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Verdict

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JOANNA L. GROSSMAN AND LAWRENCE M. FRIEDMAN

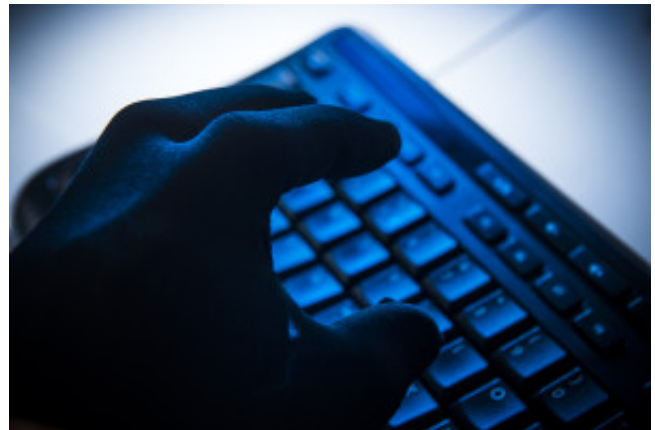
The Power and Peril of the Internet: How Should “Revenge Porn” Be Handled?

In *The Adventures of Charles Augustus Milverton* (1904), a Sherlock Holmes story, Lady Eva Blackwell, engaged to be married to the Earl of Dovercourt, finds herself in a terrible situation. She had at one time written foolish letters to an “impecunious young squire.” If these letters were to come to light, they would destroy any chance of her marriage to the Earl. But now these letters have fallen into the hands of

Milverton, a cruel and vicious blackmailer. He is using the letters as the means to extort money from Lady Blackwell. Desperate, Lady Blackwell hires Holmes to get the letters back, by hook or by crook. Holmes, of course, is successful in the end; he gets the letters, and saves the day for Lady Blackwell—and her marriage.

Lady Blackwell was a purely fictional character; but no doubt there have been countless people in her position: people who wish they could retrieve or wipe off the face of the earth certain foolish, or embarrassing or compromising letters they once had sent. Or, in contemporary societies, foolish or embarrassing or compromising emails or pictures. Blackmail, of course, is only one of the risks such messages pose: more commonly, they might be a source of shame, disgrace, loss of a job, or destruction of a valued relationship. This of course is bad enough.

Today, in the age of the Internet, there is a new and startling development, a vicious and potent descendant of the mess Lady Blackwell was in. This is so-called revenge porn. The definitions of this term vary; in general, it is used to describe sexually explicit or naked pictures or videos of a person, posted or shared online without his or her consent; and with vast potential for harm. The term “revenge” reflects the context: the source is usually a former partner, who posts the photos or videos to shame, humiliate, or embarrass an



ex-lover. In the most objectionable form, it is not only images that are posted, but also identifying information—such as the victim’s name, address, and social media profiles. Websites sprang up expressly designed to make revenge porn possible—sites for the purpose of sharing such images and information. According to a 2014 [article \(http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be\)](http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be) in *The Economist*, there have been at least 3,000 such sites, worldwide; and more of them come into being all the time. To be sure, some of the most notorious of these have been taken down and dismantled.

Revenge porn is one of the unsavory downsides of the Internet. The Internet makes invasions of privacy costless to the invader, instantaneous, damagingly widespread, and almost impossible to undo. But revenge porn, like upskirting (secretly taking pictures up a woman’s skirt and, typically, posting them on the Internet) is not an obvious violation of most existing privacy laws, which were designed with more traditional invasions in mind. (We discuss the emerging law of upskirting [here \(https://verdict.justia.com/2012/10/02/i-see-london-i-see-france\)](https://verdict.justia.com/2012/10/02/i-see-london-i-see-france) and [here \(https://verdict.justia.com/2014/03/12/private-skirt-public-place-surprising-law-upskirting\)](https://verdict.justia.com/2014/03/12/private-skirt-public-place-surprising-law-upskirting).) Revenge porn doesn’t fit these laws in large part because the images, when they were produced, were generally consensual. Sometimes they were taken by the “victim” herself—as a “selfie,” perhaps, and sent in digital form to a partner, who has since become an ex-partner, and a tormentor.

Can something be done? Federal and state governments are now playing a game of catch-up—trying to enact statutes that will restrain this gross invasion of privacy. But, as legislators and advocates have discovered, laws against revenge porn are not so easy to craft. There is, to begin with, the little matter of the First Amendment. It is also hard to write laws that ban just enough conduct, not too much, and not too little.

The Burgeoning Law of Revenge Porn

As awareness of revenge porn has grown, states have begun to see it more as a problem. A dozen or so states have passed laws specifically targeting revenge porn. California’s law dates from 2013. The law added a provision to the state’s disorderly conduct statute, in order to cover revenge porn. It is now a misdemeanor to “intentionally distribute the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private,” but only if the person distributing the image “knows or

should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.”

To violate the law the image must be explicit, there must be an expectation of privacy, and the distribution of the image must cause harm to the victim. To aid in enforcement, California created a special prosecution unit to focus on crimes facilitated by Internet technology, including revenge porn.

In 2014, California also added a civil provision on revenge porn (section 1708.85 of the California Civil Code), creating a private cause of action against someone who intentionally distributes an explicit photograph that was clearly expected to remain private and which causes harm to the person depicted. The elements track the elements of the criminal prohibition, but make it possible for the victim to collect damages.

The first conviction under California’s criminal law on revenge porn came in December 2014. Noe Iniguez, a 36 year old man in Los Angeles, was definitely an ex-boyfriend from hell. His anger was limitless—his victim had felt compelled to get a restraining order against him at one point. He then turned to revenge porn—posting derogatory comments on her employer’s Facebook page, and then a topless photograph, together with a message calling her a “slut” and a “drunk,” and encouraging the company to fire her. He was arrested, prosecuted, convicted, and sentenced to a year in jail.

