supreme Court concluded that the substantial government interest of protecting residents from non-consensual dissemination of private sexual images would be achieved less effectively without the Statute. Likewise, the Court pointed out that "the legislature has broad discretion to determine not only what the public interest and welfare require but to determine the means needed to serve such interest." *Id* at 71 (Citations Omitted).

Likewise, the Supreme Court rejected the defendants claim that the Statute is facially unconstitutional because it is overbroad. *Id.* At ¶88. The overbreadth doctrine focuses on whether the law improperly regulates speech based on viewpoint or content. *Id.* At ¶89. Generally, to assert the overbreadth doctrine that a statute is a facial violation of the 1st amendment, a defendant is required to establish no set of circumstances where the statute would be valid. However, a defendant may challenge a statute as a facial violation , even if that conduct not fall under the amendments protection. A facial challenge based on the 1st

amendment overbreadth is permitted out of concern that threat of enforcement of the law may chill or deter constitutionally protected speech, especially when criminal penalties are at issue. *Id.*

The Court pointed out that under the 1st amendment, to satisfy the overbreadth doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech. *Id.* At ¶90. The doctrine attempts to balance two compelling social costs: (1) the chilling effect on constitutionally protect speech verses the invalidation of a law that is entirely constitutional in some of its applications. The overbreadth must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep" to be unconstitutional. Merely conceiving of some impermissible application of a statute is insufficient to satisfy an overbreadth challenge. Applying the intermediate scrutiny, a "content-neutral" statute is overbroad only when it burdens substantially more speech than necessary to advance the substantial government interest. *Id.* At ¶90. Because the invalidating a statute pursuant to the overbreadth doctrine is "strong medicine", it should be applied as "only as a last resort" and when the statute is not subject to a limiting construction. *Id.* At ¶ 91. When applying these principals, the Supreme Court held that the Statute is not overbroad. *Id.* At ¶ 92. The statute prohibits a limited category of intensely personal image of another person. Likewise, it encompasses only image of private and sexual nature, which the disseminator must know or understand is to remain private without consent. The Court concluded that the statute does not prohibit a substantial amount of protected speech when viewed in relation to the statute's legitimate sweep. Likewise, it does not burden substantially more speech than necessary to advance the substantial governmental interest. *Id.*

Therefore, the Supreme Court reversed and remanded the case back to McHenry County.

Open Issues?

Is dissemination to one person sufficient? Does it need to be posted on Social Media to be a crime?

What if the alleged victim is a Public Figure?

What if the alleged victim had already posted similar images on social media but not the actual images disseminated by the accused?

What if the alleged victim had shared the same picture with multiple third-parties? At what point does the expectation of privacy end?

What if there was no "malicious intent"?

What if there was no actual harm to the victim? Presumptively harmful?

What if someone hacked the phone of the person accused of disseminating the images and published the images? What if the accused took no actions (i.e. password) to protect the phone making it easier to hack?

Is criminalization necessary? Wouldn't civil actions be adequate (i.e. civil action of invasion of the right of privacy)?

SUBMITTED AND PRESENTED BY:

Team 4
Robert E. Jones Inns of Court

2019 IL 123910

Supreme Court of Illinois.

The PEOPLE of the State of Illinois, Appellant,

v.

Bethany AUSTIN, Appellee.

(Docket No. 123910)

Opinion filed October 18, 2019

Synopsis

Background: Defendant was charged with violating statute criminalizing nonconsensual dissemination of private sexual images, or so called "revenge porn." The Circuit Court, McHenry County, granted defendant's motion to dismiss the charge, finding the statute facially unconstitutional. State filed direct appeal.

Holdings: The Supreme Court, Neville, J., held that:

[1] nonconsensual dissemination of private sexual images was not categorically excepted from First Amendment;

[2] statute was subject to intermediate scrutiny under First Amendment;

[3] statute served substantial government interest in protecting privacy of persons who had not consented to dissemination of their private sexual images;

[4] statute was narrowly tailored to serve that substantial government interest;

[5] statute was not unconstitutionally overbroad under First Amendment; and

[6] statute was not void for vagueness as applied to defendant.

Reversed and remanded.

Garman, J., dissented, with opinion, joined by Theis, J.

West Headnotes (77)

[1] **Criminal Law**
⇐ Review De Novo

Issue of whether a statute is constitutional presents a question of law, which the Supreme Court reviews de novo.

[2] **Constitutional Law**
⇐ Presumptions and Construction as to Constitutionality

Constitutional Law
⇐ Clearly, positively, or unmistakably unconstitutional

Constitutional Law
⇐ Burden of Proof

All statutes are presumed to be constitutional, and the party challenging a statute's constitutionality bears the burden of clearly establishing its invalidity.

[3] **Constitutional Law**
⇐ Presumptions and Construction as to Constitutionality

A court must construe a statute so as to uphold its constitutionality, if reasonably possible.

[4] **Statutes**
⇐ Intent

When presented with an issue of statutory construction, the Supreme Court's primary objective is to ascertain and give effect to the intent of the legislature.

[5] **Statutes**
⇐ Related provisions

A court engaging in statutory construction will not read language in isolation and must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions.

[6] **Statutes**
Superfluousness

Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous when construing a statute.

[7] **Statutes**
Presumptions, inferences, and burden of proof

In construing a statute, the Supreme Court must presume that the legislature did not intend to create absurd, inconvenient, or unjust results.

[8] **Statutes**
Purpose

Statutes
Construction in View of Effects, Consequences, or Results

It is proper for the court construing a statute to consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another.

[9] **Constitutional Law**
Resolution of non-constitutional questions before constitutional questions

Supreme Court would reach issue of constitutionality of statute criminalizing nonconsensual dissemination of private sexual images, in state's appeal of trial court's decision finding that statute was unconstitutional violation of free speech protections of state and federal constitutions, where statute covered defendant's alleged conduct in disseminating nude photographs victim had sent to defendant's fiancé, and no other justification for trial court's judgment had been asserted. U.S. Const. Amend. 1; Ill. Const. art. 1, § 4; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

[10] **Constitutional Law**
Resolution of non-constitutional questions before constitutional questions

A court will not consider constitutional issues where a case can be decided on other grounds.

[11] **Criminal Law**
Constitutional questions

Criminal Law
Points and authorities

Supreme Court would consider only federal constitutional principles, and not state constitutional principles, in state's appeal of trial court's finding that statute criminalizing nonconsensual dissemination of private sexual images violated free speech protections of both state and federal constitutions; after finding that statute violated First Amendment, trial court held, without specific analysis, that statute also violated state's free speech guaranty, and, on appeal, the parties did not offer any arguments specifically addressing the state constitutional free speech guaranty. U.S. Const. Amend. 1; Ill. Const. art. 1, § 4; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

[12] **Constitutional Law**
Content-Based Regulations or Restrictions

First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. U.S. Const. Amend. 1.

[13] **Constitutional Law**
Freedom of Speech, Expression, and Press

An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information

might be used or disseminated. U.S. Const. Amend. 1.

[14] **Constitutional Law**
Freedom of Speech, Expression, and Press

Whatever the challenges of applying the Constitution to ever-advancing technology, the basic First Amendment principles of freedom of speech do not vary when a new and different medium for communication appears. U.S. Const. Amend. 1.

[15] **Constitutional Law**
Pornography in general

Obscenity
Photographs and videos in general

Nonconsensual dissemination of private sexual images was not categorically excepted from First Amendment, and thus statute criminalizing such conduct was subject to First Amendment scrutiny, though nonconsensual dissemination of private sexual images appeared to be strong candidate for categorical exclusion from full First Amendment protections; United States Supreme Court had not addressed question of new categorical exclusion from First Amendment for nonconsensual dissemination of private sexual images, and nonconsensual dissemination of private sexual images did not fall within any established First Amendment categorical exclusion. U.S. Const. Amend. 1; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

1 Cases that cite this headnote

[16] **Constitutional Law**
Particular Issues and Applications in General

There are categories of speech that are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality, such that the protection of the First Amendment does not extend to those categories of speech; those categories include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. U.S. Const. Amend. 1.

[17] **Constitutional Law**
Content-Based Regulations or Restrictions

Generally, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based, so as to be presumptively invalid. U.S. Const. Amend. 1.

[18] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

A content-based law is justified under the First Amendment only if it survives strict scrutiny, which requires the government to demonstrate that the law is narrowly tailored to serve a compelling state interest. U.S. Const. Amend. 1.

[19] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

To satisfy strict scrutiny review of a content-based law, the state must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution. U.S. Const. Amend. 1.

[20] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

Under strict scrutiny review of a content-based law, if a less restrictive alternative would serve the governmental purpose, a legislature must use that alternative. U.S. Const. Amend. 1.

[21] **Criminal Law**
Constitutional issues in general

In a First Amendment case, the Supreme Court, as a court of review, must decide independently whether a given course of conduct falls on the near or far side of the line of constitutional protection. U.S. Const. Amend. 1.

[22] **Criminal Law**
Scope of Inquiry

Supreme Court, as a court of review, is not bound by a party's concession.

[23] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

In contrast to content-based speech restrictions, which are subject to strict scrutiny, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue. U.S. Const. Amend. 1.

[24] **Constitutional Law**
Absolute nature of right

First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. U.S. Const. Amend. 1.

[25] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Laws that impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. U.S. Const. Amend. 1.

[26] **Constitutional Law**
Governmental disagreement with message conveyed

Principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. U.S. Const. Amend. 1.

[27] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Government regulation of speech is content neutral so long as it is justified without reference to the content of the regulated speech. U.S. Const. Amend. 1.

[28] **Constitutional Law**
Content-Neutral Regulations or Restrictions

A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

[29] **Constitutional Law**
Content-Neutral Regulations or Restrictions

Proper focus in determining whether a restriction is content neutral is on whether the government has addressed a category of speech to suppress discussion of that topic. U.S. Const. Amend. 1.

[30] **Constitutional Law**
Pornography in general

Obscenity
Photographs and videos in general

Statute criminalizing nonconsensual dissemination of private sexual images was content-neutral time, place, and manner restriction, and thus intermediate scrutiny, rather than strict scrutiny, applied to determination of statute's constitutionality under First Amendment; statute distinguished dissemination of sexual image not based on content of image itself, but rather based on whether disseminator obtained image under circumstances in which a reasonable person would know that the image was to remain private and knew or should have known that the person in the image had not consented to dissemination, such that it was the

manner of image's acquisition and publication, and not its content, was crucial to illegality of its dissemination. U.S. Const. Amend. 1; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b)(2, 3).

[31] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Content-neutral laws are subject to an intermediate level of scrutiny under the First Amendment because they generally present a less substantial risk of excising certain ideas or viewpoints from the public dialogue. U.S. Const. Amend. 1.

[32] **Constitutional Law**
Pornography in general

Obscenity
Photographs and videos in general

Defendant's nonconsensual dissemination of victim's private sexual images was not an issue of public concern, but rather was a purely private matter, and thus statute prohibiting such conduct was subject to intermediate scrutiny, rather than strict scrutiny, under First Amendment, in prosecution of defendant for disseminating nude photographs victim sent to defendant's fiancé in text messages; fiancé informed family members that it was defendant's fault their relationship ended, defendant responded with letter explaining her version of events and attaching victim's private sexual images and text messages, those images and text messages were never in public domain, and public had no legitimate interest in victim's private sexual activities or embarrassing facts revealed about victim's life. U.S. Const. Amend. 1; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

[33] **Constitutional Law**
Matters of public concern

Speech on matters of public concern lies at the heart of First Amendment protection. U.S. Const. Amend. 1.

[34] **Constitutional Law**
Matters of public concern

Speech on public issues occupies the highest position of the hierarchy of First Amendment values and is entitled to special protection. U.S. Const. Amend. 1.

[35] **Constitutional Law**
Matters of private concern

First Amendment protections are less rigorous where matters of purely private significance are at issue because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas; and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import. U.S. Const. Amend. 1.

[36] **Constitutional Law**
Matters of private concern

While speech on matters of purely private significance is not totally unprotected by the First Amendment, its protections are less stringent. U.S. Const. Amend. 1.

[37] **Constitutional Law**
Matters of public concern

Constitutional Law
Matters of private concern

Deciding whether speech is of public or private concern requires an examination of the content, form, and context of that speech, as revealed by the entire record. U.S. Const. Amend. 1.

[38] **Constitutional Law**
Matters of public concern

Constitutional Law

Matters of private concern

In considering content, form, and context of speech to determine if it is of public or private concern, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. U.S. Const. Amend. 1.

[39] **Constitutional Law**

Narrow tailoring requirement; relationship to governmental interest

Generally, to survive intermediate scrutiny, the law must serve an important or substantial governmental interest unrelated to the suppression of free speech and must not burden substantially more speech than necessary to further that interest or, in other words, must be narrowly tailored to serve that interest without unnecessarily interfering with first amendment freedoms, which include allowing reasonable alternative avenues of communication. U.S. Const. Amend. 1.

[40] **Constitutional Law**

Narrow tailoring

In the context of the First Amendment, fit matters between the government interest and the statute; even when the Supreme Court is not applying strict scrutiny, the Court still requires a fit that is not necessarily perfect but reasonable, a fit that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, a fit that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective. U.S. Const. Amend. 1.

[41] **Constitutional Law**

Pornography in general

Obscenity

Photographs and videos in general

Statute criminalizing nonconsensual dissemination of victims' private sexual images served substantial government interest in protecting privacy of persons who did not consent to dissemination of their private sexual images, which was unrelated to the suppression of free speech, as would support finding that statute did not violate First Amendment under intermediate scrutiny; nonconsensual dissemination of private sexual images caused unique and significant harm to victims, including engendering domestic violence and deterring reports of sexual assaults, victims were frequently harassed, solicited for sex, threatened with sexual assault, fired from jobs, and lost future employment opportunities, victims suffered profound psychological harm, and victims were disproportionately women. U.S. Const. Amend. 1; 720 Ill. Comp. Stat. Ann. 5/11-23.5.

