

More than ‘Revenge Porn’: Image-Based Sexual Abuse and the Reform of Irish Law

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Summary: In the past few years, there have been a worrying number of press reports detailing the extent and harms of ‘revenge porn’. In response, governments across the world have begun to take action, often adopting new criminal laws. However, both the term ‘revenge porn’ and many of these new laws are limited and fail to cover the nature and breadth of this growing phenomenon. Accordingly, the current law reform discussions in Ireland are taking place at an opportune moment. Ireland has a real opportunity to learn from the mistakes of other jurisdictions and to introduce an effective package of measures to reduce the prevalence of these pernicious practices. But in doing so, it will be vital that law and policy looks beyond the paradigmatic example of ‘revenge porn’, where a vengeful ex-partner shares private sexual images without consent. To be truly comprehensive, and to ‘future-proof’ legislation in a context of rapidly changing technology, the legislation must encompass the range of activities increasingly understood and conceptualised as ‘image-based sexual abuse’.

Keywords: Revenge porn, image-based sexual abuse, non-consensual pornography, online abuse, digital abuse.

Introduction

In the past few years, there have been a worrying number of press reports of the growing phenomenon colloquially known as ‘revenge porn’. In one recent Irish example, a sexually explicit video was uploaded by a malicious ex-partner to a pornography website and it had 10,000 views before the victim–survivor found out about it (Ward, 2016). Speaking about the experience, the victim–survivor talked of how this was a violation of her trust and basic human rights. She also urged a change in the law, as there was little the authorities could do to challenge her ex-partner’s actions.

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This is just one example of the harmful and often devastating impact of having private, sexual images created and/or distributed without consent. With the ubiquity of the smartphone, these practices have become ever more prevalent. In response, governments across the world have begun to take action. New laws have been adopted in England & Wales, Scotland, Israel, Japan, Canada, New Zealand, Victoria (Australia), and over 30 states in the US. Many more countries are currently debating reform, including South Africa, Iceland and parts of Australia.

Accordingly, the current law reform discussions in Ireland are taking place at an opportune moment. Ireland has a real opportunity to learn from the mistakes of other jurisdictions and to introduce an effective package of measures to reduce the prevalence of these pernicious practices. But in doing so, it will be vital that law and policy look beyond the paradigmatic example of 'revenge porn', where a vengeful ex-partner shares private sexual images without consent. To be truly comprehensive, and to 'future-proof' legislation in a context of rapidly changing technology, the legislation must encompass the range of activities increasingly understood and conceptualised as 'image-based sexual abuse' (McGlynn and Rackley, 2017a).

What's the problem?

'Revenge porn'

In the classic case of 'revenge porn', a malicious ex-partner distributes private, sexual images without consent of the person(s) in the images. These images – typically posted on social media platforms such as Facebook or Twitter – often end up on one of many websites specifically dedicated to 'revenge porn' and/or commercial pornography websites. As the images spread they attract user comments, most of which are extremely abusive and sexualised. Often personal info is posted about the individual, including her (and it is usually her) name, social media details and sometimes a home address.

Women are far more likely than men to be victim-survivors of 'revenge porn' (Halliday, 2015). Figures from the UK's Revenge Porn Helpline show that 75% of 1800 calls over six months were from women (Government Equalities Office, 2015). Similarly, snapshot data of a 'revenge porn' website over a 28-day period found that just 18 (5%) of the 356 new posts featured men (Whitmarsh, 2015). However, while most online abuse is gendered and misogynistic, and victim-survivors are therefore predominantly women, men who do not conform to

conventional masculine norms or stereotypes are at greater risk of abuse and harassment than other men.

The impact on the victim–survivor can be devastating. They often feel shame and humiliation, and experience abuse and harassment – as well as fearing for their personal and physical safety. And the harm is ongoing: taking down these images is extremely difficult, and even when this does happen, victim–survivors’ online and personal lives are often scarred for years.

Hacked or stolen images

The above scenario is the tip of the iceberg. Revenge is just one form of motivation for this type of abuse. Others are financial gain (including blackmail) or notoriety. In these cases, the victim–survivor is unlikely to be known personally to the perpetrator. A familiar example here is the hacking of a number of celebrity iCloud accounts, including that of the actor Jennifer Lawrence, and the subsequent posting of their private sexual images online in 2014 (Farrell, 2014).

