



CYBERSTALKING AND REVENGE PORN

The Power of the State to Combat the Use of Technology in Domestic
Abuse Cases

AGENDA

- Introduction
- Stalking/Cyberstalking
 - *People v. Relerford*
 - *People v. Ashley*
- Nonconsensual Dissemination of Private Sexual Images (revenge porn)
 - *People v. Austin*

STALKING/CYBERSTALKING

- 2009 Amendment
 - Repealed requirement that the defendant have the actual “intent to place [the victim] in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint,” see 720 ILCS 5/12-7.3(a) (1992)
- Elements
 - Knowingly engage in course of conduct
 - Course of conduct can include communication to or about the victim
 - Knows or should know will cause a reasonable person to:
 - Fear for his or her safety or the safety of a third person, or
 - Suffer other emotional distress

PEOPLE V. RELERFORD, 2017 IL 121094

- First District struck down entire stalking statute on due process grounds based on *Elonis*
 - Held that “should have known” or negligence standard violated due process
- Illinois Supreme Court
 - Agreed with State that the statutes did not violate due process
 - Held that criminalizing communication to or about the victim that defendant knew or should have known would cause the victim to suffer emotional distress is facially unconstitutional under the First Amendment
 - Struck “communicates to or about” from the definition of course of conduct
 - Held remainder of statute was severable

PEOPLE V. ASHLEY, NO. 123989

- Fourth District
 - Defendant's due process challenge foreclosed by *Relerford*
 - Defendant's conviction can be sustained based on conduct other than communication to or about victim
 - **This includes "threatens," which remains part of the definition of course of conduct**
- Questions for the Supreme Court
 - First Amendment
 - Is "threatens" consistent with the true threats exception to First Amendment protections?
 - Whether a true threat requires the defendant's subjective intent or mere negligence?
 - Due Process
 - Does the statute capture substantial conduct unrelated to its purpose?

“REVENGE PORN”

- Nonconsensual Dissemination of Private Sexual Images
- Image-Based Sexual Abuse
- Elements:
 - Intentional dissemination of an image of another person
 - At least 18 years old
 - Identifiable from the image itself or information connected to it
 - Engaged in sexual act or whose intimate parts are exposed
 - Reasonable person would know the image was to remain private
 - Knows or should have known the victim has not consented

HOW IS THIS “ABUSE”?

- Direct Harm
 - 93% of victims suffered “significant emotional distress”
 - 82% of victims suffered “significant impairment in social, occupational, or other important areas of functioning”
 - 50% of victims report being stalked on-line
 - 33% of victims report the stalking extends beyond the internet
- Controlling victims
 - Abusive partners use the threat of dissemination to keep victims from leaving or reporting abuse
 - Sex traffickers use the threat of revenge porn to trap unwilling victims in the sex trade
 - Rapists record crime to discourage reporting (and inflict further pain and humiliation on the victim)
- Societal Harm
 - Revenge porn “sends a message to all women that they are not equal, that they should not get too comfortable, . . . that it might happen to them.”
 - Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, Oxford Journal of Legal Studies (2017)

THE FIRST AMENDMENT AND TRULY PRIVATE INFORMATION

- There may be “some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such.”
 - *United States v. Stevens*, 559 U.S. 460, 472 (2010)
 - Slight social value clearly outweighed by interest in order and morality
 - Part of a long tradition of proscription
- The United States Supreme Court has never invalidated a proscription on speech like the revenge porn statute
- Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)
 - Already a long common law history of causes of action protecting privacy interests
 - Inadequate to fully meet that need in a changing world
- Revenge porn statute closely tracks public disclosure tort

STRICT SCRUTINY

- Compelling Government Interest
 - Physical and psychological health of victims
- Narrow Tailoring
 - Intent to harm
 - Defendants motivated by desire to entertain, make money or gain notoriety
 - Heightened *mens rea*
 - Biases and assumptions
 - Technology enables thoughtless/impulsive dissemination or private sexual images
- Current or former intimate partners
 - Friends, co-workers or strangers can inflict just as much harm
 - “Revenge porn” describes only a narrow sub-set of cases

DISCUSSION

