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Does NY's Criminal 'Revenge Porn' Law Need Fixing?

By Bonnie M. Baker
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New York's "revenge porn" law, Penal Law §245.15 ("Section 245.15"), criminalizes the intentional, nonconsensual dissemination or publication of a sexually explicit intimate image of another with intent to harm the emotional, financial or physical welfare of that other person. When signed into law by then-Governor Andrew Cuomo in 2019, Section 245.15 was hailed as a milestone, intended to address a growing phenomenon where individuals maliciously sought to "punish" ex-lovers and others by sharing intimate pictures and videos of them on porn sites and elsewhere.

Simultaneously, the Legislature enacted Civil Rights Law §52-b, which created a private right of action for nonconsensual dissemination and publication of intimate images—as well as for *threatening* such dissemination or publication. A recent New York Criminal Court decision from Kings County focused on the scope of liability under Section 245.15, and simultaneously thrust into the spotlight the question whether *threatening* nonconsensual dissemination of an individual's intimate images should be criminalized under state law.

In *People v. Marvel B.*, 215 N.Y.S.3d 748 (N.Y. Crim. Ct. July 8, 2024), the defendant was alleged to have texted to the complainant, presumably a former sexual partner, pictures of her engaging in oral sex with the defendant in a private bedroom. There was no allegation that the picture-taking or sexual acts themselves had been nonconsensual, but the criminal information alleged that the complainant believed that the pictures would not be disseminated anywhere, that she had a reasonable expectation of privacy, and that she hadn't given the defendant permission or authority to disseminate the images.

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The information also alleged that the defendant had threatened the complainant that he would disseminate the images to all her social media followers and family if she "continued to refuse the defendant." *Id.* at 752. Based on these factual allegations, the defendant was charged with having violated Section 245.15, its New York City analogue, NYC Admin. Code §10-180 (the "City Code provision"), and Coercion in the Third Degree, Penal Law §135.60(3).

The defendant moved for dismissal of all charges, claiming that the information was facially insufficient as to every count. The court agreed and granted the motion.

Turning first to the charge of unlawful dissemination under the state criminal statute, the court observed that Section 245.15 requires the defendant to disseminate the intimate image "with intent

to cause harm to the emotional, financial, or physical welfare" of the complainant.

Reviewing the legislative history, the court determined that the law's animating purpose was to criminalize the nonconsensual dissemination of sexually explicit images *to the public*, that is, outside the confines of an intimate relationship, regardless of whether that relationship was ongoing.

The complainant had a reasonable expectation of privacy that the images would stay between herself and the defendant, but his act of sending them to her did not violate that expectation. The court therefore concluded that the defendant's dissemination of the images to the complainant *herself*, even if unwanted, was not the kind of unlawful dissemination that Section 245.15 contemplates.

The court also held that the prosecutor had failed to allege how sending the images to the complainant had harmed her emotional, financial, or physical welfare. Accordingly, the court dismissed the charges under Section 245.15.

Next, the court determined that based on the language of the criminal information itself, the only subsection of the City Code provision with which the defendant was charged was subsection (b)(1), the nonconsensual disclosure of an intimate image with the intent to cause economic, physical, or substantial emotional harm to the depicted individual. This was significant, because subsection (b)(2)—uncharged in the information—criminalizes a threat to violate subsection (b)(1).

Having concluded that the defendant was charged only with unlawful disclosure under subsection (b)(1), instead of threatened disclosure under subsection (b)(2), the court dismissed the charges under the City Code provision as facially insufficient for the same reasons it dismissed the charges under Section 245.15.

Finally, turning to the charge of Coercion in the Third Degree, the court acknowledged that the information did allege that the defendant had *threatened* he would post and disseminate intimate images of the complainant if she "continued to refuse" him. But the court held that to plead this crime, the information must allege the complainant was "actually compelled to engage in conduct that she had a legal right to abstain from out of fear of what the defendant would do in response." 215 N.Y.S.3d at 755-56.

Noting that the information lacked allegations that the complainant actually engaged in *any* conduct from which she had a right to refrain as a result of the defendant's threats, the court dismissed the coercion count.

With that, the defendant's motion to dismiss the information in its entirety was granted and the case dismissed.

