

Closing the sextortion sentencing gap: A legislative proposal

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INTRODUCTION



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On the surface, at least, the sextortion case of Joseph Simone seems far more egregious than does that of Joshua Blankenship. Simone was a wrestling coach at a prestigious preparatory high school in Providence, Rhode Island. He was charged with sextorting “numerous” minor males; prosecutors estimated that he had exploited at least 22 young boys through a social media manipulation scheme, pretending to be a young girl when soliciting initial nude images, and then threatening to release those initial images on Facebook if the boys did not perform more sex acts. Blankenship also ran a social media manipulation scheme—but in this instance, against a single minor female in Maryland, convincing her that she had broken the law herself by sending out a nude photo, and demanding more images in exchange for not telling the police.

But Blankenship was sentenced in federal court, whereas Simone faced trial in state court in Rhode Island, specifically in the Providence Superior Court. The result? The man with at least 22 victims was sentenced to one year in prison and two more in home confinement.¹ By contrast, Blankenship, who had only one victim, received 12 years in prison after pleading guilty to federal child exploitation charges.²

What sort of sentence does conduct like Simone’s get a man in federal court? Another sextortionist, William T. Koch, was convicted in a federal court in Ohio on charges that he too extorted 20 minor males, with one victim as young as 11-years-old. Koch was sentenced to 20 years in prison on federal charges of extortion, exploitation of a minor, and receipt and distribution of child pornography.³

Sextortionists don’t get to decide which jurisdiction prosecutes them. They do, however, get to choose their victims. And it matters a great deal which ones they choose.

Mark Reynolds was sentenced to 14 years in prison on one federal charge of possession of child pornography for sextorting one minor female using a social media manipulation scheme.⁴ Contrast that with Adam Paul Savader, who sextorted between 15 and 45 adult women and received a

paltry sentence of two-and-a-half years in federal prison. Savader was convicted on charges of interstate extortion and stalking. Reynolds received eleven-and-a-half years more in prison than did Savader, even though Savader potentially had up to 44 more victims.⁵ Federal law seems to care a great deal more about children than it does about adult women.

A federal sextortion law, we argue in this paper, is justified by the sheer volume of sextortion cases already being prosecuted in the federal system, the interstate and international character of many of the cases, and the disparate fashion in which these cases are handled.

It also devalues violence in the virtual world, even very real violence, as opposed to violence in the physical world. Consider the disparity between the sentencing of James Bruguier and Karen Kazaryan. Bruguier assaulted one adult woman and one teenager, climbing through the teenager's window in order to rape her. He also had sex with a thirteen-year-old girl in what would later be charged as statutory rape.⁶ For his attacks on these three victims, Bruguier was sentenced to 30 years in prison.⁷

Kazaryan outdid him, at least in victim count, by more than two orders of magnitude. He targeted an estimated 350 women,⁸ leaving his victims feeling “terrorized” and “extremely violated;” one victim testified that she “felt like she was raped.”⁹ Yet because Kazaryan's method of choice was to sextort his victims virtually, rather than to attack them physically, he received a sentence of only five years.¹⁰

Sextortion—as we describe in “Sextortion: Cybersecurity, Teenagers, and Remote Sexual Assault”¹¹—is a form of remote sexual violence. Its victims are children and adults, males and females. Both its perpetrators and its victims are spread throughout the world. And while no two sextortion cases are quite alike, there is a growing number of people targeting victims in the perceived privacy and security of their own homes and committing sexual violence from sometimes thousands of miles away.

While prosecutors have many ways of getting at the crime of sextortion, the assortment of charges across various state and federal districts has so far produced disparate sentences with almost no clear association between prison time meted out and the egregiousness of the crime committed. The severity of the sentence in a sextortion case, according to the data we reviewed, is simply not directly related to either the number of victims or the depravity of the individual crime.

The dramatic disparities at issue in sextortion cases all have, we argue in this paper, either the same root cause or a common exacerbating factor: the absence of a federal sextortion statute. They also all have the same solution: Congress should pass a federal sextortion law, one incorporating elements already present in federal sexual abuse, extortion, child pornography, and abusive sexual contact statutes.

A federal sextortion law, we argue in this paper, is justified by the sheer volume of sextortion cases already being prosecuted in the federal system, the interstate and international character of many of the cases, and the disparate fashion in which these cases are handled, with respect both to each other and to cases prosecuted at the state level and cases involving physical assaults. Such a law would guarantee that sextortionists nationwide are subject to at least one single criminal statute, that weak state laws are backstopped by something stronger, and that the

targeting of adult women victims is not systemically undervalued in sentencing in federal court relative to similar conduct against minors.

This paper accompanies, and assumes familiarity with, “Sextortion,” to which it is a kind of legislative appendix. In this essay, we outline and justify a specific legislative recommendation for a federal law criminalizing online sexual extortions of the type we describe detail in “Sextortion.”

We proceed in several parts. First, we flesh out the disparities to which current law gives rise—disparities which in our view treat similarly-culpable perpetrators vastly differently and give victims radically disparate conceptions of justice. We then describe the need for a federal sextortion law and look at other laws against non-consensual pornography. In the final two sections of the paper, we look at existing federal sex crimes and extortion laws for guidance on a new sextortion statute and sketch out the requisite elements of a new law. We also offer both a possible model text and a series of explanatory notes on the choices and judgments that text reflects.