[42] **States**

Police power

It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.

[43] **Municipal Corporations**

Nature and scope of power of municipality

In the exercise of the police power, government may act to regulate, restrain or prohibit that which is harmful to the public welfare even though the regulation, restraint, or prohibition might interfere with the liberty or property of an individual.

[44] **Municipal Corporations**

Nature and scope of power of municipality

Government can protect individual privacy rights.

[45] **Torts**

Publications or Communications in General

To state a cause of action for the tort of public disclosure of private facts, the plaintiff must prove that (1) the defendant gave publicity (2) to the plaintiff's private and not public life (3) and that the matter made public was

highly offensive and (4) not of legitimate public concern. Restatement (Second) of Torts § 652D cmt. d.

[46] **Constitutional Law**
⇐ Matters of public concern
Constitutional Law
⇐ Matters of private concern

Speech on matters of private concern that invades the privacy interests of nonpublic figures does not enjoy the same degree of First Amendment protection as speech on matters of public concern or relating to public figures. U.S. Const. Amend. 1.

[47] **Obscenity**
⇐ Power to regulate
Telecommunications
⇐ Privacy in general

State has an interest in protecting the privacy of personal images of one's body that are intended to be private—and specifically, protecting individuals from the nonconsensual publication on websites accessible by the public.

[48] **Constitutional Law**
⇐ Pornography in general
Obscenity
⇐ Photographs and videos in general

Substantial government interest of protecting state residents from nonconsensual dissemination of private sexual images would be achieved less effectively absent statute criminalizing such dissemination, as would support finding that statute was narrowly tailored and, thus, did not violate First Amendment under intermediate scrutiny; civil actions in tort based on privacy violations or copyright were inadequate, especially in light of concerns regarding re-victimization and ineffectiveness of remedies, and criminalization was vital deterrent, given that neither privacy torts nor copyright law successfully removed images or deterred dissemination in first instance. U.S. Const. Amend. 1; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

[49] **Constitutional Law**
⇐ Narrow tailoring

Unlike strict scrutiny, which requires the least restrictive means to accomplish a compelling government interest, the narrowly tailored requirement of intermediate scrutiny does not require that the regulation be the least speech-restrictive means of advancing the government interest; rather, the narrowly tailored requirement of intermediate scrutiny is satisfied so long as the law promotes a substantial government interest that would be achieved less effectively absent the law. U.S. Const. Amend. 1.

[50] **Constitutional Law**
⇐ Narrow tailoring

A law must reasonably fit the substantial government interest to satisfy the requirement for intermediate scrutiny that a restriction on speech be narrowly tailored to serve a substantial government interest without unnecessarily interfering with First Amendment freedoms. U.S. Const. Amend. 1.

[51] **States**
⇐ Police power

Legislature has broad discretion to determine not only what the public interest and welfare require, but to determine the means needed to serve such interest.

[52] **States**
⇐ Police power

Legislature, under the State's police power, has wide discretion to classify offenses and prescribe penalties for the defined offenses.

[53] **Constitutional Law**
⇐ Pornography in general

Obscenity
⇐ Photographs and videos in general

Statute criminalizing nonconsensual dissemination of victim's private sexual images did not burden substantially more speech than necessary, and thus statute was narrowly tailored to further important governmental interest of protecting privacy of personal images of one's body that were intended to be private, such that it survived intermediate scrutiny under First Amendment; statute defined nonconsensual dissemination of private sexual images narrowly, scope of statute was restricted to images of discreet and personal nature, statute burdened only speech that targeted specific person, statute was inapplicable if disclosure was natural and expected outcome or if there was consent to disclosure, statute required dissemination to be intentional, statute contained exemptions, and reasonable avenues of communication remained. U.S. Const. Amend. 1; 720 Ill. Comp. Stat. Ann. 5/11-23.5(a)-(d).

[54] Constitutional Law
⇐ Pornography in general

Obscenity
⇐ Photographs and videos in general

Statute criminalizing nonconsensual dissemination of victim's private sexual images did not burden substantially more speech than necessary to advance substantial governmental interest of protecting such persons, and thus statute was not unconstitutionally overbroad under the First Amendment, though malicious purpose or harm to victim was not expressly mandated in statute; statute had narrowly focused scope, as it prohibited a certain and limited category of knowing conduct that involved the unauthorized and intentional dissemination of an intensely personal image of another person, illicit motive or malicious purpose was inherent in act of disseminating intensely personal image without consent of person being portrayed, and unauthorized dissemination of private sexual image was presumptively harmful. U.S. Const. Amend. 1; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

1 Cases that cite this headnote

[55] Constitutional Law
⇐ Overbreadth

"First amendment overbreadth doctrine" looks not at whether a law improperly regulates speech based on viewpoint or content but at the appropriate scope of the regulation. U.S. Const. Amend. 1.

[56] Constitutional Law
⇐ Facial invalidity

Constitutional Law
⇐ Overbreadth

Generally, a defendant seeking to assert a facial challenge to the constitutionality of a statute would be required to establish that there is no set of circumstances under which the statute would be valid; however, the overbreadth doctrine permits a party to challenge a statute as a facial violation of the First Amendment, even if that party's conduct would not fall within the amendment's protection. U.S. Const. Amend. 1.

[57] Constitutional Law
⇐ Prohibition of substantial amount of speech

Under the "First Amendment's overbreadth doctrine," a statute is facially invalid if it prohibits a substantial amount of protected speech. U.S. Const. Amend. 1.

[58] Constitutional Law
⇐ Prohibition of substantial amount of speech

To be unconstitutional based on the First Amendment's overbreadth doctrine, the overbreadth must be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. U.S. Const. Amend. 1.

[59] Constitutional Law
⇐ Overbreadth

Mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge under the First Amendment's overbreadth doctrine. U.S. Const. Amend. 1.

[60] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

Under intermediate scrutiny, a content-neutral statute is overbroad only when it burdens substantially more speech than necessary to advance its substantial governmental interest. U.S. Const. Amend. 1.

[61] **Constitutional Law**
Invalidation of all enforcement

Because the invalidation of a statute on overbreadth grounds under the First Amendment is "strong medicine," it is to be applied "only as a last resort" and where the statute is not subject to a limiting construction. U.S. Const. Amend. 1.

[62] **Constitutional Law**
Limiting construction

If a statute is readily susceptible to a narrowing construction that will eliminate its substantial overbreadth under the First Amendment, the statute must be upheld. U.S. Const. Amend. 1.

[63] **Constitutional Law**
Prohibition of substantial amount of speech

To resolve an argument that a statute is facially unconstitutional under the First Amendment's overbreadth doctrine, the Supreme Court must determine whether the statute impermissibly restricts constitutionally protected expression in a substantial number of its applications when considered in relation to its plainly legitimate sweep. U.S. Const. Amend. 1.

[64] **Obscenity**
Purpose

Purpose of statute criminalizing nonconsensual dissemination of victim's private sexual images is to protect living persons from being victimized by harassment, discrimination, embarrassment, and possible violence resulting from the privacy violation occasioned by the nonconsensual dissemination of private sexual images. 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

[65] **Constitutional Law**
Certainty and definiteness; vagueness

A statute may be challenged as vague in violation of due process on either of two grounds: (1) it fails to give fair warning to allow innocent people to steer clear of its prohibitions, or (2) it contains insufficiently clear standards for those who enforce it and may lead to arbitrary or discriminatory enforcement. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2.

[66] **Constitutional Law**
Certainty and definiteness; vagueness

Constitutional Law
Speech, press, assembly, and petition

Constitutional Law
Association

Where a statute involves First Amendment rights, to satisfy due process, it should not be so vague that it chills the exercise of free expression by generating concern over whether such conduct may violate the statute's prohibition; therefore, when a statute interferes with the right of free speech or of association, a more stringent vagueness test should apply. U.S. Const. Amends. 1, 14; Ill. Const. art. 1, § 2.

[67] **Constitutional Law**
Prohibition of substantial amount of speech

Constitutional Law
Certainty and definiteness; vagueness

A vagueness claim based on due process is analytically distinct from a First Amendment overbreadth claim and does not depend upon whether a law applies to a substantial amount of protected speech. U.S. Const. Amends. 1, 14; Ill. Const. art. 1, § 2.

[68] **Constitutional Law**
Certainty and definiteness; vagueness

A facial challenge to a statute that is premised on due process vagueness grounds can succeed only if the enactment is impermissibly vague in all of its applications. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2.

[69] **Constitutional Law**
Vagueness in General

Constitutional Law
Freedom of Speech, Expression, and Press

A litigant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others; that rule makes no exception for conduct in the form of speech. U.S. Const. Amends. 1, 14; Ill. Const. art. 1, § 2.

[70] **Constitutional Law**
Certainty and definiteness; vagueness

Determination of whether a statute is unconstitutionally vague in violation of due process must be decided based on the particular facts before the court. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2.

[71] **Constitutional Law**
Freedom of Speech, Expression, and Press

A litigant whose speech is clearly proscribed cannot successfully assert a due process claim of vagueness for lack of notice, and he certainly cannot do so based on the speech of others. U.S. Const. Amends. 1, 14; Ill. Const. art. 1, § 2.

[72] **Constitutional Law**
Vagueness

Of critical importance to the inquiry of whether a statute provides fair warning sufficient to avoid prosecution, so as to comport with due process, is whether the statute provides people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits so that one may act accordingly. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2.

[73] **Constitutional Law**
Obscenity and lewdness

Obscenity
Photographs and videos in general

Defendant's conduct in sending letter to at least one other person that included private sexual images of victim without victim's consent fostered general knowledge of the victim's image and made it more widely known, and thus fell within statutory proscription on nonconsensual dissemination of private sexual images, such that defendant could not claim that statute was void for vagueness for lack of notice as to her circumstances, though statute did not define "disseminate," and did not state to whom, when, where, or how the dissemination had to be accomplished. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

[74] **Statutes**
Undefined terms

In the absence of a statutory definition, courts presume that the words used in a statute have their ordinary and popularly understood meanings.

[75] **Constitutional Law**
Obscenity and lewdness

Obscenity
Photographs and videos in general

Defendant, who sent letter to at least one other person that included nude photographs victim had sent to defendant's fiancé, was not entitled

to challenge statute prohibiting nonconsensual dissemination of private sexual images on vagueness grounds based on statutory exception for dissemination that served a "lawful public purpose" but did not address what such purpose might be; dissemination of private sexual image was private matter, defendant offered no argument that she acted in furtherance of "lawful public purpose," and, indeed, defendant explained that her dissemination of photographs was for personal reason, namely to defend herself against fiancé's statements that she was crazy and to explain reason underlying their breakup. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b), (c)(4).

[76] **Constitutional Law**
Obscenity and lewdness

Obscenity
Photographs and videos in general

Statute criminalizing nonconsensual dissemination of private sexual image if a "reasonable person would know or understand that the image was to remain private" was not rendered unreasonably vague in violation of due process based on use of "reasonable person" negligence standard, though defendant asserted that it required her to "read the minds of others" as to whether image was intended to remain private, as such negligent mental state was valid basis for imposing criminal liability and did not violate due process. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b)(2).

[77] **Constitutional Law**
Obscenity and lewdness

Obscenity
Photographs and videos in general

Statute criminalizing nonconsensual dissemination of private sexual images did not violate due process on ground that a private sexual image that had been shared with another person was not a truly private matter, though defendant asserted that unconditional disclosure of such image imposed no duty to keep image private and operated to relinquish all privacy rights of person depicted therein; sharing of private sexual image was truly private matter, due process did not require formality of requiring person portrayed in image to elicit express promise that image would be kept private, and person who received private sexual image did not acquire ownership interest that entitled him or her to do with it as he or she saw fit, including dissemination to others without consent of person portrayed. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2; 720 Ill. Comp. Stat. Ann. 5/11-23.5(b).

OPINION

JUSTICE NEVILLE delivered the judgment of the court, with opinion.

*1 ¶ 1 Defendant Bethany Austin was charged with violating section 11-23.5(b) of the Criminal Code of 2012 (720 ILCS 5/11-23.5(b) (West 2016)), which criminalizes the nonconsensual dissemination of private sexual images. On defendant's motion, the circuit court of McHenry County dismissed the charge, finding that provision facially unconstitutional as an impermissible restriction on the right to free speech as guaranteed by the United States and Illinois Constitutions. U.S. Const., amend. I; Ill. Const. 1970, art. I, § 4. The State filed a direct appeal challenging the judgment of the circuit court. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013). We now reverse and remand the cause to the circuit court for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 Defendant was engaged to be married to Matthew, after the two had dated for more than seven years. Defendant and Matthew lived together along with her three children. Defendant shared an iCloud account with Matthew, and all data sent to or from Matthew's iPhone went to their shared iCloud account, which was connected to defendant's iPad. As a result, all text messages sent by or to Matthew's iPhone automatically were received on defendant's iPad. Matthew was aware of this data sharing arrangement but took no action to disable it.

¶ 4 While Matthew and defendant were engaged and living together, text messages between Matthew and the victim, who was a neighbor, appeared on defendant's iPad. Some of the text messages included nude photographs of the victim. Both Matthew and the victim were aware that defendant had received the pictures and text messages on her iPad. Three days later, Matthew and the victim again exchanged several text messages. The victim inquired, "Is this where you don't want to message [because] of her?" Matthew responded, "no, I'm fine. [S]omeone wants to sit and just keep watching want [*sic*] I'm doing I really do not care. I don't know why someone would wanna put themselves through that." The victim replied by texting, "I don't either. Soooooo baby ...."

¶ 5 Defendant and Matthew cancelled their wedding plans and subsequently broke up. Thereafter, Matthew began telling family and friends that their relationship had ended because defendant was crazy and no longer cooked or did household chores.

