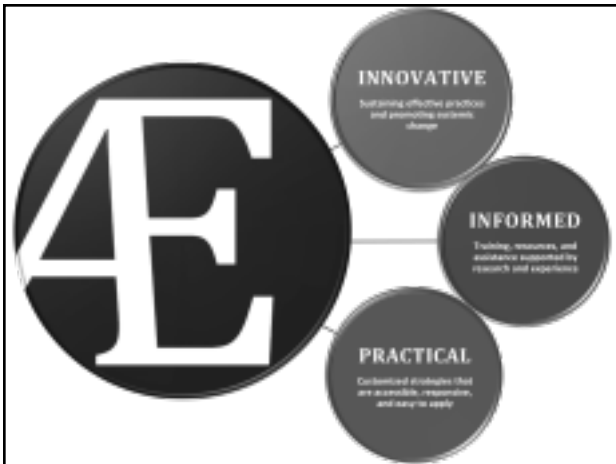


STOP CALLING IT “REVENGE PORN”

Prosecuting Image Exploitation

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN



AEQUITAS

AVAILABLE 24/7 VIA TELEPHONE AND/OR EMAIL

TECHNICAL ASSISTANCE

- Case Consultations
- Research

TRAININGS

- Live
- Online

RESOURCES

- Recorded Webinars
- Model Briefs, Motions, Expert Reports, etc...
- Sample Voir Dire Questions, Expert Examinations, etc...

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SUPPORT

This project was supported by Grant No. 2009-TA-AX-K024 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, and conclusions, or recommendations expressed in this presentation are those of the authors and do not necessarily reflect the views of the Department of Justice.

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OBJECTIVES

- Identify crimes of image exploitation and available statutes that may be used to hold offenders accountable.
- Make charging decisions that hold offenders accountable for the full extent of their criminal behavior.
- Assist the jury in understanding the devastating effects of the crime on the victim and the defendant's responsibility for that harm.

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WHAT IS IMAGE EXPLOITATION?

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IMAGE EXPLOITATION

Nonconsensual creation, possession, or distribution

of an image or images of the victim

nude, semi-nude, engaged in consensual sexual activity, or being sexually assaulted

This isn't about porn; this is about humiliation. There's [sic] plenty [of] naked women on the Internet who are there by their free will and would love to be looked at. I'm not one of them. That's the appeal of this. It's humiliation.

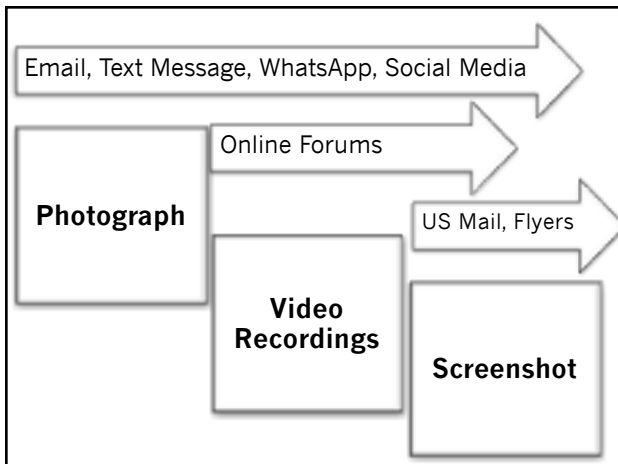
'Online rape' is a hard way to say it, but it's the only way I can make sense of the violation part. You're sexualizing a person and getting off on the fact that she doesn't want to be there.

"Elizabeth," anonymous victim of image exploitation

What might “images” include?

How might images be distributed?

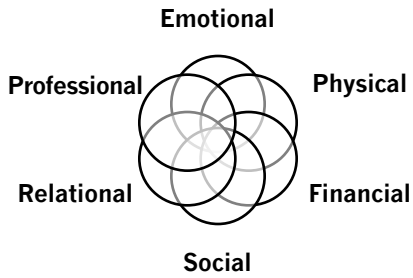
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What type of harm do victims experience?