THE DISPARITIES

The evidence of massive disparities in the way our criminal justice system handles sextortion cases rather jumps off of the data we reported in “Sextortion.” The data, as we suggested above, highlight two major axes of disparity; a third becomes apparent when one compares federal sextortion sentencing to sentencing in the federal system for sexual abuse in the physical, as opposed to the virtual, world.

The first of these disparities runs between the state and federal systems. Quite simply, cases prosecuted in state courts get dramatically lesser sentences than those prosecuted in the federal system. The average sentence in the six state cases in our dataset that have reached the sentencing phases is 88 months (seven years and 4 months). By contrast, the average sentence in the 49 federal cases that have produced a sentence less than life in prison (one case has produced a life sentence) is, by contrast, 349 months (just over 29 years).

There are several reasons for this astonishing gap. Some states have evidently weak laws. The federal system, by contrast, has particularly robust sentences available in child pornography cases.

Moreover, the federal government has significantly greater resources for the investigation of these crimes than do local police departments. As a general proposition, if you are a sextortionist, you don’t want to get prosecuted in federal court.

But the federal courts are themselves inconsistent. The second major disparity is the gap within the federal system between those who victimize children and those who victimize adults. Within the federal system, the length of a given perpetrator’s sentence turns less on the number of victims or the brutality of the conduct involved in the case than on whether the victims are minors or adults. Of those cases that involved minor victims, the sentencing range varied from seven months to 139 years imprisonment, with a median of 288 months (24 years) and a mean sentence of 369 months (31 years). Cases that involved only adult victims, by contrast, involved sentencing ranges from one

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month to six-and-a-half years imprisonment, with a median sentence of only 40 months and a mean sentence of 38 months. That's a difference of almost a factor of ten.

There's also a significant disparity between adult sextortion cases and physical assault cases within the federal system. In contrast to the median sentence of 40 months in adult victim sextortion cases, the median sentence in sexual abuse cases in the federal system is 120 months, with a mean sentence of 127 months, according to data

from the United States Sentencing Commission.¹² Data from the Bureau of Justice Statistics suggests an even higher average sentence of 228.7 months for federal sexual abuse cases.¹³ This is broadly consistent with the cases we looked at. In the 145 total sexual assault cases we reviewed, the mean sentence under the aggravated sexual abuse statute was 287 months, and in cases in which there were only adult victims, 230 months. Under the sexual abuse statute, the mean sentence in all cases was 160 months, and 100 months for cases in which there were only adult victims. Under the abusive sexual contact statute, the mean sentence was 80 months, and 29 months for cases in which there were only adult victims.¹⁴ In other words, sextortionists who prey on adult victims seem to be treated remarkably lightly relative to their physical assault counterparts.

But the real disparity is probably worse than these data reflect. Most sextortionists, after all, are known to have or are suspected of having multiple victims, while most of the sexual abuse cases in the federal system—at least in the ones we examined—seem to involve single-victim cases. So in other words, sextortionists with many adult victims seem to be receiving substantially less time, on average, than in-person abusers prosecuted for their crimes against only one person. In the five cases of physical assaults we found involving multiple adult victims, the average sentence was 158 months, three-and-a-half times the average sentence for sextortionists with adult victims.¹⁵

NORMATIVE ASSUMPTIONS

Here it is worth pausing to lay out several normative propositions from which the rest of this proposal flows.

The first is that sextortion is closely akin to sexual assault in the physical world. It is coerced sexual activity that—as we describe in “Sextortion”—has severe consequences for victims. It should presumptively, therefore, be treated similarly, in our judgment, to forms of coerced sexual activity in the physical world. We acknowledge that some readers may not share our belief that sextortions are easily analogizable to in-person assaults, and others may have anxieties about the severity of sexual assault laws, believing them either too severe or too lax. As to the latter point, we take no position here except to say that we think the law ought to take sexual assaults very seriously and have robust punishments available for those who coerce sex from others.

As to the propriety of the analogy, the major difference between a sextorted sexual act and an in-person non-consensual encounter lies, in our view, in the former's not having the same capacity in general to produce serious physical injury, as a sexual assault can.¹⁶ But many sexual assaults, like most sextortions, do not produce serious physical injuries—or any physical injuries, for that matter. They are punished severely, however, on the theory both that they constitute an inherent assault on human autonomy and dignity and that they have the capacity to inflict serious emotional and psychological harms. Sextortion, as we show in the accompanying paper, has similar capacity

and real-world effects. We thus propose treating sextortion as broadly similar in character to physical abuse of a sort that does not inflict serious physical injury.

The second proposition is that the sentencing in the federal system more appropriately addresses the severity of sextortion offenses than does the sentencing in many state courts. Here we acknowledge a certain normative bias in favor of the availability of substantial criminal penalties in sextortion cases. There has been, over the years, a great deal of anxiety about the severity of child pornography sentencing in the federal system,¹⁷ and we take no position on the general subject of child pornography sentencing. That said, the sextortion cases we have reviewed involve especially brutal exploitations and abuses. And the sentences meted out in sextortion cases in state courts seem inadequate both in purely punitive terms and, given the high rates of recidivism among sex offenders, in terms of public protection.

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A call for stiffer sentences for sextortionists may seem dissonant with the current political climate, with its suspicion of mass incarceration and longer prison sentences. And to be sure, we do not purport to know what the average sextortion sentence should be. That said, it does seem wrong for a man to get 20 years in prison if prosecuted in federal court and 20 months if prosecuted in state court for similar conduct. And as a law-making matter, one has to make choices about whether one wants to err on the side of incarceration or err on the side of non-incarceration. We have chosen here what we think is a kind of middle ground. The federal child pornography laws impose stiff mandatory minimums and we have eschewed any mandatory minimum sentencing. We do think, however, that these crimes should carry at least *the potential for*, if not a requirement of, far stiffer sentences than the state courts on average are meting out.

