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# A legal perspective on the non-consensual dissemination of sexual images: Identifying strengths and weaknesses of legislation in the US, UK and Belgium

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## ABSTRACT

Non-consensual dissemination of sexual images, often denoted as 'revenge porn', can be described as the act of distributing photos or videos depicting individuals in sexually suggestive or explicit circumstances without consent. The harmful impact can be felt both in the private and professional spheres of victims. Questions were raised across jurisdictions regarding the applicability of existing criminal law provisions or the need for legislative initiatives. After analysing the terminology and scope, this article examines three US state level dedicated laws, the amended UK Criminal Justice and Courts Act, and a dedicated provision in the Belgian Criminal Code. This analysis results in the identification of key elements that could serve as guidance for legislators to amend or adopt criminal legislation. Such provisions should include clearly delineated definitions, acknowledge that the lack of consent of the pictured person is the trigger for criminalisation, provide for relevant defences, and integrate sufficiently deterrent sanctions.

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## 1. Introduction

The distribution of sexually explicit material depicting ex-partners without their consent on websites and social media platforms has increasingly become the subject of popular and scientific debate. Awareness about this phenomenon, often labelled "revenge porn", was first raised by feminist activists and legal scholars in the United States. Gradually, "revenge porn" also made headlines across Europe.<sup>1</sup> Specific statistics concerning the prevalence of this non-consensual distribution of intimate images are rare, and, according to Keats-Citron (2009), most probably underestimate the problem, due to the fact that victims experience fear and embarrassment to file an official complaint.<sup>2</sup>

*Abbreviations:* BCC, Belgian Criminal Code; CCRI, Cyber Civil Rights Initiative; CDA, Communications Decency Act; COE, Council of Europe; USC, United States Code.

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<sup>1</sup> The Guardian, "Revenge porn: 175 cases reported to police in six months", 11 October 2015; Sioen and Vankersschaever, 2014.

<sup>2</sup> Marta Santos Pais, the United Nations Special Representative of the Secretary-General on Violence against Children, recently addressed this issue in a speech at a side event organized in the context of the latest thematic report by Special Rapporteur Juan E. Mendez (SRT) on gender perspectives on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57) (9 March 2016), stressing that "In many countries it is particularly hard for girls to approach police stations or courts, for fear of verbal intimidation and harassment, and of seeing their testimony dismissed. Once they enter the criminal justice system, girls are at risk of stigmatization and violence that may be worse than what they experienced in their homes and communities. For justice systems to be responsive to the specific situation of girls and sensitive to the challenges they face, the underlying causes for girl's involvement with the criminal justice system need to be assessed and addressed." - See more at: [http://srsg.violenceagainstchildren.org/story/2016-03-10\\_1441#sthash.sCBF8w6a.dpuf](http://srsg.violenceagainstchildren.org/story/2016-03-10_1441#sthash.sCBF8w6a.dpuf) dc 1 April 2016.

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The dissemination of “revenge porn” is an intrusive act that often leaves its victims emotionally and psychologically paralysed and, in some cases, socially and professionally ostracised (Desai, 2015). Currently, this phenomenon mostly occurs in the online environment on social media platforms (such as Facebook – Bartow, 2008; or YouTube), mainstream porn sites and dedicated revenge porn websites (Franks and Keats-Citron, 2014), and through photo and video apps – though it also takes place offline. Consequently, the effects can be far-reaching as today’s technologies and ever increasing network availability allow every individual to post, copy and share these kinds of visual content with just one click. Once the material has been uploaded, the number of possible viewers can grow exponentially over the course of mere hours and days. Its harmful effect can be further exacerbated by the never-ending circulation of the images, causing perpetual re-victimisation. Once images are posted online it is nearly impossible to remove them (Kitchen, 2015). Also, the uploaded images are often accompanied by personal information of the victim (real name, home and work address, phone number, e-mail and a link to their social media profile) – a practice known as ‘doxing’ (Parkin, 2014),<sup>3</sup> which leaves the victim exposed and unable to stave off further harassment, both online and in real life (Lichter, 2013). Following such online exposure, there are records of victims having lost their jobs, suffering from anxiety and depression and even committing suicide (Dahl, 2013).<sup>4</sup>

