

"REVENGE PORN" AS SEXUAL HARRASMENT

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In early 2014, Amendment 10 to Israel's Prevention of Sexual Harassment Law entered into effect. The legislature passed this amendment in recognition of the fact that the virtual realm provides fertile ground for sexual offenses. Under the amendment, publication of a sexually explicit photograph, film, or recording without consent of the subject, where such publication is likely to humiliate the subject, constitutes sexual harassment.

In the past, the impact of publication of offensive material had been limited in scope, in that it was not easy to locate, and usually resulted in localized harm for a short period of time. With the advent of the virtual realm, however, the publication and dissemination of a photograph can result in boundless, irreversible (sometimes not even technically deletable), and ongoing harm. And the ease of use of the Internet, social media, and messaging applications provide an accessible and convenient platform for the dissemination of such sexually offensive material. Thus, dissemination of sexually offensive videos and photographs, with primarily female subjects, has become widespread. As such, it quickly became clear that there was a need for a legal mechanism directed at such behavior so that the Internet would not become a lawless domain with no oversight via criminal jurisprudence.

In recent years, there have been many instances in which sexually explicit images have been disseminated via the internet without the subject's permission. In one such case, the complainant's previous partner published videos of sexual relations between the two of them. Such unauthorized publication breached the man's obligation with regard to her, and appeared to have been done with the express intent to humiliate her. The complainant testified that the publication had resulted in significant emotional damage such that she required psychological and psychiatric treatment and was left with emotional scars. Here is an excerpt from the woman's testimony before the Knesset Committee on the Status of Women and Gender Equality:

I had a boyfriend with whom I lived for six months. We lived together. We decided to capture an intimate moment on his cell phone. When we broke up, he decided to send it to his friends. It was spread all over the country, as his friends sent it to their friends, and they to their friends. It spread like wildfire all over the net. Everyone I know saw it. Everyone I hadn't known before but met got a copy. So many people saw it. It destroyed my life. From the time this happened, and everyone saw it, including my family, and closest friends - just everyone, my brother, my parents - I can't get back to my normal day-to-day life. I don't consider this an invasion of privacy; I consider it rape in front of the entire country. I feel like it's virtual rape, rape via the Internet.

Such actions, which have been dubbed "revenge porn", can have additional physical and emotional consequences. Citron and Franks report that following the original offensive publication, some women have suffered further assault when strangers turn to them requesting sexual favors. Fear and suspicion of unknown men contacting them to request sex have resulted in significant disruptions in daily activities of the victims, to the extent of absences from work and even fear to leave the house alone. Some have attempted, and even succeeded, in committing suicide. The damage resulting from the publication of such sexually explicit material can have significant ramifications on the victim's economic well-being as well. Women have lost their jobs and been unable to find new ones after their photographs have been published, often accompanied by identifying information.

The incident cited above, and similar incidents, spurred the legislation of Amendment 10 to the Prevention of Sexual Harassment Law. One innovation is that it is now possible to indict not only an individual who published sexually explicit photographs on the Internet without the consent of the subject but also one who distributes such a photograph via a messaging service, such as WhatsApp.

This Israeli legislation tracks the worldwide trend of recognizing the severity of the phenomenon and addressing it within criminal jurisprudence. Laws penalizing the unauthorized publication of sexually explicit photographs or videos have been passed

in several jurisdictions in the United States; as of 2019, Forty states had passed such legislation.

California, for example, criminalized activities that fall into the revenge porn category. A person who disseminates media that includes images of intimate parts of someone else's body, where that individual is identifiable, and where the parties had agreed that the media would remain private, is subject to six months in jail and a fine of 1,000 dollars. Elements of the crime include the intent to cause serious emotional distress and that the victim did indeed suffer such distress. And Pennsylvania legislation also prohibits publication of images of a naked body or sexual intercourse with intent to harass. However, here the defendant must be a prior or current sexual or intimate partner of the victim.

Israel, then, has gone further than the United States with respect to both the definition of the criminal offense and the severity of the penalty. As opposed to the situation in most U.S. jurisdictions, Israeli law requires no proof of either an intent to harass or actual injury that results from the publication. Similarly, there may be criminal responsibility even without the exposure of intimate body parts. And while several U.S. jurisdictions provide for a penalty of six months' incarceration or a minimal fine, Israeli law calls for a sentence of up to five years in prison.

Some are of the opinion that a more appropriate method of dealing with the phenomenon of revenge porn is via civil legislation, with a focus on restoring the original situation by removing the offensive material from the net and heightening censorship by various digital gatekeepers as well as suing the offender for damages. I am of the opinion, however, that the application of criminal jurisprudence to the offense of publishing sexually explicit material is appropriate, at the normative level, considering that the injury to the victim's dignity, privacy, and freedom by the publication of a sexually explicit image, without her consent, (particularly considering the almost boundless dissemination once such material is available on the Internet) is particularly severe, to the point that victims describe it as irreversible damage that has completely changed their lives beyond recognition. These values, dignity, privacy, and freedom, are social values that should be protected within criminal jurisprudence,

particularly where the infringement upon them is severe, and the protection of such values underlie the criminalization of such acts as: kidnapping, unlawful imprisonment, rape, lewd acts, and invasion of privacy.