The third proposition is that the cases with only adult victims are being substantially under-punished relative to cases with child victims. We do not doubt that the law should treat the abuse of children with particular severity. That said, under current federal law, the sextortion of an adult is not clearly a sex crime at all. Cases with adult victims only tend to get prosecuted as computer hacking cases, as extortions, or as stalkings. These statutes simply do not yield sentences commensurate with the offense sextortionists are committing against their victims. The case with which we opened “Sextortion,” that of Luis Mijangos, is a good example of this problem.¹⁸ Adam Savader is another. Part of the problem here is simply that sextortion is new, so the law hasn’t had time to adapt punishments for it yet. But part of the problem is probably also that victim-blaming is much harder when the victims are children than when they are adult women. The law, probably unintentionally, currently encourages the all-to-common instinct that adult victims somehow asked for it or behaved in a risky fashion that encouraged their victimizations. We should protect adults better. A person who sexually coerces dozens or hundreds of women into sexual activity should be guilty of a sex crime and be punished as such. Again, we acknowledge a bias here in favor of treating these crimes as serious offenses that often will warrant serious prison time.

THE NEED FOR A FEDERAL SEXTORTION LAW

Before turning to the substance of which a federal sextortion law might consist, let's consider briefly whether a new statute is really necessary and why, specifically, this new law is a matter for Congress, not merely for state legislatures. Normally, after all, we think of sexual assault as among the quintessentially state offenses, a matter for the state police power, not for federal jurisdiction. Even the federal criminal laws forbidding sexual assault respect this assumption, being jurisdictionally limited to the “special maritime or territorial jurisdiction of the United States” or in a prison facility—the locations under U.S. control to which state jurisdiction does not reach.¹⁹ Why should sextortion be different in this regard from rape or sexual assault?

In our view, four main factors create between them an overpowering argument not merely for federal jurisdiction but specifically for federal jurisdiction under a new, targeted sextortion law.

Four main factors create between them an overpowering argument not merely for federal jurisdiction but specifically for federal jurisdiction under a new, targeted sextortion law.

The first is the interstate and often international nature of sextortion cases. Rape and sexual assault are seldom interstate, much less transnational, matters—and they can convey federal jurisdiction when they are.²⁰ Sextortion, by contrast, routinely *does* cross state and national lines. Forty-nine cases (63 percent) in our study sample involved significant interstate elements: the perpetrator, for example, victimizing people in other states. At least six cases involved more than 10 jurisdictions, either foreign or domestic. Seven additional cases involved more than five

jurisdictions. Moreover, 16 cases (21 percent) involve a perpetrator who victimized at least one person in a country other than that in which he was himself residing.²¹ A crime's routinely crossing state lines is the most compelling basis for presumptive federal jurisdiction over that crime.

The second factor is the current lack of uniformity with which the justice system treats similarly-situated perpetrators and victims. As we have shown, the patchwork of federal and state law under which we currently prosecute sextortionists is not delivering anything like predictable justice. This argues for some sort of uniform standard under which the law can treat similar conduct similarly.

Third, the federal government has resources for complex computer forensics—as these cases sometimes involve—that are unavailable to most state investigators. Not all of these cases are especially complicated, but the more elaborate of them implicate multiple companies and multiple jurisdictions. The FBI and other federal investigative entities are simply better positioned than local police departments to conduct many of these investigations.

Finally, the volume of cases in the federal system suggests that these factors have already collectively created a *de facto* norm of federal jurisdiction over sextortion cases. Of the 78 cases that constitute our dataset, fully 63 of them are federal cases; only 12 are state cases. The presumption of federal jurisdiction, in other words, already exists—just often under the wrong statutes. The same factors that lie behind this present reality counsel for legislative focus, at least in the first instance, at the federal level.

Is such a law necessary? The argument for a new sextortion statute seems to us similarly clear. The current lack of uniformity is functioning, in practice, as an unjust sentencing windfall for perpetrators either lucky enough to be

prosecuted outside the federal system or who happen to target adult women. We don't pretend to have any certainty as to the proper sentencing range for men who victimize dozens of different women by forcing them to photograph themselves naked or masturbating, but the current sentencing range in those cases seems indefensibly light.

Moreover, and perhaps less concretely, there is civic value in giving a crime a name. Sextortion is not computer fraud and abuse. It is not simple extortion by means of a threat of reputational damage. It is not identity theft. And it is not stalking. It is something else. When in a remarkably short space of years, a society has seen nearly 80 cases of a new behavior it does not wish to tolerate, it is worth going through the process of defining that behavior legislatively and deciding how to punish it. Having a federal sextortion law would help force the government to keep readily available statistics on how often it occurs and how often it gets prosecuted—something it does not currently do. And it would also help victims know what is happening to them, and to know that it is illegal.

Sextortion is different from revenge porn. The fundamental crime lies not in the distribution of material. The core of the crime lies, rather, in the creation of the material, and in the threats necessary to create it.