¶ 6 In response, defendant wrote a letter detailing her version of events. As support, she attached to the letter four of the naked pictures of the victim and copies of the text messages between the victim and Matthew. When Matthew's cousin received the letter along with the text messages and pictures, he informed Matthew.

¶ 7 Upon learning of the letter and its enclosures, Matthew contacted the police. The victim was interviewed during the ensuing investigation and stated that the pictures were private and only intended for Matthew to see. The victim acknowledged that she was aware that Matthew had shared an iCloud account with defendant, but she thought it had been deactivated when she sent him the nude photographs.

*2 ¶ 8 Defendant was charged by indictment with one count of nonconsensual dissemination of private sexual images. 720 ILCS 5/11-23.5(b) (West 2016). She moved to dismiss the charge, asserting, *inter alia*, that the statute is facially unconstitutional because it is a content-based restriction of speech that is not narrowly tailored to serve a compelling government interest, in violation of the federal and state constitutions. U.S. Const., amend. I; Ill. Const. 1970, art. I, § 4.

¶ 9 The State opposed defendant's motion, arguing that the type of speech restricted by the statute is not constitutionally protected and that the statute is narrowly tailored to serve a compelling government interest.

¶ 10 The circuit court agreed with defendant that section 11-23.5(b) imposes a restriction on speech based on its content and is not narrowly tailored to serve a compelling government interest. In compliance with Illinois Supreme Court Rule 18 (eff. Sept. 1, 2006), the circuit court found section 11-23.5(b) unconstitutional on its face. Because section 11-23.5(b) was held invalid, the State appeals directly to this court. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013). We granted the Cyber Rights Initiative leave to submit an *amicus curiae* brief in support of the State. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

¶ 11 II. ANALYSIS

¶ 12 Before this court, the State argues that the circuit court erred in finding section 11-23.5(b) facially unconstitutional because the public distribution of truly private facts is not constitutionally protected. In the alternative, the State asserts that, even if such speech is protected, section 11-23.5(b) is constitutionally valid because it is narrowly tailored to serve a compelling government interest.

¶ 13 Defendant responds by contending that the circuit court correctly found the statute to be unconstitutional because it outlaws protected content-based speech in violation of the United States and Illinois Constitutions. U.S. Const., amend. I; Ill. Const. 1970, art. I, § 4. She further argues that the distribution of nude images that have been disclosed to another person is constitutionally protected because such images are not truly private facts as the State contends.

[1] [2] [3] ¶ 14 The issue of whether a statute is constitutional presents a question of law, which we review *de novo*. *People v. Minnis*, 2016 IL 119563, ¶ 21, 409 Ill.Dec. 60, 67 N.E.3d 272. All statutes are presumed to be constitutional, and the party challenging a statute's constitutionality bears the burden of clearly establishing its invalidity. *Id.* In addition, a court must construe a statute so as to uphold its constitutionality, if reasonably possible. *Id.*

[4] [5] [6] [7] [8] ¶ 15 To resolve this appeal, we must construe section 11-23.5(b) because a court cannot determine whether a statute reaches beyond constitutional limits without first knowing what the statute covers. *Id.* ¶ 25 (citing *United States v. Stevens*, 559 U.S. 460, 474, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)). When presented with an issue of statutory construction, this court's primary objective is to ascertain and give effect to the intent of the legislature. *Oswald v. Hamer*, 2018 IL 122203, ¶ 10, 425 Ill.Dec. 626, 115

N.E.3d 181; *Minnis*, 2016 IL 119563, ¶ 25, 409 Ill.Dec. 60, 67 N.E.3d 272. The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *Oswald*, 2018 IL 122203, ¶ 10, 425 Ill.Dec. 626, 115 N.E.3d 181; *Minnis*, 2016 IL 119563, ¶ 25, 409 Ill.Dec. 60, 67 N.E.3d 272. A court will not read language in isolation and must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions. *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund*, 2018 IL 122793, ¶ 35, 429 Ill.Dec. 677, 125 N.E.3d 383; *Oswald*, 2018 IL 122203, ¶ 10, 425 Ill.Dec. 626, 115 N.E.3d 181. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Oswald*, 2018 IL 122203, ¶ 10, 425 Ill.Dec. 626, 115 N.E.3d 181; *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 25, 410 Ill.Dec. 937, 72 N.E.3d 323. Additionally, we must presume that the legislature did not intend to create absurd, inconvenient, or unjust results. *Carmichael*, 2018 IL 122793, ¶ 35, 429 Ill.Dec. 677, 125 N.E.3d 383; *Minnis*, 2016 IL 119563, ¶ 25, 409 Ill.Dec. 60, 67 N.E.3d 272. It is also proper for the court to consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *Carmichael*, 2018 IL 122793, ¶ 35, 429 Ill.Dec. 677, 125 N.E.3d 383; *Murphy-Hylton*, 2016 IL 120394, ¶ 25, 410 Ill.Dec. 937, 72 N.E.3d 323.

¶ 16 A. The Necessity for the Law

*3 ¶ 17 Section 11-23.5 addresses the problem of nonconsensual dissemination of private sexual images, which is colloquially referred to as "revenge porn." Generally, the crime involves images originally obtained without consent, such as by use of hidden cameras or victim coercion, and images originally obtained with consent, usually within the context of a private or confidential relationship. Once obtained, these images are subsequently distributed without consent. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014); see Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 Chi.-Kent L. Rev. 247, 247-48 (2015).

¶ 18 The colloquial term "revenge porn" obscures the gist of the crime:

> "In essence, the crux of the definition of revenge porn lies in the fact that the victim did not consent to its *distribution*—though the victim may have consented to its recording or may have taken the photo or video themselves. As a result, the rise of revenge porn has (unsurprisingly) gone hand-in-hand with the increasing use of social media and the Internet, on which people constantly exchange ideas and images without asking permission from the originator." (Emphasis in original.) Christian Nisttáhuz, *Fifty States of Gray: A Comparative Analysis of 'Revenge-Porn' Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 Tex. Tech. L. Rev. 333, 337 (2018).

Indeed, the term "revenge porn," though commonly used, is misleading in two respects. First, "revenge" connotes personal vengeance. However, perpetrators may be motivated by a desire for profit, notoriety, entertainment, or for no specific reason at all. The only common factor is that they act without the consent of the person depicted. Second, "porn" misleadingly suggests that visual depictions of nudity or sexual activity are inherently pornographic. Mary Anne Franks, *"Revenge Porn" Reform: A View From the Front Lines*, 69 Fla. L. Rev. 1251, 1257-58 (2017); see Diane Bustamante, *Florida Joins the Fight Against Revenge Porn: Analysis of Florida's New Anti-Revenge Porn Law*, 12 Fla. Int'l. U. L. Rev. 357, 364 (2017).

¶ 19 This is a unique crime fueled by technology:

> "We do not live in a world where thousands of websites are devoted to revealing private medical records, credit card numbers, or even love letters. By contrast, 'revenge porn' is featured in as many as 10,000 websites, in addition to being distributed without consent through social media, blogs, emails, and texts. There is a demand for private nude photos that is unlike the demand for any other form of private information. While nonconsensual pornography is not a new phenomenon, its prevalence, reach, and impact have increased in recent years in part because technology and social media make it possible to 'crowdsource' abuse, as well as make it possible for unscrupulous individuals to profit from it. Dedicated 'revenge porn' sites and other forums openly solicit private intimate images and expose them to millions of viewers, while allowing the posters themselves to hide in the shadows." Franks, *supra*, at 1260-61.

Because the nonconsensual dissemination of private sexual images "so often involves the Internet and social media, the public, law enforcement, and the judiciary sometimes

struggle to understand the mechanics of the conduct and the devastation it can cause." Citron & Franks, *supra*, at 347.

¶ 20 For example, in the course of its analysis, the circuit court speculated as follows:

> *4 "[W]hen a girlfriend texts a nude selfie to a third party—her boyfriend—she gives up all expectations of privacy in the images. And if she cannot reasonably expect that the image remain private, then didn't the act of sharing it in the first place demonstrate she never *intended* the image to remain private?" (Emphasis in original.)

Such postulating is refuted by reams of scholarship. Moreover, the above comments reflect a fundamental misunderstanding of the nature of such communications. Given the circuit court's factual starting point, the boyfriend to whom a nude selfie is sent is the *second* party to the private communication—not a third party. As a consequence, a girlfriend who transmits such a photo does not automatically relinquish "all expectations of privacy in the images," as the circuit court hypothesized. Contrary to the circuit court's conclusion, the sharing of a private sexual image in a personal and direct communication with an intended recipient does not demonstrate that the transmission was never intended to remain private.

¶ 21 Consent is contextual. "The consent to create and send a photo or the consent to be photographed by another is one act of consent that cannot be equated with consenting to distribute that photo to others outside of the private relationship * * *." Erica Souza, *"For His Eyes Only": Why Federal Legislation Is Needed to Combat Revenge Porn*, 23 UCLA Women's L.J. 101, 109-10 (2016); see Citron & Franks, *supra*, at 354-56 (same). Accordingly, criminal liability here does not depend on "whether the image was initially obtained with the subject's consent; rather, it is the absence of consent to the image's distribution that renders the perpetrator in violation of the law." Ava Schein, Note, *When Sharing Is Not Caring: Creating an Effective Criminal Framework Free From Specific Intent Provisions to Better Achieve Justice for Victims of Revenge Pornography*, 40 Cardozo L. Rev. 1953, 1955-56 (2019). The nonconsensual dissemination of private sexual images "is not wrong because nudity is shameful or because the act of recording sexual activity is inherently immoral. It is wrong because exposing a person's body against her will fundamentally deprives that person of her right to privacy." Franks, *supra*, at 1260.

¶ 22 The breadth of the problem is staggering. Four percent of American Internet users "have either had intimate images posted online without their consent or have been threatened with this heinous act. * * * [This] is a serious social problem that has a devastating impact on those victimized by it. The 4 percent of American internet users affected by it amounts to millions of individuals." Carrie Goldberg & Adam Massey, *State-Sanctioned Humiliation: Why New York Needs a Nonconsensual Pornography Law*, 89 N.Y. St. B. Ass'n J. 48, 50 (May 2017); see Schein, *supra*, at 1960 (both citing Amanda Lenhart *et al.*, *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of "Revenge Porn,"* Data and Society Research Institute (Dec. 13, 2016), https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf [https://perma.cc/3XPC-UF64]).

¶ 23 The overwhelming majority of state legislatures have enacted laws criminalizing the nonconsensual dissemination of private sexual images. In 2004, New Jersey was the first state to enact such a statute. Schein, *supra*, at 1973. By 2013, only Alaska and Texas followed suit. However, between 2013 and 2017, 36 additional states enacted criminal statutes, bringing the total to 39. See Franks, *supra*, at 1280-81. In 2015, Illinois enacted its statute (Pub. Act 98-1138, § 5 (eff. June 1, 2015) (enacting 720 ILCS 5/11-23.5)). To date, 46 states and the District of Columbia have enacted legislation prohibiting this conduct. *46 States + DC + One Territory Now Have Revenge Porn Laws*, Cyber Civil Rights Initiative, http://www.cybercivilrights.org/revenge-porn-laws (last visited July 15, 2019) [https://perma.cc/JUX4-B4GK]; see Schein, *supra*, at 1973-74 (citing website when it listed 43 states). These statutes "vary widely throughout the United States, each with their own base elements, intent requirements, exceptions, definitions, and penalties." Nisttáhuz, *supra*, at 357. "The mass adoption of these statutes by states on opposite sides of the political spectrum reflects the urgency of the problem." Goldberg & Massey, *supra*, at 50.

¶ 24 B. The General Assembly's Solution

*5 ¶ 25 Against this historical and societal backdrop, we consider the terms of the statutory provision at issue. Section 11-23.5(b) provides as follows:

> "(b) A person commits non-consensual dissemination of private sexual images when he or she:

(1) intentionally disseminates an image of another person:

(A) who is at least 18 years of age; and

(B) who is identifiable from the image itself or information displayed in connection with the image; and

(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination." 720 ILCS 5/11-23.5(b) (West 2016).

A person convicted under section 11-23.5(b) is subject to forfeiture sanctions. *Id.* § 11-23.5(e). Also, the crime is a Class 4 felony. *Id.* § 11-23.5(f).

¶ 26 C. Preliminary Findings

[9] **[10]** ¶ 27 We observe that we cannot avoid addressing the constitutionality of section 11-23.5(b). A court will not consider constitutional issues where a case can be decided on other grounds. *People v. Nash*, 173 Ill. 2d 423, 432, 220 Ill.Dec. 154, 672 N.E.2d 1166 (1996); *People ex rel. Waller v. 1990 Ford Bronco*, 158 Ill. 2d 460, 464-65, 199 Ill.Dec. 694, 634 N.E.2d 747 (1994). In this case, section 11-23.5(b) covers defendant's alleged conduct, and no other justification for the circuit court's judgment has been asserted. Therefore, as the circuit court found, it is proper to reach the constitutional issues presented. See, *e.g.*, *United States v. Grace*, 461 U.S. 171, 175-76, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

[11] ¶ 28 Additionally, the circuit court determined that section 11-23.5(b) is facially unconstitutional because it is a content-based restriction of speech in violation of the first amendment. Notably, after finding that the statute violated the first amendment, the court held, without specific analysis, that the statute also violated Illinois's constitutional free speech guaranty (Ill. Const. 1970, art. I, § 4). Further, before this court, the parties do not offer any arguments specifically addressing our state constitutional free speech guaranty. Therefore, we consider only federal constitutional principles. See, *e.g.*, *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 502-03, 328 Ill.Dec. 892, 905 N.E.2d 781 (2009).

¶ 29 D. First Amendment

[12] ¶ 30 The first amendment, which applies to the states through the fourteenth amendment, provides that government "shall make no law * * * abridging freedom of speech." U.S. Const., amends. I, XIV; *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937). "[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); see also *Stevens*, 559 U.S. at 468, 130 S.Ct. 1577 (stating that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (stating that the first amendment "generally prevents government from proscribing speech * * * because of disapproval of the ideas expressed").