Domestic abuse and violence

Sharing – or the threat of sharing – private sexual images without consent of all the individuals involved is also used as a measure of coercion and control in abusive relationships. For a number of years, Women’s Aid in Ireland has been raising awareness of the growing problem of online technology being used to perpetrate abuse and harassment, including using the Internet and social media to share intimate images and videos without women’s consent. Often the videos and images are created without consent, and the threat of distribution is also used as a particularly potent method of instilling fear in victim–survivors. Such abuse is extremely harmful:

Women feel that their privacy has been invaded and that they have no control over their lives. Women experience anxiety, feel vulnerable and fearful, having difficulty in concentrating and sleeping. Women have to change their contact numbers and email addresses, close down social media accounts and in some cases, move out of their homes. (Women’s Aid, 2017)

‘Upskirting’

In the above examples, the harm and abuse are largely the result of the *distribution* of private sexual images without consent. Another reason

why the term 'revenge porn' fails to capture the breadth of harms is that it does not cover the non-consensual *creation* of such images. Creation includes images such as those surreptitiously taken up a woman's skirt – so-called 'upskirting' – and then distributed without consent (McGlynn and Downes, 2015). The ubiquity of smartphones – as well as the development of an alarming array of devices specially designed for these purposes, such as a camera hidden in the perpetrator's shoes (Chong, 2015) – means that these practices are on the rise. Women – and, again, the images are almost exclusively of women (Perrie, 2016; BBC News, 2016) – have been furtively photographed or filmed on university campuses (Siegel *et al.*, 2006), on trains (MacLaughlin, 2016) and in supermarkets (Yensi, 2015). Again, such activities are undertaken for a variety of reasons – money, fame, group bonding and, for some, sexual gratification. The images regularly appear online, usually on the many pornography websites dedicated to this genre. And this is big business. One such website exposed in a national UK newspaper reportedly receives 70,000 views a day and is valued at £130 million (Perring, 2015).

Sexualised Photoshopping

Another example of the non-consensual *creation* of private, sexual images is where a pornographic image is superimposed onto an individual's head/body part, such that it looks as if that individual is engaged in the pornographic activity: also known as 'sexualised Photoshopping' (McGlynn and Rackley, 2017a, 2017b). Sophisticated and readily available technologies not only mean that it is often impossible to tell that edits have been made to an original image, but also that a considerable proportion of non-consensually distributed private sexual images are Photoshopped (Gladstone and Laws, 2013). Indeed, a market has been created around this practice, with websites offering to produce such images (Gander, 2016). While these generated images are not 'real', the harms are very real. Many victim-survivors experience a breach of trust as well as a loss of dignity, harassment and/or abuse (e.g. Jeffreys, 2014; Blott and Martin, 2016). For them it matters little whether the images were 'originally' sexual, or Photoshopped:

the fact that an image has been altered, or is even composed of images taken of different women, does not diminish the potential harm resulting from its dissemination. (Australian Women Against Violence Alliance, 2016: 6)

Sexual extortion

A further form of non-consensually created and distributed private sexual image involves the perpetrators coercing individuals, often but not only young people, into creating and/or sharing private sexual images. These are then used to force further image-creation – a practice known as sexual extortion or, more colloquially, ‘sextortion’. On other occasions, as noted above, webcams, phones or data storage areas such as the iCloud may be hacked or stolen in order to obtain consensually taken private sexual images. The perpetrators can then use the threat of public dissemination to solicit further images and/or sexual practices and, in some cases, money (Wolak and Finkelhor 2016; Wittes *et al.*, 2016).

Perpetrators of sexual extortion are generally men. Children and young adults (both women and men) are common targets (Wittes *et al.*, 2016), though where victim–survivors are adults they are more likely to be women. For example, in a recent study, a perpetrator was found to have ‘15,000 webcam-video captures, 900 audio recordings, and 13,000 screen captures’ that were predominantly of women (Wittes *et al.*, 2016: 2). Wittes *et al.* conclude that ‘adult sextortion therefore appears to be a species of violence against women’ (2016: 4). The harms experienced by victim–survivors are similar to those experienced by people who have spoken out following acts of ‘revenge porn’. These include adverse impacts on mental health as well as fear of physical assault. Indeed, one victim–survivor described the feeling as ‘like being raped through a phone’ (Wolak and Finkelhor, 2016: 31).