Interestingly, the problem of sextortion goes unaddressed in the various proposals, which certainly are laudable on their own terms, to address the related problem of “revenge porn.” The differences between sextortion and revenge porn are instructive. Revenge porn involves, generally speaking, the non-consensual *release or publication* of consensually-created material. As such, the crime—to the extent a legislature criminalizes it—is generally a crime of distribution or publication, not of creation or production in the first instance. The various revenge porn proposals reflect this. The model federal revenge-porn statute advanced by the Cyber Civil Rights Initiative, for example, would make it a crime “to *distribute* a visual depiction of a person who is identifiable from the image itself or information displayed in connection with the image and who is engaging in sexually explicit conduct” (emphasis added).²² The model state law is similarly concerned with one who “disclose[s]” such an image.²³ The many state laws passed in recent years to deal with revenge porn are similarly concerned with distribution, publication, and disclosure of existing material.²⁴ Of those, a few states—by our count, four—include some production elements.²⁵ But none of those laws implicates the next step of using images or videos produces to extort or otherwise control victims’ behaviors. To the extent these statutes provide civil causes of action for non-consensual pornography, they arguably address sextortion in the civil arena; a plaintiff might, after all, recover on the theory that she had been threatened with non-consensual pornography.²⁶ While this tool could be powerful it does require that the plaintiff know who her attacker is.

The fundamental problem here is one of square pegs and round holes. Sextortion is different from revenge porn. The fundamental crime lies not in the distribution of material. The core of the crime lies, rather, in the *creation* of the material, and in the threats necessary to create it. Sextortion consists of both the issuance of an extortionate threat in order to compel someone to produce pornography—whether or not that person actually complies—and, separately, of the compulsion of an act of sex or nudity by means of such a threat. The revenge porn laws do not seek to reach this conduct. Nor does sextortion require that the material be released, the distribution that is the *sin qua non* of a revenge porn violation. As such, sextortion requires its own legal response.

To be clear, we are emphatically not arguing here against enhancing state enforcement; to the contrary, as we argue in “Sextortion,” we believe state legislatures should adopt parallel criminal statutes. The law we propose here

could easily be adapted for use at the state legislative level. It is best to have all layers of federal law enforcement empowered and mobilized on this issue. That said, in our judgment, the biggest enforcement bang for the legislative reform buck is at the federal level. That's where most of the cases are, and it's the only level at which a single legislative reform would have create a national baseline.

ELEMENTS OF A FEDERAL SEXTORTION LAW

A federal sextortion law should operate, in effect, as a hybrid of the interstate extortion statute,²⁷ the sexual abuse statutes,²⁸ and the abusive sexual contact law²⁹—with an additional jurisdictional element drawn from a federal child pornography statute.³⁰

Let's start with the interstate extortion statute, of which as a practical matter, subsections (a), (b), and (c) are generally irrelevant to sextortion cases, since they involve kidnappings and threats of physical violence. The relevant provision, in practice, is 18 U.S.C. § 875(d), which reads:

Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

For purposes of sextortion prosecutions, the trouble with this statute is that, being designed to cover lower-grade extortions, it has a rather *de minimis* sentencing regime attached to it. It is clearly aimed at extortions of money, not sex. The Congress that adopted it may have had the revelation of sexual improprieties in mind as possible *threats* to “injure ... reputation,” but the statute incorporates coerced sex as the extorted good only because the phrase “thing of value” is capacious enough to include pornographic images. Congress when it passed this law was clearly imagining something far less horrible than the average sextortion case, and the two year sentencing maximum reflects the limits of the legislature's imagination.

The simplest way to address the sextortion problem might be simply to raise the maximum sentence under § 875(d). But this approach seems too crude. The right answer to the problem of sextortion is not, after all, to punish all reputation-based extortions more harshly. Someone who threatens to reveal a public figure's extra-marital dalliances if not paid money deserves no more prison time today than he did before the wave of sextortion cases began. The crime is of an altogether different character, and just as it undersells sextortions to jury rig the interstate extortion law to cover them, Congress should not treat extortions generally more harshly so as to amply cover sextortions.

The federal sexual abuse statute, (18 U.S.C. § 2242), by contrast, has ample sentencing power. It reads as follows:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
engages in a sexual act with another person if that other person is—
(A) incapable of appraising the nature of the conduct; or
(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

A separate section, 18 U.S.C. § 2241, criminalizes “aggravated sexual abuse,” which is substantially the same except that the abuse involves “force against th[e] other person” or a threat involving “death, serious bodily injury, or kidnapping.”

The trouble with these statutes is both jurisdictional and definitional. Sextortions, as a preliminary matter, generally do not take place “in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison”—or at least, they cannot be relied upon to do so. So any sextortion statute for general use would have to employ a different jurisdictional hook.

One possible such hook presents itself in 18 U.S.C. § 2552A, the federal child pornography statute, which prohibits the distribution and receipt of “any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or *transported in or affecting interstate or foreign commerce by any means, including by computer*” (emphasis added).³¹ Since sextortion cases do not involve physical materials shipped or mailed or transported, the relevant language is the final phrase “transported in or affecting interstate or foreign commerce by any means, including by computer.”

The more challenging problem is how to define the sexual activity the statute should forbid demanding. The definition of “sexual act” in federal law presumes two people in the same physical space, one of whom is doing something to the other:

the term “sexual act” means—

- (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;³²

This language is not especially useful for sextortion cases, where the perpetrator and victim are presumptively not in the same physical location.