*6 **[13]** **[14]** ¶ 31 The United States Supreme Court has held that the dissemination of information is speech within the meaning of the first amendment. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); see *Bartnicki v. Vopper*, 532 U.S. 514, 527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001). Accordingly, "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used or disseminated.' " *Sorrell*, 564 U.S. at 568, 131 S.Ct. 2653 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)). Also, the Supreme Court has held that first amendment protections for speech extend fully to Internet communications See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (explaining that Supreme Court case law "provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"); *Minnis*, 2016 IL 119563, ¶ 23, 409 Ill.Dec. 60, 67 N.E.3d 272 (same). We also recognize that "whatever the challenges of applying the Constitution to ever-advancing technology," the basic first amendment principles of freedom of speech do not vary "when a new and different medium for communication appears." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

¶ 32 1. No Categorical Exception

[15] **[16]** ¶ 33 In the case at bar, the State asks this court to recognize the nonconsensual dissemination of private sexual images as "a category of speech that has not been protected as a historical matter." There are categories of speech that are " 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *R.A.V.*, 505 U.S. at 383, 112 S.Ct. 2538 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)). These categories include incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. *United States v. Alvarez*, 567 U.S. 709, 717, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (collecting cases); *Stevens*, 559 U.S. at 468, 130 S.Ct. 1577 (same). These categories of speech are well-defined and narrowly limited, and " 'the prevention and punishment of which have never been thought to raise any Constitutional problem.' " *Stevens*, 559 U.S. at 468-69, 130 S.Ct. 1577 (quoting *Chaplinsky*, 315 U.S. at 571-72, 62 S.Ct. 766). These categories are outside the area of constitutionally protected speech, and the protection of the first amendment does not extend to them. *R.A.V.*, 505 U.S. at 383, 112 S.Ct. 2538.

¶ 34 The United States Supreme Court has rejected a free-floating test for first amendment coverage that balances the relative social costs and benefits on an *ad hoc* basis. Rather, the Supreme Court has permitted content-based restrictions where confined to the few historic, traditional, and long-familiar categories of expression. *Alvarez*, 567 U.S. at 717, 132 S.Ct. 2537; *Stevens*, 559 U.S. at 468, 470, 130 S.Ct. 1577. The Supreme Court has observed: "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." *Stevens*, 559 U.S. at 472, 130 S.Ct. 1577. However, the above-listed categories of unprotected speech "have a historical foundation in the Court's free speech tradition." *Alvarez*, 567 U.S. at 718, 132 S.Ct. 2537.

¶ 35 In this case, the circuit court found that the targeted speech did not fit into any categorical first amendment exception. Before this court, the State argues that "state laws protecting individual privacy rights have long been established." According to the State, "history supports the conclusion that States may regulate speech that invades privacy without violating the First Amendment."

¶ 36 We decline the State's invitation to identify a new category of speech that falls outside of first amendment protection. The nonconsensual dissemination of private sexual images, prohibited by section 11-23.5(b) of the Criminal Code (720 ILCS 5/11-23.5(b) (West 2016)), does not fall within an established first amendment categorical exception. We acknowledge, as did the Vermont Supreme Court, that the nonconsensual dissemination of private sexual images "seems to be a strong candidate for categorical exclusion from full First Amendment protections" based on "[t]he broad development across the country of invasion of privacy torts, and the longstanding historical pedigree of laws protecting the privacy of nonpublic figures with respect to matters of only private interest without any established First Amendment limitations." *State v. VanBuren*, 2018 VT 95, ¶ 43, 214 A.3d 791. However, we decline to identify a new categorical first amendment exception when the United States Supreme Court has not yet addressed the question. See *id.* ¶ 46. Nevertheless, the consideration of individual privacy that would support the articulation of a first amendment categorical exclusion in this case will carry weight later in our analysis.

*7 ¶ 37 Thus far, we have concluded that section 11-23.5(b) implicates the freedom of speech and that the targeted speech does not fit into any first amendment categorical exception. Therefore, first amendment scrutiny is warranted. We must next determine the appropriate level of scrutiny for the statute.

¶ 38 2. Degree of Scrutiny

[17] ¶ 39 The United States Supreme Court has long held "[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004); see *R.A.V.*, 505 U.S. at 382, 112 S.Ct. 2538 (stating that content-based regulations are presumptively invalid); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (same). Generally, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System*, 512 U.S. at 643, 114 S.Ct. 2445.

[18] **[19]** **[20]** ¶ 40 Accordingly, courts "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its

content." *Id.* at 642, 114 S.Ct. 2445. A content-based law is justified only if it survives strict scrutiny, which requires the government to demonstrate that the law is narrowly tailored to serve a compelling state interest. *Reed v. Town of Gilbert*, 576 U.S. ——, ——, 135 S. Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). "The State must specifically identify an 'actual problem' in need of solving [citation], and the curtailment of free speech must be actually necessary to the solution [citation]." *Brown*, 564 U.S. at 799, 131 S.Ct. 2729. In other words, if a less restrictive alternative would serve a governmental purpose, a legislature must use that alternative. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

¶ 41 In the case at bar, the circuit court found that section 11-23.5(b) "is a content-based speech restriction because it doesn't target all pictures, videos, depictions, and portrayals, but only those showing nudity or sexual activity." In both the circuit court and before this court, the parties premised their arguments on the assumption that section 11-23.5(b) must survive strict scrutiny to be found constitutional.

[21] [22] ¶ 42 However, because this is a first amendment case, we, as a court of review, must decide independently "whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); see *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-49, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). In any event, if the State arguably is considered to have conceded the applicability of strict scrutiny, "it is well established that we, as a court of review, are not bound by a party's concession." *People v. Carter*, 2015 IL 117709, ¶ 22, 398 Ill.Dec. 62, 43 N.E.3d 972 (citing *Beacham v. Walker*, 231 Ill. 2d 51, 60-61, 324 Ill.Dec. 541, 896 N.E.2d 327 (2008)).

[23] ¶ 43 In contrast to content-based speech restrictions, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny [citation] because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System*, 512 U.S. at 642, 114 S.Ct. 2445. We conclude that section 11-23.5(b) is subject to an intermediate level of scrutiny for two independent reasons. First, the statute is a content-neutral time, place, and manner restriction. Second, the statute regulates a purely private matter.

¶ 44 a. Time, Place, and Manner

*8 [24] [25] [26] [27] ¶ 45 It is generally understood "that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). Laws that "impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broadcasting System*, 512 U.S. at 643, 114 S.Ct. 2445 (and cases cited therein). "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Government regulation of speech "is content neutral so long as it is *justified* without reference to the content of the regulated speech." (Emphasis in original and internal quotation marks omitted.) *Id.*

[28] ¶ 46 Determining "whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broadcasting System*, 512 U.S. at 642, 114 S.Ct. 2445. We recognize that section 11-23.5(b) on its face targets the dissemination of a specific category of speech—sexual images. However, the statute is content neutral. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746 (citing *City of Renton*, 475 U.S. at 47-48, 106 S.Ct. 925).

¶ 47 We find *City of Renton* instructive. That case involved the first amendment validity of a Renton, Washington, zoning regulation of adult movie theaters. The Supreme Court observed that the Renton ordinance "does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters." *City of Renton*, 475 U.S. at 47, 106 S.Ct. 925. Nevertheless, the Court concluded that the ordinance was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." (Emphases in original.) *Id.* The Supreme Court agreed with the lower court that "the City Council's '*predominate* concerns' were with the secondary effects of adult theaters, and not with the content of adult films themselves." (Emphasis in original.) *Id.*

[29] ¶ 48 Further, in *Turner Broadcasting System*, the Court recognized that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." *Turner Broadcasting System*, 512 U.S. at 659, 114 S.Ct. 2445. Nevertheless, the Court further instructed that "[i]t would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Id.* at 660, 114 S.Ct. 2445. These cases instruct that the proper focus is on whether the government has addressed a category of speech to suppress discussion of that topic.

[30] ¶ 49 In the case at bar, section 11-23.5(b) is justified on the grounds of protecting privacy. Section 11-23.5(b) distinguishes the dissemination of a sexual image not based on the content of the image itself but, rather, based on whether the disseminator obtained the image under circumstances in which a reasonable person would know that the image was to remain private and knows or should have known that the person in the image has not consented to the dissemination. 720 ILCS 5/11-23.5(b)(2), (b)(3) (West 2016). There is no criminal liability for the dissemination of the very same image obtained and distributed with consent. The *manner* of the image's acquisition and publication, and not its *content*, is thus crucial to the illegality of its dissemination. See, *e.g.*, *Turner Broadcasting System*, 512 U.S. at 645, 114 S.Ct. 2445 (acknowledging that the statutory "provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry * * *."). "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Id.*

*9 ¶ 50 Section 11-23.5 does not prohibit but, rather, regulates the dissemination of a certain type of private information. Viewed as a privacy regulation, section 11-23.5 is similar to laws prohibiting the unauthorized disclosure of other forms of private information, such as medical records (410 ILCS 50/3(d) (West 2016)), biometric data (740 ILCS 14/15 (West 2016)), or Social Security numbers (5 ILCS 179/10 (West 2016)). The entire field of privacy law is based on the recognition that some types of information are more sensitive than others, the disclosure of which can and should be regulated. To invalidate section 11-23.5 would cast doubt on the constitutionality of these and other statutes that protect the privacy rights of Illinois residents.

[31] ¶ 51 Content-neutral laws are subject to an intermediate level of scrutiny because they generally present a less substantial risk of excising certain ideas or viewpoints from the public dialogue. *Minnis*, 2016 IL 119563, ¶ 33, 409 Ill.Dec. 60, 67 N.E.3d 272 (citing *Turner Broadcasting System*, 512 U.S. at 642, 114 S.Ct. 2445). Section 11-23.5(b) meets this standard.

¶ 52 b. Purely Private Matter

[32] [33] [34] ¶ 53 We conclude that section 11-23.5(b) is subject to an intermediate level of scrutiny also because the statute regulates a purely private matter. Speech on matters of public concern lies at the heart of first amendment protection. The first amendment reflects a national commitment to the principle that debate on public issues should be robust and uninhibited. Accordingly, speech on public issues occupies the highest position of the hierarchy of first amendment values and is entitled to special protection. *Snyder v. Phelps*, 562 U.S. 443, 451-52, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (and cases cited therein).

[35] [36] ¶ 54 However, first amendment protections are less rigorous where matters of purely private significance are at issue:

> "That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: '[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas'; and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship' on matters of public import." *Id.* at 452, 131 S.Ct. 1207 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)).

"While such speech is not totally unprotected by the First Amendment [citation], its protections are less stringent." *Dun & Bradstreet*, 472 U.S. at 760, 105 S.Ct. 2939.

[37] [38] ¶ 55 The Supreme Court has articulated some guiding factors:

> "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community [citation], or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the

public [citation]. [Citations.] The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." (Internal quotation marks omitted.) *Snyder*, 562 U.S. at 453, 131 S.Ct. 1207.

Deciding whether speech is of public or private concern requires an examination of the content, form, and context of that speech, as revealed by the entire record. *Id.* "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id.* at 454, 131 S.Ct. 1207.

¶ 56 Applying these principles to the instant case, we have no difficulty in concluding that the nonconsensual dissemination of the victim's private sexual images was not an issue of public concern. Matthew was telling his and defendant's families and friends that it was defendant's fault that their relationship ended. Defendant responded with a letter, in which she explained her version of events. To this letter defendant attached the victim's private sexual images along with text messages between the victim and Matthew. The victim's private sexual images, in context with her and Matthew's text messages, were never in the public domain. They do not relate to any broad issue of interest to society at large. The message they convey is not a matter of public import. *Cf. id.* (holding that messages on protest signs at a private funeral related to broad issues of interest to society at large and were matters of public import). Rather, the public has no legitimate interest in the private sexual activities of the victim or in the embarrassing facts revealed about her life. See *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (nonconsensual dissemination of a victim's private nude photos "may be proscribed consistent with the First Amendment").

***10** ¶ 57 In sum, section 11-23.5(b) does not pose such inherent dangers to free expression or present such potential for censorship or manipulation as to justify application of strict scrutiny. Therefore, the appropriate standard to apply is the intermediate level of first amendment scrutiny. See *Turner Broadcasting System*, 512 U.S. at 661-62, 114 S.Ct. 2445.

¶ 58 3. Applying Intermediate Scrutiny

[39] ¶ 59 In the context of the first amendment's guaranty of freedom of speech, intermediate scrutiny is variously described in similar forms. Generally, to survive intermediate scrutiny, the law must serve an important or substantial governmental interest unrelated to the suppression of free speech and must not burden substantially more speech than necessary to further that interest or, in other words, must be narrowly tailored to serve that interest without unnecessarily interfering with first amendment freedoms, which include allowing reasonable alternative avenues of communication. See *id.* at 662, 114 S.Ct. 2445; *Ward*, 491 U.S. at 791, 109 S.Ct. 2746; *City of Renton*, 475 U.S. at 50, 106 S.Ct. 925; *Heffron*, 452 U.S. at 647-48, 101 S.Ct. 2559; *Minnis*, 2016 IL 119563, ¶ 36, 409 Ill.Dec. 60, 67 N.E.3d 272; *People ex rel. Ryan v. World Church of the Creator*, 198 Ill. 2d 115, 121, 260 Ill.Dec. 180, 760 N.E.2d 953 (2001).

[40] ¶ 60 Accordingly, in the context of the first amendment, fit matters. Even when the Supreme Court is not applying strict scrutiny, the court still requires a fit that is not necessarily perfect but reasonable, a fit that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, a fit that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective. *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, ——, 134 S. Ct. 1434, 1456-57, 188 L.Ed.2d 468 (2014).