Recordings of sexual assault and rape

Finally, one of the most disturbing examples of non-consensually created private sexual images involves the recording of rapes or other forms of sexual assault. In a notorious US case from 2013, two high school footballers were found guilty of raping an incapacitated young woman after pictures and films of the crime were distributed across social media. The images were used to further harass and humiliate the victim–survivor, blaming her for the assaults and including death threats against her (BBC News, 2013; Carpentier, 2013).

Terminology matters: image-based sexual abuse

The above are just a few examples of what an Irish Law Reform Commission report termed ‘harmful communications’ (Law Reform Commission,

2016). However, we suggest that they are better conceptualised as forms of 'image-based sexual abuse' (McGlynn and Rackley, 2017a). Why, though, if there is general agreement that such images are harmful, does the label matter? It matters because it informs and shapes our response to these actions. It matters because it risks causing misunderstanding of the nature of the harms, which in turn will have adverse impacts on attempts to prevent and tackle this phenomenon. And it matters because – contrary to the views of the Law Reform Commission – these actions should be recognised and categorised as sexual offences. Why?

First and foremost, the images involved are sexual. Countries across the world, including Ireland and the UK, are taking action against these harmful practices *because* the images are sexual. It is because they are sexual that the images go 'viral' and there is a market in their distribution. This is also the reason why the language of 'intimate' images (used, for example, in the recent Labour 'Harassment, Harmful Communications and Related Offences' Bill) misses the mark. Non-sexual (including intimate) images – while certainly capable of leading to harm and abuse – simply do not have the same potency.

Second, the language used when commenting on the images and/or in threats to distribute these or other images is sexualised. The women in the images are harassed and abused for transgressing expected norms of women's sexuality. They are castigated for exercising sexual agency (for taking sexual images or 'allowing' them to be taken). And, far from the impact of such comments being reduced by being online and/or anonymous, the threats (including those to rape) are often experienced by the victim-survivor as real, especially when posted next to their name, address and other contact details.

The sexualised nature of the abuse and harassment further identifies the harms suffered as breaches of women's rights to sexual freedom and sexual autonomy. The impact of image-based sexual abuse is that *all* women are made to feel constrained in their sexual choices and expression. Victim-blaming is rife, with police and media often telling *all* women that the way to prevent such abuse is to refuse to take or share pictures of themselves in the first place. Such advice – while often well-meaning – is clearly directed at the wrong party. And, clearly, everyone should be free to express their sexuality as they choose (so long as they don't harm others), including, if they wish, the taking and sharing of private, sexual images, without fear of these being distributed further without their consent.

Finally, women who have spoken about their experiences of image-based sexual abuse characterise what happened to them as a form of sexual offending and abuse (McGlynn, 2017). American YouTube star Chrissy Chambers described her experiences of such images being distributed worldwide as a form of ‘sexual assault’ (Kleeman, 2015). Similarly, Jennifer Lawrence described the hacking and distribution of her private sexual images as a ‘sex crime’ (*Vanity Fair*, 2014). And, of course, it’s not just celebrities who are victims. Keeley Richards-Shaw from North Yorkshire became a victim–survivor when her ex-boyfriend took and shared sexual images of her without her agreement. Speaking of her experiences, she said: ‘How anyone can fail to see revenge porn as a sexual crime is beyond me’ (*Yorkshire Post*, 2016).

Unsurprisingly then, many organisations supporting women who have survived image-based sexual abuse characterise these harms as a form of violence and sexual abuse against women. In Ireland, Women’s Aid’s excellent work in this area, raising awareness and lobbying for legislative action, is germane not just to the general argument about the need for legislative and policy action, but also because it recognises and emphasises the gendered nature of these harms: ‘our language matters around this issue. It’s not revenge, it’s not porn. It is abuse’ (Women’s Aid, 2016). Not only is image-based sexual abuse part and parcel of the broader phenomena of online abuse and harassment (McGlynn *et al.*, 2017) but its harms are gendered, and include, in some cases, gendered crimes (McGlynn and Rackley, 2017a). And yet, to date, there is no specific law in Ireland addressing these real and increasing harms.