A different statute, which forbids abusive sexual contact short of conduct that meets the definition of sexual abuse, contains more useful language. It makes it a crime to “knowingly engage in or cause sexual contact with or by another person” if that conduct would violate the sexual abuse laws but for not meeting the definition of a “sexual act.”³³ “Sexual contact” here is defined cleverly here as: “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”³⁴

Note here that this definition, unlike the definition of “sexual act,” does not require that “another person” be involved; the definition of “sexual contact,” because of its use of the phrase “any person,” seems to encompass the possibility of a person’s having sexual contact with him- or herself. Similarly, the abusive sexual contact language, again in contrast to the sexual abuse language, also leaves room for sexual contact to take place without two parties physically being in the same location. A person who, in a fashion that otherwise violates the law, “knowingly ... causes sexual contact ... by another person,” violates the statute even if that sexual contact involves only that one other person. In other words, a perpetrator could be in violation of the statute remotely without ever touching the victim, merely by causing the victim to have sexual contact with herself. This is an important feature for a law that has to presume that the victim and the perpetrator will not be in the same state—or even the same country—and that their interactions may never include physical contact.

United States v. Weisinger,³⁵ a recent Second Circuit case, directly supports the notion that direct, in-person, physical contact is not a necessary element of the crime of abusive sexual contact. In that case, the Second Circuit interpreted 18 U.S.C. § 2246, the federal criminal statute prohibiting abusive sexual contact, focusing specifically on the meaning of “any person” and whether masturbation could be a type of sexual contact covered by the statute, or if the statute required contact between two or more persons.³⁶ The Second Circuit, following prior reasoning from the Supreme Court regarding a different statute, found that “any person” could indeed mean “oneself.”³⁷ The court found that the statute “plainly reach[ed] masturbation.”³⁸

To be useful, in brief, a federal sextortion statute needs to accomplish several distinct things that neither the federal extortion law, the sexual abuse law, nor the abusive sexual contact law currently accomplishes on their own:

1. It needs to have a jurisdictional reach similar to that of § 2252A—that is, reaching all material transmitted in interstate or foreign commerce by any means, including by computer;
2. Like § 875(d), it needs to criminalize the transmittal of a threat to harm reputation, only it needs to tie the object of that threat to coerced sex, not to money or a “thing of value;”
3. Like §§ 2241-2242, it also needs to criminalize the causing of someone to engage in sexual activity by means of such a threat, only it should punish coerced nudity and “sexual contact,” in addition to coerced “sexual acts,” so as to reach the range of conduct—including remote stripping and forced masturbation—that sextortion cases often involve; and
4. It should carry sentences commensurate with a sex crime that will not, by its nature, involve serious physical injuries but routinely does involve serious psychological trauma for victims.

TEXT OF A PROPOSED FEDERAL SEXTORTION STATUTE

To accomplish these objectives, we propose the following model text of a federal sextortion law:

Sexual Extortion

(a) Whoever, with intent to coerce any person to engage in sexual contact or in a sexual act or to produce any image, video, or other recording of any person naked or engaged in sexually explicit conduct, transmits in interstate or foreign commerce by any means, including by computer, any communication containing a threat to injure the property or reputation of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.

(b) Whoever knowingly causes another person to engage in sexual contact or in a sexual act or to produce any image, video, or other recording of any person naked or engaged in sexually explicit conduct by transmitting in interstate or foreign commerce by any means, including by computer, any communication containing any threat to injure property or reputation of the addressee or of another, shall be fined under this title or imprisoned for not more than fifteen years, or both.

Subsection (a) is designed to criminalize the threats through which perpetrators extort sexual activity from their victims. The following are a few explanatory notes on the text:

- The basic structure of subsection (a) is drawn from 18 USC § 875(d), which criminalizes the transmission of a threat to injure a person's reputation or property, with intent to extort, in order to force a person to pay money or give over a thing of value. To adapt the statute for sextortion, we would have Congress specify the nature of the thing of value being extorted: sexual conduct or nude or sexually explicit images or videos.
- In choosing what constitutes demands for sexual activity with this legislation, we designed the model language to include (1) demands for physical-world sexual activity, (2) demands for nude images or videos, (3) demands for video or images of masturbation, and (4) demands for video or images of sexual activity between two remote parties. As discussed above, physical world sexual activity is covered by the term "sexual act," as defined in § 2246; demands for nude images are covered by the nakedness language; demands for masturbation are covered by the phrase "sexual contact," also as defined in § 2246; and demands for images of remote parties engaged in sexual activity is covered by the phrase "image, video, or other recording of any person naked or engaged in sexually explicit conduct"—as the phrase "sexually explicit conduct" is defined in § 2256. There is no consistency in the sextortion cases we have studied regarding of whom the sextortion victim is required to produce images. Most commonly, she is forced to produce images of herself. But sextortionists have also demanded images of siblings, friends, and others. So we have used the phrase "any person" to describe both the person being sextorted and the person who is the subject of the demanded images.
- The model language covers, in a fashion drawn from § 2252A, any transmission "in interstate or foreign commerce by any means, including by computer" of a threat that meets its terms.
- We have maintained in subsection (a) the vague language from § 875(d) characterizing the sort of threat the statute punishes: a "threat to injure the property or reputation of the addressee or of another." In the vast majority of sextortion cases, the threat is to the victim—not to another—and the threat is the release of sexually explicit

material. But there are cases that deviate in important ways. In one case we examined, a perpetrator threatened to “blow up” the new computer of a 13-year-old girl, who—believing he could do it—proceeded to engage in explicit conduct over Skype.³⁹ Because of incidents like this, it is important to use broad language on the nature of threats, as the extortion statute does.

