

CRIMINALIZING REVENGE PORN: A QUICK GUIDE

What is the issue? Non-consensual pornography is the distribution of sexually graphic images of individuals without their consent. This includes images originally obtained without consent (e.g. hidden recordings or recordings of sexual assaults) as well as images originally obtained with consent within the context of a private or confidential relationship (e.g. images consensually given to an intimate partner who later distributes them without consent, popularly referred to as “revenge porn”).

What is the harm? Non-consensual pornography transforms unwilling individuals into sexual entertainment for strangers. A vengeful ex-partner or malicious hacker can upload an explicit image of a victim to a website where thousands of people can view it and hundreds of other websites can share it. In a matter of days, that image can dominate the first several pages of “hits” on the victim’s name in a search engine, as well as being emailed or otherwise exhibited to the victim’s family, employers, co-workers, and peers.

Victims are routinely threatened with sexual assault, stalked, harassed, fired from jobs, and forced to change schools. Some victims have committed suicide. Non-consensual pornography can destroy victims’ intimate relationships as well as their educational and employment opportunities.

Non-consensual pornography is frequently a form of domestic violence. The threat to expose intimate pictures is often used to prevent a partner from exiting the relationship or from reporting other forms of abuse. Non-consensual pornography is also used by traffickers to trap unwilling individuals in the sex trade.

While non-consensual pornography can affect both male and female individuals, evidence so far indicates that the majority of victims are women and girls, and that women and girls face more serious consequences as a result of their victimization. By violating legal and social commitments to gender equality, non-consensual pornography is similar to sexual harassment, rape, and domestic violence.

Isn’t this already illegal? As of May 2, 2014, only ten states - New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, and Arizona - have laws that treat non-consensual pornography as a crime in itself, and no federal law yet prohibits it as such. Some states have strong anti-voyeurism laws, but even these only protect victims whose images were taken without their knowledge or consent, not victims who consented to give their pictures to one intimate partner for private use.

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Federal and state laws prohibiting harassment and stalking only apply if the victim can show that the non-consensual pornography is part of a larger pattern of conduct directed at the victim with intent to distress or harm, which will not apply to the many purveyors of non-consensual pornography motivated by a desire for money or notoriety.

Why can't victims just use civil or copyright remedies? Civil suits are costly, time-consuming, draw further attention to the offending material, and often will not result in the removal of images. In addition, a federal law known as the Communications Decency Act §230 grants online entities a special defense against civil liability, though not against copyright claims. However, copyright claims can only be made by the person who took the picture or video, and they present the same problems as other civil actions. If the threat of civil or copyright actions were an effective deterrent against non-consensual pornography, we would likely not be witnessing the proliferation of revenge porn sites and increase in reported rates of victimization.

Does criminalizing non-consensual porn violate the First Amendment? If it is possible to bring civil or copyright actions against non-consensual pornography without violating the First Amendment, it must be possible to do the same with criminal actions. There is no constitutionally protected right to distribute sexually graphic images of private individuals without their consent any more than there is a constitutionally protected right to distribute obscenity, steal someone's identity, or engage in threats, harassment, or defamation. A carefully crafted statute with exceptions for lawful activity (e.g. law enforcement, commercial practices, public interest) does not offend First Amendment principles.

Criminalization is a serious step – is it justified? Non-consensual pornography is an act of sexual use without consent, that is, a form of sexual abuse. It is also a serious invasion of privacy, an infringement upon the freedom of private expression. The harm it causes is severe and in many cases irreversible. Criminal penalties are both the most appropriate response to and the most effective deterrent of this conduct.

Isn't it victims' own fault for making sexually graphic pictures of themselves available to other people? In many cases, victims have not made the pictures available to anyone; some victims are sexually assaulted, some are not aware that they are being filmed, and some have had their private images stolen from them. Victims who do make their images available to an intimate partner are no more at fault than a person who becomes a victim of identity theft after giving a waiter a credit card to pay for dinner, or a patient whose sexual dysfunction is publicly disclosed by the doctor he consults for treatment.

