

THE BETRAYAL OF REP. KATIE HILL: WHY WE NEED A FEDERAL REVENGE PORN LAW

COURTNEY HINKLE*

When former Representative Katie Hill (D-CA) delivered her final remarks on the House floor as a member of Congress, it was the first time she had left her apartment in the days since nude photos were published online by the right-wing blog, *RedState*.¹ The images, allegedly leaked by Hill's estranged husband, Kenny Heslep, were included alongside reports of a consensual relationship with a female campaign staffer. For days, she barely left her bed. As additional photos were published by *The Daily Mail*, and quickly spread across social media, Hill found herself going "to the darkest places that a mind can go...shed[ding] more tears than [she] thought possible."²

While her relationship with a campaign staffer was surely improper, and perhaps reason enough to resign, plenty of Hill's colleagues in Congress have remained despite similar allegations of misconduct.³ Certainly, Donald Trump never contemplated resigning despite *at least* twenty-five credible accusations of sexual assault and rape.⁴ But Hill revealed her decision to resign came after facing threats of "more photos and text messages that...would [be] release[ed] bit by bit until they broke [her] down to nothing."⁵

In other words: it was the *photos*, not the consensual relationship, that ended her career in Congress.

Hill took square aim at whom she viewed as the perpetrators of this nightmarish ordeal: an abusive partner and gleeful right-wing media outlets willing to sexually humiliate her. She also called out a misogynistic culture that "consumed [her] naked pictures, capitalized on [her] sexuality and enabled [her] abusive ex to continue that abuse, this time with the entire country watching."⁶

Hill's gut-wrenching speech gave searing insights into the depths of the harm suffered by victims of "revenge porn," or what experts have termed "nonconsensual pornography."⁷ Nonconsensual pornography is an act of sexual violence, and a clear violation of sexual privacy.⁸ A recent report

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¹ *Rep. Katie Hill's full remarks in her farewell speech from the floor of the US House of Representatives*, CNN (Oct. 31, 2019, 5:13 PM), <https://www.cnn.com/2019/10/31/politics/katie-hill-farewell-speech-full-text/index.html>.

² *Id.*

³ Molly Olmstead, *Prosecutors Allege Rep. Duncan Hunter Used Campaign Funds to Support Five Extramarital Affairs*, SLATE (June 25, 2019, 3:33 PM), <https://slate.com/news-and-politics/2019/06/filing-duncan-hunter-case-affairs.html>.

⁴ Eliza Relman, *The 25 women who have accused Trump of sexual misconduct*, BUSINESS INSIDER (Oct. 9, 2019, 3:07 PM), <https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12>.

⁵ *Rep. Katie Hill's full remarks in her farewell speech from the floor of the US House of Representatives*, *supra*, note 1.

⁶ *Id.*

⁷ Cyber Civil Rights Initiative – About Us, <https://www.cybercivilrights.org/welcome/> (last visited Nov. 7, 2019).

⁸ *See generally* Danielle K. Citron, *Sexual Privacy*, 128 YALE L.J. (2019) (stating the posting of nude images online is an invasion of sexual privacy—the behaviors, expectations, and choices about the human body, sex, sexuality, gender, and intimate activities – that is necessary for sexual autonomy and consent).

revealed one in twenty-five Americans have been victims of, or threatened with, the nonconsensual disclosure of explicit images.⁹ The more vulnerable the victim, the more likely they are to be targeted; women and people who identify as LGBTQ are reportedly most affected by this invasion of privacy.¹⁰

The publication of intimate images is not only abhorrent; it is a crime. In recent years, numerous criminal and civil nonconsensual porn laws have been enacted across the country, in part due to the tireless work of the Cyber Civil Rights Initiative (CCRI).¹¹ In 2013, only three states had laws against non-consensual pornography. Today, forty-six states, including Hill's home state of California, and Washington, D.C., have some form of these laws on the books.¹²

Law enforcement in both California and D.C. should immediately open an investigation into the matter. In both D.C. and California, the "disclosure" of sexual images is a misdemeanor, and in D.C., the "publishing" of sexual images is a felony.¹³ However, under D.C. law, it is a crime to disclose or publish intimate images *only if* for financial gain or with the intent of harming the persons depicted.¹⁴ In contrast, California law requires only a showing that the person knew, or should have known, the distribution would cause a person serious emotional distress.¹⁵

Under these provisions, a criminal conviction seems more likely under California law. A prosecutor would likely have no issues against Heslep in either jurisdiction. However, showing intent of either harm or financial gain by a news organization, or some random Reddit user reposting the images, would be more difficult.