- We took the five-year sentencing maximum from 18 U.S.C. § 875(c), which involves extortions involving “any threat to injure the person of another.”⁴⁰ The analogy here is not precise, as sextortions do not generally involve a physical threat of injury. On the other hand, § 875(c) does not require that the injury actually takes place, and we think the issuance of a threat in order to compel sexual activity is an offense roughly comparable in gravity to a threat—perhaps not carried out—to injure someone physically.
- Under the Federal Sentencing Guidelines, sexual assaults are not “grouped” as a single pattern of conduct for purposes of sentencing.⁴¹ Assuming Congress and the Sentencing Commission treated sextortion cases the same way, a pattern of sextortionate threats against multiple victims could add up to real prison time.

Subsection (b) is designed to criminalize the production of pornography using sextortionate coercion and threats. The following are a few explanatory notes on the text:

- The basic structure of subsection (b) is drawn from the sexual abuse statutes, discussed above, and from the extortion statute.
- To adapt the statute for sextortions, we have broadened the requirement of § 2241 and § 2242 that the result be a “sexual act” to include any situation in which a victim “engage[s] in sexual contact or in a sexual act or ... produce[s] any image, video, or other recording of any person naked or engaged in sexually explicit conduct.” The choice of these terms is discussed above in explanation of subsection (a).
- To limit the statutory reach to situations of sextortion, subsection (b) reaches only pornography produced by “transmitting ... any communication containing any threat to injure property or reputation of the addressee or of another.” In other words, only non-consensual pornography produced by means of a violation of subsection (a) is criminal under subsection (b).
- As with subsection (a), the model language of subsection (b) covers, in a fashion drawn from § 2252A, any non-consensual pornography produced “by transmitting in interstate or foreign commerce by any means, including by computer” a threat to reputation or property.
- The 15-year maximum sentence here is a made-up figure and admittedly somewhat arbitrary. The sexual abuse laws, §§ 2241-2242, both allow for any term of years or life in prison, an acknowledgment of the fact that sexual assaults can produce grievous injuries. On the other hand, as the data we cited above show, these cases often do not produce sentencing at the high end of the spectrum the statutory language contemplates. Sextortions are not likely to produce physical injury, so we think the highest-end punishments the sexual abuse laws contemplate should be off the table in sextortion cases. On the other hand, many of these cases do involve egregious abuses that warrant stiff punishments. And many of them also involve serial offenders who have a great many victims. It is essential that cases involving multiple victims be treated for sentencing purposes as

ungrouped offenses.⁴² So a perpetrator who commits multiple acts of sextortion should rack up real prison time if prosecutors chose—as they often do—to charge multiple counts.

CONCLUSION

There are any number of other ways Congress could address the sextortion problem by means different from the approach we've outlined. From our point of view, several key policy objectives are critical:

- Sextortion, though it has an important role in child protection, is not fundamentally a child exploitation matter. Under current federal law, the child predators are being prosecuted amply. The core problem in federal sextortion prosecutions relates to adult women. It is therefore essential to not make the crime in any way a function of the victim's age.
- Second, the threat itself must be a crime, whether or not the perpetrator achieves compliance with his demands.
- Third, the extorted production of non-consensual pornography must itself be a crime. In other words, a person who demands pornographic images on threat of release of other images commits a crime when he issues the threat; he commits a separate crime when he causes the victim to actually produce the images in question. But these crimes are analytically separate—just as, in the physical world, a demand for sex accompanied by a threat and a resulting sexual assault or rape are analytically separate offenses.
- Finally, the sentences associated with these crimes must treat sextortion as a sex crime. Sextortionists are a form of online sexual predator. Federal law needs to recognize them as such.

ENDNOTES

- 1 State of Rhode Island v. Joseph Simone, No. P2-2012-0684A (Providence County Superior Court). See also W. Zachary Malinowski, *Former Moses Brown Wrestling Coach Sentenced for Child Pornography, Indecent Solicitation of Minor and Extortion*, Providence Journal (Dec. 12, 2014), <http://www.providencejournal.com/article/20141212/NEWS/312129915>.
- 2 United States v. Joshua Blankenship, No. 11-CR-00461 (Dist. Md.).
- 3 United States v. William Koch, No. 13-CR-70 (N.D. Ohio).
- 4 United States v. Mark Reynolds, No.14-CR-00547 (D.S.C.).
- 5 United States v. Adam Savader, No. 13-CR-20522 (E.D. Mich.).
- 6 United States v. James Bruguier, No. 11-CR-40012 (D.S.D.).
- 7 His sentence was later revised downward by six months. Judgment, United States v. James Bruguier, No. 11-CR-40012 (Nov. 21, 2011); Amended Judgment, United States v. James Bruguier, No. 11-CR-40012 (Mar. 31, 2014).
- 8 “FBI Arrests Glendale Man in ‘Sextortion’ Case,” U.S. Attorney’s Office, Central District of California (Jan. 29, 2013), <https://www.justice.gov/usao-cdca/pr/fbi-arrests-glendale-man-sextortion-case>. United States v. Karen Kazaryan, No. 13-CR-00056 (Gen. Dist. Calif.).
- 9 Government’s Sentencing Position at 13–14, United States v. Karen Kazaryan, No. 2:13-cr-00056 (Nov. 22, 2013).
- 10 Judgment, United States v. Karen Kazaryan, No. 2:13-cr-00056 (Dec. 16, 2013).
- 11 Benjamin Wittes, Cody Poplin, Quinta Jurecic & Clara Spera, *Sextortion: Cybersecurity, Teenagers, and Remote Sexual Assault*, Brookings (May 11, 2016), <http://www.brookings.edu/research/reports2/2016/05/sextortion-wittes-poplin-jurecic-spera>
- 12 U.S. Sentencing Comm’n, 2015 Sourcebook of Federal Sentencing Statistics, tbl.13 (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table13.pdf>.
- 13 U.S. Bureau of Justice Statistics, 2012 Statistical Tables, 22 tbl.5.2 (2012), <http://www.bjs.gov/content/pub/pdf/fjs12st.pdf>.
- 14 We did not use a scientific sampling of such cases. Cases were identified by searching terms descriptive of the statutes in question (i.e., “aggravated sexual abuse,” “sexual abuse” and “abusive sexual contact”) on <https://www.fbi.gov/> and <https://www.justice.gov/>. We found 45 cases under the aggravated sexual abuse statute, 21 of which involved only adult victims; 18 cases under the sexual abuse statute, 10 of which involved only adult victims; and 81 cases under the abusive sexual contact statute, 21 of which involved adult victims. The above data are based on these cases. (Note that some defendants are sentenced under more than one of these statutes; in these instances,