His behavior was, of course, disgraceful; but before the new law, he could have argued that nothing he did was illegal. After all, he was in possession of that photo because she sent it to him. And traditional invasions of privacy usually involved glimpses or images taken without one’s consent. A Peeping Tom is never invited to look in the window, and the key to the success of the paparazzi is their ability to photograph celebrities when they are unaware of the presence of a photographer.

So did Iniguez’s ex-girlfriend have a right to restrict the distribution of the topless photo after she e-mailed it? Generally, once we send something to another person, whether a letter, or an e-mail, or a picture, we lose the power to control it (as Lady Blackwell learned to her horror). The recipient can cherish it, destroy it, or send it to the newspaper. California’s revenge porn law, however, imposes penalties for distributing such images. Property rights to photos, pictures, and images are never absolute. If you own a painting by a well-known artist, it is certainly yours to hang on the wall, sell, mortgage, and give away; but you do not have the right to mutilate it or destroy it. Now, under the California law, your rights to that naked picture of your partner are also subject to a legal restriction. Noe Iniguez learned that lesson the hard way.

Tackling Revenge Porn

Only some states have laws specifically designed to prohibit or penalize revenge porn. But revenge porn may expose the vengeful to civil or criminal liability through other means—laws and doctrines against stalking, harassment, conspiracy, cyberhacking, and copyright infringement. (Selfies, in particular, can be protected by copyright laws, though only if the “photographer” is willing to register the images with the federal Copyright Office.) But laws that explicitly take on the problem of revenge porn may provide a better remedy.

Some parts of the revenge porn industry have been easier to tackle because they rely on stolen photos. Hacking into someone else’s computer and stealing nude images is more easily addressed under general cybercrime or invasion of privacy laws. Or rules against blackmail and extortion. Hunter Moore the so-called king of revenge porn, who ran a website called “Is Anyone Up.” has been indicted and is facing federal prosecution for a number of crimes, including conspiracy and identity theft. His website raked in significant amounts of ad money, while it was going strong.

Some revenge porn websites have been basically little better than blackmail devices: the site will happily delete material—if the victim is willing to pay. Craig Brittain, who operated a revenge porn site, just agreed to [a settlement \(http://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges\)](http://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges) with the Federal Trade Commission requiring him to take his website offline and delete all the images and personal information he collected. His transgressions, beyond simply trafficking in revenge porn, were that he used deception to acquire revealing photos of women (and paid bounties for images of specific women) and then posted links to a supposedly separate website where the women could pay to get them removed. Brittain apparently operated both the porn website and the takedown services he recommended—making money on the front and back end.

There are also new initiatives to fight revenge porn, such as a new pro bono project reported on in a recent *New York Times* [article \(http://dealbook.nytimes.com/2015/01/29/law-firm-founds-project-to-fight-revenge-porn/\)](http://dealbook.nytimes.com/2015/01/29/law-firm-founds-project-to-fight-revenge-porn/)

[rref=business&module=Ribbon&version=context®ion=Header&action=click&content](http://dealbook.nytimes.com/2015/01/29/law-firm-founds-project-to-fight-revenge-porn/)
. A Pittsburgh-based law firm has rounded up fifty lawyers willing to volunteer time to pursue revenge porn lawsuits. The law firm, according to the article, has teamed up with advocacy groups such as the Cyber Civil Rights Initiative. A website, Without My Consent, aims to “empower” victims to stand up for their rights; it seeks “paths to justice for survivors of online harassment.”

The problem is real enough; but the statutory solution is open to criticism—from both sides. Some have criticized the laws for not going far enough. The ACLU, for example,

criticized the 2013 California bill because it criminalized speech whether or not it rises to the level of a true threat to the victim's safety—in other words, it goes too far. But others complain of just the opposite problem. The California law depends on inflicting “emotional distress”; and this is a fairly vague standard that may require victims to expose even more of their private lives in order to obtain justice. If a student shows his fraternity brothers his girlfriend's selfie, after they break up, has he violated the law? Does it depend on whether her feelings have been hurt? If she, after the break-up, shows his selfies to her friends, can he do the same? Does the law—or society—assume that a naked photo of her is more harmful than a naked photo of him? Most of the complaints have come from women, against men; but recently a woman in Virginia was arrested for violating a new Virginia law, which makes it an offense to put a nude photo on the Internet, without the consent of the owner of the body in question. The woman, aged 28, got hold of an explicit picture of her ex-boyfriend's new girlfriend, and posted it on Facebook.

Revenge Porn in Historical Context

Privacy, in human history, is a relatively recent concept. Nobody had much privacy in the middle ages, even kings and queens, at a time when crowds watched a queen give birth, and the king received visitors while on the chamber pot. Technology and concepts of privacy grew up together—as both friends and enemies. The late 19th century invention of the candid camera made it possible, for the first time, to take someone's picture without that person's consent. This fact was in the background of the classic article by Warren and Brandeis (1890) that launched the right of privacy. Now, today, we have smart-phones with cameras, selfies, the Internet, social media, and the like. The dangers have been multiplied greatly.

It is hard to feel much sympathy for those who go in for revenge porn; and least of all for those who make a business of exploiting the victims. The victims, to be sure, have often been extremely foolish: even without the problem of revenge porn, naked or explicit selfies are not a good idea. Lady Blackwell's letters could be and were destroyed; but the Internet is forever. Like the proverbial elephant, it never forgets. The law can perhaps help out in extreme cases; but in the end the best solutions are self-control with the camera—and more sensible choices of partners and lovers.



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