

## USING TECHNOLOGY TO IMPEDE PRIVACY AND CONSENT: A SURVEY OF REVENGE PORN LAWS

Kellianne Hickey\*

In early 2017, headlines were covered with reports of reality star Rob Kardashian's Instagram tirade against his ex-fiancée, Blac Chyna.<sup>1</sup> Kardashian posted a slew of nude pictures of Chyna along with personal details of their relationship.<sup>2</sup> Intimate pictures once shared in the privacy of a relationship were suddenly released to the world and open to harsh criticism across the internet. Enabled by technology, these images were shared immediately to third parties, resulting in swift repercussions for the victim.

This is not the first time this story has been told—a couple breaks up, the scorned ex-lover seeks revenge for his rejection, and suddenly sexually explicit posts pop up on social media paired with nasty captions that garner thousands of views.<sup>3</sup> Nonconsensual distribution of sexual pictures or videos, or more commonly, “revenge porn,” has gained increasing attention in recent years as a growing form of sexual violence. Such conduct has been characterized in a variety of ways, including as sexual harassment, defamation, and cyberbullying. However, these terms are insufficient to illustrate or even define the extent of this behavior. The incredibly invasive and vicious nature of such attacks and the inadequacy of current legal remedies demonstrate the need for states to criminalize revenge porn in its own right, to deter potential offenders and better protect the privacy and consent of their citizens.

Revenge porn affects millions of Americans. Advancements in technology have facilitated cellphone and internet users' abilities to access and distribute sexual images and videos of individuals.<sup>4</sup> A recent study by the Data & Society Research Institute found that roughly one in twenty-five Americans have either had intimate images posted without their

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\* Kellianne Hickey is a *juris doctor* candidate at the Georgetown University Law Center, with expected graduation in 2019. She is a Featured Online Contributor for Volume 55 of the *American Criminal Law Review*.

<sup>1</sup> Greg Price, *Rob Kardashian's naked Blac Chyna pictures could mean revenge porn charge in California*, Newsweek (July 8, 2017) <http://www.newsweek.com/kardashian-blac-chyna-revenge-porn-633848>.

<sup>2</sup> *Id.*

<sup>3</sup> Statistics show 90% of revenge porn victims are women. For ease of reference, victims are referred to as “she” in this article. See Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration*, Cyber Civil Rights Initiative, Inc., June 2017, available at <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

<sup>4</sup> Haw. Rev. Stat. Ann. § 711-1110.9 editor's notes (West 2017).

consent, or have had someone threaten to post such images.<sup>5</sup> Out of these millions of citizens, young people between the ages of fifteen and twenty-nine—particularly women—are most likely to be targeted.<sup>6</sup>

The ease with which perpetrators can access and disseminate such images creates substantial obstacles to prosecuting offenders under current laws. While revenge porn has colloquially been grouped in with the likes of harassment, defamation, and cyberbullying, most states' legal precedents are inadequate to cover the more specific, revenge porn-type scenarios.

In a 2014 case in New York, a defendant posted naked pictures of his ex-girlfriend to his Twitter page and sent those pictures to her sister and employer.<sup>7</sup> New York law does not criminalize nonconsensual pornography, so the defendant was charged with dissemination of an unlawful surveillance image, aggravated harassment, and public display of offensive sexual material.<sup>8</sup> The court dismissed all three charges based on: 1) the lack of factual information alleging that the image was obtained unlawfully; 2) the fact that the defendant did not communicate directly with the victim and so did not harass her; and 3) that the pictures were not offensively sexual or on public display.<sup>9</sup> The court states that the "defendant's conduct, while reprehensible, does not violate any of the criminal statutes under which he is charged."<sup>10</sup> The uniqueness of the situation prevented successful prosecution as an existing crime and the case was dismissed.

More recently, a high school student in Indiana sent a topless image via Snapchat to a boy who had asked her out and she later turned down.<sup>11</sup> He posted her picture on a pornographic website with images of other teenage girls from the area, divided into categories by school.<sup>12</sup> The state's "sexting" laws did not apply because she was over 18 years old.<sup>13</sup>

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<sup>5</sup> Amanda Lenhart et al., *Nonconsensual Image Sharing: One in 25 Americans has been a Victim of "Revenge Porn,"* Date & Society Research Institute, Dec. 13, 2016, available at [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *People v. Barber*, 42 Misc.3d 1225(A) (N.Y. Crim. Ct. 2014).

<sup>8</sup> *Id.* at \*1.

<sup>9</sup> *Id.* at \*2–6.

<sup>10</sup> *Id.* at \*1. Since the writing of this article, New York City has unanimously passed legislation making it a misdemeanor to disseminate intimate images without the subject's consent and with the intent to cause harm. The law will take effect in late January 2018. See Sara Ashley O'Brien, *Revenge porn will soon be a crime in New York City*, CNNtech (Nov. 16, 2017), <http://money.cnn.com/2017/11/16/technology/nyc-revenge-porn-bill/index.html>.

<sup>11</sup> Sandra Chapman, *Family: Indiana law fails to protect revenge porn victims*, 13 WTHR (Sept. 28, 2017), <https://www.wthr.com/article/family-indiana-law-fails-to-protect-revenge-porn-victims>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Sextortion charges were not relevant because there was no demand or threat of extortion involved.<sup>14</sup> Without a statute covering this type of nonconsensual distribution, the perpetrator faced no criminal consequences for his actions.