cases were categorized according to the most serious charge, with aggravated sexual abuse superseding sexual abuse and sexual abuse superseding abusive sexual contact.)

15 Sentencing under these five cases runs as follows: (1) Joshua Linkous received 168 months on one count of aggravated sexual abuse and two counts of abusive sexual contact. See Amended Judgment, *United States v. Joshua Linkous*, No. 7:15-cr-00016 (W.Di. Va. Feb. 3, 2016). (2) James Bruguier received 354 months on one count of sexual abuse, as well as one count of statutory rape (18 U.S.C. § 2243(a)) and one South Dakota state burglary charge. See Amended Judgment, *United States v. James Bruguier*, No. 4:11-cr-40012 (D.S.D. Mar. 31, 2014). (3) Leo Villareal received 120 months on one count of aggravated sexual abuse and one count of sexual abuse. See Judgment, *United States v. Leo Villareal*, No. 5:10-cr-50082 (D.S.D. Mar. 9, 2012). (4) Alan Houston Johnson received 27 months on three counts of abusive sexual contact as well as one count of interfering with the duties of a flight attendant (49 U.S.C. § 46504). See Judgment, *United States v. Alan Houston Johnson*, No. 1:10-cr-00113 (D. Colo. Mar. 2, 2011). (5) James Pesicka received 120 months on two counts of abusive sexual contact. See Judgment, *United States v. James Pesicka*, No. 3:13-cr-30116 (D.S.D. Dec. 23, 2014).

16 A reduced capacity to inflict physical violence however does not mean that sextortionists never coerce victims to inflict physical violence on themselves. Take for instance the case of Christopher DeKruif, who demanded that his ex-girlfriend send sexually explicit videos, including videos that showed her stabbing herself with scissors. He also requested other forms of mutilation and bestiality. DeKruif also demanded that a different victim, who had confided in him that her grandfather sexually abused her, provide a video of her grandfather molesting her. The victim complied.

17 See, e.g., Mark Hansen, *A Reluctant Rebellion*, A.B.A. J. (June 2, 2009), http://www.abajournal.com/magazine/article/a_reluctant_rebellion; Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* (2009), <http://www.lb7.uscourts.gov/documents/INND/110CR40.pdf>; Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?* 22 *Stan. L. & Pol'y Rev.* 545 (2011), https://journals.law.stanford.edu/sites/default/files/stanford-law-policy-review/print/2011/06/hamilton_22_stan._l._poly_rev._545.pdf; Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 4 *Wash. U. L. Rev.* 853 (2011), http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1046&context=law_lawreview.

18 *United States v. Mijangos*, No. 10-CR-743-GHK (C.D. Ca.).

19 See, e.g., 18 U.S.C. §§ 2241–2244 (2012).

20 See, e.g., 18 U.S.C. § 2423(b) (2012) “A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”

21 The specific list of cases supporting these statements can be found in notes 89, 90, 91, and 92 of “Sextortion.”

22 Cyber Civil Rights Initiative, *CCRI Model Federal Law: CCRI Model Federal Law Against NCP*, <http://www.cyber-civilrights.org/ccri-model-federal-law/> (last visited Apr.15, 2016), <http://www.cybercivilrights.org/ccri-model-federal-law/>.

23 Cyber Civil Rights Initiative, CCRI Model State Law: CCRI Model State Law Against NCP (last accessed Apr. 15, 2016), <http://www.cybercivilrights.org/model-state-law/>

