
Non-consensual Pornography (Don't Call it Revenge Porn)

Imagine these scenarios...

Jaden is sexually assaulted by a person she considered her friend. While getting a ride home from him, he changed course and took her to his apartment to wait for a friend. Once there, he forced her to take her shirt off and then took several nude photos. After taking the pictures, he sexually assaulted her. Upon her disclosure of the assault, he flooded his contacts with those photos to discredit her.

John received a Facebook request from a beautiful young woman. After chatting for several days John agreed to perform a sex act on video. Unbeknownst to him, the act was taped. The "beautiful woman" began blackmailing John to keep the video secret. Should he stop paying, the video would be sent out to all his contacts with his identifying information.

Theresa was involved in an abusive relationship with her partner. As part of his controlling behavior, he made Theresa strip naked and photographed her. He then used the photographs to coerce Theresa into staying in the relationship. She eventually ended the relationship and he sent the nude photographs to Theresa's conservative family.

Erika, a senior in high school considered sexting to be nothing more than 21st century flirting. She took a nude photograph and sent it to her boyfriend. Her boyfriend shared the picture with five of his friends, one of which posted it on social media tagging Erika in the picture. Erika now is worried that college admissions counselors will view her negatively and diminish her future employment opportunities, in that when she Googles her name, a link to the nude photograph appears.

Ronnie was involved with a man she met online. She realized he was married when a nude photograph of her appeared on her Facebook profile with a link to her address and cell phone number. The picture along with her identifying information was posted by her partner's wife in a vicious act of revenge. All of these scenarios, are classic examples of non-consensual pornography (NCP), more commonly referred to as "revenge porn." The name revenge porn doesn't accurately reflect the damages and implications of NCP. In most cases, revenge is not the motivating factor.

The narrow framing as revenge porn fails to include photographs taken during a sexual assault, for a sexual deviance, as an act of power and control, for blackmail, or for no identifiable motive at all. In addition, the term fails to capture the dissemination of a private, sexually explicit image to someone other than the intended audience which can turn a private and consensual image into public sexual entertainment or pornography.¹ NCP, defined as "the distribution of sexually graphic images of individuals without their consent" is now a crime in the State of Michigan.

Passed on July 25, 2016, the Michigan Legislature, with wide bipartisan support, made the intentional dissemination of sexually explicit visual material without consent a crime. With passage, Michigan joined 34 other states and the District of Columbia in holding NCP offenders accountable with MCL 750.145e which states:

"A person shall not intentionally and with the intent to threaten, coerce, or

Intimidate, disseminate any sexually explicit visual material of another person if

¹ Franks, Mary Anne. "Guide for Legislators." Cyber Civil Rights Initiative. www.cybercivilrights.org (accessed March 23, 2017).

all of the following conditions apply:

- (a) The other person is not less than 18 years of age.
- (b) The other person is identifiable from the sexually explicit visual material.

This subdivision does not apply if the identifying information is supplied by a person other than the disseminator.

- (c) The person obtains the sexually explicit visual material of the other person under circumstances in which a reasonable person would know or understand that the sexually explicit visual material was to remain private.

- (d) The person knows or reasonably should know that the other person did not consent to the dissemination of the sexually explicit visual material.”

Punishment for a first time offender is up to 93 days in jail, a \$500.00 fine or both. Subsequent conviction for a violation of MCL 750.145e is up to 1 year in jail, a \$1,000.00 fine or both.²

The currently enacted legislation follows the nationwide trend of adopting laws designed to hold offenders accountable and give victims some recourse in criminal court.

In 2012 only three states had legislation in place that criminalized NCP.³ Offenders could disseminate nude photographs without the fear of being held accountable in a criminal court of law. This inability to prosecute offenders only emboldened them to spread the photographs to any website they could find. Now however, in addition to the 34 states already

² MCL 750.145f.

³ Cyber Civil Rights Initiative. “Revenge Porn Laws.” www.cybercivilrights.org/revenge-porn-laws. (Accessed March 20, 2017).

having laws criminalizing NCP, legislative efforts are underway in 5 additional states and in the military justice system, making criminalization a priority across the nation with almost all states taking up the issue in an effort to further protect victims.⁴ But as evidenced by the recent Marine Corp photo sharing scandal, work remains in criminalizing this behavior. A recently uncovered Facebook group entitled Marines United revealed that current and former members of the Marine Corp were sharing hundreds of naked photographs of female service members and veterans.⁵ In response, Rep. Jackie Speier, a California Democrat, introduced legislation on March 15, 2017 that would make it a crime for service members to share nude photos and other intimate images without consent.⁶

For Michigan prosecutors, the criminalization of disseminating nude photos to others was a much-needed tool to hold offenders accountable for this conduct. The new law will most certainly be used in conjunction with the current laws targeting frequently co-occurring criminal behavior such as domestic violence, child sexually abusive activity, stalking, extortion, and dissemination of video and images obtained through unlawful surveillance. The new law focuses on those photographs that were consensually taken or shared by the victim, but that are ultimately used to terrorize them. The repercussions for victims of having this type of material on the internet is immeasurable with most reporting irreversible harm. Victims suffer from significant emotional distress including embarrassment, depression, loss of relationships, loss of

⁴ Cyber Civil Rights Initiative. "Revenge Porn Laws." www.cybercivilrights.org/revenge-porn-laws. (Accessed March 20, 2017).