Nonetheless, getting law enforcement to expend resources for a misdemeanor charge is another likely barrier. This is particularly true given the complexity of investigating cybercrimes, which many law enforcement departments are ill-equipped to address.¹⁶ But unlike the vast majority of victims, Hill's high profile is likely to garner greater attention from the relevant authorities.

Notably, both D.C. and California law carve out exceptions for images released on matters of public interest.¹⁷ *RedState* and *The Daily Mail* are likely to argue they published for purposes of sharing newsworthy information, and thus, their right to publish is protected by the First Amendment. But arguably, the "newsworthiness" exception does not extend to the publishing of nude photos, which added little to the story other than crude interest in a visual depiction of the improper relationship.

⁹ Andrea Peterson, *1 in 25 Americans has faced or been threatened with 'revenge porn'*, WASH. POST (Dec. 13, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/12/13/one-in-25-americans-has-faced-or-been-threatened-with-revenge-porn/>.

¹⁰ *Id.*

¹¹ Cyber Civil Rights Initiative – Revenge Porn Laws, <https://www.cybercivilrights.org/revenge-porn-laws/> (last visited Nov. 7, 2019).

¹² *Id.*

¹³ D.C. Code § 20-275 (2019); Cal. Penal Code § 647(j)(4) (2019).

¹⁴ D.C. Code § 20-275 (2019).

¹⁵ Cal. Penal Code § 647(j)(4) (2019).

¹⁶ See generally Danielle K. Citron, *The Privacy Policymaking of State Attorneys General*, 92 Notre Dame L. Rev., 747 (2016); Danielle K. Citron, *Hate Crimes in Cyber Space* (Harvard Univ. Press, 2014).

¹⁷ Cyber Civil Rights Initiative – Revenge Porn Laws, *supra*, note 10.

Of course, Hill could – and should – bring claims in California under the civil “revenge porn” statute.¹⁸ Hill could also sue for common law invasion of privacy and disclosure torts, cyberstalking, or intentional infliction of emotional distress. Hill recently hired powerhouse victim’s rights attorney, Carrie Goldberg, to represent her.¹⁹ Carrie is known as a fierce advocate for her clients, so undoubtedly, she will leave no claim off the litigation table.

But regardless of whatever monetary damages Hill may receive, nothing is going to bring back her political career. And there is reason to be concerned that such tactics could be repeated in the future with an undoubtedly chilling effect on women and LGBTQ candidates entering public service. As one of the youngest women, and one of the first openly bisexual members of Congress, the thirty-two year old was a rising star in the Democratic party.

Hill’s swift ascension to power, however, put a target on her back. One of the individuals behind publishing Hill’s photos in *RedState* is a Republican operative who previously worked for former GOP Congressman Steve Knight, the incumbent ousted by Hill.²⁰ As *The Atlantic*’s Quinta Jurecic warned, this was perhaps the first time “a politically aligned publication has published an explicit photo of an opposition politician for political gain.”²¹

Despite Hill’s promise not to let her experience “scare off other young women or girls from running for office,”²² the indisputable success of the political hit job may very well send the wrong message to political operatives – certainly those who lack scruples: a well-timed leak of an intimate image is all that is required to tip an election, or force a political opponent to resign from office.

In response, some have scoffed that the lesson from Hill’s downfall is simply do not take photos – an all too familiar tact of blaming the victim.²³ But this line of thinking has been widely debunked by sexual privacy experts²⁴ – and even Representative Matt Gaetz (R-FL).²⁵ Any discussion of solutions to address nonconsensual pornography should not resort to slut-shaming.

¹⁸ Cal. Civ. Code § 1708.85(a).

¹⁹ Gabrielle Fonrouge and Jackie Salo, *Katie Hill hires revenge porn lawyer Carrie Goldberg to sue over leaked nude photos*, N.Y. POST (Oct. 31, 2019, 11:32 AM), <https://nypost.com/2019/10/31/katie-hill-hires-revenge-porn-lawyer-carrie-goldberg-to-sue-over-leaked-nude-photos/>.

²⁰ Michael Calderone, *Reporter on Katie Hill scandal promotes GOP candidates for her seat*, POLITICO (Oct. 28, 2019, 5:44 PM), <https://www.politico.com/news/2019/10/28/reporter-katie-hill-scandal-gop-060576>.