24 See Alaska Stat. § 11.61.120 (defining Harassment in the Second Degree in part as “publish[ing]” or distribut[ing]” lewd pictures or films); Arizona Rev. Stat. § 13–1425 (2016) (entitled the Unlawful distribution of private images); Arkansas Code § 5–26–314 (2015) (making unlawful the distribution of sexual images or recordings); California Penal Code § 647(j)(4) (2014) (criminalizing the distribution of sexual images without consent); Colorado Rev. Stat. §§ 18–7–107, 18–7–108 (2014) (the offense if “posting a private image for harassment” is defined by the act of distribution or online posting); D.C. Law § 20–275 (2014) (criminalizing the “disclosure” of sexual images without consent); Delaware Code tit. 11 § 1335 (2014) (A person is guilty of the crime of “violation of privacy” if s/he “knowingly reproduces, distributes, exhibits, publishes, transmits, or otherwise disseminates” a sexual image without consent.); Florida Stat. § 784.049 (2015) (defining “sexual cyberharassment” as “publish[ing] a sexual explicit image” without consent); Georgia Code tit. 16 chpt. 11 art. 3 pt. 1 § 16–11–90 (2014) (an invasion of privacy includes when one “electronically transmits or posts, in one or more transmissions or posts, a photograph or video which depicts nudity or sexually explicit conduct of an adult” without that adult’s consent); Hawaii Rev. Stat. § 711–1110.9 (defining the offense of violation of privacy, in part, as the disclosure of a lewd image without consent); Idaho Code § 16–6609 (2014) (creating the crime of “Video Voyeurism” and defining it, in part, as the “dissemination” of images of the “intimate areas of another person or persons without the consent of such other person or persons”); Illinois Crim. Code § 12–23.5 (2014) (Non-consensual dissemination of private sexual images); RS 14:283.2 (2015) (An Act in Louisiana creating the crime of “Nonconsensual disclosure of a private image.”); Maine Rev. Stat. Sec. 1. 17–A § 511–A (2015) (“Unauthorized dissemination of certain private images”); Maryland Code § 3–809 (2014) (criminalizing the act of “revenge porn” when a person “intentionally plac[es] on the Internet” a private image without consent to intentionally cause serious emotional harm); Nevada Rev. Stat. chpt. 200 § 2–6 (2015) (Unlawful Dissemination of an Intimate Image); New Jersey Code § 2C:14–9 (defining the crime of “invasion of privacy” as, in part “disclos[ing]” sexual images without consent); New Mexico Crim. Code (2015) (now includes the offense of “Unauthorized Distribution of Sensitive Images”); North Carolina Gen. Stat. § 14–190.5A (2015) (Disclosure of private images); North Dakota Century Code § 12.1–17–07.2 (2015) (Distribution of intimate images without or against consent); Oregon Rev. Stat. § 161.006 (2015) (Unlawful Dissemination of an Intimate Image); Pennsylvania Consolidated Stat. tit. 16 § 3131 (2014) (Unlawful Dissemination of an Intimate Image); Texas Penal Code § 21.16 (2015) (Unlawful Disclosure or Promotion of Intimate Visual Material); Utah Code § 76–5b–203 (2014) (Distribution of intimate images); Vermont Stat. Annon. sec. 2 § 2606 (2015) (Unlawful Disclosure of Sexually Explicit Images Without Consent); Virginia Code § 182.–386.2 (2014) (Unlawful Dissemination or Sale of Images of Another Person); Washington Rev. Code tit. 9A (2015) (Wrongful distribution of intimate images); Wisconsin Code § 942.09 (2013) (Representations Depicting Nudity).

25 See California Penal Code § 647(j)(4) (2014) (criminalizing the secret filming or other recording of an individual without consent when that person has a reasonable expectation of privacy); Hawaii Rev. Stat. § 711–1110.9 (defining the offense of violation of privacy, in part, as installing or using, in a private place, a device for recording or otherwise observing an individual in a private place without that individual’s consent); Idaho Code § 16–6609 (2014) (creating the crime of “Video Voyeurism” and defining it, in part, as using or installing equipment that can record intimate images of a person without that person’s consent and in a place where s/he would have a reasonable expectation of privacy); New Jersey Code § 2C:14–9 (defining the crime of “invasion of privacy” as, in part photographing, filming, or otherwise recording sexual images without consent and in a place where a victim would have a reasonable expectation of privacy).

26 At least two proposed state civil statutes would do this explicitly. See, H.F. 2741, 89th Leg., Reg. Sess. (Minn. 2016), https://www.revisor.mn.gov/bills/text.php?number=HF2741&version=2&session=1s89&session_year=2016&session_number=0; State Assemb. B. A00571, 238th Leg., Reg. Sess. (N.Y. 2015), http://assembly.state.ny.us/leg/?default_fld=&bn=A00571&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y#jump_to_Summary.

27 18 U.S.C. § 875 (2012).

28 18 U.S.C. §§ 2241–2242 (2012).

29 18 U.S.C. § 2244 (2012).

30 18 U.S.C. § 2252A (2012).

31 18 U.S.C. § 2252A (2012).

32 18 U.S.C. § 2246(2) (2012).

33 18 U.S.C. § 2244 (2012).

34 18 U.S.C. § 2246(3).

35 *United States v. Weisinger*, 586 Fed. Appx. 733 (2d Cir. 2014).

36 *Id.* at 739.

37 *Id.* (citing *United State v. Gonzalez*, 520 U.S. 1, 5 (1997) (noting that “[r]ead naturally, the word ‘any’ has an expansive meaning”)).

38 *Id.*

39 Jesse Paul, *Ohio Man Sentenced in Jefferson County for Sexually Exploiting Teen*, *Denver Post* (Jan. 12, 2015), http://www.denverpost.com/news/ci_27306114/ohio-man-sentenced-jefferson-county-sexually-exploiting-teen.

40 The subsection reads: “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”

41 See U.S. Sentencing Comm’n, *U.S. Sentencing Guidelines Manual 2015*, § 3D1.2 .

42 Under § 3D1.2 of the United States Sentencing Guidelines, “all counts involving substantially the same harm shall be grouped together.” However, sexual abuse offenses are explicitly excluded from this “grouping” as offenses under Chapter 2, Part A. Under § 3D1.4, the presence of multiple ungrouped counts can lead to an increased offense level and, correspondingly, an increased length for the guideline sentence range. To put it another way, the fact that federal sexual abuse charges must remain ungrouped means that, in many cases, multiple counts increase the range

of recommended sentencing—which would not be true if counts were grouped. See U.S. Sentencing Comm’n, U.S. Sentencing Guidelines Manual 2015, chpt. 3, pt. D.

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