Not only should such behavior rightfully be penalized under criminal law, civil law is not capable of preventing these acts. Civil law alone will neither deter the potential offender nor compensate the victim. In many cases, the victim does not have the resources necessary to sue the offender, thus weakening the deterrent effect significantly. Even if a lawsuit is filed, it is far from clear that the victim will be properly compensated, particularly if the offender is not wealthy. And since she will often realize this, it serves as yet another reason not to bother filing the suit in the first place.

Amendment 10, however, has created a number of legal difficulties that cannot be easily dismissed. I would like to focus on two of these.

The provision states that publication of a sexually explicit photograph, video, or recording of an individual may, under certain circumstances, be considered sexual harassment. The provision is unclear, however, regarding certain situations. For example, what about publication of a photograph of a nude woman, accompanied by a caption identifying her, with the express intent to humiliate the woman. The photograph, however, is not actually of the woman mentioned but of someone else entirely. It is possible to argue that the individual who published the photograph would not be guilty under the provisions of amendment. Clearly, it is not possible to identify the subject of the photograph as the named person, since it is actually a different woman. However, the rationale behind the provision would allow for conviction in such a case, since the purpose of the amendment was to protect in individual's dignity and privacy from an offense that is sexual in nature. The assumption is that publication of sexually explicit images, without consent of the subject, may well offend and humiliate that person significantly, thus infringing upon her dignity and privacy. In this case, however, attaching the name of one person to the image of another may well embarrass and humiliate the person mentioned because people will believe that she is the one pictured. Failure to include such cases under

the law not only undermines the law's effectiveness but creates a serious lacuna in the law itself.

An additional issue arises with regard to the good-faith exception entrenched in the offense itself. The provision establishes good faith as a defense "if the publication was done in good faith, considering all of the circumstances of the publication, its content, form, scope, and purpose." The question is whether it is indeed appropriate to grant such a defense to a person who publishes sexually explicit material about someone else simply because there was no intent to offend. For example, what about a situation in which someone was aware that such publication could be humiliating but claims that his intent was a harmless prank? Should he have a right to the good-faith defense, which applies only in situations where all elements of the offense exist?

And assuming there is room for a good-faith defense, how does it operate with regard to the responsibility of secondary disseminators, that is those who receive the image from the original publisher and pass it on? Such chain dissemination of sexually explicit images via email or messaging services is quite typical. Clearly this increases the harm exponentially.

It is possible to describe the relationship between the original publisher and subsequent disseminators as one between a creator of harm and a facilitator of harm. The former is the proximate cause without which there would be no offense, while the latter contributes to the damage that the first creates by supplying conditions that preserve and intensify the damage, particularly in the virtual realm. As such, the actions of the original publisher, who created the risk of harm, are more serious, in the normative sense, than the actions of later disseminators.

So the question remains: to what extent should society hold the secondary publishers accountable in light of the good-faith defense? Clearly we must consider the secondary publisher's intent in light of the sexually offensive nature of the material and the lack of consent of the victim along with the extent of the injury caused to the victim, which is the sum of the egregiousness of the content itself and the scope of the publication. As such, where the secondary publisher is completely aware of the elements of the offense and intended to injure the victim, and the injury was indeed

magnified by further dissemination, such publisher should be held accountable under the law. Furthermore, where the secondary publisher was not aware of all of the circumstances but should have realized such circumstances may exist, and the degree of injury is great due to the nature of the material and scope of publication, a good-faith defense should not be available. However, there should be some distinction with regard to the severity of penalty between the original publisher and any secondary publisher.

On the other hand, where the secondary publisher had reason to believe that the potential injury to the victim was not likely to be great, perhaps such individual should be able to rely on a good-faith defense. However, where the secondary publisher was aware of the circumstances of the original offense, even if the injury to the victim is relatively low, clearly with regard to punishment the offense has occurred. Nonetheless, if the content was not particularly egregious, and the scope relatively limited, it may not make sense to prosecute the secondary publisher. In making this decision, it would be appropriate to consider the precise role of the secondary publisher in facilitating the offense.

In conclusion, this amendment, which includes within the category of sexual harassment the publication of a sexually explicit images without the subject's consent, is consistent with the growing trend in the United States to criminalize such activities. This trend is motivated by the realization that the Internet provides a simple and easy way to cause serious harm to an innocent victim. With just a few clicks, it is possible to upload a nude photograph or video, with the intent to take revenge on someone, resulting in severe and long-lasting physical, emotional, and financial consequences for the victim. The Israeli legislature has done well in not ignoring this issue and in including it within the rubric of normative sexual offenses.

In my presentation I would like to point out a significant conceptual difference between the two legal systems (Israel and United States): While in the United States the distributor's behavior has been classified as a violation of privacy or as a crime of harassment in general, in Israel, the behavior was classified as a sexual offense for all intents and purposes. In the lecture I will show why the Israeli legal system classified the behavior as a sexual offense with reference to the harm caused to victims of revenge pornography and with reference to the violation of sexual autonomy and

dignity due to the publication of a sexually explicit picture or video; On the other hand, I will show why most countries in the United States chose not to regard this phenomenon as a sexual offense.