[41] [42] [43] ¶ 61 In the case at bar, we conclude that section 11-23.5 serves a substantial government interest. "It is a traditional exercise of the States' police powers to protect the health and safety of their citizens." (Internal quotation marks omitted.) *Hill v. Colorado*, 530 U.S. 703, 715, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). This court has long recognized "[i]t is clear that in the exercise of the police power, government may act to regulate, restrain or prohibit that which is harmful to the public welfare even though the regulation, restraint or prohibition might interfere with the liberty or property of an individual." *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 368, 91 Ill.Dec. 610, 483 N.E.2d 1245 (1985); *People v. Warren*, 11 Ill. 2d 420, 424-25, 143 N.E.2d 28 (1957) (collecting cases).

[44] ¶ 62 It is well established that government can protect individual privacy rights. In their influential 1890 law review article, future Supreme Court Justice Louis Brandeis and his coauthor argued for recognition of a distinct right to privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Reviewing various developments in the common law, the article described one of the problems it sought to address:

"Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what

> Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops. For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons * * *." (Internal quotation marks omitted.) *Id.* at 195.

*11 Reviewing case law, the article explained that then-existing causes of action, such as breach of trust and property-based claims, had long been used to protect privacy interests. However, those actions had become inadequate to protect individual privacy in a changing world. *Id.* at 211. The article explained that the right to privacy does not prohibit publication of matters of public interest. As an example, the article argued that publishing that a private individual has a speech impediment or cannot spell may be proscribed, but publishing the same characteristics of a congressional candidate could not. *Id.* at 214-15.

[45] ¶ 63 Today, "the existence of a right of privacy is now recognized in the great majority of the American jurisdictions that have considered the question." Restatement (Second) of Torts § 652A cmt. a, at 377 (1977). "As it has developed in the courts, the invasion of the right of privacy has been a complex of four distinct wrongs, whose only relation to one another is that each involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life * * *." *Id.* cmt. b, at 377. Relevant here is the tort of public disclosure of private facts. *Id.* § 652D. To state a cause of action, the plaintiff must prove that (1) the defendant gave publicity (2) to the plaintiff's private and not public life (3) and that the matter made public was highly offensive and (4) not of legitimate public concern. *Doe v. TCF Bank Illinois, FSB*, 302 Ill. App. 3d 839, 841, 236 Ill.Dec. 375, 707 N.E.2d 220 (1999); see Restatement (Second) of Torts § 652D cmt. d (1977); Prosser and Keeton on the Law of Torts § 117, at 856-57 (W. Page Keeton *et al.* eds., 5th ed. 1984). With their longstanding historical pedigree, invasion of privacy torts broadly developed across the country, without any established first amendment limitations, to protect the privacy of nonpublic figures with respect to matters of only private interest. See *VanBuren*, 2018 VT 95, ¶ 43, 214 A.3d 791. Thus, section 11-23.5 is distinguishable from the law prohibiting depictions of animal cruelty that the Supreme Court struck down in *Stevens*, 559 U.S. at 469, 130 S.Ct. 1577 (stating that the Court was "unaware of any similar tradition excluding depictions of animal cruelty from 'the freedom of speech' codified in the First Amendment" (emphasis omitted)).

¶ 64 Indeed, we observe that the United States Supreme Court has never declared unconstitutional a restriction of speech on purely private matters that protected an individual who is not a public figure for an invasion of privacy. Rather, the Supreme Court has repeatedly reconciled the tension between the right to privacy and free speech by analyzing the specific privacy claim and the public interest in the communication in each case. See, *e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (declining to announce categorical rule on whether truthful publication of revelations so intimate as to shock community's notions of decency could be constitutionally proscribed); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (same); *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (same); *Bartnicki*, 532 U.S. at 529, 121 S.Ct. 1753 (same).

[46] ¶ 65 These Supreme Court decisions reflect three consistent themes. First, speech on matters of private concern that invades the privacy interests of nonpublic figures does not enjoy the same degree of first amendment protection as speech on matters of public concern or relating to public figures. Second, state laws protecting individual privacy rights are long established and are not necessarily subordinate to first amendment free speech protections. Third, the Court is wary of broad rules or categorical holdings framing the relationship between laws protecting individual privacy and the first amendment. See *VanBuren*, 2018 VT 95, ¶ 38, 214 A.3d 791.

*12 ¶ 66 Specifically, the nonconsensual dissemination of private sexual images causes unique and significant harm to victims in several respects. Initially, this crime can engender domestic violence. Perpetrators threaten disclosure to prevent victims from ending relationships, reporting abuse, or obtaining custody of children. Sex traffickers and pimps threaten disclosure to trap unwilling individuals in the sex trade. Rapists record their sexual assaults to humiliate victims and deter them from reporting the attacks. Schein, *supra*, at 1963; Franks, *supra*, at 1258; see Citron & Franks, *supra*, at 351.

¶ 67 Also, the victims' private sexual images are disseminated with or in the context of identifying information. Victims are frequently harassed, solicited for sex, and even threatened with sexual assault (Schein, *supra*, at 1963-64; Franks, *supra*,

at 1259; Citron & Franks, *supra*, at 353) and are fired from their jobs and lose future employment opportunities (Franks, *supra*, at 1259; Bustamante, *supra*, at 365-66; Citron & Franks, *supra*, at 352-53). Victims additionally suffer profound psychological harm. Victims often experience feelings of low self-esteem or worthlessness, anger, paranoia, depression, isolation, and thoughts of suicide. Schein, *supra*, at 1964; Bustamante, *supra*, at 366-67; see Citron & Franks, *supra*, at 350-51; Souza, *supra*, at 103 ("Beyond the obvious embarrassment suffered, victims are often threatened with bodily harm, fired from their jobs, or forced to change their names. Some have been driven to suicide.").

¶ 68 Additionally, the nonconsensual dissemination of sexual images disproportionately affects women, who constitute 90% of the victims, while men are most commonly the perpetrators and consumers. Schein, *supra*, at 1961; Franks, *supra*, at 1259 (acknowledging that the crime affects both men and women, but stating that "available evidence to date indicates that the majority of victims are women and girls").

[47] ¶ 69 In a brief time span, 43 states and the District of Columbia have enacted laws prohibiting the nonconsensual dissemination of private sexual images. These widespread efforts demonstrate that government recognizes the plight of victims of this crime and their need for protection. See Nisttáhuz, *supra*, at 357. "No one can challenge a state's interest in protecting the privacy of personal images of one's body that are intended to be private—and specifically, protecting individuals from the nonconsensual publication on websites accessible by the public." *State v. Culver*, 2018 WI App 55, ¶ 19, 384 Wis. 2d 222, 918 N.W.2d 103. Indeed, courts have concluded that the government interest in this regard is "compelling." *VanBuren*, 2018 VT 95, ¶ 59, 214 A.3d 791; *People v. Iniguez*, 247 Cal.App.4th Supp. 1, 202 Cal. Rptr. 3d 237, 243 (App. Dep't Super. Ct. 2016). We have no difficulty in concluding that section 11-23.5 serves a substantial government interest unrelated to the suppression of speech.

[48] [49] [50] ¶ 70 We next consider whether section 11-23.5 is narrowly tailored to serve this substantial government interest without unnecessarily interfering with first amendment freedoms. In contending that the statute fails strict scrutiny, defendant argues that a penal statute is not the least restrictive means to accomplish the alleged compelling government interest. We earlier concluded that this contention is misplaced. Unlike strict scrutiny, which requires the least restrictive means to accomplish a compelling government interest, the "narrowly tailored" requirement of intermediate scrutiny does not require that the regulation be the least speech-restrictive means of advancing the government interest. Rather, the "narrowly tailored" requirement of intermediate scrutiny is satisfied so long as the law promotes a substantial government interest that would be achieved less effectively absent the law. *Turner Broadcasting System*, 512 U.S. at 662, 114 S.Ct. 2445; *Ward*, 491 U.S. at 798-99, 109 S.Ct. 2746; *Minnis*, 2016 IL 119563, ¶ 42, 409 Ill.Dec. 60, 67 N.E.3d 272. Stated otherwise, the law must reasonably fit the substantial government interest. *McCutcheon*, 572 U.S. at ——, 134 S. Ct. at 1456-57.

*13 [51] [52] ¶ 71 We conclude that the substantial government interest of protecting Illinois residents from nonconsensual dissemination of private sexual images would be achieved less effectively absent section 11-23.5. "As we have noted in the past, 'the legislature has broad discretion to determine not only what the public interest and welfare require, but to determine the means needed to serve such interest.' " *People v. McCarty*, 223 Ill. 2d 109, 140, 306 Ill.Dec. 570, 858 N.E.2d 15 (2006) (quoting *Chicago National League Ball Club*, 108 Ill. 2d at 364, 91 Ill.Dec. 610, 483 N.E.2d 1245). It is quite established that "the legislature, under the State's police power, has wide discretion to classify offenses and prescribe penalties for the defined offenses." *People v. La Pointe*, 88 Ill. 2d 482, 500, 59 Ill.Dec. 59, 431 N.E.2d 344 (1981); see *People v. Simmons*, 145 Ill. 2d 264, 269-70, 164 Ill.Dec. 568, 583 N.E.2d 484 (1991) (collecting cases).

¶ 72 Defendant's contention overlooks the fundamental difference between civil and criminal law. "The civil action for a tort * * * is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered at the expense of the wrongdoer." Prosser and Keeton on the Law of Torts § 2, at 7 (W. Page Keeton *et al.* eds., 5th ed. 1984). The distinction between a tort and a crime "lies in the interests affected and the remedy afforded by the law." *Id.* "The criminal law is concerned with the protection of interests common to the public at large, as they are represented by the entity which we call the state; often it accomplishes its ends by exacting a penalty from the wrongdoer." *Id.* § 1, at 5.

¶ 73 Civil actions are inadequate. "[M]any civil remedies are not only insufficient or unrealistic, but also counterintuitive in terms of their supposed redress or the harm victims

suffer." Bustamante, *supra*, at 368. Scholars have explained as follows:

> "Civil suits based on privacy violations are problematic. Most victims want the offensive material removed and civil suits almost never succeed in removing the images due to the sheer magnitude of dissemination. Highly publicized trials often end in re-victimization. Civil litigation is expensive and time-consuming, and many victims simply cannot afford it. It is difficult to identify and prove who the perpetrator is for legal proceedings because it is so easy to anonymously post and distribute revenge porn. Even when victims can prove who the perpetrator is in court and win money damages, many defendants are judgment-proof so victims cannot collect.
>
> * * *
>
> Further, a court order requiring a defendant or website to remove the images would fail to remove the images from the web entirely, particularly as they appear on numerous sites. Because most perpetrators are judgment-proof, and injunctive relief may be difficult to obtain and would ultimately fail to remove the images, civil suits are poor remedies. As perpetrators frequently have nothing to lose, which is why they engage in this behavior in the first place, civil suits do not deter revenge porn." (Internal quotation marks omitted.) Kitchen, *supra*, at 251-53.

Accord Souza, *supra*, at 111-15; Citron & Franks, *supra*, at 357-59.

¶ 74 Additionally, copyright law might appear to be a viable option for victims to remove nonconsensual private sexual images from the Internet. If the victim created such an image herself, then she is considered the copyright owner and would be entitled to protection under federal copyright law. Such copyright infringement protection could result in the removal of such images from a website. Souza, *supra*, at 115.

¶ 75 However, registering the copyright

> "requires the victim to be exposed all over again—this time to the government. So, ironically, to copyright an image and stop strangers from seeing their nude pictures, victims have to send more pictures of their naked body to more strangers (the individuals at the U.S. Copyright Office). Though a successful registration can effectuate a takedown from the identified website, the registered images are sent to the copyright office and appear in the Library of Congress' public catalog alongside copyright owners' names and image descriptions. Though copyright law can provide help to victims who own the copyright of their images and are willing to register them, this avenue is not available to victims whose posted photographs or videos were created by others." (Internal quotation marks omitted.) *Id.* at 115-16.

***14** Accord Kitchen, *supra*, at 258-61; Citron & Franks, *supra*, at 359-60.

¶ 76 Criminalization is a vital deterrent. "As neither privacy torts nor copyright law successfully removes revenge porn images or deters it in the first instance, a more effective deterrent is necessary." Kitchen, *supra*, at 261; see also Bustamante, *supra*, at 377-78 (same); Schein, *supra*, at 1972 ("It is not merely the insufficiency of other legal and adjudicatory means that merits its criminalization, but also the overtly non-consensual, sexual nature of revenge porn's core."). Section 11-23.5(b) constitutes a reasonable fit whose scope is in proportion to the substantial government interest served. See *McCutcheon*, 572 U.S. at ——, 134 S. Ct. at 1456-57. The General Assembly reasonably determined, in the exercise of the police power, that a criminal law was necessary to combat the evils of nonconsensual dissemination of private sexual images. See *Ward*, 491 U.S. at 801, 109 S.Ct. 2746.

[53] ¶ 77 We next consider whether section 11-23.5 burdens substantially more speech than necessary. Subsections (a) through (d) are relevant to our analysis. 720 ILCS 5/11-23.5(a)-(d) (West 2016).

¶ 78 Subsection (a) provides as follows:

> "(a) Definitions. For the purposes of this Section:
>
> 'Computer', 'computer program', and 'data' have the meanings ascribed to them in Section 17-0.5 of this Code.
>
> 'Image' includes a photograph, film, videotape, digital recording, or other depiction or portrayal of an object, including a human body.
>
> 'Intimate parts' means the fully unclothed, partially unclothed or transparently clothed genitals, pubic area, anus, or if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing.

'Sexual act' means sexual penetration, masturbation, or sexual activity.

'Sexual activity' means any:

(1) knowing touching or fondling by the victim or another person or animal, either directly or through clothing, of the sex organs, anus, or breast of the victim or another person or animal for the purpose of sexual gratification or arousal; or

(2) any transfer or transmission of semen upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or another; or

(3) an act of urination within a sexual context; or

(4) any bondage, fetter, or sadism masochism; or

(5) sadomasochism abuse in any sexual context." *Id.* § 11-23.5(a).

