Evaluating New York’s “Revenge Porn” Law: A Missed Opportunity to Protect Sexual Privacy

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Six years after lawmakers first considered the issue of nonconsensual pornography, New York has *criminalized* the practice. We wholeheartedly support the effort in our role as legal scholars and as advocates for the Cyber Civil Rights Initiative (CCRI). One of us (Franks) *drafted* the first *model statute* criminalizing “revenge porn” and worked on New York’s *original effort* to address the abuse in 2013. Together, in 2014, we wrote the *first law review article* calling for the criminalization of “revenge porn.” But our enthusiasm for New York’s long overdue step in *joining* 42 other states and D.C. in prohibiting nonconsensual pornography is tempered by our view that the statute falls short in failing to conceive the problem as involving *sexual privacy*.

Regrettably, New York’s law treats nonconsensual pornography as a form of harassment instead of as a privacy violation. The law’s weaknesses are not the fault of the determined legislators and advocates, including sponsor Assemblyman Ed Braunstein and CCRI Advisory Board member Carrie Goldberg, who fought valiantly for years to keep the bill’s prospects alive and from its being watered down. But despite these efforts, the law is a missed opportunity to protect sexual privacy.
The New York law makes it a crime to distribute an image or video showing an identifiable person’s “naked genitals, pubic area, anus or female nipple” without that person’s consent. It applies if the depicted person had a reasonable expectation that the image would remain private and the defendant knew or reasonably should have known about that expectation — so far so good.

New York’s law — like far too many other state laws addressing this abuse — goes astray, however, by reaching only defendants who act with the intent to harm their victims. It requires proof that the defendant acted with “intend to cause harm to the emotional, financial, or physical welfare of that person.” The law’s private right of action also hinges upon proof that the perpetrator acted “with the purpose of harassing, alarming, or annoying” the person depicted in the intimate image.

This limitation seems harmless — at first glance. After all, many cases of nonconsensual pornography, especially those that receive media attention, involve people motivated by personal malice. The colloquialism “revenge porn” reinforces the perception that vengeful ex-partners are the primary perpetrators of the abuse. But this perception is contradicted by reality. People disclose private, intimate imagery of others without consent for a myriad of impersonal reasons, including a desire to gain social status, to brag, to make money, for sexual gratification, or to provide “entertainment.”

Consider the celebrity nude-photo hack, the activities of revenge porn site owners like Hunter Moore or Craig Brittain, or New York City Ballet principal dancer Chase Finlay’s exposure of his girlfriend’s nude images. None of these cases involve ex-partners seeking “revenge,” and none would be punishable under New York’s law. The anonymous hacker who distributed nude photos of Jennifer Lawrence, Gabrielle Union, and other female celebrities had no personal connection to, let alone animus for, their targets. Craig Brittain, the operator of a notorious revenge porn site, claimed that his activities were not intended to “shame[ or] hurt” anyone, but were “for entertainment purposes and business.” Available evidence indicates that Chase Finlay was showing off to a rich donor and his buddies rather than exacting revenge against his then-girlfriend and former ballet student. If New York lawmakers are really trying to tackle nonconsensual pornography, then surely they had someone like Finlay in mind. But the law does not capture perpetrators in the Finlay mold. That is as regrettable as it is predictable.

Empirical evidence shows these anecdotes are not isolated. CCRI’s research has demonstrated that almost 80% of people who disclose private, intimate imagery without consent do not do so out of an explicit desire to harm victims. The fact that perpetrators do not explicitly intend to cause harm does not mean that they do not in fact cause harm. To be sure, the desire to harm or harass can make the harm worse. But the underlying wrongful conduct remains the exposure of private information to the public without consent. Every unauthorized disclosure of private, intimate imagery amounts to wrongful conduct, regardless of motive, because every such disclosure is a violation of sexual privacy.

In conceptualizing harassment as the wrong at issue, the New York law makes a categorical error. The nonconsensual dissemination of someone’s nude image involves an invasion of sexual privacy—the social norms that manage access to and information about people’s intimate lives. Sexual privacy, as one of us (Citron) has argued, is a distinct privacy interest whose recognition is crucial to individuals, groups, and society. It serves as a cornerstone to sexual autonomy, self-determination, and intimacy, and its denial results in the subordination of marginalized communities. The denial of equal opportunity in the wake of such privacy invasions is why one of us (Citron) called for the recognition of “cyber civil rights” more than ten years ago and why we named our advocacy organization the Cyber Civil Rights Initiative.

An often-disregarded fact is that sexual privacy violations impose serious chilling effects on victims’ right to expression. Victims of nonconsensual pornography self-censor to avoid additional harm and exposure. Widespread sharing of intimate images drives victims from online spaces, constraining their freedom of expression. Sexual privacy deserves protection, much in the way that other foundational privacy interests — health privacy, financial privacy, and intellectual privacy — do.

To understand the inappropriateness of restricting the protection of sexual privacy only to situations involving “intend to harm,” consider what it would look like if laws protecting other forms of private information were treated similarly. Imagine allowing doctors to post patients’ pre-op photos to Facebook — photos in which the patients are clearly identifiable by face or name or other identifying information — to amuse friends, make money, or provide sexual gratification, or any other motive other than to harm the patient. If that seems absurd, it is no less absurd here.

In addition to being a categorical error, this approach renders these laws ineffective and duplicative. “Intent to harm” requirements convert what should be a sexual privacy law into a harassment law. Harassment laws already exist at the state and the federal level. If harassment laws were effective in protecting sexual privacy, thousands of victims would not be left without legal recourse. Yet they are. And, worse still, harassment laws generally require a “course of conduct,” which is usually understood to mean at least more than one act or repeated behavior. Perpetrators who make only a single disclosure — for example, if they post online an intimate image once — cannot face harassment charges. Harassment laws also often require that perpetrators communicate directly with victims, while perpetrators of nonconsensual pornography may never tell their victims what they have done.

The insufficiency of New York’s harassment law to address nonconsensual pornography was made patently clear in New York’s first so-called “revenge porn” case: People v. Barber. Ian Barber posted naked pictures of his girlfriend to his Twitter account without her consent. Barber then sent the pictures to his girlfriend’s employer and to his girlfriend’s sister. In February 2014, Judge Steven M. Statsinger noted that New York, like many other jurisdictions, defines harassment as requiring actual communication with a person. The judge dismissed the charge because Barber did not send the images directly to his girlfriend.

The New York law should be amended to make it clear that targets violations of sexual privacy rather than harassment — and to avoid outcomes like the Barber case. That would signal that the wrongdoing requiring criminal penalties and civil recourse is denying people the ability to decide for themselves who sees their naked bodies. It would attest to the serious dignity harm of being reduced to sexualized body parts. It would make clear how invasions of sexual privacy threaten equality, given the stigma that attaches to women and minorities when they are targeted.

It would also recognize the profound betrayal of trust and damage to future intimacy when nonconsensual pornography is perpetrated by an ex-intimate partner, as well as the injury inflicted by the exposure of this intimate information by strangers. New York legislators are not oblivious to this point. The law’s drafters explained that posting someone’s nude images online can “destroy[ ] future intimate relationships.” Once one’s sexual privacy has been invaded, as in the case of nonconsensual pornography, it can be difficult to let one’s guard down and trust others with intimate information. Intimacy depends upon partners treating intimate information with discretion and care, as well as protection of intimate information from exploitation by strangers.

New York’s long-awaited law is a step in the right direction, but it falls sadly short of its original promise to protect sexual privacy.