Why are both state and federal criminal laws necessary? State criminal laws are necessary to address conduct that does not cross state lines. Federal law is necessary because state laws are limited both by jurisdiction and by the aforementioned

Communications Decency Act §230, which creates high hurdles for either civil or criminal charges against website operators who distribute non-consensual pornography. The Internet has greatly facilitated the production and distribution of this material, and federal criminal law is the most effective and appropriate means of addressing interstate crimes. While §230 provides online intermediaries with a special defense against state criminal laws and tort claims, it does not provide such immunity against violations of federal criminal law.

Would making non-consensual pornography a federal crime mean that ISPs or online intermediaries such as Google, YouTube, etc. would likely face criminal prosecution? The federal law would prohibit a narrowly defined form of intentional conduct that can take online or offline form. It would thus add non-consensual pornography to the list of hundreds of federal criminal laws already on the books (including laws against child pornography, extortion, and identity theft) against which online entities cannot raise a special defense. It would have no effect on the normal defenses any entity, offline or online, could raise.

What would criminal laws addressing this conduct look like?

Model State Law Version 1

An actor commits a crime if he knowingly discloses a photograph, film, videotape, recording, or other reproduction of the image of another, identifiable person whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the person depicted did not consent to such disclosure and under circumstances in which the person has a reasonable expectation of privacy. A person who has consented to the capture or possession of an image within the context of a private or confidential relationship retains a reasonable expectation of privacy with regard to disclosure beyond that relationship.

A. Definitions. For the purposes of this section,

- (1) “Disclose” includes transferring, publishing, distributing, or reproducing;
- (2) “Image” includes a photograph, film, videotape, recording, digital, or other reproduction;
- (3) “Intimate parts” means the naked genitals, pubic area, or female adult nipple of the person;
- (4) “Sexual act” includes but is not limited to masturbation, genital, anal, or oral sex.

B. Exceptions. This section does not apply to

- (1) Lawful and common practices of law enforcement, criminal reporting, legal proceedings; or medical treatment; or

- (2) The reporting of unlawful conduct; or
- (3) Images of voluntary exposure by the individual in public or commercial settings; or
- (4) Disclosures made in the public interest.

Model State Law Version 2

An actor may not knowingly disclose an image of another, identifiable person, whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the depicted person has not consented to such disclosure.

A. Definitions. For the purposes of this section,

- (1) “Disclose” includes transferring, publishing, distributing, or reproducing;
- (2) “Image” includes a photograph, film, videotape, recording, digital, or other reproduction;
- (3) “Intimate parts” means the naked genitals, pubic area, or female adult nipple of the person;
- (4) “Sexual act” includes but is not limited to masturbation, genital, anal, or oral sex.

B. Exceptions. This section does not apply to

- (1) Lawful and common practices of law enforcement, criminal reporting, legal proceedings; or medical treatment; or
- (2) The reporting of unlawful conduct; or
- (3) Images involving voluntary exposure in public or commercial settings; or
- (4) Disclosures made in the public interest.

Model Federal Law

I. Whoever knowingly discloses through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including a computer, an image of another, identifiable person whose intimate parts are exposed or who is engaged in a sexual act, when the actor knows or should have known that the depicted person has not consented to such disclosure, shall be fined under this title or imprisoned not more than two years, or both.

II. Definitions. For the purposes of this section,

- (1) “Disclose” includes transferring, publishing, distributing, or reproducing;
- (2) “Image” includes a photograph, film, videotape, recording, digital, or other reproduction;

- (3) “Intimate parts” means the naked genitals, pubic area, or female adult nipple of the person;
- (4) “Sexual act” includes but is not limited to masturbation, genital, anal, or oral sex.

III. Exceptions. This section does not apply to

- (1) Lawful and common practices of law enforcement, criminal reporting, legal proceedings; or medical treatment; or
- (2) The reporting of unlawful conduct; or
- (3) Images involving voluntary exposure in public or commercial settings; or
- (4) Disclosures made in the public interest.

IV. State Attorneys General shall have the authority to enforce the provisions of this law.

V. Civil Remedy

- (1) An individual who is a victim of a violation of this section may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys’ fees.

VI. Safe Harbor Provision for Information Content Providers