Criminalization of Revenge Porn: Providing Victims with a Realistic Legal Avenue

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At her counselor’s suggestion, Leona Taylor took intimate photos of herself in an attempt to heal from past molestation and “become more comfortable with her body.”¹ She gave these photos to her then-boyfriend, William Franko, and told him about her history of sexual abuse. However, she never gave him permission to share them.² Years after Taylor and Franko had separated, a co-worker asked her if she had posted revealing images of herself on the Internet.³ Franko had posted Taylor’s photos online along with her name and contact information, fully aware of the harm he would cause.⁴ As a result, Taylor began to receive numerous messages and phone calls soliciting sex acts,⁵ including a voice mail threatening to “slit [her] throat.”⁶ Worse, there was nothing Taylor could do to hold Franko criminally accountable or to remove the photos.

Revenge pornography (“revenge porn”),⁷ like in Leona Taylor’s case, has become a frequently inflicted harm.⁸ Revenge porn falls under the broader umbrella of non-consensual porn, which covers the distribution of any sexually explicit image or video without the subject’s consent.⁹

The publication of nude photos with personally identifying information is not a recent phenomenon,¹⁰ but the development of the Internet has made it a common one.¹¹ The web allows for more people to post and view revenge porn materials than ever before. One of the first major revenge porn sites, IsAnyoneUp.com, hosted as many as 350,000 visitors a day at its peak.¹² Moreover, revenge porn has affected couples’ dynamics and the manner in which they handle separation, increasing the amount of intimate materials proliferated online. One in ten ex-partners have threatened to post compromising intimate photos online, and sixty percent of them

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¹ Georgetown University Law Center, J.D. expected 2017. The author is a Featured Online Contributor for the *American Criminal Law Review*.
³ *Id.* at *2.*
⁴ *Id.*
⁵ *Id.* at *2–4.*
⁶ *Id.* at *4.*
⁸ The private nature of the content and the inability of victims to seek criminal retribution in many states can lead to non-reporting, making reliable statistics hard to find. Studies show that revenge porn is not an uncommon phenomenon. *Id.* at 350–51 (“In a study of 1,244 individuals, over fifty percent of victims reported that their naked photos appeared next to their full name and social network profile; over twenty percent of victims reported that their e-mail addresses and telephone numbers appeared next to their naked photos.”).
¹¹ Levendowski, supra note 10.
have followed through. As a result, victims suffer emotional distress, depression, stalking, harassment, and damage to their employability and professional reputations.

There have been recent instances in which courts have held revenge porn perpetrators accountable for their actions. For example, Hunter Moore, a self-proclaimed “life ruiner” and founder of the website IsAnyoneUp?.com, pled guilty to commissioning email hacking to steal pictures. Also, Google recently announced it will “honor requests from people to remove nude or sexually explicit images shared without their consent” from search results. In addition, federal lawmakers discussed a bill criminalizing revenge porn. However, so far Congress hasn’t gone any further. Currently, victims whose photos were voluntarily shared with partners cannot press federal criminal charges.

Opponents of criminalizing revenge porn claim that civil remedies provide adequate legal recourse for victims. However, civil remedies are limited. For example, even though tort actions for intentional infliction of emotional distress (“IIED”) have yielded positive results for some victims, an IIED claim is an uphill battle. Since the victim suffers emotional damage and reputational stigma, quantifying and proving the requisite harm is much more difficult than if there was a physical injury. Others think copyright law provides an adequate legal solution, suggesting that victims use takedown provisions to reclaim their photos. Unfortunately, such rights only apply when the subject has taken the picture himself or herself, so victims have no cause of action if someone else photographed them.

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14 Citron & Franks, supra note 7, at 347 (“[G]rave harms they have suffered, including stalking, loss of professional and educational opportunities, and psychological damage.”).
15 Danielle Citron, Ding Dong, Revenge Porn King Hunter Moore is Going to Jail, FORBES (Feb. 18, 2015), http://www.forbes.com/sites/daniellecitron/2015/02/18/ding-dong-revenge-porn-king-hunter-moore-is-going-to-jail/.
21 Alexis F. Chen Pen, Note, Striking Back: A Practical Solution to Criminalizing Revenge Porn, 37 T. JEFFERSON L. REV. 405, 428–29 (2015) (“[T]his doctrine fails to allow recovery for those victims who do not suffer emotional harm, but rather encounter reputational or other non-economic harms.”); see e.g., GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 758 (Tex. App. 2014) (denying an independent claim for intentional infliction of emotional distress against the host of revenge porn websites); Boyles v. Kerr, 855 S.W.2d 593, 596, 603 (Tex. 1993) (denying recovery for emotional damage of a non-consensual porn victim without a breach of a recognized legal duty).
22 Levendowski, supra note 19, at 427.
23 Citron & Franks, supra note 7, at 360.
Furthermore, civil actions require victims to bring claims under their own name while the revealing photos are still available and searchable online. As a result, civil actions may draw further attention to the very photos victims wished were not public in the first place.24 Additionally, civil injunctions’ retroactive application fails to provide a strong deterrent to similar future actions since there is no threat of punishment.