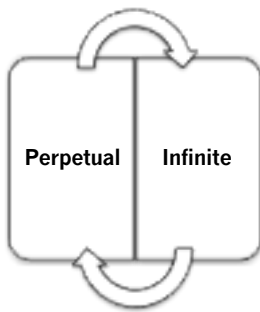
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IMPACT



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UNIQUE HARM



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“Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. I did not choose to be there, but now I am there forever in pictures that people are using to do sick things. I want it all erased. I want it all stopped. But I am powerless to stop it just like I was powerless to stop my uncle.... My life and my feelings are worse now because the crime has never really stopped and will never really stop.... It's like I am being abused over and over and over again.”

Paroline v. United States, 134 S. Ct. 1710, 1717 (2014)
(quoting an impact statement provided by the victim)

CHALLENGES TO PROSECUTION

No comprehensive statute that addresses crimes of image exploitation

- Patchwork
- Imperfect
- Untested
- Narrowly tailored
- Ever changing technology

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VICTIM BLAMING

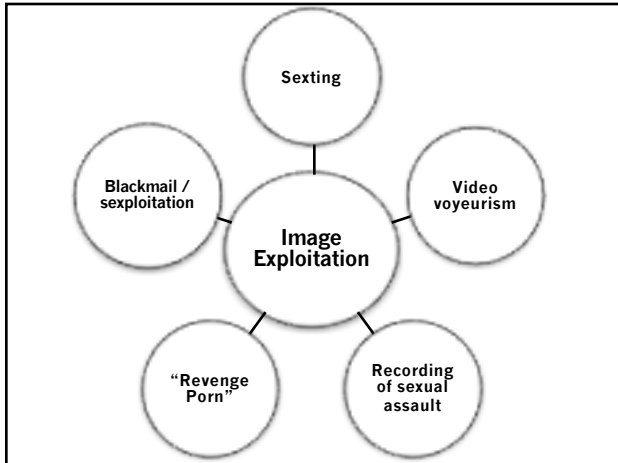
Attitudes of investigators, prosecutors, judges, and juries

- Focus on the victim's behavior, not the offender's
- "If you don't want this to happen, don't take photos"
- "Boys will be boys" attitude allows offenders to escape accountability

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VARIATIONS AND EXAMPLES OF IMAGE EXPLOITATION

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“SEXTING”

- ◉ Sending provocative text or images via a communication device; cell phones, social media, third-party applications
- ◉ Research shows that sexting is typically an emotionally-driven behavior
- ◉ Spotlight is on teenagers engaging in this behavior

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HOW COMMON IS SEXTING?

- ◉ Research driven by concerned parents and advocates fearful that juveniles would be charged with child pornography
- ◉ Studies vary widely
 - 1% - 33%
 - Range of methods used can explain wide variance

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VIDEO VOYEURISM

- ◉ Generally, crime occurs where offenders secretly photograph or videotape a victim in a place where the victim has an expectation of privacy
- ◉ Statutes vary and are being rewritten to address changes in technology and offender behavior

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CAVEAT RE: "REVENGE PORN"

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"REVENGE PORN"

- ◉ Image depicting nudity or sexual activity that is consensually taken or shared, but is then distributed without consent or knowledge of victim
- ◉ Typically intended to embarrass, harass, or harm the victim

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NONCONSENSUAL DISTRIBUTION

Can vary

- Scope
- Intent
- Harm

Posting online may include “doxxing”:

Providing personal identifying information publicly

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“SEXPLOITATION”

Perpetrators with access to explicit images may blackmail victims

- Demand actions
- Extort money
- Sexual favors

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“SEXPLOITATION”

CONT'D

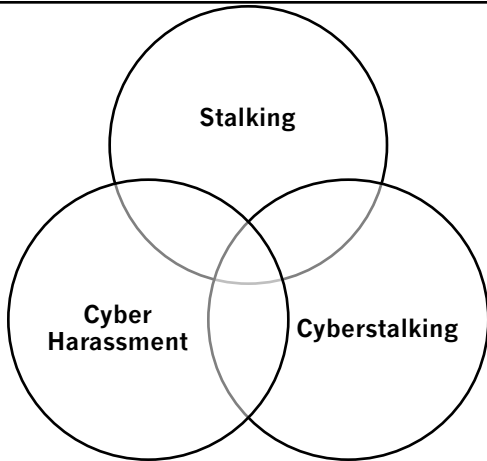
- ◉ Legally possess images
 - Distribute images without consent
- ◉ Gain access illegally via hacking
 - Computer
 - Email
 - Smart phone
 - Social media accounts