⁵ Brennan, Thomas James. "Hundreds of Marines investigated for sharing photos of naked colleagues." Reveal. [www.revealnews.org. http://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/](http://www.revealnews.org/blog/hundreds-of-marines-investigated-for-sharing-photos-of-naked-colleagues/) (accessed March 20, 2017).

⁶ Seck, Hope Hodge. "Lawmaker to Introduce Bill Criminalizing Military 'Revenge Porn.'" Military.com. <http://www.military.com/daily-news/20147/03/15/lawmaker-introduce-bill-criminalizing-military-revenge-porn.html>. (Accessed March 20, 2017).

employment, having to shut social media accounts and emails, being stalked online and outside of the internet by users who had seen the material online, and even suicide.⁷

The ease with which an abuser or rapist can upload a photo or video to a website to then be viewed by thousands with a click of the button and shared on hundreds more websites make this crime especially torturous for victims. Once on the internet, victims report a limited ability to get the photos removed. Progress has been made in that Google and Bing will remove content when victims request it. Social media platforms such as Facebook, Instagram, Reddit, Tumblr, Twitter and Yahoo do not allow NCP.⁸ However, even if the search platforms remove the links, the hosting webpages, will still have the material online. Attempts to have the websites remove the material are ineffectual at best. Many of the over 3000 sites dedicated to NCP are hosted in countries other than the United States and are therefore not subject to our laws. For those websites hosted within the borders of the U.S. they are broadly immune from liability under Section 230 of the Communications Decency Act and they have no legal obligation to identify posters.⁹

NCP all too often plays a role in intimate partner violence. As in Theresa's case illustrated above, victims will report the coercion that comes after the taking of the pictures perpetuating the cycle of power and control. When the victim attempts to leave the abusive relationship, the batterer will threaten to send the pictures to the victim's family, friends, and employers or even to post them on social media. That fear of being exposed in such a public way often leads victims to remain in the abusive relationship. For others who have had their

⁷ Cyber Civil Rights Initiative. "Guide for Legislators." [Cybercivilrights.org. https://www.cybercivilrights.org/guide-to-legislation](https://www.cybercivilrights.org/guide-to-legislation) (accessed March 23, 2017).

⁸ Cyber Civil Rights Initiative. "Online Removal Guide." [Cybercivilrights.org. https://www.cybercivilrights.org/online-removal](https://www.cybercivilrights.org/online-removal). (Accessed March 23, 2017).

⁹ "Nonconsensual Pornography: Circulating Sexual Violence Online: A Taped Webinar." Amber Morczek. 2017.

private photographs published online they report that the posts encourage strangers to comment on the pictures in vicious ways. It also encourages strangers to approach victims and proposition them in lewd ways leading them to be frightened to leave their homes. Put simply, technology has become another tool of batterers to engage in a systematic pattern of abusive behavior to gain or maintain power and control over their intimate partner.¹⁰ Beyond what their partner had done to them, society often engages in victim blaming with comments like “what did she expect when she took those photos?” or “she never should have taken the pictures in the first place.” This quote sums it up: “Technology is yet another means by which victims of gender-based violence are readily stripped of their dignity, dehumanized, and publicly adorned with shame, anguish and blame.”¹¹ Taking this victim blaming approach allows offenders to escape accountability for their heinous actions. Successful prosecution of offenders under MCL 750.145e holds them accountable for their actions against victims in a criminal court.

In Michigan, prosecutors will use MCL 750.145e as yet another way to combat the violence against intimate partners. While no case has yet made it to the appeals courts, it is widely anticipated that the statute will withstand the future constitutional challenges as cases across the country are standing up in courts in other jurisdictions. For many victims, the criminal conviction may be too little, too late, while for others it may be used in combination with other statutes to hold offenders accountable. Civil remedies are also available for victims seeking redress. In Oakland County, a victim was awarded \$500,000 against an ex-boyfriend who had published nude photographs on multiple websites. In addition to the monetary award, the judge

¹⁰ Department of Justice. “Office on Violence Against Women.” Justice.gov. <http://www.justice.gov/ovw/areas-focus>. (Accessed March 23, 2017).

¹¹ “Nonconsensual Pornography: Circulating Sexual Violence Online: A Taped Webinar.” Amber Morczek. 2017.

in the case issued a permanent injunction against the ex-boyfriend, requiring him to immediately destroy and never republish the photos to third-party websites.¹²

If your client reports being a victim of NCP or being threatened with exposure of NCP, help is available. NCP is a crime and you should explore reporting to local law enforcement authorities for investigation as an option. If you suspect your client has been a victim of NCP even if they have not reported it, you should explore this area with them. Many victims will be too embarrassed to report, or may not believe that anything can be done about it. Anonymous help is also available online at www.cybercivilrights.org including information about online removal of the photographs. Survivors of domestic violence or sexual assault can also seek help from the Michigan Coalition to End Domestic and Sexual Violence or from a local domestic violence or sexual assault service provider.¹³

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¹² Stafford, Katrease. “Oakland County woman gets \$500k in revenge porn case.” Freep.com. <http://www.freep.com/story/news/local/michigan/oakland/2016/08/25/oakland-county-woman-receives-500k-revenge-porn-case/89351938/>

¹³ For a listing of local service providers visit <http://www.mcedsv.org/help/find-help-in-michigan.html>