Subsection (a) defines nonconsensual dissemination of private sexual images narrowly, including limiting the crime to a confined class of content.

¶ 79 Subsection (b), quoted earlier, states the elements of the offense. Subsection (b) is narrowly tailored in several respects so as not to burden more speech than necessary. First, the images must be "private sexual images" that portray any of several specific features, including the depiction of a person whose intimate parts are exposed or visible, in whole or in part, or who is engaged in a sexual act as defined in the statute. *Id.* § 11-23.5(a), (b)(1)(C). Therefore, the scope of the statute is restricted to images that can fairly be characterized as being of a discreet and personal nature. See *Culver*, 2018 WI App 55, ¶ 12, 384 Wis.2d 222, 918 N.W.2d 103 (observing that the "private representation" element in Wisconsin's nonconsensual dissemination statute, which is similar to the definition of "private sexual images" in section 11-23.5(b), narrows the statute's application). As a consequence, the statute does not apply to circumstances in which the subject images are not of a private sexual nature.

*15 ¶ 80 Second, the person portrayed in the image must be over the age of 18 and identifiable from the image or information displayed in connection with the image. 720 ILCS 5/11-23.5(b)(1)(A)-(B) (West 2016). The statute is inapplicable if the image does not contain sufficient information to identify the person depicted. Therefore, section 11-23.5(b) burdens only speech that targets a specific person.

¶ 81 Third, the image must have been obtained under circumstances in which a reasonable person would know or understand that it was to remain private. *Id.* § 11-23.5(b)(2). We construe this provision as requiring a reasonable awareness that privacy is intended by the person depicted. This requirement limits the statute's application to the types of personal, direct interactions or communications that are typically involved in a close or intimate relationship. See *Minnis*, 2016 IL 119563, ¶ 21, 409 Ill.Dec. 60, 67 N.E.3d 272 (recognizing that, where possible, a court must construe a statute so as to uphold its constitutionality). Thus, this provision ensures that the statute is inapplicable if the image was obtained under circumstances where disclosure to another is a natural and expected outcome.

¶ 82 Fourth, the person who disseminates such an image must have known or should have known that the person portrayed in the image has not consented to the dissemination. 720 ILCS 5/11-23.5(b)(3) (West 2016). The lack of consent to dissemination forms the core of the statute and its protective purpose. As with the expectation of privacy discussed above, we construe this provision to incorporate a reasonable awareness of the lack of consent to dissemination. Where the person portrayed in the image has consented to its disclosure, the statute simply does not apply and poses no restriction on the distribution of the image to others.

¶ 83 Fifth, the statute specifically requires that the dissemination of private sexual images be intentional. *Id.* § 11-23.5(b)(1). Therefore, the probability that a person will inadvertently violate section 11-23.5(b) while engaging in otherwise protected speech is minimal.

¶ 84 Section 11-23.5 also includes several specific exemptions. Subsection (c) provides as follows:

"(c) The following activities are exempt from the provisions of this Section:

(1) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination is for the purpose of a criminal investigation that is otherwise lawful.

(2) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose

intimate parts are exposed when the dissemination is made for the purpose of, or in connection with, the reporting of unlawful conduct.

(3) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the images involve voluntary exposure in public or commercial settings.

(4) The intentional dissemination of an image of another identifiable person who is engaged in a sexual act or whose intimate parts are exposed when the dissemination serves a lawful public purpose." *Id.* § 11-23.5(c).

These exemptions shield from criminal liability any dissemination of a private sexual image that advances the collective goals of ensuring a well-ordered system of justice and protecting society as a whole. In addition, subsection (c)(3) recognizes that public disclosure has been sanctioned based on the very nature of such an image. Finally, the statute does not apply to electronic communication companies that provide access to the Internet, public mobile services, or private radio services. *Id.* § 11-23.5(d).

*16 ¶ 85 Based on the statutory terms set forth above, section 11-23.5 is narrowly tailored to further the important governmental interest identified by the legislature. Accordingly, we conclude the statute does not burden substantially more speech than necessary.

¶ 86 Also, we observe that reasonable avenues of communication remain. As the United States Supreme Court has "emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least instrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726, 120 S.Ct. 2480. Under section 11-23.5, "[p]eople remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images. Moreover, they remain free to criticize or complain about fellow citizens in ways that do not violate the privacy rights of others." Franks, *supra*, at 1326. Section 11-23.5, with its narrow tailoring,

"does not come close to shutting down the vast number of ways in which people may vent their anger and aggression. The Internet has provided innumerable opportunities for aggressive and offensive interactions, and the First Amendment largely protects those opportunities. The First Amendment does not, however, protect the unauthorized distribution of personal, private, and intimate images unrelated to any public interest." *Id.* at 1326-27.

In this case, defendant makes no argument that her speech would have been in any way stifled by not attaching the victim's private sexual images to her letter. We hold that section 11-23.5 satisfies intermediate scrutiny.

¶ 87 E. First Amendment Overbreadth

[54] ¶ 88 We have concluded that section 11-23.5 does not improperly restrict defendant's freedom of speech as guaranteed by the first amendment. However, in support of the circuit court's order, defendant alternatively contends that section 11-23.5(b) is facially unconstitutional because it is overbroad. We do not agree.

[55] [56] ¶ 89 The first amendment overbreadth doctrine looks not at whether a law improperly regulates speech based on viewpoint or content but at the appropriate scope of the regulation. See *Osborne v. Ohio*, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (recognizing that, where a statute regulates expressive conduct, it may be found to be unconstitutionally overbroad if it "criminalizes an intolerable range of constitutionally protected conduct"). Generally, a defendant seeking to assert a facial challenge would be required to establish that there is no set of circumstances under which the statute would be valid. *Minnis*, 2016 IL 119563, ¶ 24, 409 Ill.Dec. 60, 67 N.E.3d 272. However, the overbreadth doctrine permits a party to challenge a statute as a facial violation of the first amendment, even if that party's conduct would not fall within the amendment's protection. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); see also *People v. Relerford*, 2017 IL 121094, ¶ 50, 422 Ill.Dec. 774, 104 N.E.3d 341; *Minnis*, 2016 IL 119563, ¶¶ 14, 24, 409 Ill.Dec. 60, 67 N.E.3d 272. A facial challenge based on first amendment overbreadth is permitted out of concern that the threat of enforcement of an overbroad law may chill or deter constitutionally protected speech, particularly where the statute imposes criminal penalties. *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003); see also *Minnis*, 2016 IL 119563, ¶ 24, 409 Ill.Dec. 60, 67 N.E.3d 272; *People v. Melongo*, 2014 IL 114852, ¶ 24, 379 Ill.Dec. 43, 6 N.E.3d 120.

*17 [57] [58] [59] [60] ¶ 90 Under the first amendment's overbreadth doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); see also *Relerford*, 2017

IL 121094, ¶ 50, 422 Ill.Dec. 774, 104 N.E.3d 341 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). The doctrine operates to balance two competing social costs—the chilling effect on constitutionally protected speech against the invalidation of a law that is entirely constitutional in some of its applications. *Williams*, 553 U.S. at 292, 128 S.Ct. 1830 (citing *Hicks*, 539 U.S. at 119-20, 123 S.Ct. 2191). In order to be unconstitutional, the overbreadth must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." (Emphasis omitted.) *Id.* at 292-93, 128 S.Ct. 1830 (citing *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 485, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), and *Broadrick*, 413 U.S. at 615, 93 S.Ct. 2908); see also *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577. "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.' " *Williams*, 553 U.S. at 303, 128 S.Ct. 1830 (quoting *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). Under intermediate scrutiny, a content-neutral statute is overbroad only when it burdens substantially more speech than necessary to advance its substantial governmental interest. *Turner Broadcasting System*, 512 U.S. at 662, 114 S.Ct. 2445; *Minnis*, 2016 IL 119563, ¶ 44, 409 Ill.Dec. 60, 67 N.E.3d 272.

[61] [62] ¶ 91 Because the invalidation of a statute on overbreadth grounds is "strong medicine," it is to be applied "only as a last resort" and where the statute is not subject to a limiting construction. *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908; see also *Relerford*, 2017 IL 121094, ¶ 51, 422 Ill.Dec. 774, 104 N.E.3d 341. If a statute is " 'readily susceptible' " to a narrowing construction that will eliminate its substantial overbreadth, the statute must be upheld. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)); see also *Hicks*, 539 U.S. at 118-19, 123 S.Ct. 2191.

[63] ¶ 92 To resolve defendant's overbreadth argument, we must determine whether section 11-23.5(b) impermissibly restricts constitutionally protected expression in a substantial number of its applications when considered in relation to its "plainly legitimate sweep." See *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577; *Williams*, 553 U.S. at 292-93, 128 S.Ct. 1830. As explained above, the statute includes several elements that operate to significantly limit its application.

¶ 93 In light of these detailed restrictions that serve to confine the sphere of proscribed conduct, we conclude that section 11-23.5(b) is not overbroad. The statute prohibits a certain and limited category of knowing conduct that involves the unauthorized and intentional dissemination of an intensely personal image of another person. It encompasses only an image of a private and sexual nature, which the disseminator must know or understand is to remain private and which is disclosed without the consent of the person depicted in the image. Given the narrowly focused scope of section 11-23.5(b), we conclude that the statute does not prohibit a substantial amount of protected speech when judged in relation to the statute's legitimate sweep. See *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577; *Williams*, 553 U.S. at 292-93, 128 S.Ct. 1830. As such, it does not burden substantially more speech than necessary to advance its substantial governmental interest. *Turner Broadcasting System*, 512 U.S. at 662, 114 S.Ct. 2445; *Minnis*, 2016 IL 119563, ¶ 44, 409 Ill.Dec. 60, 67 N.E.3d 272.

¶ 94 Despite the fact that the statute includes the several narrowing factors previously discussed, defendant argues that the circuit court correctly determined that section 11-23.5(b) is unconstitutionally overbroad. As support of its overbreadth determination, the circuit court posited several hypothetical scenarios as examples of circumstances in which the statute would impermissibly restrict protected speech.

¶ 95 First, the circuit court stated that, because the statutory definition of "sexual activity" includes acts of "any bondage" or "fetter," section 11-23.5(b) would criminalize the publication of news photographs of arrestees and prisoners, historic photographs of slaves, and publicity posters of escape artists. The circuit court's conclusion is clearly wrong. It is firmly established that a court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation. *People v. Casas*, 2017 IL 120797, ¶ 18, 422 Ill.Dec. 858, 104 N.E.3d 425. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Id.* The court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *Id.* Section 11-23.5(b) pertains only to the unauthorized dissemination of "private *sexual* images" and is intended to protect the privacy of victims from the unauthorized disclosure of discreet and personal portrayals. Although section 11-23.5(b) does not include a definition of "bondage," Black's Law Dictionary defines that term to mean

"[t]he state or condition of being a slave; * * * the condition or state of having one's freedom limited[;] * * * [t]he state or practice of being tied up for sexual pleasure." Black's Law Dictionary 216 (10th ed. 2014). Only that portion of the definition relating to "sexual pleasure" has any relevance in the context of section 11-23.5(b). Images depicting arrestees, prisoners, slaves, or escape artists are not sexual in nature and, therefore, do not fall within the purview of section 11-23.5(b).

***18** ¶ 96 We similarly reject the circuit court's suggestion that section 11-23.5(b) would impose criminal liability on a person who discovers and shares with other family members nude sketches of his or her grandmother that were created by his or her grandfather but were discovered in an attic after her death. As noted above, we may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *Casas*, 2017 IL 120797, ¶ 18, 422 Ill.Dec. 858, 104 N.E.3d 425. Obviously, the statute is intended to protect living victims from the invasion of privacy and the potential threat to health and safety that is intrinsic in the disclosure of a private sexual image. However, "the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living." *Campbell v. United States Department of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998); see also *National Archives & Records Administration v. Favish*, 541 U.S. 157, 168-69, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004) (collecting authorities holding that it is the privacy interest of living family members—not the dead—that protects against public disclosure of photographs and autopsy reports of deceased persons). In light of the fact that a deceased person cannot suffer the types of injuries that section 11-23.5(b) is intended to safeguard against, the statute does not apply to the hypothetical situation suggested by the circuit court.

¶ 97 The circuit court also questioned whether section 11-23.5(b) would criminalize the sharing of nude sketches of a person's grandmother if his or her grandfather had been an artist such as Andrew Wyeth, who created the "Helga Pictures" that remained secret for many years, or Pablo Picasso. Again, we must consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. *Casas*, 2017 IL 120797, ¶ 18, 422 Ill.Dec. 858, 104 N.E.3d 425. Given that a model who poses for an artist is aware of that person's profession, it will generally be understood that the sketch or painting may be displayed to others at some point in time. In such a circumstance, the statute would not apply because a reasonable person would not know or understand that the image was to remain private. The same is true of the circuit court's reference to images published in Playboy Magazine and in movies or programs depicting nudity. The people portrayed in such images have clearly consented to public disclosure and dissemination. Indeed, that is the whole point of appearing in such a photograph or film.

¶ 98 And, even if the publication of Wyeth's secret Helga collection would fall within the statute's purview, such a situation is rare and should be addressed on a case-by-case basis. See *New York v. Ferber*, 458 U.S. 747, 773-74, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (holding that impermissible applications of a statute that do not amount to more than a small fraction of the materials within the statute's reach should be cured through case-by-case analysis); see also *Broadrick*, 413 U.S. at 615-16, 93 S.Ct. 2908; *People v. Anderson*, 148 Ill. 2d 15, 26-27, 169 Ill.Dec. 288, 591 N.E.2d 461 (1992). A statute will not be held to be overbroad simply because some impermissible applications are conceivable. *Ferber*, 458 U.S. at 772, 102 S.Ct. 3348.