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PROSECUTING IMAGE EXPLOITATION

Implementing Existing and Identifying Emerging Laws

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STALKING LAWS

Typical statute will include language requiring the prosecution to prove that the offender engaged in a course of conduct with the intent to threaten, cause distress, or harass the victim

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COURSE OF CONDUCT

Repeated behavior

- How may this be applied where an offender sends an image to multiple people?
- What about one post that is viewed by multiple people?

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INTENT

Typically, statutes include an “intent” element

- Intent to harass
- Intent to cause distress
- Intent to harm

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CHALLENGES

- ◉ “Course of conduct”
- ◉ Communication not directly sent to the victim
- ◉ Proof of intent
- ◉ Misdemeanor charge

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ARGUMENTS

When broad statute language



Includes continuous harassment



Any image uploaded to Internet exists forever



Even one online posting can continually cause harm

WHAT ABOUT THE FIRST AMENDMENT?

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IN THE NEWS...

NEW YORK TIMES, JUNE 1, 2015

Supreme Court Overturns Conviction in Online Threats Case, Citing Intent

WASHINGTON — The Supreme Court on Monday made it harder to prosecute people for threats made on Facebook and other social media, reversing the conviction of a Pennsylvania man who directed brutally violent language against his estranged wife.

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THE CRIME
18 U.S.C. § 875(C)

“Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another” commits a federal offense.

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SUPREME COURT’S OPINION

- Statute didn’t specify mental element for “threat”
- Trial court erred by implying a *negligence* standard (that a “reasonable person” would realize recipient would understand it as a threat)

Teresa Garvey & Joan Meier, *Keep Calm and Understand Elonis v. U.S.*, AEQUITAS (Aug. 15, 2015), <http://www.aequitasresource.org/trainingDetail.cfm?id=123>

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RECORDINGS OF SEXUAL ASSAULTS

- ◉ Overall increase in crimes being recorded and posted online or shared among social network
- ◉ With sexual assault, this compounds harm of assault leading to essentially perpetual harm

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RECORDINGS

CONT'D

- ◉ Victim's assault becomes part of public domain
- ◉ Consequences for those who film or share assault
 - Charged with assault
 - Charged with crimes of image exploitation
 - Other charges as applicable

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VIDEO VOYEURISM AND INVASION OF PRIVACY

- ◉ Federal government and every state has laws protecting individual privacy rights
 - ◉ Video voyeurism
 - ◉ Invasion of privacy
- ◉ Illegal to secretly film or photograph someone nude or engaged sexually

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CHALLENGES

- ◉ When statutes require victims to be “unaware” of recording or that the recording be done in secret
 - What if the victim is aware of recording, but does not give consent?
 - What if the victim is unconscious?
- ◉ Significant gap in exploitation law

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CHALLENGES

CONT'D

- ◉ Problematic application of laws
 - State v. Glas, 147 Wash.2d 410 (2002)
 - ◉ Washington Supreme Court
 - ◉ Statute failed to include public space
- ◉ Challenges when statutes out of date with criminal behavior
 - Facilitated by ever-changing technology

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PRACTICE TIPS

- ◉ Prosecutors should seek to adapt voyeurism and invasion of privacy law
- ◉ Victim always has an expectation of privacy when engaging in sexual activity, especially when being sexually assaulted
- ◉ Argue that sexual assault is the “ultimate invasion of privacy”

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CHARGE CO-OCCURRING CRIMES

Examine role of person making the recording

- More than bystander
- Accomplice liability
- Conspiracy charges may apply
- Charge with failure to report a crime

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THEFT BY EXTORTION OR BLACKMAIL

THEFT STATUTES APPLY

Offender unlawfully gained control of image

BLACKMAIL STATUTES APPLY

Anyone threatening to release explicit images unless certain demands met

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CHALLENGES

Typically, theft, extortion, and blackmail offenses are usually graded by the monetary value of the "thing"