Another problem with civil claims is there cost. Even if a victim’s claim succeeds, the individual defendant often does not possess the assets necessary for compensation and the exorbitant cost of litigation makes the action financially unfeasible.25

Criminalizing revenge porn provides stronger deterrence against future perpetrators, shields victims from the publicity of civil cases, and indicates societal condemnation. Currently, twenty-five states and the District of Columbia have statutes prohibiting revenge porn.26 Though this is a productive step towards criminalization, much of the legislation is inadequate. Some statutes require intentional harassment or harm. 27 Specific intent is a harder mens rea to prove, potentially barring victims from retribution though they have been harmed. Also, the decision by many states to classify revenge porn as a misdemeanor fails to recognize the severe harm inflicted on victims and weakens the deterrent effect.28 Officials are less likely to devote resources to minor crimes, and people are more willing to commit offenses with minimal sanctions that are unlikely to be enforced.29

As revenge porn laws continue to develop, legislatures can learn from successful provisions of current statutes. First, specifically defining key terms and elements, like “harm” and “consent,” can address counter-arguments claiming that broad revenge porn laws unnecessarily suppress free speech and infringe on the First Amendment.30 Second, an expansive definition of harm respects the expansive damage that can be inflicted upon victims. D.C.’s law defining harm as “any injury, whether physical or nonphysical, including psychological, financial, or reputational injury” is a good example.31 Third, instead of a specific intent requirement, proof of harm should be sufficient to invoke punishment.32 As long as harm is proved, posting photos should be punishable unless the subject consented to the specific form of public disclosure. Claims that the victim consented to being photographed or that the photo is the perpetrator’s property should not

25 Poole, supra note 9, at 200 (“A jury in Texas . . . recently awarded a woman $500,000 for emotional distress after her ex boyfriend posted intimate photos and Skype sessions online . . . [defendant] may never have the resources to pay the award, meaning the woman will have footed the bill for an award-less lawsuit.”).
27 See e.g., ARK. CODE ANN. § 5-26-314(a) (West 2015) (“[P]urpose to harass, frighten, intimidate, threaten, or abuse another person.”); D.C. CODE § 22-3052(a)(3) (West 2001) (“[W]ith the intent to harm the person depicted or to receive financial gains.”).
28 See e.g., ARK. CODE ANN. § 5-26-314(c) (West 2015); D.C. CODE § 22-3052(b) (West 2001).
29 See Chen Pen, supra note 21, at 434.
30 Kitchen supra note 24, at 273–74, 281.
32 N.J. STAT. ANN. § 2C:14–9(c) (West 2004).
be recognized defenses.\textsuperscript{33} To avoid suppressing issues that serve the public interest, like political sex scandals, photos related to newsworthy events should be excluded from liability.\textsuperscript{34} This combined statute would provide a solid foundation for prosecuting perpetrators of revenge porn.

Laws punishing the perpetrator still do not provide a means to combat revenge porn websites hosting and redistributing the photos.\textsuperscript{35} These sites currently fall under the protection of the Communications Decency Act,\textsuperscript{36} which shields websites from liability for the content third parties share on their platform.\textsuperscript{37} Prosecution of the sites should be considered, but focusing on perpetrators first would likely provide a more direct deterrent effect. Holding those individuals, who have uploaded intimate materials online without the subject’s consent, accountable will likely dissuade others from doing so—addressing the problem at its source, before websites even become involved.

The humiliation and physiological damage inflicted on revenge porn victims is much worse than a simple breach of trust between former partners. Criminalizing revenge porn would help ensure that victims like Leona Taylor who cannot go to work or even answer their phone without fearing sexual harassment, have a realistic legal recourse to pursue justice.

\textsuperscript{33} ARK. CODE ANN. § 5–26–314(b) (West 2015) (“The fact that an image, picture, video, or voice or audio recording was created with the knowledge or consent of the other person or that the image, picture, video, or voice or audio recording is the property of a person charged under this section is not a defense to prosecution under this section.”).
\textsuperscript{34} COLO. REV. STAT. ANN. § 18-7-107(2) (West 2015).
\textsuperscript{35} See e.g., GA. CODE ANN. § 16-11-90(f) (West 2015) (“There shall be a rebuttable presumption that an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet, for content provided by another person, does not know the content of an electronic transmission or post.”); Kitchen supra note 24, at 271 (stating that redistribution is almost never criminalized).
\textsuperscript{37} Paul J. Larkin, Jr., Revenge Porn, State and Free Speech, 48 LOY. L.A. L. REV. 57, 66–67 (2015) (“The principal obstacle is section 230 of the Communications Decency Act of 1996, 33 which provides that a website cannot be treated as “the publisher or speaker” of material posted online by someone else.”); see also Layla Goldnick, Note, Coddling the Internet: How the CDA Exacerbates the Proliferation of Revenge Porn and Prevents a Meaningful Remedy for its Victims, 21 Cardozo J.L. & Gender 583 (2015).