Proposals for a new criminal law in Ireland

In this context, we welcome the announcement in May 2017 by the Tánaiste that a new criminal law will be adopted aimed at tackling a number of forms of image-based sexual abuse including ‘upskirting’ and ‘revenge porn’. It follows the Labour Party’s ‘Harassment, Harmful Communications and Related Offences Bill’, published in April 2017 (Howlin, 2017). This, in turn, was a response to the Law Commission’s report on ‘Harmful Communications and Digital Safety’, published in September 2016, which outlined a comprehensive package of law reforms to tackle the growing problems of online harassment and abuse perpetrated using modern technologies and social media (Law Commission 2016).

Ireland is, then, on the cusp of introducing one of the more comprehensive and effective approaches to tackling these forms of online abuse. It has the opportunity to learn from the inadequacies of the English approach, recognise the benefits of the Scottish legislation, and take the best of the international mechanisms focusing on civil sanctions and actions.

Definition of an 'intimate' image

In order ensure that this happens, however, it is vital that legislators do not become bewitched by specific instances of image-based sexual abuse encompassed in 'media-friendly' terms such as revenge porn and upskirting, and continue to adopt a broad understanding of the many and varied – and potentially as yet unrealised – ways in which image-based sexual abuse can be perpetrated. It is welcome, therefore, that proposals to date have included sexualised Photoshopped images, images of body parts covered by underwear, and images taken in public places within the definition of an 'intimate image'.

Threats, motivations and requirement of actual harm

It is also welcome that, to date, the proposed offence has avoided requiring an enquiry into the motivations of the defendant and covers threats to record, distribute or publish such an image, without the consent of the individual(s) depicted. The latter is particularly important in terms of challenging forms of coercive control and abuse in domestic abuse relationships. This progressive stance, mirrored in the comparable Scottish provisions, is absent from the English law and reflects its failure to appreciate the prevalence and significance of such threats. However, the progressive nature of the absence of any focus on the motivations of the defendant is limited by the requirement, contained in the Labour Bill, that the recording, distribution or publication (or threat thereof) of an intimate image without consent 'seriously interfere with the peace and privacy of the person or causes alarm, distress or harm to the other person'. This appears to require the prosecution to prove – presumably by requiring evidence from the victim-survivor – that the defendant *actually* interfered with a victim's peace/privacy or caused *actual* harm to her/him, and is problematic for two key reasons.

First, there is a real danger this provision reifies an 'ideal victim' by pre-determining what is seen to be the 'appropriate' response from victims-survivors. Many victims-survivors do suffer serious harms. However, it

would be entirely appropriate for a victim–survivor to simply be angry at the actions of the defendant, who has still committed a serious offence even if there is no other ‘evidence’ of distress. Second, it may make prosecutions harder in circumstances where a potential victim–survivor may not yet know they have been victimised (for example in cases of multiple victims). If what is required involves not only informing the victim–survivor, but also securing evidence that the defendant’s actions *caused* the distress or harm, there is a serious risk this will involve further intruding on the privacy of victims–survivors and reluctance to support prosecutions.

This is a far more restrictive provision than is provided in most other jurisdictions. In Scotland, for example, the requirement is to show that the defendant either *intended to cause* fear, alarm or distress, or was *reckless* as to this. This requires an inquiry into the intentions of the defendant but not evidence of any actual impact on the victim. Even the restrictive approach of English law (which does not cover reckless intention) only requires an intention of causing distress. In other jurisdictions, such as Illinois in the US, the law requires simply an intention to distribute intimate images without consent (McGlynn and Rackley, 2017a).

Invasion of privacy and/or a sexual offence?

The characterisation of the harms as a breach of the victim–survivor’s privacy is welcome. The Law Reform Commission was right to conceptualise that the ‘posting online [of] intimate images without consent ... involve[s] gross breaches of the right to privacy’ (2016: 1). We know that women experience image-based sexual abuse as an invasion of privacy (Women’s Aid, 2016), but the Commission also locates its harms within a key constitutional right:

the core of the right to privacy is frequently acknowledged to be the concept of intimacy, which includes certain details, activities, ideas or emotions that people generally do not want to share with others, except perhaps close family or friends, and includes the home and family life, correspondence and sexual relations. (Law Reform Commission, 2016: 32)

