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 that were 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”). Non-consensual pornography does not include images taken of individuals in public or of people engaged in unsolicited and unlawful sexual activity, such as flashing.

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. 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? Only two states, New Jersey and California, currently treat non-consensual pornography as a crime in itself. While New Jersey’s law is fairly comprehensive, California’s law is very limited, protecting only victims whose image were taken by another party and only reaching perpetrators who act with the intent to cause serious emotional distress. Some other 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. 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 intended to distress or harm the victim, which does not apply to the many purveyors of non-consensual pornography motivated by a desire for money or notoriety.

Why can’t victims just sue? Civil suits are costly, time-consuming, and bring further attention to the offending material. In addition, websites that distribute non-consensual pornography are given broad immunity for civil liability under federal law (Communications Decency Act §230), with the exception of copyright claims. Copyright claims, however, can only be made by the person who created the image.

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 and an infringement upon the freedom of private expression. Criminal penalties are both the most appropriate response and the most effective deterrent to this conduct.

Does criminalizing non-consensual porn violate the First Amendment? There is no constitutionally protected right to consume or distribute sexually graphic images of private individuals without their consent any more than there is a constitutionally protected right to distribute obscenity or to

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engage in threats, harassment, or defamation. A carefully crafted statute with exceptions for lawful activity (e.g. law enforcement or commercial practices) does not offend First Amendment principles.

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 Communications Decency Act §230, which creates high hurdles for either civil or criminal charges against website operators who distribute non-consensual pornography. Given that the Internet has greatly amplified the scope and harm of non-consensual pornography, an effective law must also reach Internet traffickers. Congress’s power to regulate interstate commerce (here, Internet activity) and the fact that CDA §230 does not shield websites from federal criminal liability means that a federal criminal prohibition is both appropriate and necessary to fully address the problem of non-consensual pornography.

What would criminal laws addressing this issue 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 person whose intimate parts are exposed or who is engaged in an act of sexual contact, 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, exhibiting, advertising, or offering;
(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” is sexual intercourse including genital, anal, or oral sex.

(b) Exceptions:

(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 that serve a bona fide and lawful public purpose.

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:

(1) “Disclose” includes transferring, publishing, distributing, exhibiting, advertising, or offering;
(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” is sexual intercourse including genital, anal, or oral sex.

B. 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) Situations involving voluntary exposure in public or commercial settings; or
(4) Disclosures that serve a bona fide and lawful public purpose.

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

(a) “Disclosure” includes creation, distribution, publication, dissemination, transfer, sale, purchase, delivery, trade, offering, or advertising;
(b) “Sexually graphic” means revealing intimate areas of an individual or exposing an individual engaged in sexually explicit conduct;
(c) “Intimate areas” is defined as in 18 USC § 1801 [slightly modified]: “the naked genitals, pubic area, buttocks, or any portion of the female breast below the top of the areola”;
(d) “Sexually explicit conduct” as defined in 18 USC § 2256 [modified]: “graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex”; and
(e) “Visual depiction” is defined as in 18 USC § 2256: “includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.”

III. Exceptions

(a) Lawful and common practices of law enforcement, criminal reporting, legal proceedings; or medical treatment; or
(b) The reporting of unlawful conduct; or
(c) Situations involving voluntary exposure in public or commercial settings; or
(d) Disclosures that serve a bona fide and lawful public purpose.

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

(a) 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.