Similarly, a thirty-one-year-old man in Oregon uploaded explicit videos of himself and his ex-girlfriend to multiple pornographic websites without her consent after the couple broke up.<sup>15</sup> However, under Oregon's newly passed revenge porn law prohibiting the unlawful dissemination of intimate images, he was convicted and sentenced to six months in jail with five years of probation.<sup>16</sup> Criminalizing revenge porn creates an avenue to justice for victims whose situations are not covered by existing laws, especially for those who cannot afford a civil adjudication.

Proponents of criminalizing revenge porn have been largely successful: currently thirty-nine states and the District of Columbia have adopted laws against the nonconsensual distribution of sexually explicit photographs.<sup>17</sup> Eight of the remaining eleven states have bills pending.<sup>18</sup> However, there is not yet a federal statute addressing the issue, leaving a legal void for images distributed across state lines. Representative Jackie Speier (D-Calif.) introduced the "Intimate Privacy Protection Act" in July 2016, intending to protect the dissemination of nonconsensual pornographic images through the mail, any electronic communication system, interactive computer service, or other means of interstate commerce.<sup>19</sup> The bill failed to advance out of committee.<sup>20</sup> In late November 2017, Senators Kamala D. Harris (D-Calif.), Richard Burr (R-NC) and Amy Klobuchar (D-Minn.) joined Rep. Speier to introduce the "Ending Nonconsensual Online User Graphic Harassment (ENOUGH) Act" in both the House and Senate.<sup>21</sup> This bill touts bipartisan sponsors,

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<sup>14</sup> *Id.*

<sup>15</sup> FOX 12 Staff, *Oregon man sentenced to jail under state's new 'revenge porn' law*, FOX 12 Oregon (Dec. 1, 2016) <http://www.kptv.com/story/33845912/oregon-man-sentenced-to-jail-under-states-new-revenge-porn-law>.

<sup>16</sup> CBS News, *First person sentenced under Ore.'s revenge porn law*, CBS News (Dec. 2, 2016), <https://www.cbsnews.com/news/benjamin-barber-first-person-sentenced-under-oregon-revenge-porn-law/>.

<sup>17</sup> Currently, the following states have revenge porn statutes: AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, IA, KS, LA, ME, MD, MI, MN, NV, NH, NJ, NM, NC, ND, OK, OR, PA, SD, TN, TX, TY, VA, VT, WA, WV, WI. *See State Revenge Porn Laws*, C.A. Goldberg (Sept. 24, 2017, 6:02pm), <http://www.cagoldberglaw.com/states-with-revenge-porn-laws/>.

<sup>18</sup> The following states have bills pending in legislation: KY, MA, MO, NY, RI, SC. *See id.*

<sup>19</sup> *H.R. 5896- Intimate Privacy Protection Act of 2016*, Congress.gov (Aug. 10, 2016), <https://www.congress.gov/bill/114th-congress/house-bill/5896/text>.

<sup>20</sup> *Id.*

<sup>21</sup> Elana Schor, *Lawmakers target 'revenge porn' in bipartisan bill*, Politico (Nov. 28, 2017), <https://www.politico.com/story/2017/11/28/congress-revenge-porn-bill-263539>.

as well as support from major tech companies like Twitter and Facebook.<sup>22</sup> Prior to his state's adoption of a revenge porn statute, John Lesch, a prosecutor in St. Paul, Minnesota remarked, "[t]he guys who are putting naked photos online ... know we can't get to them because of the status of the law. They're not your typical criminal defendant."<sup>23</sup> The ENOUGH Act would establish the necessary criminal liability to prosecute the sharing of explicit images without consent in federal court.<sup>24</sup> In the age of technology and the corresponding ability of information to flow freely across state lines, comprehensive state laws and supporting federal statutes are necessary to deter potential offenders.

Mary Ann Franks, a professor at University of Miami School of Law has explained, "[l]ike domestic violence and sexual assault, non-consensual pornography is the product of a culture that does not view women as fully human and deserving of the same rights of bodily autonomy as men. It is not a matter of changing our laws or our technology or our culture; it is a matter of changing all of them."<sup>25</sup> In our capacity as lawyers, the law is something we can and must change in order to protect the privacy and consent of our fellow citizens. While the law inevitably struggles to keep up with technological innovations and advancements, we must advocate for the passage of laws specifically targeting revenge porn in the remaining eleven states and for serious consideration of the ENOUGH Act in Congress, in order to do our part to combat this form of sexual violence.

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<sup>22</sup> Press Release, Rep. Ryan Costello, Rep. Costello and Rep. Speier Announce the Bipartisan ENOUGH Act (Nov. 28, 2017), <https://costello.house.gov/media-center/press-releases/rep-costello-and-rep-speier-announce-bipartisan-enough-act>.

<sup>23</sup> Steven P. Aggergaard, *A Blind Spot in the Law*, 72 BENCH & B. MINN. 24, 25 (2015).

<sup>24</sup> See Press Release, Rep. Ryan Costello, *supra* note 20.

<sup>25</sup> Emily Reynolds, *Why there's no 'silver bullet' for ridding the web of revenge porn*, Wired (Mar. 16, 2017), <http://www.wired.co.uk/article/revenge-porn-facebook-social-media>.