[64] ¶ 99 The animating purpose of section 11-23.5(b) is to protect living persons from being victimized by harassment, discrimination, embarrassment, and possible violence resulting from the privacy violation occasioned by the nonconsensual dissemination of private sexual images. The hypothetical examples cited by the circuit court do not establish that section 11-23.5(b) is unconstitutional in a substantial number of its applications when judged against its plainly legitimate sweep. See *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577; *Williams*, 553 U.S. at 292-93, 128 S.Ct. 1830.

¶ 100 In concluding that the statute is overbroad, the circuit court also referenced the fact that section 11-23.5(b) does not require that the nonconsensual dissemination of private sexual images be done with "malicious intent." This feature does not render the statute overbroad.

¶ 101 Initially, we observe that section 11-23.5(b) specifically requires that the dissemination of a private sexual image be *intentional*, that the person who disseminates the image knows or should have known that the person portrayed has not consented to the dissemination and that the image was obtained under circumstances in which a reasonable person would know or understand that the image was to remain private. See 720 ILCS 5/11-23.5(b)(1)-(3) (West 2016). Thus, the circuit court's reference to the lack of a "malicious intent"

does not, and cannot, pertain to the lack of a mental state as set forth in sections 4-4 through 4-7 of the Criminal Code. See *id.* §§ 4-4 to 4-7.

***19** ¶ 102 Instead, the circuit court's criticism refers to the fact that the statute does not require proof of an illicit motive or malicious purpose. The circuit court did not, however, cite legal authority for the proposition that a criminal statute necessarily must contain an illicit motive or malicious purpose to survive an overbreadth challenge. In addition, we observe that the motive underlying an intentional and unauthorized dissemination of a private sexual image has no bearing on the resulting harm suffered by the victim. A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator's objective. Therefore, the question of the disseminator's motive or purpose is divorced from the legislative goal of protecting the privacy of Illinois citizens. The explicit inclusion of an illicit motive or malicious purpose would not advance the substantial governmental interest of protecting individual privacy rights, nor would it significantly restrict its reach.

¶ 103 We recognize that most state laws prohibiting the nonconsensual dissemination of private sexual images expressly require some form of malicious purpose or illicit motive as a distinct element of the offense. Of course, the exact statutory language establishing this element varies. Most of these states provide elaborate descriptions of malice, such as "the intent to harass, intimidate, threaten, humiliate, embarrass, or coerce" (W. Va. Code § 61-8-28a(b) (2019); see N.M. Stat. Ann. § 30-37A-1(A) (2019)) or "the intent to annoy, terrify, threaten, intimidate, harass, offend, humiliate or degrade" (Idaho Code § 18-6609(3)(a) (2019)) or "the intent to harass, intimidate, or coerce" (see Colo. Rev. Stat. § 18-7-801(1)(a) (2019); Mo. Rev. Stat. § 573.110(2); Okla. Stat. tit. 21, § 1040.13b(B)(2) (2019); Va. Code Ann. § 18.2-386.2(A) (2019)). [1] Other states describe simply the intent to "harm" (Ohio Rev. Code Ann. § 2917.211(B)(5) (West 2019); Tex. Penal Code Ann. § 21.16(b)(3) (West 2019)) or "harass" (Minn. Stat. § 617.261(2)(b)(5) (2018)).

¶ 104 In contrast, the legislatures of four states, including our General Assembly, have chosen not to expressly include "malice" as a distinct element of the offense. 720 ILCS 5/11-23.5 (West 2016); see also Wis. Stat. § 942.09 (2017-18); N.J. Stat. Ann. § 2C:14-9 (West 2019); Del. Code Ann. tit. 11, § 1335 (2017). [2]

¶ 105 We conclude that, although a malicious purpose is not expressly mandated, the breadth of section 11-23.5(b) is effectively limited by the five elements and conditions that define the prohibited conduct. First, a violation of section 11-23.5(b) requires proof of an intentional dissemination of a "private sexual image[ ]." 720 ILCS 5/11-23.5(b)(1)(C) (West 2016). Second, that image must consist of a "private sexual image[ ]," which depicts a person whose intimate parts are fully or partially exposed or visible or who is engaged in a sexual act. *Id.* § 11-23.5(a), (b)(1)(C). Third, the person portrayed in the image must be at least 18 years old and identifiable from the image or from information displayed with the image. *Id.* § 11-23.5(b)(1)(A), (B). Fourth, the image must have been obtained under circumstances in which a reasonable person would know or understand that it was to remain private. *Id.* § 11-23.5(b)(2). Fifth, the person who disseminates such an image must have known or should have known that the person portrayed in the image has not consented to the dissemination. *Id.* § 11-23.5(b)(3).

***20** ¶ 106 Given this broad compendium of exacting elements and conditions necessary to prove a violation of section 11-23.5(b), we conclude that a wrongful motive or purpose is inherent in the act of disseminating an intensely personal image without the consent of the person portrayed. See *Culver*, 2018 WI App 55, ¶ 22, 384 Wis.2d 222, 918 N.W.2d 103. In our view, section 11-23.5(b) implicitly includes an illicit motive or malicious purpose, and the inclusion of an explicit motive to cause harm would not appreciably narrow its scope. See *id.*

¶ 107 In addition, as we have already explained, the express requirement that the dissemination be intentional severely limits the likelihood that a person will violate the statute inadvertently or accidentally. Such unusual situations do not demonstrate substantial overbreadth and should be addressed on a case-by-case basis. See *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); see also *Ferber*, 458 U.S. at 773-74, 102 S.Ct. 3348; *Broadrick*, 413 U.S. at 615-16, 93 S.Ct. 2908.

¶ 108 The circuit court further observed that section 11-23.5(b) does not expressly require a showing of any specific harm to the victim. Again, the circuit court did not cite any legal authority for the proposition that inclusion of an element of harm is necessary to avoid a finding of overbreadth. Moreover, we believe that the unauthorized dissemination of a private sexual image, which by definition must depict a person while nude, seminude, or engaged in

sexually explicit activity, is presumptively harmful. *Culver*, 2018 WI App 55, ¶ 24, 384 Wis.2d 222, 918 N.W.2d 103.

¶ 109 In evaluating the competing social costs at stake, we have held that Illinois has a substantial governmental interest in protecting the privacy of persons who have not consented to the dissemination of their private sexual images. Although defendant claims that section 11-23.5(b) will deter the free speech of persons who have legally and unconditionally obtained the private sexual images of others, her assertion is unpersuasive given the limited application of the statute and the fact that any possible overbreadth is minor when considered in light of the statute's legitimate sweep. Defendant also contends that section 11-23.5 "criminalizes an adult complainant's own stupidity at the expense of the [f]irst [a]mendent." Yet this argument entirely disregards the victim's first amendment right to engage in a personal and private communication that includes a private sexual image. Defendant's crude attempt to "blame the victim" is not well received and reinforces the need for criminalization. Accordingly, defendant has not established that, on balance, the social costs weigh in her favor or that the marginal restraint on constitutionally protected speech is greater than necessary to advance the governmental interest at stake.

¶ 110 F. Constitutional Vagueness

[65] **[66]** ¶ 111 Defendant also argues that section 11-23.5(b) is unconstitutionally vague on its face in violation of her right to due process (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2). The argument that a statute is void for vagueness is premised on the notice requirement of the due process clause. *Grayned*, 408 U.S. at 108, 92 S.Ct. 2294; *Wilson v. County of Cook*, 2012 IL 112026, ¶ 21, 360 Ill.Dec. 148, 968 N.E.2d 641. A statute may be challenged as vague on either of two grounds: (1) it fails to give fair warning to allow innocent people to steer clear of its prohibitions, or (2) it contains insufficiently clear standards for those who enforce it and may lead to arbitrary or discriminatory enforcement. *Hill*, 530 U.S. at 732, 120 S.Ct. 2480; *Grayned*, 408 U.S. at 108-09, 92 S.Ct. 2294; *Wilson*, 2012 IL 112026, ¶ 21, 360 Ill.Dec. 148, 968 N.E.2d 641. In addition, where a statute involves first amendment rights, it should not be so vague that it chills the exercise of free expression by generating concern over whether such conduct may violate the statute's prohibition. *Grayned*, 408 U.S. at 109, 92 S.Ct. 2294; *Wilson*, 2012 IL 112026, ¶ 22, 360 Ill.Dec. 148, 968 N.E.2d 641. Therefore, "when a statute 'interferes with the right of free speech or of association, a more stringent vagueness test should apply.' " *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)); *Wilson*, 2012 IL 112026, ¶ 22, 360 Ill.Dec. 148, 968 N.E.2d 641. However, " 'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.' " *Williams*, 553 U.S. at 304, 128 S.Ct. 1830 (quoting *Ward*, 491 U.S. at 794, 109 S.Ct. 2746).

***21** **[67]** **[68]** **[69]** **[70]** **[71]** ¶ 112 A vagueness claim based on due process is analytically distinct from a first amendment overbreadth claim and does not depend upon whether a law applies to a substantial amount of protected speech. *Holder*, 561 U.S. at 19-20, 130 S.Ct. 2705. A facial challenge to a statute that is premised on due process vagueness grounds can succeed "only if the enactment is impermissibly vague in all of its applications. A [litigant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates*, 455 U.S. at 494-95, 102 S.Ct. 1186. "That rule makes no exception for conduct in the form of speech." *Holder*, 561 U.S. at 20, 130 S.Ct. 2705 (citing *Parker v. Levy*, 417 U.S. 733, 755-57, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974)). Therefore, the determination of whether a statute is unconstitutionally vague must be decided based on the particular facts before the court. *Id.* at 18-19, 130 S.Ct. 2705. Even where a more stringent standard of vagueness applies, a litigant whose speech is clearly proscribed cannot successfully assert a due process claim of vagueness for lack of notice. *Id.* at 20, 130 S.Ct. 2705. "And he certainly cannot do so based on the speech of others." *Id.* Accordingly, we address defendant's claim that section 11-23.5(b) is unconstitutionally vague on its face in relation to her conduct.

[72] ¶ 113 Defendant does not contend that section 11-23.5(b) contains insufficiently clear standards for those who enforce it and may lead to arbitrary or discriminatory enforcement. We therefore address only whether the statute provides fair warning sufficient to avoid prosecution. Of critical importance to this inquiry is whether the statute provides "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits so that one may act accordingly." *Wilson*, 2012 IL 112026, ¶ 21, 360 Ill.Dec. 148, 968 N.E.2d 641 (citing *Hill*, 530 U.S. at 732, 120 S.Ct. 2480, and *Grayned*, 408 U.S. at 108-09, 92 S.Ct. 2294).

[73] ¶ 114 Initially, defendant contends that section 11-23.5 is facially invalid as unconstitutionally vague because the

term "disseminate" is not defined in the statute and does not expressly state to whom, when, where, or how the dissemination must be accomplished. This contention is without merit.

[74] ¶ 115 In the absence of a statutory definition, courts presume that the words used in a statute have their ordinary and popularly understood meanings. *Anderson*, 148 Ill. 2d at 28, 169 Ill.Dec. 288, 591 N.E.2d 461. The term "disseminate" is defined as "to foster general knowledge of." Webster's Third New International Dictionary 656 (1993). In addition, its synonyms include "BROADCAST," "PUBLICIZE," and "SPREAD." *Id.* The same dictionary defines "spread" as "to make more widely known." *Id.* at 2208. In this case, defendant sent a letter to at least one other person that included the private sexual images of the victim without her consent. That conduct unquestionably "foster[ed] general knowledge of" the victim's image and made it "more widely known." Therefore, defendant's conduct clearly fell within the statutory proscription, and she cannot claim that it was vague for lack of notice as to her circumstances. See *Holder*, 561 U.S. at 20, 130 S.Ct. 2705; *Anderson*, 148 Ill. 2d at 28, 169 Ill.Dec. 288, 591 N.E.2d 461. The fact that the statute may be vague as applied to the speech of others is not relevant to the resolution of this appeal. See *Holder*, 561 U.S. at 20, 130 S.Ct. 2705; *Village of Hoffman Estates*, 455 U.S. at 495, 102 S.Ct. 1186; *Anderson*, 148 Ill. 2d at 28, 169 Ill.Dec. 288, 591 N.E.2d 461.

[75] ¶ 116 Defendant further objects that the statute carves out an exception for dissemination that serves a "lawful public purpose" but does not address what such a purpose might be. See 720 ILCS 5/11-23.5(c)(4) (West 2016). Again, defendant cannot challenge the clarity of statutory language that is inapplicable to her case. We have held that the dissemination of a private sexual image is a private matter, and defendant has presented no argument that she acted in furtherance of a "lawful public purpose." Indeed, she has explained that her dissemination of the image of the victim was for a *personal* reason—to defend herself against Matthew's statements that she was crazy and to explain the reason underlying the breakup of their relationship. Because her conduct was motivated by an entirely personal concern, she is precluded from asserting that the phrase "lawful public purpose" is unconstitutionally vague. It is recognized that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack." *Hill*, 530 U.S. at 733, 120 S.Ct. 2480. As noted above, a litigant cannot argue that statutory language is void for vagueness based on the speech of others. *Holder*, 561 U.S. at 20, 130 S.Ct. 2705.

*22 [76] ¶ 117 Defendant also argues that the statute violates due process because it imposes criminal liability for the nonconsensual dissemination of a private sexual image if a "reasonable person would know or understand that the image was to remain private." 720 ILCS 5/11-23.5(b)(2) (2016). In defendant's view, the "reasonable person" negligence standard is unconstitutionally vague because it mandates that the defendant "read the minds of others" regarding whether the image was intended to remain private. We do not agree. This court has held that a negligent mental state may be a valid basis for imposing criminal liability and does not violate due process. *Relerford*, 2017 IL 121094, ¶ 22, 422 Ill.Dec. 774, 104 N.E.3d 341.