The toll that “revenge porn” takes on its victims – and on society at large is high. The question therefore rises how a society can and should respond to it<sup>5</sup>. The advent of new, easily accessible and user-friendly technology which enables an ever growing population to be connected to the Internet anywhere, anytime, has forced legislators to review their approach to online crimes of a sexual nature, in particular towards girls and women (Franks and Keats-Citron, 2014). Across different jurisdictions both activists and lawmakers raised the question whether existing (criminal law) provisions could be applied in instances of “revenge porn” or whether amendments to existing legislation or new legislative initiatives were necessary. Where the latter option is chosen, the subsequent question is which essential elements such provisions should contain.

Of course, any law that targets a behaviour as complex as “revenge porn” presupposes a profound understanding of that particular behaviour. Hence, the notion of what is commonly dubbed “revenge porn” and the broad range of behaviours that fall under its scope will be examined first. Next, this article aims to identify key strengths and weaknesses of criminal legislation addressing “revenge porn”. Since “revenge porn” first appeared in the United States at the turn of the century, a significant number of state-level governments have introduced legislation specifically dedicated to deal with this phenomenon. Drawing on this decade-long experience with “revenge porn”, we first explore the three most pertinent American state-level statutes. Once we have established their characteristics, we examine and assess recently adopted legislation in the United Kingdom and Belgium and compare these instruments to those developed in the United States. These analyses, which lead to a visual mapping of key elements, aim to contribute to a critical reflection on the appropriate scope of criminal legislation taking into account the complexity of non-consensual dissemination of sexual images and the role of other actors and actions to prevent or reduce the harm that is caused by this phenomenon.

## 2. Dismantling terminology and scope

Mainstream media often define “revenge porn” rather narrowly, describing a scenario where a scorned ex-lover posts naked, consensually taken pictures of a person on the internet (Sioen and Vankersschaever, 2014).<sup>6</sup> The phenomenon, however, goes far beyond that, both in scope and complexity. In this section, we describe the scope and notions that are used to describe the behaviour that is at the centre of our analysis, and reflect on the societal as well as the legal impact thereof.

Making abstraction of how and under which circumstances the nude imagery originally came to be and regardless of which medium is ultimately used to disseminate the images (via the Internet or using flyers or posters in an offline environment), the defining act is the disclosure of the nude or sexual images to third parties against the will of or even unbeknownst to (and thus without the consent of) the person pictured (Henry and Powell, 2015). As such, there are two basic steps to be discerned: the primary step where the explicit imagery of person A is created and subsequently falls into the hands of person B; and the secondary step where person B distributes the images or makes them accessible to third parties against the will or without the knowledge of person A. Regardless of what happens at the primary level where person B is either handed the explicit material willingly by person A who trusts the images will remain private or person B uses deceitful or even criminal means to somehow procure the images from person A (theft, hacking, voyeurism, ...), the intentional act of disclosure by person B without the consent of person A, which happens at the secondary level, constitutes the behaviour analysed within the context of this article.

Despite the term’s prevalence in both mainstream media and scholarly literature, the notion “revenge porn” is in itself problematic for several reasons (Franks, 2013a). First, the word “revenge” creates the impression that such acts are exclusively

<sup>3</sup> “[A] slang term for document tracing, which is when a person’s personal details—home address, phone numbers, bank details, and, in some cases, social-security number—are made public on the Internet. Doxing carries with it a tacit invitation to harangue and harass the subject” (Parkin, 2014).

<sup>4</sup> Moreover, research conducted by Henry and Powell has shown that the mere threat of the exposure or dissemination of intimate imagery or the refusal to delete such images is often used within the context of domestic and family abuse (Henry and Powell, 2015).

<sup>5</sup> United Nations member states “are urged ... (c) to review, evaluate and update their criminal laws in order to ensure that: (i) ... (ii) Individuals can be prohibited or restrained, within the framework of their national legal systems, from harassing, intimidating or threatening women; (iii) The laws on sexual violence adequately protect all persons against sexual acts that are not based on the consent of both parties;” (article 14 of the Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (Resolution 65/228)).

<sup>6</sup> 80% of all revenge porn cases in the US occur online (Stokes, 2014).

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