However, it is important that this focus does not come at the expense of other key understandings of the harm of image-based sexual abuse. The Law Reform Commission’s suggestion that the non-consensual creation and/or distribution of intimate images is not a sexual offence (2016: 17)

is particularly troubling. Though the Commission is not entirely alone in its view – the UK Government has taken a similar approach in resisting the label ‘sexual offences’ (McGlynn 2017) – other jurisdictions have taken the opposite view. Israel, for example, prosecutes ‘revenge porn’ as a form of sexual offence (Yaakov, 2014), and an Australian Senate inquiry recently described the phenomenon as a ‘sex crime’ (Legal and Constitutional Affairs Committee, 2016). It is heartening, therefore, that Denis Naughten TD recently confirmed that the (now superseded) ‘revenge porn’ offence (as introduced by the Labour Party) ‘will also be a sexual offence for the purpose of the Sex Offenders Act 2001, if an individual convicted is sentenced to a term of imprisonment’ (Naughten, 2017). We are hopeful that this will be reflected in any new legislation.

Victim-survivor anonymity

The Commission’s stance in relation to labelling image-based sexual abuse as a sexual offence is also somewhat at odds with its welcome recommendation that anonymity be granted to complainants (2016:106). Anonymity is vital in order to increase police reports and successful prosecutions, as well as to protect complainants from further harm (McGlynn, 2016). Anonymity is commonly extended to complainants of sexual offences, including in Ireland, and it is hoped that new provisions will continue this approach.

Effective enforcement and victim support

Following the introduction in 2015 of the English ‘revenge porn’ offence, there has been an important rise in the number of reports made to the police and the number of prosecutions (though the number of cases resulting in a conviction remains low). Effective enforcement is vital to ensure the effectiveness of any new provision. However, neither criminal nor civil sanctions against a particular individual remove the images from the Internet, or prevent their posting elsewhere. To this end, the Law Reform Commission’s recommendation that a Digital Safety Commission be established to promote education and digital safety and be responsible for take-down processes is vital.

Support for victims-survivors is also essential. This requires sustainable funding for specialist organisations such as Women’s Aid and Rape Crisis Centres. It is incumbent on any Government raising awareness about these harms, and introducing new measures to tackle them, to ensure that victims are properly informed of their rights and

given support. Only if this happens will victims feel able to report and continue with prosecutions. In the UK, the Revenge Porn Helpline has provided support to thousands and is a vital resource.

Beyond law reform: education and public awareness

At the beginning of 2016, there were reports of images of young Irish women being taken from Facebook and posted on various pornography websites (Rogers, 2016). The images were accompanied by highly sexual, pejorative and abusive comments. Many of the images did not involve nudity, but some were ‘cum shots’, where someone has ejaculated over the image and then posted this online. This was not ‘revenge porn’. It is a form of image-based sexual abuse and attempt to exercise power over the person in the image.

However, it is unlikely to fall within the remit of current or proposed criminal laws in this area. Even the broadest law on image-based sexual abuse is unable to cover the myriad ways in which women and girls are currently harassed and abused online. And nor should it. While the criminal (and civil) law is an important coercive tool in this context (McGlynn and Rackley, 2017a), it is also a blunt one.

Fortunately, however, it is not the only resource available to us. Education and prevention campaigns that highlight and address the gendered and sexualised reality of image-based sexual abuse are vital. These are what really matter when the law runs out; when abusive actions do not fall within the scope of the criminal law; when women and men are deciding how to exercise their sexual autonomy and expression. While a new offence is a start towards public recognition of the harm of image-based sexual abuse, it can only play a small part in reducing the prevalence and the underlying culture that creates and legitimises sexual violence, abuse and harassment in all their forms.

Addressing this requires a commitment not just to headline-making legislative reform but also to law enforcement and, among other things, compulsory, age-appropriate education on sexual ethics and respectful relationships. What is needed is education programmes that explore intimate relationships and the increasing use of technology, value sexual expression and autonomy, and emphasise and distinguish between sexual consent and coercion.

And so, while any law on image-based sexual abuse is a welcome addition to the array of legal tools with which to tackle the abuse and humiliation of women, what is really needed is cultural change. We need

a shift in societal attitudes so that it is not just the breach of someone's privacy by malicious distribution of private images – sexual or otherwise – that is condemned, but also the culture of hostility and aggression that feeds and underpins it. The law plays a vital – but ultimately limited – role in bringing about that change.

Acknowledgements

The authors would like to thank Tara Beattie for her research assistance in the preparation of this paper. Erika Rackley is grateful to the Philip Leverhulme Trust (PLP-2014-193: Law), which funded her time on this project.

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