[77] ¶ 118 We are similarly unpersuaded by defendant's assertion that section 11-23.5 violates due process because a private sexual image that has been shared with another person is not a truly private matter. According to defendant, the "unconditional" disclosure of such an image imposes no duty on the recipient to keep the image private and operates to relinquish all privacy rights of the person depicted therein. Defendant offers no legal support for this assertion, and we have held above that the sharing of a private sexual image is a truly private matter. Moreover, acceptance of defendant's argument would impose the strictures of a commercial transaction on personal and intimate communications by requiring that the person portrayed elicit an express promise from the recipient that the image will be kept private. Defendant has not cited any authority holding that due process requires such formality. Consequently, we reject defendant's argument that a person who receives a private sexual image acquires an ownership interest that entitles him or her to do with it as he or she sees fit, including dissemination to others without the consent of the person portrayed. See *Thompson*, 108 Ill. 2d at 368, 91 Ill.Dec. 610, 483 N.E.2d 1245 (recognizing that a government may exercise its police power to regulate or restrain conduct that is harmful to the public welfare, even where the regulation or restraint may interfere with the property rights of an individual); *Warren*, 11 Ill. 2d at 424-25, 143 N.E.2d 28 (same).

¶ 119 As a final matter, we observe that section 11-23.5 is "regarded as the country's strongest anti-revenge-porn legislation yet" (internal quotation marks omitted) (Bustamante, *supra*, at 388) and has been proposed as the model for a federal statute targeting the nonconsensual

dissemination of private sexual images (Souza, *supra*, at 118-20). Indeed, section 11-23.5 is regarded as "a model for all state revenge porn laws." Schein, *supra*, at 1981-88. Based on the foregoing, we find that section 11-23.5 does not unconstitutionally restrict the rights to free speech and due process on the grounds asserted by defendant.

¶ 120 III. CONCLUSION

¶ 121 For the foregoing reasons, the judgment of the circuit court of McHenry County is reversed, and the cause is remanded to the circuit court for further proceedings.

¶ 122 Reversed.

¶ 123 Cause remanded.

Chief Justice Karmeier and Justices Thomas, Kilbride, and Burke concurred in the judgment and opinion.

Justice Garman dissented, with opinion, joined by Justice Theis.

¶ 124 JUSTICE GARMAN, dissenting:

¶ 125 Even though both parties agree a strict scrutiny analysis applies in this case, the majority concludes an intermediate level of scrutiny is the appropriate standard, finding section 11-23.5(b) of the Criminal Code of 2012 (720 ILCS 5/11-23.5(b) (West 2016)) is a content-neutral time, place, and manner restriction. I, however, would find the statute criminalizes the dissemination of images based on their content—"private sexual images"—and thus strict scrutiny applies. Moreover, in applying strict scrutiny, I would find the statute is neither narrowly tailored nor the least restrictive means of dealing with the nonconsensual dissemination of private sexual images. Accordingly, I respectfully dissent.

***23** ¶ 126 " '[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *United States v. Alvarez*, 567 U.S. 709, 716, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002)). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Arizona*, 576 U.S. ——, ——, 135 S. Ct. 2218, 2226, 192 L.Ed.2d 236 (2015); see also *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (noting the presumed invalidity of content-based restrictions on speech and the government's burden of showing their constitutionality); *People v. Alexander*, 204 Ill. 2d 472, 476, 274 Ill.Dec. 414, 791 N.E.2d 506 (2003) (stating content-based restrictions on speech must survive strict scrutiny, which "requires a court to find that the restriction is justified by a compelling government interest and is narrowly tailored to achieve that interest"). The restriction on " 'speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.' " *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)).

¶ 127 Contrary to the majority's belief, the content of the image is precisely the focus of section 11-23.5. It is not a crime under this statute to disseminate a picture of a fully clothed adult man or woman, even an unflattering image obtained by the offender under circumstances in which a reasonable person would know or understand the image was to remain private and he knows or should have known the person in the image had not consented to its dissemination. However, if the man or woman in the image is naked, the content of that photo makes it a possible crime. Thus, one must look at the content of the photo to determine whether it falls within the purview of the statute. See *Reed*, 576 U.S. at ——, 135 S. Ct. at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

¶ 128 The majority, however, contends section 11-23.5 "does not prohibit but, rather, regulates the dissemination of a certain type of private information." *Supra* ¶ 50. But the statute does not lay out a "privacy regulation," it sets forth a criminal offense. As the statute criminalizes the dissemination of images based on their content, it should be viewed as a content-based restriction on speech that must survive strict scrutiny to be valid.

¶ 129 Assuming the State has a compelling interest in prohibiting nonconsensual dissemination of private sexual images, I would find the statute is not narrowly tailored to promote that interest. The majority cites the Vermont Supreme Court's decision in *VanBuren*, which involved Vermont's statute banning disclosure of nonconsensual

pornography. The statute in that case made it a crime to " 'knowingly disclose a visual image of an identifiable person who is nude or who is engaged in sexual conduct, without his or her consent, *with the intent to harm, harass, intimidate, threaten, or coerce the person depicted*, and the disclosure would cause a reasonable person to suffer harm.' " (Emphasis added.) *State v. VanBuren*, 2018 VT 95, ¶ 5, 214 A.3d 791 (quoting Vt. Stat. Ann. tit. 13, § 2606(b)(1) (2015)).

¶ 130 As the majority recognizes, numerous other states criminalizing the unlawful dissemination of private sexual images require a similar intent. *Supra* ¶ 103. In its strict scrutiny analysis, the *VanBuren* majority found the statute at issue was narrowly tailored, stating, in part, as follows:

> "Section 2606 defines unlawful nonconsensual pornography narrowly, including limiting it to a confined class of content, a rigorous intent element that encompasses the nonconsent requirement, an objective requirement that the disclosure would cause a reasonable person harm, an express exclusion of images warranting greater constitutional protection, and a limitation to only those images that support the State's compelling interest because their disclosure would violate a reasonable expectation of privacy." *VanBuren*, 2018 VT 95, ¶ 60, 214 A.3d 791.

*24 ¶ 131 Here, however, section 11-23.5 is not narrowly tailored, and its broad reach could include a wide swath of conduct, including innocent conduct. Unlike the Vermont statute's requirement that the defendant intend "to harm, harass, intimidate, threaten, or coerce the person depicted," section 11-23.5 offers no such "rigorous intent element." See 720 ILCS 5/11-23.5(b) (West 2016). Instead, simply viewing an image sent in a text message and showing it to the person next to you could result in felony charges. Because of the specific intent element, the majority in *VanBuren* stated "[i]ndividuals are highly unlikely to accidentally violate this statute while engaging in otherwise permitted speech." *VanBuren*, 2018 VT 95, ¶ 62, 214 A.3d 791. The same cannot be said of individuals in Illinois under this statute.

¶ 132 The majority contends that "although a malicious purpose is not expressly mandated, the breadth of section 11-23.5(b) is effectively limited by the five elements and conditions that define the prohibited conduct." *Supra* ¶ 105. I disagree. The elements and conditions do not limit the breadth of the statute at all but instead reach an expansive amount of conduct. Unlike those states that specifically require an intent to harm, harass, intimidate, threaten, coerce, embarrass, frighten, terrify, torment, terrorize, degrade, demean, annoy, alarm, or abuse the victim, the Illinois statute requires nothing of the sort. Although the majority finds the statute "implicitly includes an illicit motive or malicious purpose" (*supra* ¶ 106), the absence of any such nefarious intentions proscribed by other states opens the door wide for innocent conduct to be criminalized. The legislature's failure to include any one of the above stated terms belies the majority's claims that "the inclusion of an explicit motive to cause harm would not appreciably narrow its scope." *Supra* ¶ 106.

¶ 133 The Vermont statute also limited a violation to when the disclosure would cause a reasonable person to suffer harm, and it defines "harm" as "physical injury, financial injury, or serious emotional distress." Vt. Stat. Ann. tit. 13, § 2606(a)(2) (2015). Under the Illinois law, there is no objective or subjective harm requirement. *Cf.* Cal. Penal Code § 647(j)(4)(A) (West 2019) (requiring the victim to suffer "serious emotional distress"); Conn. Gen. Stat. § 53a-189c(a) (2015) (requiring the victim to suffer harm as a result of the dissemination); N.D. Cent. Code § 12.1-17-07.2(2)(c) (2017) (requiring "[a]ctual emotional distress or harm" to the depicted individual as a result of the distribution of intimate images); N.M. Stat. Ann. § 30-37A-1(A)(2) (2019) (requiring conduct that "would cause a reasonable person to suffer substantial emotional distress"); Or. Rev. Stat. § 163.472(1)(c), (d) (2017) (requiring the victim to be "harassed, humiliated or injured by the disclosure" and that "[a] reasonable person would be harassed, humiliated or injured by the disclosure"); Utah Code Ann. § 76-5b-203(2)(c) (LexisNexis 2019) (requiring "actual emotional distress or harm" to the person as a result of the distribution of the intimate image); Wash. Rev. Code § 9A.86.010 (2018) (requiring the offender to know or reasonably know the disclosure of the intimate images would cause harm to the depicted person). The majority, however, presumes the dissemination is harmful. Again, along with the absence of a malicious purpose, the lack of a showing of any specific harm to the alleged victim casts the net of criminality too far in my mind.

¶ 134 A hypothetical posed to the State during oral argument illustrates this point. Two people go out on a date, and one later sends the other a text message containing an unsolicited and unappreciated nude photo. The recipient then goes to a friend, shows the friend the photo, and says, "look what this person sent me." Has the recipient committed a felony? The State conceded that the recipient had, assuming the recipient knew or should have known that the photo was intended to remain a private communication.

*25 ¶ 135 The statute also does not provide the least restrictive means of dealing with the problem. See *Playboy*, 529 U.S. at 813, 120 S.Ct. 1878 (stating that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"); *Kusper v. Pontikes*, 414 U.S. 51, 59, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties."). The legislature could provide for a private right of action against an offender. It could also provide avenues of equitable relief, including temporary restraining orders, preliminary injunctions, or permanent injunctions. See, *e.g.*, Ohio Rev. Code Ann. § 2307.66 (LexisNexis 2018) (providing for a civil action resulting from the dissemination of images, including for an injunction, temporary restraining order, and compensatory and punitive damages). Instead, the statute criminalizes the conduct and subjects offenders to a possible term of one to three years in prison.

¶ 136 The majority concludes "[c]ivil actions are inadequate" and cites law review articles in support (*supra* ¶¶ 73-76), but we should "not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means." *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Comm'n*, 518 U.S. 727, 807, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (Kennedy, J., concurring in part and dissenting in part, joined by Ginsburg, J.); see also *Sable Communications of California, Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 128-30, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (noting "the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors"). Moreover, "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals" (*Playboy*, 529 U.S. at 816, 120 S.Ct. 1878), and the State has not done so here.

¶ 137 Laws burdening speech based on its content are subjected to "the most exacting scrutiny." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *People v. Jones*, 188 Ill. 2d 352, 358, 242 Ill.Dec. 267, 721 N.E.2d 546 (1999). Here, the statute cannot withstand strict scrutiny, as it is not narrowly tailored to serve the State's interests and less restrictive alternatives are available. Thus, I would find the statute unconstitutional and affirm the circuit court's judgment.

¶ 138 JUSTICE THEIS joins in this dissent.

All Citations

--- N.E.3d ----, 2019 IL 123910, 2019 WL 5287962

Footnotes

1 Such statutes include those of Alabama, Alaska, Arizona, Arkansas, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Nevada, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Dakota, and Vermont. Ala. Code § 13A-6-240(a) (2018); Alaska Stat. § 11.61.120(a) (2018); Ariz. Rev. Stat. Ann. § 13-1425(A)(3) (2018); Ark. Code Ann. § 5-26-314(a) (2018); Iowa Code § 708.7 (2019); Kan. Stat. Ann. § 21-6101(a)(8) (2018); Ky. Rev. Stat. Ann. § 531.120(1)(a) (West 2019); Me. Rev. Stat. Ann. tit. 17-A, § 511-A(1) (2019-20); Md. Code Ann., Crim. Law § 3-809(c)(1) (2018); Mich. Comp. Laws § 750.145e(1) (2019); Nev. Rev. Stat. § 200.780(1) (2017); N.H. Rev. Stat. § 644:9-a(II)(a) (2018); N.C. Gen. Stat. § 14-190.5A(b) (2018); 18 Pa. Cons. Stat. Ann. § 3131(a) (2018); 11 R.I. Gen. Laws § 11-64-3(a)(4) (2018); S.D. Codified Laws § 22-21-4 (2018); Vt. Stat. Ann. tit. 13, § 2606(b)(1) (2018).

2 The Delaware statute requires a malicious purpose not as an element of the offense but rather as an aggravating factor in determining the penalty.

Citing References (5)

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by NEGATIVE	1. State v. Casillas --- N.W.2d ----+ , Minn.App. CRIMINAL JUSTICE --- Obscenity and Pornography. Statute criminalizing the nonconsensual dissemination of private sexual images facially violates First Amendment overbreadth doctrine.	Dec. 23, 2019	Case		15 64 IL
---	2. Statute criminalizing so-called "revenge porn" survived intermediate scrutiny under First Amendment Statute criminalizing nonconsensual dissemination of victim's private sexual images did not burden substantially more speech than necessary, and thus statute was narrowly tailored...	2019	Other Secondary Source	---	15 41 64 IL
---	3. Harassment Statute criminalizing nonconsensual dissemination of private sexual images was content-neutral time, place, and manner restriction, and thus intermediate scrutiny, rather than...	2019	Other Secondary Source	---	15 41 53 IL
---	4. Illinois high court upholds state's 'revenge porn' law WESTLAW Data Privacy Daily Briefing	---	Other Secondary Source	---	---
---	5. 37 Westlaw Journal Computer and Internet 01, Illinois high court upholds state's 'revenge porn' law 37 Westlaw Journal Computer and Internet 01	---	Westlaw Journal	---	---

