Revenge Pornography: An Analysis of Privacy, Obscenity, and the First Amendment

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ABSTRACT
An important issue in modern communication law and policy is the emergence of harassment via the Internet and social media. One form of such harassment is revenge pornography, the sharing of sexual images or videos without the consent of the individual depicted, usually at the hands of an ex-lover. In punishing the posters and purveyors of revenge pornography, perpetrators are often convicted of unrelated crimes such as identify theft or fraud, furthering the silence of revenge pornography. This new challenge in law raises some serious questions about the intersections of obscenity, privacy and the First Amendment in the effort to morally ethically take cases to court. To handle both the logistics and impact of persecuting revenge pornography, law students and professionals must consider our country’s history of gendered violence, the intent behind such pornographic posts, and the weight of modern communication as a vehicle for violence and invasion.

Recent Case Law
Elonis v. United States (2015)
• Anthony Elonis posted violent “rap lyrics” about ex-wife and boss to Facebook
• Ex-wife sought protection orders and the FBI investigated the lyrics
• Case brought to Supreme Court after multiple appeals
• SCOTUS declared that while the lyrics were threatening in nature, Elonis’s intent could not be proved

Hoewischer v. White (2016)
• Plaintiff Hoewischer brought her debtor, White, to court after he posted nude photos of her on a specific revenge pornography website
• Judge reports in her opinion: “The fact that a debtor posts pictures to a website characterized as a ‘revenge porn’ website is evidence that the debtor possessed a subjective motive to cause harm.”

• Unconstitutional for registered sex offenders to be prohibited from social networking sites
• Justice Kennedy: “By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources...of human thought and knowledge.”

Law Review Analyses
The Need to Criminalize Revenge Porn: How A Law Protecting Victims Can Avoid Running Ablow of the First Amendment by Adrienne Kitchen
• Privacy tort and copyright claims are insufficient
• Litigation simplified with fines and demands to remove content, but crime is one of widespread and repeated damage
• 60-70% of victims are women
• Revenge porn can lead to even more gendered violent activity
• Laws in place have drawbacks

No Vengeance for ‘Revenge Porn’ Victims: Unraveling Why This Latest Female-Centric, Intimate-Partner Offense is Still Legal and Why We Should Criminalize It by Sarah Bloom
• Societally historically ignores predominately female-felt crimes
• Categorize revenge pornography as sexual misconduct rather than an invasion of privacy or cyber civil rights case
• Harassment statutes do not require plaintiff to be physically touched– but intentionally exposed
• Lawmakers must consider the loss of First Amendment liberty for victims— not just defendants

Conclusions
• Looking at revenge pornography law with a sexual harassment outlook— rather than a digital communications issue— could be beneficial to victims
• Further, shifting the focus from the First Amendment reconciles the issue of developing criminal law without being unconstitutional
• Would further zero in on the implications of all forms of sexual harassment

Limitations
• Constantly changing nature of social media and communication policies
• Lack of prior literature on the subject
• Lack of reporting from victims, making it challenging for courts to even process crimes of this nature

Future Research
Future research should consider:
• The legal history of sexual harassment
• Similar issues, such as cyber-bullying, that also take residence on social media
• The timely spread of revenge pornography content online– and the affects it has on, not only victims, but purveyors, as well

References

Research Questions
RQ1: What are the intersections of obscenity, privacy, and the First Amendment that would allow for criminal law in the world of revenge pornography?
RQ2: Is that possible, or is it, in fact, technically legal for people to post nonconsensual sensitive materials online?

Brief Legal History
• Issue rose to prominence with Hunter Moore and IsAnyoneUp.com
• U.S. Supreme Court has yet to declare a stance on revenge pornography
• Purveyors usually prosecuted through copyright or defamation of character
• About 9 states have criminal law in place (Nebraska is not one of them)
• History of pornography: made and distributed legally to Americans 18 years or older
• Miller Test: The item must have “purient appeal,” must be “sufficiently graphic,” or “lack serious literary, artistic, political or scientific thought and knowledge.” (Miller v. California, 1972).

• Reno v. ACLU (1997) gives utmost First Amendment protections to Internet users; we are all publishers

Further developing criminal law without being unconstitutional

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