As a threshold matter, *Marvel B.* is significant because it underscores that criminal liability does not arise when partners to an intimate relationship share with each other sexually explicit images, even where one partner may later regret having participated in, and consented to, the making of those images. According to the *Marvel B.* court, the sending of such images between the two original sexual partners is not the kind of "dissemination" that the State Legislature meant to prohibit.

But *Marvel B.* also highlights what some see as a deficiency in the reach of Section 245.15. Arguably, threatening the nonconsensual release to third parties of intimate images is itself a coercive and damaging act, worthy of punishment. But, as noted, while Section 245.15 criminalizes the intentional dissemination and publication of intimate images, it does not criminalize the threat to disseminate or publish such images. Section 245.15's lack of coverage of such threats stands in sharp contrast to the City Code provision, which *does* criminalize such threats—but only within the five boroughs of New York City. To say the least, it is odd that these threats are criminalized only in New York City, but victims of the same threats are unprotected elsewhere in New York State.

This seeming incongruence between Section 245.15 and the City Code provision has not escaped legislative notice. In the spring of 2024, months before the *Marvel B.* decision, the New York State Senate passed S. 7881, which would have amended Section 245.15 to additionally criminalize the threat to disseminate or publish nonconsensual intimate images, just like the City Code provision.

While S. 7881 passed the Senate unanimously, however, it died in the Assembly. And though a similar Senate bill is likely to be reintroduced in January when the legislature reconvenes, there are no guarantees it will pass the Assembly.

Potentially extending criminal liability throughout New York State to threatened dissemination or publication raises concerns that are worthy of deliberation before a new amendment to Section 245.15 is introduced. For example, one consideration could be the impact on teenagers of criminalizing these threats. Many teens engage in "sexting,"—sharing sexually explicit images via electronic means—and it's hardly news that teens experience intense emotions and can be prone to extreme emotional highs and lows. Should some guardrails be added to any potential criminalization of threat-making to minimize the possibility that a teenager's spontaneous emotional outburst, expressed, for example, to an ex-romantic partner in the heat of a traumatic breakup, may subject him or her to criminal liability?

In that regard, for teens—and perhaps everyone else—because a threat to disseminate or publish an intimate image is manifestly different in kind than actual dissemination or publication (the act can lead to perpetual proliferation of the image once it is "out there," while a threat to disseminate or publish cannot), perhaps criminal liability for threats should require that the threat be continuing or repeated in nature, rather than an isolated incident. There is precedent for such an approach. For instance, the repeated nature of the act is an element of harassment in New York's Penal Law. *See, e.g.*, Penal Law §240.25.

Also, as drafted, S. 7881 made both the threat of unlawful dissemination or publication and the act itself Class A misdemeanors subject to the same penalties. But there may be reasons to punish the making of a threat—particularly if it is a one-time threat—less severely than the act. As discussed, the kinds of harm stemming from a threat versus dissemination or publication can be significantly different.

In addition, if both the threat and the act lead to the same punishment, it could mean loss of a potentially meaningful incentive for an individual who threatens in an emotionally charged situation to stand down before proceeding to unlawfully share an intimate image.

Finally, as noted at the outset, the private right of action for unlawful dissemination or publication of an intimate image enshrined in Civil Rights Law §52-b can be predicated on the threat of such conduct, even in the absence of actual dissemination or publication. This means that the victim of a threat already has some recourse which, under the statute, can include injunctive relief, compensatory and punitive damages, and reasonable court costs and attorney fees.

The legislative history to Civil Rights Law §52-b explains that the private right of action was drafted "to work in conjunction with" Section 245.15. New York Bill Jacket, 2019 A.B. 5981, Ch. 109. It does not necessarily follow, however, that criminal liability under Section 245.15 should be made coextensive with the civil remedy available under Civil Rights Law §52-b.

Enlarging the scope of criminal liability should always entail thoughtful analysis of both intended and possible unintended consequences, together with a weighing of relevant policy concerns, including the protection of potential victims and the risks posed to potential offenders. The questions discussed above reflect some of the concerns that warrant careful consideration before our State Legislature seeks to expand liability under Section 245.15 to cover the threat of unlawful dissemination or publication of intimate images.

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