- Creative arguments about value may be necessary
- Charge multiple counts

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HACKING OR TRESPASS

- ◉ Some victims never shared images
 - Law enforcement can gather computer forensic evidence
- ◉ Prosecute using computer trespass or “hacking” statutes

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“SEXTING” AND CHILD PORNOGRAPHY

- ◉ Crimes of image exploitation and particularly “sexting” may violate federal and state child pornography statutes
- ◉ Great concern that “typical teenage” behavior may be criminalized and lead to juveniles being branded sexual offenders

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ADULTS & “SEXTING”

- ◉ Not in itself illegal between adults, but may lead to “revenge porn”
- ◉ Adults soliciting images from children should be prosecuted under child pornography and other existing sexual offense laws

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JUVENILES “SEXTING”

Sexting as sexual abuse vs.
experimental adolescent phase

- 20 states have modified statutes or enacted “sexting” statutes
- Affirmative defenses available based on the victim’s age, lack of distribution, and lack of coercion used to elicit the creation and/or transmission

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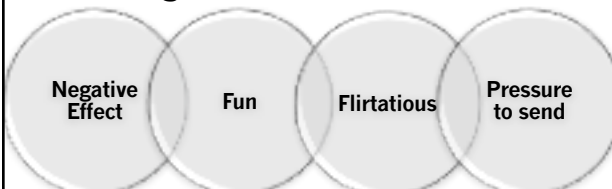
EXAMPLES

- ◉ Nebraska,
 - Juvenile can assert affirmative defense
NEB. REV. STAT. § 28-813.01
- ◉ Nevada
 - Allows for affirmative defense
 - Misdemeanor-level punishment
 - Juvenile cannot be registered as sexual offender
NEV. REV. STAT. ANN. § 200.737

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COMPLICATED MOTIVES IN MINOR-TO-MINOR “SEXTING”

- ◉ Emotionally-driven behavior
- ◉ “Sexting” recalled with remorse



THE NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SEX AND
TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS (2008)

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ANALYSIS

- ◉ Law enforcement must not assume “sexting” is innocuous
 - Review of cases referred to law enforcement showed that ~66% cases involved criminal behavior
 - Adults or minors engaged in nonconsensual, malicious, or abusive behavior
- ◉ Potential harm is immediate, permanent, enduring

THE NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY,
SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG
ADULTS (2008)

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PROSECUTORS MUST BE VIGILANT

Investigating, charging, resolving cases involving minor-to-minor sexting; factors include:

- Consensual or coerced
- Images distributed or uploaded
- Assessing images' potential harm

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“REVENGE PORN”

- ◉ 34 states + DC have laws
- ◉ Almost all other states have pending laws
- ◉ Federal law proposed

34 states + DC have revenge porn laws, CYBER CIVIL RIGHTS INITIATIVE, <http://www.cybercivilrights.org/revenge-porn-laws/>

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Lawmaker pushes back at Peter Thiel's mention of her 'revenge porn' bill

"It is not 'the Gawker bill' or the 'revenge porn bill,'" she said. "It is the Intimate Privacy Protection Act, and it does exactly what its name suggests: protects the intimate privacy of all individuals."

David McCabe, *Lawmaker pushes back at Peter Thiel's mention of her 'revenge porn' bill*, THEHILL, (Aug. 16, 2016), <http://thehill.com/policy/technology/291617-lawmaker-pushes-back-on-gawker-case-backer-thiels-mention-of-her-bill> (discussing Rep. Jackie Speier (D-Calif.) proposed bill)

STATUTORY CONSTRUCTION

- ◉ Distribute or publish images online or via electronic means
- ◉ Victim must be identifiable
- ◉ Offender must have the intent to cause harm, distress, or harassment
- ◉ Offender must know that the victim did not consent

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QUESTIONS

- ◉ What does it mean to publish?
- ◉ Website or messages?
- ◉ Identify victim by name?
- ◉ What is the required intent?
- ◉ Can lack of consent be implied?