²¹ Quinta Jurecic, *The Humiliation of Katie Hill Offers a Warning*, THE ATLANTIC (Oct. 31, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/katie-hill-and-many-victims-revenge-porn/601198/>.

²² *Rep. Katie Hill's full remarks in her farewell speech from the floor of the US House of Representatives*, *supra*, note 1.

²³ Maureen Dowd, *Now Comes the Naked Truth*, N.Y. TIMES OPINION (Nov. 2, 2019), <https://www.nytimes.com/2019/11/02/opinion/sunday/katie-hill-resigns-millennials-boomers.html>; Addy Baird, *Nancy Pelosi Said Katie Hill's Resignation After Details Of Her Sex Life Were Published Without Her Consent Shows That Young People Need To "Be Careful"*, BUZZFEED NEWS (Oct. 31, 2019), <https://www.buzzfeednews.com/article/addybaird/nancy-pelosi-katie-hill-resignation-pictures>.

²⁴ Mary Anne Franks (@ma_franks), TWITTER (Nov. 3, 2019, 12:59 PM), https://twitter.com/ma_franks/status/1191052307385012224; *See generally* Danielle K. Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 Mich. L. Rev. 373 (2009).

²⁵ Zack Budryk, *Gaetz defends Democratic colleague Katie Hill over leaked photo*, THE HILL (Oct. 24, 2019), <https://thehill.com/homenews/house/467259-gaetz-defends-democratic-colleague-katie-hill-over-leaked-photo>.

This focus detracts from the real issues: privacy and consent. And in Hill’s case, the images were taken without her knowledge, let alone her consent.

Moreover, the images need not be real to be effective. As Professor Danielle Citron warns, the recent proliferation of “deep fake” technologies can be used to manipulate video or audio clips that make people appear to be doing or saying things that never happened.²⁶ Perhaps unsurprisingly, her research shows that ninety-eight percent of deep fakes appearing online are deep fake sex videos, and ninety-nine percent of deep fake sex videos involve women, usually female celebrities.²⁷ Technologists warn it will soon be nearly impossible to distinguish between a real video and fake video.²⁸

Stronger laws are needed to protect privacy and enforce meaningful deterrents. In 2017, a report by the CCRI revealed severe criminal liability – including registry on the sex offenders list or felony conviction – is the most effective deterrent.²⁹ Thus, perhaps the only positive takeaway from this entire ordeal is a renewed effort by Hill’s former colleagues to finally pass a federal law criminalizing nonconsensual pornography.³⁰ Earlier this year, Representative Jackie Speier (D-CA) introduced the Stopping Harmful Image Exploitation and Limiting Distribution (SHIELD) Act that would address weaknesses in the patchwork of state laws. Moreover, with its focus on privacy violations– regardless of motive–the law is viewed by many experts to correct for a flawed focus on the perpetrator’s intent, or malice towards the victim.³¹

Congress should immediately pass the SHIELD Act, and send a clear signal to any would-be political operative that this type of “gutter-politics” is completely unacceptable. Anyone who engages in such vile conduct should – and will – be held accountable to the fullest extent of the law. While it may be too late to save Hill, these reforms could spare thousands her same fate.

²⁶ See Robert Chesney and Danielle K. Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Cal. L. Rev. (2019, Forthcoming).

²⁷ Brian Feldman, *MacArthur Genius Danielle Citron on Deepfakes and the Representative Katie Hill Scandal*, N.Y. MAGAZINE (Oct. 31, 2019), http://nymag.com/intelligencer/2019/10/danielle-citron-on-the-danger-of-deepfakes-and-revenge-porn.html?utm_source=tw.

²⁸ Danielle K. Citron, *How deepfakes undermine truth and threaten democracy*, TED SUMMIT 2019 (July 2019), https://www.ted.com/talks/danielle_citron_how_deepfakes_undermine_truth_and_threaten_democracy?utm_source=twitter.com&utm_medium=social&utm_campaign=tedsread.

²⁹ Asia A. Eaton, PhD, et al., *2017 Nationwide Online Study Of Nonconsensual Porn Victimization And Perpetration*, 22 (June 2017) <https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf>.

³⁰ Mary Anne Franks, *Congress Failed Katie Hill*, NEWSWEEK (Nov. 4, 2019) <https://www.newsweek.com/congress-failed-katie-hill-opinion-1469623>.

³¹ *Id.*