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APPLICATION

- ◉ California, December 2014
 - First successful prosecution
 - Under disorderly conduct law
 - ◉ California also approved amendment
 - Includes unlawful distribution of “selfies” shared with offender
- CAL. PENAL CODE § 647(j)(4)(A)

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REVISIONS

- ◉ Laws must be narrowly written to overcome First Amendment challenges
- ◉ New or untested statutes may need revisions due to changing technology

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PROSECUTING IMAGE EXPLOITATION

General Strategies

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COMMON ATTRIBUTES

- Intimate partner violence
- Digital evidence
- Extensive harm

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INTIMATE PARTNER VIOLENCE

Image exploitation part of ongoing pattern of abuse and stalking

- Multiple acts encompassing offender's criminal activity
- Charged or introduced as prior bad acts
- Shows the context of the relationship
- Provides proof of offender's intent

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CIVIL PROTECTION ORDERS



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PROTECTION ORDERS

Specific language

- Prohibiting online communication
- Prohibiting use of victim's image
- Prohibiting indirect contact
- Other prohibitions particular to facts

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CHARGING DECISIONS

- Domestic violence and stalking statutes may apply
- Charge each discrete offense
- Charge each "victim," including family, friends, new intimate partners, and/or co-workers who received images

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DIGITAL EVIDENCE

- Offenders use electronic means to perpetrate their crimes
- Evidence at Trial:
 - Testimony
 - Screenshots
 - Forensic examinations

Jane Anderson, *Following the Digital Breadcrumbs: Utilizing Technology in Sex Trafficking Prosecutions*, AEQUITAS (Dec. 12, 2014), <http://www.aequitasresource.org/trainingDetail.cfm?id=115>

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EXTENT OF HARM

Court or jury must be informed of full extent of harm inflicted

- Victim impact statements
- Testimony from victim, family and friends
- Victim's counselor / therapist
 - ◉ ONLY if victim approves and it does not pierce confidentiality

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IMAGE EXPLOITATION

Not just a temporary
"scandal"

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TYPES OF HARM

- ◉ Monetary harm
 - Loss of employment
 - Medical expenses incurred
- ◉ Professional harm
- ◉ Harm to relationships
- ◉ Ability to live a full and complete life, including online

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IMAGE EXPLOITATION

- ◉ Can cause infinite harm to victim and his / her family
- ◉ Existing criminal laws provide avenues for offender accountability
- ◉ Consequences can be grave

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RESOURCES

- ◉ cyberrightsproject.com
- ◉ cybercivilrights.org
- ◉ cagoldberglaw.com
- ◉ withoutmyconsent.org
- ◉ endrevengeporn.org
- ◉ womenagainstrevengeporn.com
- ◉ dmcadefender.com
- ◉ copybyte.com
- ◉ nnedv.org



END REVENGE PORN

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CYBER CIVIL RIGHTS LEGAL PROJECT

What is "Revenge Porn"?

With the click of a mouse, a letter or a malicious hacker can spread compromising photos or videos of a victim to public websites without the consent of the pictured individual. These sexually explicit images quickly make their way to the attention of the victim's family members, friends, co-workers, classmates, colleagues, and employees. Victims are routinely threatened, stalked and tormented. They have difficulty finding work and often get fired from or are forced to leave their current jobs or schools because of the severity of the harassment. Some victims of nonconsensual pornography have even committed suicide.

Revenge porn, is a form of sexual abuse that involves the distribution of nude/sexually-explicit photos and/or videos of an individual without their consent. Revenge porn, sometimes called nonconsensual pornography, is usually posted by a scorned ex-lover or friend, in order to seek revenge after a relationship has gone sour.

www.womenagainreporn.org

What is the Cyber Civil Rights Legal Project?

CYBER RIGHTS PROJECT, <https://www.cyberrightsproject.com>

First Name:

Last Name:

City:

State/Province:

Country Code:

Country of Residence:

Phone Number:

Phone:

Do you use social media?

By checking this box, you are consenting to receive information regarding the Cyber Civil Rights Legal Project and its activities. Information will be transmitted periodically unless you opt-out. Information will be shared with our partners.

GOING FORWARD

- Review statutes that could apply and make charging decisions based on the entirety of the offender's criminal behavior
- Focus on the offender's actions in the context of the power and control exerted over the victim
- Articulate the immense and perpetual nature of the the harm inflicted upon victims

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